Pattern Criminal Federal Jury Instructions

for the

Seventh Circuit

The Committee on Federal Criminal Jury Instructions for the Seventh Circuit drafted these proposed pattern jury instructions. The Seventh Circuit Judicial Council, on November 30, 1998, approved these instructions in principle and authorized their publication for use in the Seventh Circuit.

The Judicial Council wishes to express its gratitude to the judges and lawyers who have worked so long and hard to make a contribution to our system of criminal justice.

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INTRODUCTORY INSTRUCTIONS

Many instructions require the giving of additional or accompanying instructions. The Committee has tried to make explicit cross-references wherever possible, but gives no warranty that it has done so exhaustively. In some circumstances, instructions other than or in addition to those referenced may be appropriate.

These instructions were drafted based on the most common factual and legal scenarios. The Committee anticipates that changes in the language of the instructions may be appropriate in particular cases.

The Committee has drafted a separate instruction for use where the charge includes aiding and abetting or acting through another rather than including those possibilities in each statutory instruction.

Phrases and sentences which appear in brackets ([ ]) are alternatives or additions to instructions which are to be used when relevant to the particular case on trial.

1.01 THE FUNCTIONS OF THE COURT AND THE JURY

Members of the jury, you have seen and heard all the evidence and the arguments of the attorneys. Now I will instruct you on the law.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in the case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow these instructions, even if you disagree with them. Each of the instructions is important, and you must follow all of them.

Perform these duties fairly and impartially. Do not allow sympathy, prejudice, fear, or public opinion to influence you. [You should not be influenced by any person's race, color, religion, national ancestry, or sex.]

Nothing I say now, and nothing I said or did during the trial, is meant to indicate any opinion on my part about what the facts are or about what your verdict should be.

1.02 THE EVIDENCE

The evidence consists of the testimony of the witnesses, the exhibits admitted in evidence, and stipulations.

A stipulation is an agreement between both sides that [certain facts are true] [that a person would have given certain testimony].

[I have taken judicial notice of certain facts that may be regarded as matters of common knowledge. You may accept those facts as proved, but you are not required to do so.]

Committee Comment

Rule 201 of the Federal Rules of Evidence governs judicial notice of adjudicative facts. Judicial notice may be taken at any stage of the proceedings, but generally only after the parties have been afforded an opportunity to be heard on the matter. Rule 201(g) requires the court in criminal cases to "instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed."

1.03 TESTIMONY OF WITNESSES (DECIDING WHAT TO BELIEVE)

You are to decide whether the testimony of each of the witnesses is truthful and accurate, in part, in whole, or not at all, as well as what weight, if any, you give to the testimony of each witness.

In evaluating the testimony of any witness, you may consider, among other things:

[- the witness's age;]
- the witness's intelligence;
- the ability and opportunity the witness had to see, hear, or know the things that the witness testified about;
- the witness's memory;
- any interest, bias, or prejudice the witness may have;
- the manner of the witness while testifying; and
- the reasonableness of the witness's testimony in light of all the evidence in the case.

[You should judge the defendant's testimony in the same way that you judge the testimony of any other witness.]

Committee Comment

The portion of the instruction relating to age should be given only when a very elderly or a very young witness has testified.

The bracketed final sentence should be given only when a defendant testifies.

1.04 WEIGHING THE EVIDENCE-INFERENCES

You should use common sense in weighing the evidence and consider the evidence in light of your own observations in life.

In our lives, we often look at one fact and conclude from it that another fact exists. In law we call this "inference." A jury is allowed to make reasonable inferences. Any inferences you make must be reasonable and must be based on the evidence in the case.

Committee Comment

While the term "inference" is not used in common parlance, it was retained here, and defined, as a shorthand in order to avoid the need to repeat the same point elsewhere in the instructions.

1.05 DEFINITION OF "DIRECT" AND "CIRCUMSTANTIAL" EVIDENCE

Some of you have heard the phrases "circumstantial evidence" and "direct evidence." Direct evidence is the testimony of someone who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a series of facts which tend to show whether the defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. You should decide how much weight to give to any evidence. All the evidence in the case, including the circumstantial evidence, should be considered by you in reaching your verdict.

Committee Comment

The phrase "circumstantial evidence" is addressed here because of its use in common parlance and the likelihood that jurors may have heard the term outside the courtroom.

There may be cases where a more explicit comparison of direct and circumstantial evidence would be helpful. In such cases, the Court may give examples, e.g., direct proof that it is raining is the testimony of a witness, "I was outside a minute ago and I saw it raining"; circumstantial evidence that it is raining is the sight of someone entering the courtroom carrying a wet umbrella.

1.06 WHAT IS NOT EVIDENCE

Certain things are not evidence. I will list them for you:

First, testimony [and exhibits] that I struck from the record, or that I told you to disregard, is [are] not evidence and must not be considered.

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded. [This includes any press, radio, or television reports you may have seen or heard. Such reports are not evidence and your verdict must not be influenced in any way by such publicity.]

Third, questions and objections by the lawyers are not evidence. Attorneys have a duty to object when they believe a question is improper. You should not be influenced by any objection or by my ruling on it.

Fourth, the lawyers' statements to you are not evidence. The purpose of these statements is to discuss the issues and the evidence. If the evidence as you remember it differs from what the lawyers said, your memory is what counts.

Committee Comment

This instruction is in accord with that approved by the Seventh Circuit in United States v. Coduto, 284 F.2d 464, 468 (7th Cir.), cert. denied, 365 U.S. 881 (1961). The Seventh Circuit has also defined minimal measures a district judge is required to take when confronted with evidence of prejudicial publicity prior to and during a trial. When apprised in a general fashion of the existence of damaging publicity, the district judge is only called upon to "strongly and repeatedly [admonish] the jury throughout the trial not to read or listen to any news coverage of the case." Margoles v. United States, 407 F.2d 727, 733 (7th Cir.), cert. denied, 396 U.S. 833 (1969). When the publishing of specific examples of inadmissible evidence is brought to the court's attention, further investigation is required to determine juror exposure to it:

> Thus, the procedure required by this circuit where prejudicial publicity is brought to the court's attention during a trial is that the court must ascertain if any jurors who had been exposed to such publicity had read or heard the same. Such jurors who respond affirmatively must then be examined, individually and outside the presence of the other jurors, to determine the effect of the publicity. 407 F.2d at 735.

United States v. Thomas, 463 F. 2d 1061, 1063 (7th Cir. 1972). This procedure is necessary even if the jury has already delivered a verdict. United States v. Sanders, 962 F.2d 660, 671 (7th Cir.), cert. denied, 506 U.S. 892 (1992).

1.07 ATTORNEY INTERVIEWING WITNESS

It is proper for an attorney to interview any witness in preparation for trial.

Committee Comment

This instruction should not be given unless there has been testimony regarding prior interviews. "It is not only proper but it may be the duty of the prosecutor and defense counsel to interview any person who may be called as a witness in the case (except that the prosecutor is not entitled to interview a defendant represented by counsel)." ABA Standards, The Prosecution Function 3.1, Comment a (3d ed. 1993).

1.08 PARTY OTHER THAN AN INDIVIDUAL

[Name of corporate defendant] must be given the same fair consideration as you would give an individual.

1.09 NUMBER OF WITNESSES

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a larger number. You need not accept the testimony of the larger number of witnesses.

Committee Comment

This instruction should not be given when the defendant does not call any witnesses.

1.10 REMINDER OF VOIR DIRE OBLIGATIONS

Committee Comment

The Committee determined that no purpose would be served by an instruction which reemphasizes the obligations of the jurors. Such an instruction could appear patronizing to jurors whose impartiality has already been tested during voir dire examination. Final arguments should be adequate to remind jurors of the solemnity of their duty.

2.01 THE CHARGE - THE INDICTMENT

The indictment [information] in this case is the formal method of accusing the defendant of an offense and placing the defendant on trial. It is not evidence against the defendant and does not create any inference of guilt.

The defendant is charged with the offense of _____. The defendant has pleaded not guilty to the charge(s).

Committee Comment

This instruction is necessary because, as stated by the court in United States v. Garcia, 562 F.2d 411, 417 (7th Cir. 1977), "In almost any criminal case ... the fact of the indictment has some emphasis. To the degree an uninstructed jury considers the matter, there is a real possibility that a charge leveled by a grand jury composed of its peers will weigh in the petit jury's balance on the side of guilt." Instruction on this subject is particularly important when the court permits the jury to take the indictment with it during deliberations. 2 C. Wright, Federal Practice and Procedure § 486 at 719-20 (1982).

2.02 LESSER INCLUDED OFFENSE

If you find the defendant not guilty of the offense of _____ as charged in Count ___ [or if you cannot unanimously agree that the defendant is guilty of that offense], then you must go on to consider whether the government has proved the offense of _____.

Committee Comment

This instruction is designed to be given immediately before Instruction 4.02 -- "Issues in the Case and Burden of Proof", detailing the elements of the included offense.

Rule 31(c) of the Federal Rules of Criminal Procedure provides that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged . . . . " The rule restates prior law, see Berra v. United States, 351 U.S. 131 (1956), and permits the jury to find the defendant guilty of a lesser included offense even though it was not explicitly set forth in the indictment.

The Supreme Court resolved conflicts within the Courts of Appeals concerning how to define a lesser included offense in Schmuck v. United States, 489 U.S. 705 (1989). In order to be a lesser included offense, "one offense is not 'necessarily included' in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c)." Schmuck v. United States, 489 U.S. at 716. This has also been addressed in the Seventh Circuit in United States v. Boyles, 57 F.3d 535 (7th Cir. 1995):

> Under the elements only test, an offense is a lesser included one only if all of its statutory elements can be demonstrated without proof of any fact or element in addition to those which must be provided for the greater offense. An offense is not a lesser-included one if it contains an additional statutory element.

57 F.3d at 544 (7th Cir. 1995)(citations omitted).

Second, an instruction for a lesser included offense is proper "only if the evidence would permit a rational jury to find guilt under the lesser charge and acquit on the charge alleged. United States v. Windsor, 981 F.2d 943, 946 (7th Cir. 1992). Thus, the instruction is not automatic if there is a lesser-included offense under Schmuck. "Only if under a different, but reasonable view, the evidence is sufficient to establish guilt of the lower degree and also leave a reasonable doubt as to some particular element included in the higher degree but not the lower, should the lesser crime also be submitted to the jury." United States v. Boyles, 57 F.3d 535, 545 (7th Cir. 1995).

Third, an instruction for a lesser included offense is proper only when conviction of the greater offense requires that the jury find a disputed fact which is not an element of the lesser offense. "[A] lesser-offense charge is not proper where, on the evidence presented, the factual

issues to be resolved by the jury are the same as to both the lesser and greater offenses . . . . In other words, the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater." Sansone v. United States, 380 U.S. 343, 349-50 (1965); United States v. Rein, 848 F.2d 777, 784 (7th Cir. 1988).

The mutuality doctrine which permits a lesser included offense instruction only if it may be requested by both sides of the case was rejected by the D.C. Circuit in United States v. Whitaker, 447 F.2d 314, 317 (D.C. Cir. 1971), and has been criticized by one commentator, 8A Moore's Federal Practice ¶ 31.03(2). While the Seventh Circuit abandoned the doctrine in United States v. Schmuck, 840 F.2d 384, 387 (7th Cir. 1988), the Supreme Court reaffirmed "the mutuality implicit in the language of Rule 31(c)" on appeal. United States v. Schmuck, 489 U.S. 705, 718.

The second sentence of this instruction permits its modification to conform to Judge Friendly's recommendation in United States v. Tsanas, 572 F.2d 340 (2d Cir.), cert. denied, 435 U.S. 994 (1978). In Tsanas, the court noted that although the prevailing practice in the federal courts is to instruct the jury that it may consider the lesser offense only after finding the defendant no guilty of the greater, some federal courts have permitted the jury if unable to agree on a verdict on the greater offense to proceed to consider the lesser. Finding that both forms of instructions had advantages as well as disadvantages for the government as well as the defense, the court concluded:

> With the opposing considerations thus balanced, we cannot say that either form of instruction is wrong as a matter of law. The court may give the one that it prefers if the defendant expresses no choice. If he does, the court should give the form of instruction which the defendant seasonably elects.

573 F.2d at 346. See also Pharr v. Israel, 629 F.2d 1278, 1280-82 (7th Cir. 1980), cert. denied, 449 U.S. 1088 (1981).

If the defendant denies his guilt of the lesser included offense, the court should instruct the jury that the defendant has denied his guilt of that offense as well.

The instruction does not use the term "lesser included offense." The use of this lawyer's terminology is never helpful to a jury in its deliberations. The use of the term may lead the jury to decide the issue by wrongly assuming that the lesser included offense may require a lesser burden of proof or carry a lesser sentence.

2.03 PRESUMPTION OF INNOCENCE - BURDEN OF PROOF

The defendant is presumed to be innocent of [each of] the charge[s]. This presumption continues during every stage of the trial and your deliberations on the verdict. It is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty as charged. The government has the burden of proving the guilt of the defendant beyond a reasonable doubt.

This burden of proof stays with the government throughout the case. The defendant is never required to prove his innocence or to produce any evidence at all.

Committee Comment

Regardless of what may be constitutionally required, compare Taylor v. Kentucky, 436 U.S. 478 (1978) (failure to give instruction on the presumption of innocence is reversible error) with Kentucky v. Wharton, 441 U.S. 786 (1979) (instruction is not constitutionally required in every case), it is well established that juries in federal criminal trials should be instructed on both the presumption of innocence (See also Delo v. Lashley, 507 U.S. 272 (1993) (failure to give instruction in capital case not automatically reversible error) and United States v. DeJohn, 638 F.2d 1048, 1057-59 (7th Cir. 1981) (instruction recommended, but a long and confusing instruction may do more harm than good)) and the government's burden to prove guilt beyond a reasonable doubt. Coffin v. United States, 156 U.S. 432, 452-61 (1895); United States v. Nelson, 498 F.2d 1247 (5th Cir. 1974); McDonald v. United States, 284 F.2d 232 (D.C.Cir. 1960). The instruction conforms to this practice while eliminating confusing and unhelpful elaborations which sometimes accompany instructions on the presumption of innocence.

The Committee decided that there should be no instruction stating that the burden of proof does not shift to the defendant. This is a legal concept foreign to most laymen which might only confuse jurors and detract from the main thrust of the instruction that the burden of proof lies with the government.

2.04 DEFINITION OF REASONABLE DOUBT

Committee Comment

The Committee recommends that no instruction be given defining "reasonable doubt."

In a long line of cases, the Seventh Circuit has repeatedly eschewed attempt to define reasonable doubt. See, e.g., United States v. Hanson, 994 F.2d 403, 408 (7th Cir. 1993); United States v. Bardsley, 884 F.2d 1024, 1029 (7th Cir. 1989); and cases cited in United States v. Blackburn, 992 F.2d 666, 668 (7th Cir.), cert. denied, 114 S. Ct. 393 (1993). The Court has found that "'an attempt to define reasonable doubt presents a risk without any real benefit.'" United States v. Reynolds, 64 F.3d 292, 298 (7th Cir. 1995), quoting Hanson, 994 F.2d at 408. Therefore, the Court has consistently upheld district court refusals to define the phrase, finding that the definitions are likely to "confuse juries more than the simple words themselves." Blackburn, 992 F.2d at 668. Accord, United States v. Langer, 962 F.2d 592, 599 (7th Cir. 1992); United States v. Shaffner, 524 F.2d 1021, 1023 (7th Cir. 1975).

The phrase "reasonable doubt" is self-explanatory and is its own best definition. Further elaboration "tends to misleading refinements" which weaken and make imprecise the existing phrase. United States v. Lawson, 507 F.2d 433, 443 (7th Cir. 1974), cert. denied, 420 U.S. 1004 (1975). A judge should not define the term for the jury even if asked to do so during deliberations. United States v. Blackburn, 992 F.2d 666, 668 (7th Cir.), cert. denied, 114 S.Ct. 393 (1993).

Neither "substantial doubt" nor "honest doubt" is an acceptable explanation. United States v. Loman, 551 F.2d 164 (7th Cir.), cert. denied, 433 U.S. 912 (1977), United States v. Wright, 542 F.2d 975 (7th Cir. 1976), cert. denied, 429 U.S. 1073 (1977), United States v. Hall, 854 F.3d 1036 (7th Cir. 1988), United States v. Crouch, 528 F.2d 625 (7th Cir.), cert. denied, 429 U.S. 900 (1976), United States v. Gratton, 525 F.2d 1161 (7th Cir. 1975), United States v. Emalfarb, 484 F.2d 787 (7th Cir.),cert. denied, 414 U.S. 1064 (1973). "Fair doubt" is unhelpful, but not automatically reversed. United States v. Hall, 854 F.2d 1036 (7th Cir. 1988). The Supreme Court has also recently rejected "grave uncertainty," "actual substantial doubt," and "moral certainty." Cage v. Louisiana, 498 U.S. 39 (1990). Defining reasonable doubt in a constitutionally deficient manner cannot be harmless error. Sullivan v. Louisiana, 508 U.S. 275 (1993).

Although the Seventh Circuit has refused to adopt a per se rule against defining reasonable doubt, it did, in another context, describe the "use of an instruction defining [it as] equivalent to playing with fire." United States v. Shaffner, 524 F.2d 1021, 1023 (7th Cir. 1975), cert. denied, 424 U.S. 920 (1976). See also United States v. Blackburn, 992 F.2d 666, 668 (7th Cir.), cert. denied, 114 S.Ct. 393 (1993).

2.05 DEFINITION OF CRIME CHARGED

Committee Comment

In view of Instruction 4.02--"Issues in the Case and Burden of Proof", and the earlier charge informing the jury as to the charge and the defendant's plea of not guilty, no further definition of the crime is necessary.

2.06 DEFINITION OF FELONY OR MISDEMEANOR

Committee Comment

The Committee finds that it is unnecessary to have a general instruction defining the terms "felony" or "misdemeanor" because that determination is a question of law.

2.07 BILL OF PARTICULARS

Committee Comment

The Committee determined that no instruction should be given with respect to the content or effect of a bill of particulars. The admissibility of evidence in light of a bill of particulars is a question of law for the court. If the court receives it, then it should be considered by the jury under the instructions relating to the case as a whole.

3.01 FAILURE OF DEFENDANT TO TESTIFY

The [A] defendant has an absolute right not to testify. The fact that the [a] defendant did not testify should not be considered by you in any way in arriving at your verdict.

Committee Comment

> No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum.

Carter v. Kentucky, 450 U.S. 288, 303 (1981).

In a multi-defendant trial, this instruction must be given at the request of a non-testifying defendant over the objection of a defendant who testifies. Bruno v. United States, 308 U.S. 287 (1939); United States v. Schroeder, 433 F.2d 846, 851 (8th Cir. 1970), cert. denied, 401 U.S. 943 (1971); United States v. Kelly, 349 F.2d 720, 768-69 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966).

3.02 DEFENDANT'S POST-ARREST STATEMENT

You have received evidence of a statement said to be made by the defendant to _____. You must decide whether the defendant did in fact make the statement. If you find that the defendant did make the statement, then you must decide what weight, if any, you feel the statement deserves. In making this decision, you should consider all matters in evidence having to do with the statement, including those concerning the defendant [himself / herself] and the circumstances under which the statement was made.

[You may not consider this statement as evidence against any defendant other than the one who made it.]

Committee Comment

The second paragraph is in brackets because in some uncommon circumstances, a defendant's post-arrest inculpatory statement may be admissible against co-defendants. See, e.g., Rule 804(b)(3) Federal Rules of Evidence.

This instruction utilizes the word "statement" in place of words such as "admission" and "confession." In United States v. Gardner, 516 F.2d 334 (7th Cir.), cert. denied, 423 U.S. 861 (1975), the court stated that "the word 'statements' is a more neutral description than 'confession', and should be used in its place in future instructions unless the statements can be considered a 'complete and conscious admission of guilt -- a strict confession.'" 516 F.2d at 346. If the word "statement" is used in all such instructions, however, the need for additional debate or litigation as to whether a particular statement fits the definition of a "strict confession" under Gardner is eliminated.

The instruction does not contemplate submission to the jury of a question concerning voluntariness of the statement. Clearly, due process of law prohibits criminal convictions based even partially upon involuntary statements of a defendant, irrespective of the truth or falsity of those statements. Rogers v. Richmond, 365 U.S. 534 (1961). However, the instruction assumes that any voluntariness challenge was decided adversely to the defendant by the court following a hearing comporting with the requirements of Jackson v. Denno, 378 U.S. 368 (1964), and 18 U.S.C. § 3501. Consequently, reconsideration of the voluntariness issue by the jury is not required. Lego v. Twomey, 404 U.S. 477 (1972).

As is required by 18 U.S.C. § 3501, the instruction directs the jurors to make a determination as to the weight, if any, to be given to a statement after considering factors having to do with the defendant's personal characteristics and the conditions under which the statement was made. "Evidence about the manner in which a confession was secured will often be germane to its probative weight, a matter that is exclusively for the jury to assess." Crane v. Kentucky, 476 U.S. 683, 688 (1986). It is the Committee's view that the specific factors set forth in 18 U.S.C. § 3501 should not be set forth in the instruction, but, rather, should be left to argument by counsel. Inclusion of all possible subjects of consideration in a general instruction might well result in the inclusion of irrelevant factors for many cases, while recitation of but a few common factors might result in undue emphasis with respect thereto.

This instruction does not purport to deal with vicarious or adoptive admission situations which may be covered by separate instructions where appropriate. It also does not purport to deal with a defendant's statements made in furtherance of a conspiracy or joint venture. Federal Rules of Evidence 801(d)(2)(E). Such statements are governed by separate admissibility principles and should be the subject of separate instructions.

3.03 SILENCE IN THE FACE OF ACCUSATION

You have heard evidence that _____ accused the defendant of a crime, and that the defendant did not deny or object to the accusation. If you find that the defendant was present and heard and understood the accusation, and that it was made under such circumstances that the defendant would deny it if it were not true, then you may consider whether the defendant's silence was an admission of the truth of the accusation.

Committee Comment

Where a defendant is under arrest, his silence in the face of an accusatory statement by a law enforcement official does not constitute an admission of the truth of the statements. Such evidence should not be received and no instruction will be necessary. Doyle v. Ohio, 426 U.S. 610 (1976). More difficult problems exist, however, when the accusatory statement is not made by a law enforcement official or when the defendant is not in custody. See Gamble, The Tacit Admission Rule: Unreliable and Unconstitutional, 14 Ga.L.Rev. 27 (1979), which challenges the admission of the evidence, under any circumstances, which makes the instruction necessary. Pre-Miranda silence is not subject to Doyle. Greer v. Miller, 483 U.S. 756, 763-65 (1987); Brecht v. Abrahamson, 507 U.S. 619 (1993).

Before silence can be considered as an admission, Federal Rules of Evidence 801(d)(2)(B), the court must consider whether the defendant was present and heard and understood the statement, whether the subject matter was within his knowledge, whether there were any impediments to responding, and whether the circumstances called for a reply. See United States v. Geise, 597 F.2d 1170, 1195-96 (9th Cir.), cert. denied, 100 S.Ct. 480 (1979); 4 Wigmore on Evidence § 1071 (Chadbourn rev. 1972); 4 Weinstein's Federal Evidence ¶ 801(d)(2)(B)[01] (1996).

3.04 PROOF OF OTHER CRIMES OR ACTS

You have heard evidence of acts of the defendant other than those charged in the indictment. You may consider this evidence only on the question of _____. You should consider this evidence only for this limited purpose.

Committee Comment

See Federal Rule of Evidence 404(b). This evidence may be admissible for purposes such as proof of predisposition, motive, opportunity, intent, preparation, plan, knowledge, identity, presence, or absence of mistake or accident. This listing is not intended to include all possibilities. The court may find it necessary to modify the wording of this sentence to accommodate the particular purposes for which the evidence is admitted.

This instruction may also be given during the trial at the time the evidence is introduced. The trial judge may refer specifically to the evidence alluded to if necessary for clarity. Care should be taken, however, not to characterize the evidence or to give it additional weight.

3.05 IMPEACHMENT OF DEFENDANT - CONVICTIONS

You have heard evidence that the defendant has been convicted of a crime. You may consider this evidence only in deciding whether the defendant's testimony is truthful in whole, in part, or not at all. You may not consider it for any other purpose. A conviction of another crime is not evidence of the defendant's guilt of any crime for which the defendant is now charged.

Committee Comment

In the ordinary case, evidence of a defendant's prior conviction is only admissible for the limited purpose of attacking his credibility as a witness. See Federal Rules of Evidence 609. Consequently, 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. Federal Rules of Evidence 105. A defendant's prior criminal record, however, may be called to the jury's attention for other purposes. A prior conviction may be required to be proved as an element of the offense charged. E. g., 18 U.S.C. 922(g) and (h). The defendant's commission of another crime may also be admissible to prove motive, opportunity, intent and the like. See Federal Rules of Evidence 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 3.04 -- "Proof of Other Crimes or Acts."

Rule 609(a)(1) of the Federal Rules of Evidence permits impeachment by convictions of crimes punishable by death or imprisonment greater than one year if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant. See United States v. Mahone, 537 F.2d 922, 929 (7th Cir.), cert. denied, 429 U.S. 1025 (1976) (listing considerations relevant to making this determination and noting that the burden of proof is on the government to establish admissibility) and United States v. Nururdin, 8 F.3d 1187,1191-92 (7th Cir. 1993) (impeachment value tied loosely to "inherent dishonesty" crimes). The court in Mahone also remarked that the trial judge should hold a hearing on the record before admitting such evidence and should make an explicit determination that the probative value of the conviction outweighs its prejudicial effect. See also United States v. Alvarez, 833 F.2d 724, 727 (7th Cir. 1987).

3.06 CHARACTER AND REPUTATION OF DEFENDANT

You have heard [reputation and/or opinion] evidence about the defendant's character trait for [truthfulness, peacefulness, etc].

You should consider character evidence together with and in the same way as all the other evidence in the case.

Committee Comment

Until 1985, this Circuit adhered to the idea that a "standing alone" instruction was necessary. See United States v. Donnelly, 179 F.2d 227, 233 (7th Cir. 1950). This was taken from a reading of Edgington v. United States, 164 U.S. 361 (1896) and Michelson v. United States, 335 U.S. 469 (1948). However, in United States v. Burke, 781 F.2d 1234, 1238-42 (7th Cir. 1985), this Circuit joined the rest of the circuits (except perhaps the Tenth Circuit; see Johnson v. United States, 269 F.2d 72, 74 (10th Cir. 1959); United States v. Daily, 921 F.2d 994, 1010 (10th Cir. 1990), cert. denied, 502 U.S. 952 (1991) (failure to give an instruction is reversible error); but see also Oertle v. United States, 370 F.2d 719, 727 (10th Cir. 1966), cert. denied, 387 U.S. 943 (1967) ("it seems inconsistent and confusing, without additional explanation, to instruct the jury it must consider evidence of good character together with all of the other evidence in the case, which is the generally accepted rule, and then say evidence of good character, standing alone, may generate a reasonable doubt")), and rejected the "standing alone" instruction:

> The "standing alone" instruction conveys to the jury the sense that even if it thinks the prosecution's case compelling, even if it thinks the defendant a liar, if it also concludes that he has a good reputation this may be the "reasonable doubt" of which other instructions speak. A "standing alone" instruction invites attention to a single bit of evidence and suggests to jurors that they analyze this evidence all by itself. No instruction flags any other evidence for this analysis -- not eyewitness evidence, not physical evidence, not even confessions. There is no good reason to consider <u>any</u> evidence "standing alone."

Burke, 781 F.2d at 1239.

A "standing alone" instruction is not automatically reversible. United States v. Ross, 77 F.3d 1525, 1538 (7th Cir. 1996) ("This Court has repeatedly held that such an instruction, while sometimes allowable, is never necessary"). Many of the other Circuits also recognize that there may be situations in which the instruction can be used, and may be necessary. See United States v. Winter, 663 F.2d 1120, 1147-49 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983); United States v. Pujana-Mena, 949 F.2d 24, 27-32 (2d Cir. 1991); United States v. Spangler, 838 F.2d 85, 87-88 (3d Cir.), cert. denied, 486 U.S. 1033 (1988); United States v. Foley, 598 F.2d 1323, 1336-37 (4th Cir. 1979), cert. denied, 444 U.S. 1043 (1980).

3.07 WEIGHING EXPERT TESTIMONY

You have heard a witness [witnesses] give opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way that you judge the testimony of any other witness. The fact that such a person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness' qualifications, and all of the other evidence in the case.

Committee Comment

The term "expert" has been omitted to avoid the perception that the court credits the testimony of such a witness.

Some jurisdictions do not recommend giving an instruction on expert testimony. The Illinois Pattern Jury Instructions recommend that no instruction be given on this subject while noting that the credibility of expert testimony is a proper subject of closing argument. See IPI -- Criminal 3d 3.18 (1992). Similarly, the Indiana Pattern Jury Instructions do not include a specific instruction on the subject. The general instruction relating to the jury's role in determining the weight and credibility of witnesses is thought to be sufficient. Nevertheless, the danger that an expert's testimony will be given undue weight by the jury does exist. See United States v. Brawner, 471 F.2d 969 (D.C.Cir. 1972) (noting the influence of expert testimony in prosecutions in which the defendant's sanity is an issue); United States v. Gold, 661 F.Supp 1127, 1129-30 (D.D.C. 1987). Consequently, the Committee has decided that a specific instruction that an expert's opinion should be evaluated along with all other evidence is appropriate.

An instruction on "lay" opinion generally is not needed. There may be unusual circumstances where one is called for: a case in which such testimony is of great significance or in which there is both significant "expert" and "lay" opinion testimony. The following is recommended:

> You have heard some witnesses give opinions about ____. The fact that a witness has stated an opinion does not mean you are required to accept it. Give the opinion whatever weight you think it deserves, considering the witness's reasons for the opinion and all of the other evidence in the case.

3.08 CIRCUMSTANCES OF IDENTIFICATION

You have heard testimony of an identification of a person. Identification testimony is an expression of belief or impression by the witness. You should consider whether, or to what extent, the witness had the ability and the opportunity to observe the person at the time of the offense and to make a reliable identification later. You should also consider the circumstances under which the witness later made the identification.

The government has the burden of proving beyond a reasonable doubt that the defendant was the person who committed the crime charged.

Committee Comment

A specific instruction on witness identification must be given when identification is in issue. United States v. Anderson, 730 F.2d 1254, 1257-58 (7th Cir. 1984). The present instruction is extracted from the recommended instruction in United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972), and incorporates the standard credibility instructions while attempting to eliminate some of the confusion of Telfaire. The Committee believes that elaboration on the specific circumstances surrounding the identification is best left to argument.

3.09 PRIOR INCONSISTENT STATEMENTS - WITNESSES

You have heard evidence that before the trial [a] witness[es] made [a] statement[s] that may be inconsistent with the witness[es]'s testimony here in court. If you find that it is inconsistent, you may consider the earlier statement [only] in deciding the truthfulness and accuracy of that witness's testimony in this trial. [You many not use it as evidence of the truth of the matters contained in that prior statement.] [If that statement was made under oath, you many also consider it as evidence of the truth of the matters contained in that prior statement.]

Committee Comment

Three possible situations may arise at trial: prior inconsistent statements of witnesses have been admitted (1) that are all admissible only to impeach, (2) that are all admissible substantively under Rule 801(d)(1)(A) of the Federal Rules of Evidence (and are also admissible to impeach), or (3) some of both types of statements have been admitted. This instruction should be adapted to fit whichever of these situations applies. In the third situation, the court should identify the use of the oath as the factor permitting certain inconsistent witness statements to be used substantively.

The Committee does not offer an instruction on the substantive use of out-of-court statements of witnesses under Rules 801(d)(1)(B) (consistent statement used to rehabilitate), but courts may craft one when appropriate.

3.10 PRIOR INCONSISTENT STATEMENTS - DEFENDANTS

A statement made by a defendant before trial that is inconsistent with the defendant's testimony here in court may be used by you as evidence of the truth of the matters contained in it, and also in deciding the truthfulness and accuracy of that defendant's testimony in this trial.

Committee Comment

This instruction should be given only if a defendant testifies and inconsistent statements by that defendant are admitted that also qualify for substantive use under Rule 801(d)(2)(A) of the Federal Rules of Evidence. The court may, if appropriate, craft instructions applicable to statements of others attributable to and admitted substantively against a defendant under one of the other subsections of Rule 801(d)(2).

3.11 IMPEACHMENT OF WITNESS - CONVICTIONS

You have heard evidence that _____ has been convicted of a crime. You may consider this evidence only in deciding whether _____'s testimony is truthful in whole, in part, or not at all. You may not consider this evidence for any other purpose.

Committee Comment

The admissibility of prior convictions to impeach a witness' credibility is governed by Rule 609 of the Federal Rules of Evidence. See **Committee Comment** accompanying Instruction 3.05 –"Impeachment--Defendant--Convictions." Only one condition to admissibility of convictions to impeach witnesses other than the defendant requires special attention. Rule 609(a)(1) governing convictions other than those involving dishonesty or false statement requires consideration of the prejudicial effect of the evidence to the defendant. Congress considered the danger of prejudice such as damage to reputation that revelation of a conviction might pose to a witness other than the defendant and decided that it should not prohibit the admission of the impeaching evidence.

3.12 CHARACTER OF A WITNESS

You have heard [reputation/opinion] evidence about the character trait of _____ for truthfulness [or untruthfulness]. You should consider this evidence in deciding the weight that you will give to _____'s testimony.

Committee Comment

See Federal Rules of Evidence 404(a)(2), 404(a)(3), and 608.

3.13 WITNESSES REQUIRING SPECIAL CAUTION

You have heard testimony from _____ who:

(a) received immunity; that is, a promise from the government that any testimony or other information he/she provided would not be used against him/her in a criminal case.

(b) received benefits from the government in connection with this case, namely _____.

(c) has admitted [been convicted of] lying under oath.

(d) stated that he/she was involved in the commission of the offense as charged against the defendant.

(e) has pleaded guilty to an offense arising out of the same occurrence for which the defendant is now on trial. His/ her guilty plea is not to be considered as evidence against the defendant.

You may give his/her testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care.

Committee Comment

Immunized witness: This instruction is designed to be used in normal situations involving a general grant of immunity as provided for in 18 U.S.C. § 6002. If in a particular case a witness receives a promise from the government which includes elements beyond the scope of the immunity provided for in 18 U.S.C. § 6002, there should be an appropriate modification of this instruction to reflect those additional elements.

Informer: The Supreme Court acknowledged, in On Lee v. United States, 343 U.S. 747, 757 (1952), that the use of informers "may raise serious questions of credibility. To the extent that they do, a defendant is entitled to . . . . have the issues submitted to the jury with careful instructions."

The Court has never specifically articulated what is to be included in these "careful instructions" but approved the cautionary "interested witness" instruction given in Hoffa v. United States, 385 U.S. 293, 311-12 & n. 14 (1966).

The decision as to whether a particular witness is an informer and if so, whether the defendant is entitled to a special cautionary instruction must be made by the court on a case-by-case basis.

The case law clearly identifies as an informer the witness who is a narcotic user or addict and is testifying to either gain some advantage, or avoid some disadvantage, or who is paid on a 'contingency fee' basis by the government. See United States v. Rodgers, 755 F.2d 533, 549-50

(7th Cir.), cert. denied, 473 U.S. 907 (1985) (instruction unnecessary if unreliability sufficiently highlighted elsewhere).

Also generally included are witnesses who are paid (in cash or other benefits) for their testimony in a specific case on a continuing basis by the government. United States v. Lee, 506 F.2d 111, 122-23 (D.C. Cir. 1974), cert. denied, 421 U.S. 1002 (1975).

The Seventh Circuit appears to follow this pattern and had approved the giving of a special informer instruction in certain cases. Brandes v. Burbank, 613 F.2d 658, 669 (7th Cir. 1980) ("While it is a general rule that a large discretion is vested in a trial judge as to the language to be used in an instruction, ... this does not mean that an instruction essential to the jury's understanding of the case should be omitted."); United States v. Hodge, 594 F.2d 1163, 1167 (7th Cir. 1979) ("We decline to apply under our supervisory powers . . . . that all contingent fee arrangements with informers are invalid. The method of payment is properly a matter for the jury to consider in weighing the credibility of the informant."); United States v. Rajewski, 526 F.2d 149, 159-60 (7th Cir. 1975), cert. denied, 426 U.S. 908 (1976); United States v. Gardner, 516 F.2d 334, 343-44 n. 4 (7th Cir.), cert. denied, 423 U.S. 861 (1975). However, in other cases, where neither corroboration nor materiality were at issue, the court has indicated that while the giving of the instruction may be "well-advised", it is not reversible error to refuse to do so. United States v. Booker, 480 F.2d 1310, 1311 (7th Cir. 1973); United States v. Green, 327 F.2d 715, 718 (7th Cir.), cert. denied, 377 U.S. 944 (1964).

Witness who has pled guilty: This instruction is recommended for use in trials in which a witness testifies after having pleaded guilty to an offense arising from the same occurrence for which the defendant is on trial and the jury knows of the plea. Because of the skepticism with which such testimony is received, the phrase "caution and great care" is used here, as in the Accomplice instruction. The Committee suggests that this phrase is adequate whether the testimony is inculpatory or exculpatory of the defendant on trial.

If evidence of the witness' plea is received, it may only be used for the purpose of impeachment or to reflect on the credibility of the witness and the jury should be so instructed. United States v. Fleetwood, 528 F.2d 528 (5th Cir. 1976); United States v. Braxton, 877 F. 2d 556, 564 (7th Cir. 1989).

At the request of the defendant this instruction should be given immediately after the plea is admitted and repeated with the general instructions at the end of the trial. See United States v. Bryza, 522 F.2d 414, 425 (7th Cir. 1975), cert. denied, 426 U.S. 912 (1976); United States v. Johnson, 26 F.3d 669, 677-80 (7th Cir.), cert. denied, 115 S.Ct. 344 (1994). The general rule is that guilty pleas should only be used to attack credibility. However, admissibility has been broadened to include evidence of a guilty plea to foreclose "the possibility that the government had singled out [the defendant] for prosecution, while permitting his co-defendant to go free", or to "'blunt the impact of cross examination and to avoid the impression that the government was concealing the information.'" United States v. Sanders, 893 F.2d 133, 136, 29 Fed. R. Evid. Serv. 328 (7th Cir.), cert. denied, 496 U.S. 907 (1990)(citations omitted).

3.14 POSSESSION OF STOLEN PROPERTY--INFERENCE

You may reasonably infer that a person who possesses recently stolen property knew it had been stolen. You are never required to make this inference.

The term "recently" is a relative term that has no fixed meaning. The longer the period of time since the property was stolen, the more doubtful the inference of knowledge becomes.

Possession may be explained satisfactorily by facts and circumstances independent of any testimony by the defendant. In considering whether possession has been explained satisfactorily, you are reminded that a defendant has an absolute right not to testify and need not call any witnesses or produce any evidence.

Committee Comment

See Barnes v. United States, 412 U.S. 837 (1973).

3.15 SUMMARIES--STIPULATED

Certain summaries are in evidence. They truly and accurately summarize the contents of voluminous books, records or documents, and should be considered together with and in the same way as all other evidence in the case.

Committee Comment

This instruction is based on Rule 1006 of the Federal Rules of Evidence which permits summaries to be admitted as evidence without admission of the underlying documents as long as the opposing party has had an opportunity to examine and copy the documents at a reasonable time and place. See United States v. Smyth, 556 F.2d 1179, 1184 (5th Cir.), cert. denied, 434 U.S. 862 (1977). The Rules contemplate that the summaries will not be admitted until the court has made a preliminary ruling as to their accuracy. See Federal Rules of Evidence 104; United States v. Smyth, supra.

This instruction should only be given when the accuracy and authenticity of the exhibits are not in question.

This instruction is not necessary if a stipulation instruction on other stipulated matters has been given.

3.16 SUMMARIES - NOT STIPULATED

Certain summaries are in evidence. Their accuracy has been challenged by [the government] [the defendant]. Thus, the original materials upon which the exhibits are based have also been admitted into evidence so that you may determine whether the summaries are accurate.

Committee Comment

Rule 1006 of the Federal Rules of Evidence provides that the "court may order" the underlying documents be produced in court. Thus, where the court determines the summaries might be helpful they may be admitted despite objection together with the underlying documents. See generally 6 Weinstein's Federal Evidence ¶ 1006.05[5] (2d ed. 1997).

This instruction is not intended to cover the situation where some or all of the underlying materials are unavailable.

3.17 RECORDINGS / TRANSCRIPTS OF RECORDINGS

You have heard recorded conversations. These recorded conversations are proper evidence and you may consider them, just as any other evidence.

When the recordings were played during the trial, you were furnished transcripts of the recorded conversations [prepared by government agents].

The recordings are the evidence, and the transcripts were provided to you only as a guide to help you follow as you listen to the recordings. The transcripts are not evidence of what was actually said or who said it. It is up to you to decide whether the transcripts correctly reflect what was said and who said it. If you noticed any difference between what you heard on the recordings and what you read in the transcripts, you must rely on what you heard, not what you read. And if after careful listening, you could not hear or understand certain parts of the recordings, you must ignore the transcripts as far as those parts are concerned. [[You may consider the actions of a person, facial expressions and lip movements that you can observe on videotapes to help you to determine what was actually said and who said it.]]

[I am providing you with the recordings and a player. You are not required to play the tapes, in part or in whole. You may rely, instead, on your recollections of these recordings as you heard them at trial. If you do decide to listen to [[or watch]] a tape recording and wish to have the transcript corresponding to that recording, ask the Marshal in writing and the transcript will be given to you. You may choose to listen to [[or watch]] the cassette without the transcript.

Committee Comment

Some judges may prefer to allow the jury to take all of the transcripts along with the exhibits admitted in evidence. No particular practice is prescribed in this regard. The language in double brackets should be used only when videotape recordings are in evidence.

3.18 FOREIGN LANGUAGE RECORDINGS / TRANSCRIPTS IN ENGLISH

Among the exhibits admitted during the trial were recordings that contained conversations in the _____ language. You were also provided with English transcripts of those conversations. The transcripts were provided to you [by the government] so that you could consider the content of the conversations on the recordings.

Whether a transcript is an accurate translation, in whole or in part, is for you to decide. In considering whether a transcript accurately describes the meaning of a conversation, you should consider the testimony presented to you regarding how, and by whom, the transcript was made. You may consider the knowledge, training, and experience of the translator, as well as the nature of the conversation and the reasonableness of the translation in light of all the evidence in the case. You should not rely in any way on any knowledge you may have of the language spoken on the recording; your consideration of the transcripts should be based on the evidence introduced in the trial.

Committee Comment

In a case where videotape recordings make it possible to see the person as they speak, the jury should be instructed that "You may consider the actions of a person, the facial expressions and lip movements that you can observe on videotapes to help you to determine the identity of speakers."

3.19 MOTIVE

Committee Comment

The Committee recommends that no instruction be given on this subject.

Instructions on motive have been used either to enunciate its immateriality to the proof of the case or to distinguish it from intent. IPI-Criminal 3.04; 1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 17.06 (4th ed. 1992). The Committee believes that neither of these purposes can be successfully accomplished through an instruction.

United States v. Pomponio, 429 U.S. 10 (1976) demonstrates the two entirely different meanings of the word "motive," either as a synonym for intent or a reason for acting. Only the former meaning is material to jury deliberations. To specifically define motive, then to explain its immateriality for a purpose other than one probative of intent, only creates confusion far greater than any clarification an instruction might accomplish.

3.20 FLIGHT

Committee Comment

The Committee recommends that no instruction be given on this subject.

Evidence of flight, in appropriate circumstances, is a relevant circumstance evidencing a consciousness of guilt. Any argument based upon it is proper. But the facts of flight are frequently contested and their relevance frequently disputed. An instruction on the subject gives undue weight to a particular piece of evidence which the Committee feels should be avoided. For discussions of the dangers of giving a flight instruction, see United States v. Jackson, 572 F.2d 636 (7th Cir. 1978), United States v. Levine, 5 F.3d 1100, 1107 (7th Cir. 1993), cert. denied, 114 S.Ct. 1224 (1994), United States v. Williams, 33 F.3d 876, 879 (7th Cir. 1994), cert. denied, 115 S.Ct. 1383 (1995).

3.21 DYING DECLARATIONS

Committee Comment

The Committee recommends that no instruction be given on this subject. Rule 804(b)(2) of the Federal Rules of Evidence permits the introduction of dying declarations only in prosecutions for homicide. Although there are decisions to the contrary, the Committee believes that the conditions of admissibility are questions to be determined by the court under Rule 104(a). See 5 Wigmore on Evidence § 1451 (Chadbourn rev. 1974); 4 Muller & Kirkpatrick, Federal Evidence §495 (2d ed. 1994). An instruction on this subject is, therefore, unnecessary. The weight which should be given to a particular declaration is a proper subject of final argument. See McCormick on Evidence § 314 at 333 (4th ed. 1992).

3.22 FALSE EXCULPATORY STATEMENTS

Committee Comment

The Committee is of the opinion that an instruction on this subject should not be given. The general subject is adequately covered in other instructions, and the specific references to evidence are likely to be viewed by the jury as judge's comments on the evidence.

3.23 CHILD WITNESS

Committee Comment

The Committee recommends no instruction on child witness since it is covered by Instruction 1.03 “Testimony of Witnesses (Deciding What to Believe).”

3.24 MISSING WITNESS

Committee Comment

It is the view of the Committee that a missing witness instruction should not be given. For the unusual circumstances where the court might find it appropriate, the following instruction is recommended:

> It was particularly within the power of the (government) (defense) to produce _____, who could have given material testimony on an issue in the case. The (government's) (defense's) failure to call _____ may give rise to an inference that his testimony would be unfavorable to it.
>
> You should bear in mind that the law does not impose on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

This instruction is taken from United States v. Mahone, 537 F.2d 922 (7th Cir.), cert. denied, 429 U.S. 1025 (1976), where the Seventh Circuit noted that two requirements must be met "before a party can raise to the jury the possibility of drawing an inference from the absence of a witness . . . . " Id. at 926. Thus the trial court must make an advance ruling before the instruction may be given or the inference argued to the jury. See also United States v. Rollins, 862 F.2d 1282, 1297-99 (7th Cir. 1988), cert. denied, 490 U.S. 1074 (1989); United States v. Valles, 41 F.3d 355, 360 (7th Cir. 1994). Regarding argument on this issue, see United States v. Sblendorio, 830 F.2d 1382, 1390-94 (7th Cir. 1987), cert. denied, 484 U.S. 1068 (1988).

The first requirement is that the absent witness is "peculiarly within the other party's power to produce." 537 F.2d at 926. The court noted that this occurs when the witness is (a) physically available to only one party or (b) when the witness "has a relationship with the opposing party "that would in a pragmatic sense make his testimony unavailable to the opposing party regardless of physical availability." Id. (quoting Yumich v. Cotter, 452 F.2d 59,64 (7th Cir. 1971), cert. denied, 410 U.S. 908 (1973)).

Obvious examples of persons physically available to only one party are witnesses, like informers, whose names or addresses are unknown to the other party. See United States v. Tucker, 552 F.2d 202, 209-10 (7th Cir. 1977); United States v. Valles, 41 F.3d 355, 358 (7th Cir. 1994) ("While a defendant can overcome the confidential informant privilege by demonstrating a need for the information, he bears this burden in the face of an assumption that the privilege should apply."). Persons pragmatically unavailable to one party are law enforcement officers or other persons closely associated with one party. See United States v. Mahone, supra at 926; Yumich v. Cotter, supra at 64. In Yumich, the court stated, "where there is likelihood of bias on the part of the person not called as a witness in favor of one party, 'that person is not, in a true sense, "equally available" to both parties.'" 452 F.2d at 64.

The second requirement is a showing that the absent witness' testimony would "elucidate issues in the case." United States v. Mahone, supra at 927. Where the testimony would be merely cumulative, see United States v. Johnson, 467 F.2d 804, 808 (1st Cir. 1972), cert. denied,

410 U.S. 909 (1973) and United States v. Warwick, 695 F.2d 1063, 1069 (7th Cir. 1982), or where it would be irrelevant to the issues in the case, United States v. Emalfarb, 484 F.2d 787 (7th Cir.), cert. denied, 414 U.S. 1064 (1973), no inference is permissible. See Givens v. United States, supra. In Mahone, the Seventh Circuit noted that the party requesting the missing witness instruction may ask the court to direct the witness to tell counsel what witness would say if called. 537 F.2d at 927 n. 4. The court also noted that in cases where it is "debatable" whether the witness' testimony would be elucidative, the giving of the instruction is within the trial court's discretion. Id. at 927. See also United States v. Bautista, 509 F.2d 675 (9th Cir.), cert. denied, 421 U.S. 976 (1975). The trial court may, in an appropriate case, refuse to give the instruction but allow counsel to argue the inference to the jury.

Where the witness is equally available to both parties, no instruction should be given. Nor should the instruction be given where it could be construed as a comment either directly or indirectly on the defendant's failure to testify. United States v. Keller, 512 F.2d 182, 186 (3d Cir. 1975); United States v. Miceli, 446 F.2d 256, 260 (1st Cir. 1971).

The instruction is couched in terms of an inference rather than a presumption because of the constitutional difficulties presumptions create in criminal cases. See United States v. Lake, 482 F.2d 146, 148 (9th Cir. 1973).

4.01 ELEMENTS OF OFFENSE - SINGLE OFFENSE CASES

To sustain the charge in the indictment the government must prove the following propositions:

First:
Second:
Third:
Fourth: (Addressing any issues raised by a substantive or affirmative defense, e.g., self-defense.)

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all of the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty [of that charge].

Committee Comment

Whenever self-defense, entrapment, coercion or other substantive or affirmative defenses are properly part of the case, the definition of that defense should be given immediately after this instruction.

In cases involving the defense of insanity, Instruction 4.02 should be given instead of this instruction.

4.02 ISSUES IN THE CASE AND BURDEN OF PROOF IN CASE INVOLVING DEFENSE OF INSANITY

To sustain the charge of _____ the government must prove the following propositions:

First:

Second:

Third:

If you find from your consideration of all of the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

If, on the other hand, you find from your consideration of all of the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty, unless you also find that the defendant has proved the defense of insanity by clear and convincing evidence, in which event you should find the defendant not guilty only by reason of insanity.

4.03 UNANIMITY ON SPECIFIC ACTS

[Each count of] [Count __ of] The indictment alleges that the defendant[s] committed certain specific acts. [For any count on which the government seeks conviction] The government need not prove that each and every specific alleged act was committed by the [a] defendant. However, the government must prove that [a] defendant committed at least one of the specific acts which are alleged [in that count]. In order to find that the government has proved the [a] defendant committed a specific act, the jury must unanimously agree on which specific act that defendant committed.

For example, if some of you find defendant [insert example from indictment] and the rest of you find defendant [insert different example], then there is no unanimous agreement on which act has been proved. On the other hand, if all jurors find defendant [insert example from indictment], then there is unanimous agreement.

Committee Comment

This instruction explains the necessity for unanimity and the nature of unanimity when the government alleges multiple acts but need prove only one. It is commonly required in tax prosecutions. An altered version of this instruction must be given in substantive RICO prosecutions where two acts must be proved and the jury must agree unanimously on which two acts the defendant has committed.

4.04 DATE OF CRIME CHARGED

The indictment charges that the offense was committed "on or about" _____. The government must prove that the offense happened reasonably close to that date but is not required to prove that the alleged offense happened on that exact date.

Committee Comment

This instruction is unnecessary in the average case where no discrepancy exists between the date charged in the indictment and the date suggested by the evidence at trial.

Where such a discrepancy exists, this instruction may be given if the date suggested by the evidence falls within the applicable statute of limitations, Ledbetter v. United States, 170 U.S. 606, 612 (1898); United States v. Leibowitz, 857 F.2d 373, 378 (7th Cir. 1988), cert. denied, 489 U.S. 1088 (1989). "On or about" as part of the indictment makes a date reasonably near the date in the indictment sufficient, and only a material variance will cause the government's case to fail. United States v. Leibowitz, 857 F.2d 373, 378 (7th Cir. 1988), cert. denied, 489 U.S. 1088 (1989). There are two possible exceptions to this rule:

1. where the date charged is an essential element of the offense and the defendant was misled by such date in preparing a defense, United States v. Bourque, 541 F.2d 290, 293-96 (1st Cir. 1976), United States v. Cina, 699 F.2d 853, 859 (7th Cir.), cert. denied, 464 U.S. 991 (1983).

2. where the defendant asserts an alibi defense for the specific date(s) charged, United States v. Leibowitz, 857 F.2d 373, 378-79 (7th Cir. 1988), cert. denied, 489 U.S. 1088 (1989).

4.05 SEPARATE CONSIDERATION FOR EACH DEFENDANT

Even though the defendants are being tried together, you must give each of them separate consideration. In doing this, you must analyze what the evidence shows about each defendant [, leaving out of consideration any evidence that was admitted solely against some other defendant or defendants]. Each defendant is entitled to have his/her case decided on the evidence and the law that applies to that defendant.

Committee Comment

In cases involving more than one count, it will be necessary for the court to instruct both as to the separate consideration for each defendant and also with regard to separate consideration of charges. Proper joinder and charging are assumed. The instruction was drafted to inform jurors of their imperative duty to consider each charge against each defendant separately.

The Committee recognizes that problems may arise where two and only two co-conspirators are charged in the same indictment. Although conviction of one and acquittal of one may be inappropriate, it is believed that the separate consideration of the guilt or innocence of each defendant is paramount no matter what constraints may exist with regard to the results.

4.06 "KNOWINGLY" - DEFINITION

When the word "knowingly" [the phrase "the defendant knew"] is used in these instructions, it means that the defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake or accident. [Knowledge may be proved by the defendant's conduct, and by all the facts and circumstances surrounding the case.]

[You may infer knowledge from a combination of suspicion and indifference to the truth. If you find that a person had a strong suspicion that things were not what they seemed or that someone had withheld some important facts, yet shut his eyes for fear of what he would learn, you may conclude that he acted knowingly, as I have used that word. {You may not conclude that the defendant had knowledge if he was merely negligent in not discovering the truth.}]

Committee Comment

This instruction has been approved on many occasions by the Seventh Circuit. United States v. Hauert, 40 F.3d 197, 203 (7th Cir. 1994), cert. denied, 115 S.Ct. 1822 (1995)(ruling that the older "ostrich" instruction is not error, but not preferred); United States v. Ramsey, 785 F.2d 184, 190 (7th Cir.), cert. denied, 476 U.S. 1186 (1986); United States v. Arambasich, 597 F.2d 609, 612 (7th Cir. 1979); United States v. Gabriel, 597 F.2d 95, 100 (7th Cir.), cert. denied, 444 U.S. 858 (1979). The initial sentence in brackets is optional and probably only applicable in a case based in large part on circumstantial evidence.

An instruction or combination of instructions which give the jury the impression that negligence will support a verdict of guilty is improper. See United States v Thompson-Hayward Chem. Co., 446 F.2d 583 (8th Cir. 1971).

This instruction should not be interpreted to mean that the defendant must necessarily know that his conduct violated federal law. For some federal offenses, a defendant's knowledge that his conduct affects the federal government or its agents is unnecessary. For examples, see United States v. Stanford, 589 F.2d 285 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979) (fraudulent statements need not be accompanied by knowledge that the statements were made to welfare agencies funded by federal monies); United States v. Yermian, 468 U.S. 63, 67-70 (1984) (fraudulent statements need not be accompanied by knowledge that they were made concerning a matter within federal agency jurisdiction); United States v. Dick, 744 F.2d 546, 553 (7th Cir. 1984) ("Proof of knowledge that federal funds were involved is not required"); United States v. Feola, 420 U.S. 671, 676-86 (1975) (statute punishing assaults on federal officers does not require knowledge that the person assaulted is a federal officer); United States v. Crutchley, 502 F.2d 1195 (3d Cir. 1974)(knowledge that property belonged to federal government is not required). The issue is essentially one of statutory construction. See United States v, Bailey, 444 U.S. 394 (1980)(quoting Model Penal Code § 2,02, comment (Tent. Draft No. 4, 1955))("clear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime"). Where knowledge by the defendant that is conduct does affect the federal government

is required, this must be specifically explained in Instruction 4.01 -- "Issues in the Case and Burden of Proof".

The second paragraph is derived from the suggested instruction set forth in United States v. Ramsey, 785 F.2d 184, 190 (7th Cir. 1986). See also United States v. Giovannetti, 919 F.2d 1223 (7th Cir. 1990); United States v. Nobles, 69 F.3d 172 (7th Cir. 1995); United States v. Gonzalez, 933 F.2d 417 (7th Cir. 1991). As for the final bracketed sentence, see United States v. Draves, 103 F.3d 1328 (7th Cir. 1997).

4.07 ATTEMPT

To "attempt" means that the defendant knowingly took a substantial step toward the commission of the offense with the intent to commit that offense.

Committee Comment

If the defendant is charged with attempting a particular offense, an additional element must be added to the "elements" instruction for that offense.

See United States v. Cea, 914 F.2d 881 (7th Cir. 1990).

4.08 SPECIFIC INTENT -- GENERAL INTENT

Committee Comment

The Committee recommends avoiding instructions that distinguish between "specific intent" and "general intent". In place thereof the Committee recommends that instructions be given which define the precise mental state required by the particular offense charged. [FNa1] Accordingly, district judges should determine the requisite mental state as to each element of the charged offense and instruct thereon.

Traditionally, courts have distinguished between "specific intent" and "general intent". The stock "specific intent" instruction reads: The crime charged in this case requires proof of specific intent before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the government must prove that the defendant knowingly did an act which the law forbids (or knowingly failed to do an act which the law requires), purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case (and from similar prior crimes and transactions). W. LaBuy, Jury Instructions in Federal Criminal Cases s 4.04, reprinted in 33 F.R.D. 550. See also I E. Devitt & C. Blackmar, Federal Jury Practice and Instructions s 14.03 (3d ed. 1977). Conversely, "general intent" generally is defined as follows: In determining defendant's intention the law assumes that every person intends the natural consequences of his voluntary acts (or omissions). Therefore, the general intent required to be proved as an element of the crime is inferred from defendant's voluntary commission of the act forbidden by law (or his omission of the duty required by law), and it is not necessary to establish that defendant knew that his act (or omission) was a violation of law. LaBuy, supra at s 4.03 reprinted in 33 F.R.D. 549.

Distinctions between "specific" and "general" intent more than likely confuse rather than enlighten juries. See United States v. Bailey, 100 S.Ct. 624, 629-636 (1980); United States v. Manganellis, 864 F.2d 528, 533-39 (7th Cir. 1988) (elaborate discussion of whether statute called for "specific" or "general" intent). For example, to speak of a defendant's "purpose" or to use the phrase "purposely intending to violate the law" requires a jury to find that a defendant knew his act violated the law. Ordinarily, that is not an essential element of the offense. See United States v. Brighton Building & Maintenance Co., 598 F.2d 1101, 1105 (7th Cir.), cert. denied, 100 S.Ct. 79 & 80 (1979) (criminal antitrust prosecution: "Defendants [are] not entitled to an instruction which [includes] the ... phrase [that the defendant knowingly did an act which the law forbids, purposely intending to violate the law]. 'A requirement of proof not only of this knowledge of likely effects, but also of a conscious desire to bring them to fruition or to violate the law would seem, particularly in such a context, both unnecessarily cumulative and unduly burdensome'"). Similarly, to state that "general intent" is an element of the offense inadequately and erroneously directs the jury on the issue of intent. Thus the stock instructions should be avoided.

The Seventh Circuit Court of Appeals commented on the issue in United States v. Arambasich, 597 F.2d 609 (7th Cir. 1979). There defendant appealed from convictions under

the Hobbs Act for extortion and conspiracy to extort. At trial, defendant tendered a stock specific intent instruction which the district court refused. Instead the trial court defined the requisite intent as the intent to obtain something which the defendant knew he was not entitled to receive with knowledge that it was the product of fear of economic harm. On appeal, the court affirmed the convictions, stating:

> We are inclined to agree with the district judge in the case at bar that the labels "specific intent" and "general intent," which are emphasized in the stock instructions he refused to give, and the distinction the instructions attempt to make between these categories of intent, are not enlightening to juries. More specific and therefore more comprehensible information is conveyed by stating the precise mental state required for the particular crime.
>
> . . .
>
> In the case at bar that mental state consisted of an intent to obtain money from contractors with the knowledge that it was paid because they feared economic harm and that the defendant was not entitled to receive it . . . .
>
> . . .
>
> It is unnecessary to use the term "specific intent" or to give any particular form of instruction.
>
> The stock "specific intent" instructions tendered by [defendant] are based on decided cases and have been approved in countless others. Yet they illustrate, if not the "variety" or "disparity," the "confusion of [judicial] definitions of the requisite but elusive mental element" . . . . It is not very helpful to speak of a defendant's "purpose" to violate the law, as do these stock instructions. Use of the phrase "purposely intending to violate the law" may be erroneously interpreted by jurors, for example, to require that the defendant know his act violates a criminal statute, which is ordinarily unnecessary . . . . Giving one of the stock instructions may therefore not only confuse but mislead the jury to the prejudice of the prosecution. A trial judge is accordingly justified in refusing to give it, if he adequately instructs on the requisite mental state by other means.

United States v. Arambasich, 597 F.2d at 611-613 (citations omitted). See also United States v. Perez, 43 F.3d 1131, 1135 (7th Cir. 1994) (use of "specific" not required for assault with intent to commit murder); United States v. Valencia, 907 F.2d 671, 682 (7th Cir. 1990)(acceptable if "the instructions as a whole informed the jury of the mental state the prosecution was required to prove beyond a reasonable doubt in order to secure a conviction."); and W. LaFave & Scott, Criminal Law § 28 at 202 (1972); Model Penal Code § 2.02, comment (Tent. Draft No. 4, 1955).

Instructions which attempt to define "general intent" may not only be misleading, but in some cases unconstitutional as well. In Sandstrom v. Montana, 442 U.S. 510 (1979), the Court held unconstitutional an instruction stating that "the law presumes that a person intends the ordinary consequences of his voluntary acts" because:

> a reasonable jury could well have interpreted the presumption as “conclusive,” that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant’s voluntary actions (and their “ordinary” consequences), unless the defendant proved the contrary by some quantum of proof which may well have been considerably greater than “some” evidence -- thus effectively shifting the burden of persuasion on the element of intent.

Id. at 517 (emphasis in original). See also United States v. Waldemer, 50 F.3d 1379, 1386 (7th Cir.), cert. denied, 115 S.Ct.. 2598 (1995).

The stock "specific" and "general intent" instructions should be avoided in favor of instructions that precisely define the requisite mental state of the particular crime charged: e.g., Hobbs Act Extortion, 18 U.S.C. § 1951 (intent to obtain something from another which the defendant knows he is not entitled to receive with knowledge that it is the product of actual or threatened force, violence, fear or the defendant's office); Obstruction of Justice, Influencing or Injuring an Officer, Juror or Witness, 18 U.S.C. § 1503 (intent to influence, intimidate, impede or injure); Bribery of Public Officials and Witnesses, 18 U.S.C. § 201 (intent to influence); Conspiracy Against Rights of Citizens, 18 U.S.C. § 241 (intent to injure, threaten, or intimidate any citizen in the free exercise of any right); Mail Fraud, 18 U.S.C. § 1341 (intent to defraud); False Bank Entry, 18 U.S.C. § 1005 (intent to injure or defraud a bank).

In certain instances, further elucidation of the particular intent described in a particular statute should be given. For example, "intent to defraud" frequently describes the mental state pursuant to which the defendant must act in order to be found guilty. In those instances where "intent to defraud" is an essential element of the charged offense, it should be defined in a manner tailoring it to the allegations of the indictment and the evidence adduced at trial. For example, in a mail fraud prosecution charging a scheme to defraud public bodies, the substantial terms of which included obtaining money by submitting collusive and rigged bids on public projects, the requisite intent to defraud might be described as "knowingly doing an act, with intent to deceive the public bodies out of their right to free and open competition in order to cause financial loss to them or a financial gain to defendants and others." See generally W. LaBuy, Jury Instructions in Federal Criminal Cases § 4.07, reprinted in 33 F.R.D. 555.

In addition to any instruction describing the requisite intent, the issues instruction must include the mental state as an essential element to be proved beyond a reasonable doubt.

4.09 DEFINITION OF WILLFULLY

Committee Comment

The Committee recommends that an instruction defining the word "willfully" not be given unless the word is in the statute defining the offense being tried. It should be noted that the word "willfully" is frequently included in the indictment even though not required by statute, and this practice should be discouraged. United States v. Valencia, 907 F.2d 671, 683 (7th Cir. 1990) lays down the Seventh Circuit rules for when to define "willfully" for the jury:

> First, as we have noted, the term "willful" does not appear in the statute that defines Mr. Martinez' charged offense. Thus, in general, the term need not be defined in the jury instructions . . . . Second, as we have stated earlier, the elements instructions given at the beginning of the jury charge, supra p. 681, adequately stated the mental state that the prosecution had tp prove in order to secure a conviction . Third, we conclude that the evidence that Mr. Martinez did act willfully was so strong that any failure to define the term had no prejudicial effect on him.

United States v. Valencia, 907 F.2d 671, 683 (7th Cir. 1990).

In many cases, the court need not define "willful" because the concept of willfulness will be adequately explained in other instructions defining "knowingly", "intentionally", or "deliberately", United States v. Sirhan, 504 F.2d 818, 820 (9th Cir. 1974). However, there are certain federal crimes which require willfulness as the only standard of purposeful conduct. For instance, the term "willful" in a failure to file an income tax return case is different from the willful involvement in a conspiracy. In the tax prosecution, "willful" should be defined as follows:

> An act is done 'willfully" if it is done voluntarily and intentionally with the purpose of avoiding a known legal duty.

This definition is taken primarily from United States v. Pomponio, 429 U.S. 10 (1976), as affirmed in Cheek v. United States, 498 U.S. 192, 201 (1991). The Supreme Court has discussed the various meanings of the term "willfulness" as used in the criminal tax statutes in United States v. Bishop, 412 U.S. 346 (1973). See United States v. Harris, 942 F.2d 1125, 1131-32 (7th Cir. 1991).

If the prosecution involves a perjury or conspiracy prosecution, the definition of "willful" may be different. For instance, the following definition may be appropriate in a perjury or contempt case:

> An act is done "willfully" if done voluntarily and intentionally , and with the intent to do something the law forbids; that is to say with a purpose either to disobey or disregard the law.

This definition is taken essentially from United States v. Patrick, 542 F.2d 381 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977).

As used in various criminal statutes, the term "willful" has been construed to mean an act done voluntarily as distinguished from accidentally, with bad purpose, without justifiable excuse,

without grounds for believing it was lawful, or with careless disregard whether or not one has the right so to act. See United States v. Murdock, 290 U.S. 389, 394-95 (1933); but see Cheek, 498 U.S. at 199-204 ("evil motive" or "bad purpose" does not require proof beyond an intentional violation of a known legal duty; a subjective misunderstanding of the legal duty may be enough to defeat willfulness, and objective reasonableness of position may be considered in determining whether subject misunderstanding actually existed). "Willful" has also been construed to mean an act done with specific intent to violate the law. Screws v. United States, 325 U.S. 91, 101 (1945).

Like the drafters of the Model Penal Code, the Committee was concerned with the confusion resulting from the use of the loose concept of "willfulness" to define criminal culpability. Model Penal Code § 2.02, comment (Tent. Draft No. 4, 1955).

Similarly, the Senate Judiciary Committee has expressed concern about confusion resulting from the various definitions of "willfulness" included under the "intentional" mental state. "One's state of mind is intentional with respect to conduct or a result if engaging in such conduct or causing such result is one's conscious objective." S. 1437 (95th Cong. 1st Sess.). Elaborating on this definition, the Senate Committee noted that ". . . . the word 'intentional' describes the mental attitude associated with an act to connote the meaning that the act is being done on purpose; it does not suggest that the act was committed for a particular purpose, evil in nature." S.Rep.No. 95-605, at 58-59.

Judge Learned Hand stated, "The word 'willful,' even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law." American Surety Co. v. Sullivan, 7 F.2d 605, 606 (2d Cir. 1925) (cited with approval in United States v. Hall, 346 F.2d 875, 880 (2d Cir.), cert. denied, 382 U.S. 910 (1965); Dennis v. United States, 171 F.2d 986, 990 (D.C. Cir. 1948), aff'd, 339 U.S. 162 (1950); Townsend v. United States, 95 F.2d 352, 358 (D.C. Cir. 1938)).

In United States v. Gris, 247 F.2d 860, 864 (2d Cir. 1957), the Second Circuit explained, "It matters not whether appellant realized his conduct was unlawful. He knew exactly what he was doing; and what he did was a violation of the Federal Communications Act. He intended to do what he did, and that was sufficient."

In United States v. Keegan, 331 F.2d 257, 261 (7th Cir.), cert. denied, 379 U.S. 829 (1964), the jury was instructed that, "The word 'willfully' means that the person knowingly and intentionally committed the acts which constitute the offenses charged."

In cases involving willful violations of the securities laws, juries have been instructed that an act is done "willfully" if done knowingly and deliberately and that the defendant need not know he is breaking a particular law. United States v. Peltz, 433 F.2d 48, 54-55 (2d Cir. 1970), cert. denied, 401 U.S. 955 (1971); Tarvestad v. United States, 418 F.2d 1043, 1047 (8th Cir. 1969), cert. denied, 397 U.S. 935 (1970).

In United States v. Falk, 605 F.2d 1005 (7th Cir. 1979), cert. denied, 100 S.Ct. 1079 (1980), the Seventh Circuit deemed proper an instruction that "... the word 'willful' means ... deliberately and intentionally, as distinguished from something which is merely careless, inadvertent or negligent, that's to say that the defendant must have known and specifically

intended his return to be false when he caused it to be made and subscribed to by him." Id. at 1010.

A consideration of the word "willfully", without benefit of the many cases which have attempted to define it, can lead to the logical conclusion that "willfully" is limited to the deliberateness of the actor in performing the act alleged in the indictment and need not have any reference to his knowledge at the time that the conduct was in violation of law. Earlier cases support this approach to the definition of "willfully." More recent cases, however, have incorporated into the concept of "willfully" the notion of the knowing commission of a criminal act. All of these things being so, it is rarely desirable to give a general definition of "willfully." If the statute uses the term and it must be defined, it should be defined in a manner tailoring it to the details of the particular offense charged.

5.01 RESPONSIBILITY

A person responsible for the conduct of another may be found guilty even though the one who it is claimed committed the crime has not been found guilty.

5.02 PERSONAL RESPONSIBILITY OF CORPORATE AGENT

A person is responsible for conduct that he performs or causes to be performed in behalf of a corporation just as though the conduct were performed in his own behalf. However, a person is not responsible for the conduct of others performed in behalf of a corporation merely because that person is an officer, employee, or other agent of a corporation.

Committee Comment

The first sentence of this instruction states the common sense rule that the fact that actions are taken with the intent to further corporate business does not relieve the agent of criminal responsibility for those actions. See United States v. Wise, 370 U.S. 405 (1962); United States v. Bach, 151 F.2d 177, 179 (7th Cir. 1945). "[T]he law is that, unless there is a clear legislative instruction to the contrary, any corporate officer who participates, in whole or in part, in a proscribed transaction on behalf of the corporation (and if the proscription is absolute, no consciousness on the part of the officer of the violation is required) is subject to the penal sanctions imposed by the statute defining the offense as well as the corporation on whose behalf he is acting." I National Commission on Reform of Federal Criminal Laws, Working Papers 178 (1970).

The second sentence of the instruction expands upon an idea implicit in the first sentence -- a corporate officer's criminal responsibility is not enlarged merely because of his corporate office. The corporate agent is, of course, responsible for his own conduct, and is responsible for the conduct of others according to the ordinary rules of accountability. This instruction does not exclude the possibility that a criminal statute may impose a special duty on corporate officers, see, e.g., United States v. Park, 421 U.S. 659, 667-76 (1975) and United States v. Doig, 950 F.2d 411, 414 (7th Cir. 1991), but in such event, as the Court in Park noted, criminal liability attaches not because of a corporate officer's position, but because the officer acts or fails to act in conformity with the duty imposed by statute. Id. at 674. See also United States v. McMullen, 516 F.2d 917, 921 (7th Cir.), cert. denied, 423 U.S. 915 (1975) (persons required to collect, account for, and pay over withholding taxes include all those with significant control over the financial decisionmaking process within a corporation). See generally Developments in the Law--Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions, 92 Harv.L.Rev. 1227, 1259-75 (1979).

5.03 ENTITY RESPONSIBILITY -- ENTITY DEFENDANT--AGENCY (a)

[Name of entity] is a [corporation, partnership, voluntary association]. A [corporation] [partnership] [voluntary association] may be found guilty of an offense.

A [corporation, partnership, voluntary association] acts only through its agents and employees, that is, those [directors], officers, agents, employees, or other persons authorized or employed to act for it.

To sustain the charge of _____ against [name of entity], the government must prove the following propositions:

First, the offense charged was committed by [an] agent[s] or employee[s] of [name of entity];

Second, in committing the offense, [the] agent[s] or employee[s] intended, at least in part, to benefit [name of entity];

Third, the acts by [the] agent[s] or employee[s] were committed within the authority or scope of [his/her/their] employment.

For an act to be within the authority of an agent or the scope of the employment of an employee, it must deal with a matter whose performance is generally entrusted to the agent or employee by [name of entity].

It is not necessary that the particular act was itself authorized or directed by [name of entity].

If an agent or an employee was acting within the authority or scope of [his/her] employment, [name of entity] is not relieved of its responsibility because the act was illegal, contrary to [name of entity]'s instructions, or against its general policies. You may, however, consider the existence of [name of entity]'s policies and instructions and the diligence of its efforts to enforce them in determining whether [the] agent[s] or employee[s] [was/were] acting with intent to benefit [name of entity] or within the scope of [his/her/their] employment.

Committee Comment

This instruction adopts the position of the majority of the courts of appeals which have considered the question of the responsibility of a corporation for the criminal conduct of its agents. The majority view is that unless the criminal statute explicitly provides otherwise, a corporation is vicariously criminally liable for the crimes committed by its agents acting within the scope of their employment--that is, within their actual or apparent authority and on behalf of the corporation. See Standard Oil Co. v. United States, 307 F.2d 120 (5th Cir. 1962); Developments in the Law--Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions, 92 Harv.L.Rev. 1227, 1247-51 (1979). Under this view, which simply constitutes an application of respondeat superior principles to criminal statutes, it may be irrelevant that the agent is not a high managerial official, that the corporation may have specifically instructed the agent not to engage in the proscribed conduct, or that the statute is one that requires willful or knowing violations, rather than one that imposes strict liability. See, e. g., United States v. Hilton

Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973); Continental Baking Co. v. United States, 281 F.2d 137 (6th Cir. 1960); United States v. Armour & Co., 168 F.2d 342 (3d Cir. 1948); but see Holland Furnace Co. v. United States, 158 F.2d 2 (6th Cir. 1946). The stated rationale is that the criminal statutes impose a duty upon the corporation to prevent its employees from committing the statutory violations.

Under the line of cases beginning with United States v. Parfait Powder Puff Co., 163 F.2d 1008, 1009 (7th Cir. 1947) (imputing liability to the corporation for violation of the Food and Drug Act), the Seventh Circuit holds corporations to a strict liability standard in regulatory cases. See also United States v. H.B. Gregory Co., 502 F.2d 700, 705-06 (7th Cir. 1973)(same); United States v. Kaadt, 171 F.2d 600, 604 (7th Cir. 1948)(same). Cf. United States v. Dotterweich, 320 U.S. 277, 285 (1943) ("Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless").

In non-regulatory cases, however, intent to benefit the corporation is treated as a separate element. See, e.g., United States v. One Parcel of Land Located at 7326 Highway 45 N., Three Lakes, 965 F.2d 311, 316 (7th Cir. 1992), which holds that agents are outside the scope of their employment when not acting at least in part for the benefit of the corporation, implying that the intent to benefit is an element of corporate responsibility. See also United States v. Barrett, 51 F.3d 86, 89 (7th Cir. 1995) ("common sense dictates that when an employee acts to the detriment of his employer and in violation of the law, his actions normally will be deemed to fall outside the scope of his employment and thus will not be imputed to his employer."). Cf. Doe v. R.R. Donnelley & Sons Co., 42 F.3d 439, 446 (7th Cir. 1994)(a sexual harassment case in which the Seventh Circuit noted that "[k]nowledge of the agent is imputed to the corporate principal only if the agent receives the knowledge while acting within the scope of the agent's authority and when the knowledge concerns a matter within the scope of that authority"); Juarez v. Ameritech Mobile Communications, Inc., 957 F.2d 317, 321 (7th Cir. 1992)(same).

5.04 ENTITY RESPONSIBILITY-- ENTITY DEFENDANT--AGENCY (b)

If you find that an act of an agent was not committed within the scope of his employment, then you must consider whether the corporation later approved the act. An act is approved if, after it is performed, another agent of the corporation, with the authority to perform or authorize the act, and with the intent to benefit the corporation, either expressly approves or engages in conduct that is consistent with approving the act.

A corporation is legally responsible for any act or omission approved by its agents.

Committee Comment

The instruction provides for corporate criminal liability when the corporation ratifies the conduct of employees who had acted outside the scope of their employment. See generally Steere Tank Lines, Inc. v. United States, 330 F.2d 719 (5th Cir. 1963). It is patterned on ordinary agency principles. There are no Seventh Circuit cases on point. To the extent the Seventh Circuit does not follow ordinary agency principles, the instruction should, of course, be modified.

5.05 JOINT VENTURE

An offense may be committed by more than one person. A defendant's guilt may be established without proof that the defendant personally performed every act constituting the crime charged.

5.06 ACTING THROUGH ANOTHER / AIDING AND ABETTING

(a)

Any person who knowingly [aids], [counsels], [commands], [induces] [or] [procures] the commission of an offense may be found guilty of that offense. That person must knowingly associate with the criminal activity, participate in the activity, and try to make it succeed.

(b)

If a defendant knowingly caused the acts of another, the defendant is responsible for those acts as though he/she personally committed them.

Committee Comment

This instruction requires modification in the event the crime charged is in fact an omission to do an act required by law.

This instruction covers some of the same ground as No. 5.11 (Mere Presence/ Association/Activity). Sometimes both No. 5.11 and this instruction will be required.

A defendant need not be specifically charged with aiding and abetting under Title 18 U.S.C. § 2 to be convicted as an accessory. One can be charged as a principal and convicted as an aider and abettor. See United States v. Loscalzo, 18 F.3d 374, 383 (7th Cir. 1994); United States v. Tucker, 552 F.2d 202 (7th Cir. 1977); Levine v. United States, 430 F.2d 641 (7th Cir. 1970), cert. denied, 401 U.S. 949 (1971).

In United States v. Ortega, 44 F.3d 505 (7th Cir. 1995), the Seventh Circuit defined an aider and abettor as one who, "knowing what the principal was trying to do, rendered assistance that he believed would (whether or not he cared that it would) make the principal's success more likely -- in other words did what he could do or what he was asked to do to help make success more likely." Id. at 508. Thus, the Court's view in Ortega was that although the defendant must have deliberately acted in a way to make the offense succeed, the defendant need not have desired that it succeed.

Yet, in United States v. Garcia, 45 F.3d 196 (7th Cir. 1995), decided after Ortega, the Court defined an aider and abettor as one who, with "knowledge of the illegal activity that is being aided and abetted, [has] a desire to help the activity succeed and [engages in] some act of helping." Id. at 199 (emphasis omitted).

The current instruction uses the language "try to make it succeed." Although that language clearly comports with the Court's definition in Garcia, it may or may not meet its earlier definition in Ortega. If it is determined that Ortega contains the correct definition of "aiding and abetting," then the following instruction may be more appropriate:

> Any person who knowingly aids, counsels, commands, induces, procures, or authorizes the commission of a crime may be found guilty of that crime.

However, that person must knowingly associate with the criminal activity, participate in the activity, and act in a way that the person knows will help the activity succeed. In other words, it is not enough that a person happens to act in a way that advances the criminal activity if that person has no knowledge that a crime is being committed or is about to be committed.

5.07 ACCESSORY AFTER THE FACT

An accessory after the fact is one who, with knowledge that an offense was committed, receives, relieves, comforts or assists the offender with the intent to hinder or prevent the offender's (apprehension) (trial) or (punishment).

5.08 CONSPIRACY

A conspiracy is an agreement between two or more persons to accomplish an unlawful purpose. To sustain the charge of conspiracy, the government must prove:

First, that the conspiracy as charged in Count __ existed, [and]

Second, that the defendant knowingly became a member of the conspiracy with an intention to further the conspiracy [, and]

[Third, that an overt act was committed by at least one conspirator in furtherance of the conspiracy.]

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all of the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

[A conspiracy may be established even if its purpose was not accomplished.]

[It is not necessary that all the overt acts charged in the indictment be proved, and the overt act proved may itself be a lawful act.]

[To be a member of the conspiracy, the defendant need not join at the beginning or know all the other members or the means by which its purpose was to be accomplished. The government must prove beyond a reasonable doubt that the defendant was aware of the common purpose and was a willing participant.]

Committee Comment

(a)

Under United States v. Santiago, 582 F.2d 1128 (7th Cir. 1978), the trial judge must preliminarily determine whether co-conspirator's statements will be admissible under Federal Rules of Evidence 801(d)(2)(e) at trial. In making this determination the judge must decide "if it is more likely than not that the declarant and the defendant were members of a conspiracy when the hearsay statement was made, and that the statement was in furtherance of the conspiracy...." Santiago, supra at 1134 (quoting United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977)). This standard, denominated by the Seventh Circuit as a "preponderance" standard, Santiago, supra at 1135, is a higher standard than the former "prima facie" test. If the trial judge determines the statements are admissible, the jury may consider them as it considers all other evidence. See also United States v. Cox, 923 F.2d 519, 526 (7th Cir. 1991); and United States v. Wesson, 33 F.3d 788, 796 (7th Cir. 1994), cert. denied, 115 S.Ct. 773 (1995).

Whether a co-conspirator's statements can be considered in determining membership of the defendant in the conspiracy was addressed in Bourjaily v. United States, 483 U.S. 171, 176-81 (1987). Under Santiago, the government must make a preliminary offering of evidence to show: 1) a conspiracy existed, 2) the defendant and declarant were members thereof, and 3) the proffered statements were made during and in furtherance of the conspiracy. Santiago, 582 F.2d at 1134-35. Bourjaily allows the court to consider the statements in question (the ones seeking to be admitted) to determine whether the three Santiago criteria have been met. This ruling seems to supercede United States v. Glaser, 315 U.S. 60, 74-75 (1942) which held that membership can only be proved by the defendants own acts. Bourjaily, 483 U.S. at 178.

Lastly, United States v. Shoffner, 826 F.2d 619, 627 (7th Cir.), cert. denied, 484 U.S. 958 (1987) held that once the court has made a determination that the charged conspiracy has been established, only slight evidence is required to link the defendant to the conspiracy. *Also see United States v. Martinez de Ortiz*, 907 F.2d 629, 632, *cert. denied*, 498 U.S. 1029 (1991).

(b)

The following instruction is frequently given in conspiracy cases in this Circuit:

> In deciding whether the charged conspiracy exists, you may consider the actions and statements of every one of the alleged participants. An agreement may be proved from all the circumstances and the words and conduct of all the alleged participants which are shown by the evidence.
>
> In deciding whether [a particular] [the] defendant joined the charged conspiracy, you may consider only what that defendant did or said. You may consider what other persons did or said, but only to help you understand what [a particular] [the] defendant did or said. You may not decide that a defendant joined a conspiracy solely because of what someone else did or said.

The Committee is of the view that the second paragraph of this instruction does not accurately state the law following Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 2775 (1987). Seventh Circuit cases construing Bourjaily have held that properly-admitted hearsay, including statements admitted under the co-conspirator exception to the hearsay rule (Fed.R.Evid. 801(d)(2)(E)), may be used to prove what another person did or said that may demonstrate their membership in the conspiracy. See, e.g., United States v. Espino, 32 F.3d 253, 259 (7th Cir. 1994); United States v. Loscalzo, 18 F.3d 374, 383 (7th Cir. 1994) ("[W]hile only the defendant's acts or statements could be used to prove that defendant's membership in a conspiracy, evidence of the defendant's acts or statements may be provided by the statements of coconspirators."); United States v. Brown, 940 F.2d 1090, 1093-94 (7th Cir. 1991). This point is illustrated in United States v. Martinez de Ortiz, 907 F.2d 629, 633 (7th Cir. 1990) (en banc),

wherein the court offered an example in which "B told C something like: 'I just received a phone call from A, who said that he would bring the cocaine to the meeting point at 10:00 tonight.'" The court said that assuming the judge found B's statement admissible as a co-conspirator's declaration, it was relevant to whether A was a member of the conspiracy, id. at 633, i.e. that the jury could decide from B's statement that A had made the call and the statements described, and could consider those facts in deciding whether A joined.

Because the import of these cases is that properly admitted hearsay may be used to prove the truth of anything contained therein, the Committee believes that an instruction on this point generally will not be necessary. In cases in which the trial court feels the matter needs to be addressed, the Committee recommends that the following paragraph, based on an instruction offered by the en banc court in Martinez de Ortiz, 907 F.2d 635, be given in place of the second paragraph of the instruction quoted above:

> In deciding whether [a particular] [the] defendant joined the charged conspiracy, you must base your decision only on what that defendant did or said. In determining what [that] [the] defendant did or said, you may consider [that] [the] defendant's own words or acts. You may also consider the words or acts of other persons to decide what [that] [the] defendant did or said, and you may use them to help you understand what [that] [the] defendant did or said.

5.09 CONSPIRATOR'S LIABILITY FOR SUBSTANTIVE CRIMES COMMITTED BY CO-CONSPIRATORS; CONSPIRACY CHARGED-ELEMENTS

A conspirator is responsible for offenses committed by his/her fellow conspirators if he/she was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of and as a foreseeable consequence of the conspiracy.

Therefore, if you find a defendant guilty of the conspiracy charged in Count(s) _____ and if you find beyond a reasonable doubt that while he/she was a member of the conspiracy, his/her fellow conspirator(s) committed the offense(s) in Count(s) _____ in furtherance of and as a foreseeable consequence of that conspiracy, then you should find him/her guilty of Count(s) _____.

Committee Comment

See Pinkerton v. United States, 328 U.S. 640, 647-48 (1946); United States v. Redwine, 715 F.2d 315, 322 (7th Cir. 1983), cert. denied, 467 U.S. 1216 (1984); United States v. Kimmons, 917 F.2d 1011, 1017 (7th Cir. 1990); United States v. Villagrana, 5 F.3d 1048, 1052 (7th Cir. 1993); United States v. Chairez, 33 F.3d 823 (7th Cir. 1994), where the court found a co-conspirator vicariously liable under Pinkerton despite his claim that he did not know or suspect the presence of a gun in the vehicle.

5.10 CONSPIRATOR'S LIABILITY FOR SUBSTANTIVE CRIMES COMMITTED BY CO-CONSPIRATORS; CONSPIRACY NOT CHARGED IN THE INDICTMENT--ELEMENTS

A conspirator is a person who knowingly and intentionally agrees with one or more persons to accomplish an unlawful purpose. A conspirator is responsible for offenses committed by his fellow conspirators if he was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of and as a foreseeable consequence of the conspiracy.

Therefore, if you find beyond a reasonable doubt that the defendant was a member of a conspiracy at the time that [one of] his fellow conspirators committed the offense charged in Count(s) ____ in furtherance of and as a foreseeable consequence of that conspiracy, then you should find him guilty of Count(s) ____.

Committee Comment

See Pinkerton v. United States, 328 U.S. 640, 647-48 (1946); United States v. Redwine, 715 F.2d 315, 322 (7th Cir. 1983), cert. denied, 467 U.S. 1216 (1984); United States v. Kimmons, 917 F.2d 1011, 1017 (7th Cir. 1990); United States v. Villagrana, 5 F.3d 1048, 1052 (7th Cir. 1993); United States v. Chiarez, 33 F.3d 823 (7th Cir. 1994), where the court found a co-conspirator vicariously liable under Pinkerton despite his claim that he did not know or suspect the presence of a gun in the vehicle).

5.11 MERE PRESENCE / ASSOCIATION / ACTIVITY

(a)

A defendant's presence at the scene of a crime and knowledge that a crime is being committed is not alone sufficient to establish the defendant's guilt.

[A defendant's association with conspirators [or persons involved in a criminal enterprise] is not by itself sufficient to prove his/her participation or membership in a conspiracy [criminal enterprise].]

(b)

If a defendant performed acts that advanced a criminal activity but had no knowledge that a crime was being committed or was about to be committed, those acts alone are not sufficient to establish the defendant's guilt.

Committee Comment

As a general rule, (a) and (b) are alternative instructions. The bracketed paragraph in (a) may be used as additional or substitute language in cases involving charges of conspiracy, RICO or CCE.

It is the Committee's position that the presence instruction should be used in a limited fashion. If there is no evidence other than mere presence at the scene of the crime, then presumably a motion for a directed verdict or judgment of acquittal would be granted by the trial judge. However, there may be some cases where a defendant is present and takes some action which is the subject of conflicting testimony. In those situations the Committee believes that a presence instruction might be appropriate.

The instruction (a) restates traditional law. See United States v. Valenzuela, 596 F.2d 824, 830-31 (9th Cir.), cert. denied, 441 U.S. 965 (1979), United States v. Garguilo, 310 F.2d 249, 253 (2d Cir. 1962), United States v. Moya-Gomez, 860 F.2d 706, 759 (7th Cir. 1988), cert. denied, 492 U.S. 908 (1989), United States v. Jones, 950 F.2d 1309, 1313 (7th Cir. 1991), cert. denied, 503 U.S. 996 (1992). It omits the word "mere," commonly used to modify "presence." The omission is due to the Committee's belief that "mere" is unnecessary and, in some situations, misleading or argumentative.

The instruction (a) is most often given in conspiracy (United States v. Quintana, 508 F.2d 867, 880 (7th Cir. 1975), United States v. Williams, 798 F.2d 1024, 1028-29 (7th Cir. 1986), United States v. Atterson, 926 F.2d 649, 655-56 (7th Cir.), cert. denied, 501 U.S. 1259 (1991)) and aiding and abetting cases, Nye & Nissen v. United States, 336 U.S. 613, 619 (1949), United States v. Townsend, 924 F.2d 1385, 1393-94 (7th Cir. 1991), United States v. Boykins, 9 F.3d 1278, 1287-88 (7th Cir. 1993)).

Instruction (a) reflects the notion that "mere association with conspirators or those involved in a criminal enterprise is insufficient to prove defendant's participation or membership in a conspiracy." United States v. Garcia, 562 F.2d 411, 414 (7th Cir. 1977), United States v. Moya-Gomez, 860 F.2d 706, 759 (7th Cir. 1988), cert. denied, 492 U.S. 908 (1989) ("'presence or a single act will suffice if the circumstances permit the inference that the presence or act was intended to advance the ends of the conspiracy.'" quoting United States v. Mancillas, 580 F.2d 1301, 1308 (7th Cir.), cert. denied, 439 U.S. 958 (1978)), United States v. Paiz, 905 F.2d 1014, 1020-21 (7th Cir. 1990), cert. denied, 499 U.S. 924 (1991) (reaffirms that "mere association" is not enough).

The instruction (a) may also be given where a defendant charged with a substantive crime such as assault, alleges that although he was present at the scene of the crime, he did not do it.

Instruction (b) has been given by judges in this district for many years. It stems from cases such as Dennis v. United States, 302 F.2d 5, 12-13 (10th Cir. 1962); United States v. Benz, 740 F.2d 903, 910-11 (11th Cir. 1984). More recent appellate support may be found in United States v. Windom, 19 F.3d 1190 (7th Cir. 1994).

Instruction (a) or Instruction (b) may be given where a defendant charged with a substantive crime such as assault or possession of narcotics, alleges that although he/she was present at the scene of the crime, he/she did not do it.

5.12 CONSPIRACY--WITHDRAWAL

A person is not responsible for the conduct of another, if, before the commission of an offense, he effectively ends his effort to promote or facilitate the commission of the offense by:

(a) [wholly depriving his prior efforts of effectiveness in the commission of the crime], or

(b) [giving timely warning to the proper law enforcement authorities], or

(c) [doing an affirmative act that is inconsistent with the object of the conspiracy and is done in such a way that the co-conspirators are reasonably likely to know about it before they carry through with further acts of the conspiracy], or

(d) [making proper effort to prevent the commission of the crime].

Committee Comment

In United States v. U. S. Gypsum Co., 438 U.S. 422, 463-65 (1978), the Supreme Court held that an unnecessarily confining instruction on the issue of withdrawal from a conspiracy constituted reversible error. Thus, when a defendant requests that specific actions introduced at trial which are inconsistent with the object of the conspiracy be included in the withdrawal instruction, the court should comply with such request.

5.13 CONSPIRACY - WITHDRAWAL - STATUTE OF LIMITATIONS

One of the issues in this case is whether (defendant's name) withdrew from the conspiracy.

In order to withdraw, (defendant's name) must have taken some affirmative act to terminate his effort to promote or facilitate the conspiracy by

(a) [wholly depriving his prior efforts of effectiveness in the commission of the crime],

(b) [giving timely warning to the proper law enforcement authorities],

(c) [doing an affirmative act that is inconsistent with the object of the conspiracy and is done in such a way that the co-conspirators are reasonably likely to know about it before they carry through with further acts of the conspiracy],

(d) [making proper effort to prevent the commission of the crime].

(Defendant's name) cannot be found guilty of the conspiracy charge if he withdrew from the conspiracy more than five years before the indictment was returned. The indictment in this case was returned on (date). Thus, the government must prove beyond a reasonable doubt that (defendant's name) did not withdraw from the conspiracy prior to (date).

Committee Comment

The Committee, in its original work published in 1980, recommended that no instruction be given on the statute of limitations for withdrawal from a conspiracy. This position has been revised in light of United States v. Read, 658 F.2d 1225 (7th Cir. 1981). See also United States v. Sax, 39 F.3d 1380 (7th Cir. 1994).

In Read, the Seventh Circuit held that withdrawal is a defense to a conspiracy charge only when coupled with the defense of the statute of limitations. In other words, the defendant must withdraw from the conspiracy more than five years before the indictment is returned so that he is not a member of the conspiracy during the period within the statute of limitations.

The Read court further held that the burden is on the prosecution to disprove the defense of withdrawal beyond a reasonable doubt. However, the defendant has the burden of initially going forward with the evidence that he withdrew prior to the statute of limitations. Once the defendant produces sufficient evidence of withdrawal outside of the statute of limitations, the burden of persuasion is on the government to disprove withdrawal beyond a reasonable doubt and the jury should be so instructed. United States v. Nava-Salazar, 30 F.3d 788 (7th Cir.), cert. denied, 513 U.S. 1002 (1994); United States v. Starnes, 14 F.3d 1207 (7th Cir.), cert. denied, 512 U.S. 1224 (1994).

Read did not change the law regarding the type of evidence necessary to create a jury question on withdrawal. Read, 658 F.2d at 1236 n. 8. In United States v. United States Gypsum Co., 438 U.S. 422, 463-65 (1978), the Supreme Court held that an instruction unnecessarily limiting the type of actions that may constitute withdrawal from a conspiracy is reversible error. Thus, this instruction should be tailored to the specific actions introduced by the defendant at trial that are inconsistent with the object of the conspiracy.

6.01 SELF DEFENSE

A person may use force when [he/she] reasonably believes that force is necessary to defend himself/herself [another] against the imminent use of unlawful force.

[A person may use force which is intended or likely to cause death or great bodily harm only if he/she reasonably believes that that force is necessary to prevent death or great bodily harm to himself/herself] [another].]

Committee Comment

The burden of proof is on the government to prove beyond a reasonable doubt the absence of self-defense. The issues instruction must point this out by adding the defense-negation as an element that must be proved beyond a reasonable doubt. See United States v. Jackson, 569 F.2d 1003 (7th Cir.), cert. denied, 437 U.S. 907 (1978) (particularly note 12 of the majority opinion and the second sentence of the dissent); United States v. Talbott, 78 F.3d 1183, 1186 (7th Cir. 1996).

The second paragraph should be included only if it is applicable to the circumstances of the case.

This instruction, if given, should always be given immediately after the instruction setting forth the elements of the offense.

6.02 INSANITY

If, at the time of the commission of the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his/her acts, then the defendant is not guilty by reason of insanity.

Committee Comment

The instruction is based on 18 U.S.C. § 20.

In any case involving the affirmative defense of insanity under 18 U.S.C. § 20, the court should give Issues Instruction 4.01 and a special verdict form of "not guilty only by reason of insanity" in addition to the guilty and not guilty verdict forms. 18 U.S.C. § 4242.

Under 18 U.S.C. § 4243, if the defendant is found not guilty by reason of insanity, the court must commit the defendant to a suitable facility until he/she is eligible for release under the provisions of that statute. In Shannon v. United States, 114 S. Ct. 2419 (1994), the Supreme Court held that a jury may be instructed on this automatic commitment requirement of § 4243, but only to counteract inaccurate or misleading information presented to the jury during trial. Therefore, in those situations the instruction should include the following sentence: "If the defendant is found not guilty by reason of insanity, the court will commit the defendant to a suitable facility until he/she is eligible for release under the law."

6.03 ALIBI

You have heard evidence that the defendant was not present at the time and place where the offense charged in the indictment is said to have been committed. The government must prove beyond a reasonable doubt the defendant's presence at the time and place of the offense.

Committee Comment

The "alibi" concept is not an affirmative defense. People v. Pearson, 19 Ill.2d 609, 169 N.E.2d 252 (1960). Indeed, even referring to the concept as a "defense" has been criticized. United States v. Carter, 433 F.2d 874 (10th Cir. 1970); Commonwealth v. McLeod, 367 Mass. 500, 326 N.E.2d 905 (1975). Presentation of alibi evidence is simply an attempt at refutation of the government's evidence concerning an essential element. The government always retains the burden of proving the defendant's presence at the appropriate place and time when that is an element of the offense charged. United States v. Booz, 451 F.2d 719 (3d Cir. 1971), cert. denied, 414 U.S. 820 (1973); United States v. Read, 658 F.2d 1225, 1232 (7th Cir. 1981) ("The prosecution's burden often includes disproving defenses because they bring into question facts necessary for conviction.").

One of the policies underlying these instructions is that comments on particular types of evidence should be avoided. Since alibi is an evidentiary matter rather than a defense, the idea of giving no instruction on the topic is appealing. See IPI--Criminal 3d 24-25.05 (1992). However, there is case law which would suggest that, in appropriate cases, failure to give alibi instructions when requested is error. United States v. Beaver, 524 F.2d 963 (5th Cir. 1975), cert. denied, 425 U.S. 905 (1976); United States v. Harris, 458 F.2d 670 (5th Cir.), cert. denied, 409 U.S. 888 (1972); United States v. Cole, 453 F.2d 902 (8th Cir.), cert. denied, 406 U.S. 922 (1972).

Consequently, this instruction is a simple and straightforward presentation of those elements of various instruction forms which courts have held to be important. It does not use the word "alibi", for to do so would necessarily involve expanding the instruction for the sole purpose of defining the word. Furthermore, popularization of the term may have caused a negative connotation.

The first sentence of the instruction describes the type of evidence to which it relates. The second sentence points out that the government must overcome such evidence by proof beyond a reasonable doubt. Even if the jury should choose to disbelieve alibi evidence, the government retains the burden of proof and must meet the reasonable doubt standard concerning the defendant's presence at the time and place charged. United States v. Burse, 531 F.2d 1151 (2d Cir. 1976).

The instruction is usually appropriate, and perhaps required when requested by a defendant, if the nature of the offense charged is such as to require his presence at a particular place at one or more particular times and the alibi evidence received tends to show his presence elsewhere at all such times. See United States v. Dye, 508 F.2d 1226 (6th Cir. 1974), cert. denied, 420 U.S. 974 (1975). The instruction would not be appropriate, therefore, in a case in which conviction of an offense charged could legitimately be accomplished without showing the

defendant's presence at a particular place at a particular time. United States v. Beck, 431 F.2d 536 (5th Cir. 1970). Such is often the case in prosecutions involving an aiding and abetting theory. United States v. Megna, 450 F.2d 511 (5th Cir. 1971). That is true also of many conspiracy charges. United States v. Guillette, 547 F.2d 743 (2d Cir. 1976), cert. denied, 434 U.S. 839 (1977); United States v. Lee, 483 F.2d 968 (5th Cir. 1973). Furthermore, the instruction might be inappropriate in cases involving charges that proscribe not only conduct of the defendant but conduct of another caused by the defendant, such as many offenses involving the use of the mails. See, e. g., United States v. Haala, 532 F.2d 1324 (10th Cir. 1976).

6.04 ENTRAPMENT - ELEMENTS

The government must prove beyond a reasonable doubt that the defendant was not entrapped. Thus, the government must prove beyond a reasonable doubt either (1) that, before contact with law enforcement, the defendant was ready and willing or had a predisposition or prior intent to commit the offense, or (2) that the defendant was not induced or persuaded to commit the offense by law enforcement officers or their agents.

Committee Comment

The issues instruction must show that the government has the burden to prove the negative, that is, that the defendant was not entrapped.

Predisposition is the key issue in the entrapment defense. "It is only when the government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play." United States v. Russell, 411 U.S. 423, 436 (1973). Entrapment is a relatively limited defense and was held not available even when a government agent provided a defendant with heroin to sell to law enforcement officers. See Hampton v. United States, 425 U.S. 484 (1976); United States v. Buishas, 791 F.2d 1310, 1314 (7th Cir. 1986) (marijuana); United States v. Duncan, 896 F.2d 271, 276-77 (7th Cir. 1990)(child pornography). The predisposition must be "independent"; that is, it must have existed before government agents attempted to induce criminal behavior on the part of the defendant. Jacobson v. United States, 503 U.S. 540 (1992); United States v. Akinsanya, 53 F.3d 852, 858 (7th Cir. 1995), United States v. Rodriguez-Andrade, 62 F.3d 948, 954 (7th Cir. 1995). The defense of entrapment is not limited to circumstances where the defendant admits he committed the crime. According to Mathews v. United States, 485 U.S. 58, 62 (1988), "even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment."

This instruction, if given, should always be given immediately after the instruction setting forth the elements of the offense.

6.05 ENTRAPMENT - FACTORS

In determining whether the defendant was entrapped, you may consider:

(1) The background [or character or reputation] of the defendant [including] [prior criminal history] [or economic status];

(2) Whether it was law enforcement officers or their agents that first suggested the criminal activity;

(3) Whether the defendant performed criminal activity for profit;

(4) Whether the defendant showed reluctance to perform criminal activity;

(5) Whether law enforcement officers or their agents repeatedly induced or persuaded the defendant to perform criminal activity;

(6) Whether law enforcement officers or their agents offered an ordinary opportunity to commit a crime; and

(7) Whether law enforcement officers or their agents offered exceptional [profits or] persuasion or merely solicited commission of the crime.

While no single factor necessarily indicates by itself that a defendant was or was not entrapped, the central question is whether the defendant showed reluctance to engage in criminal activity that was overcome by inducement or persuasion.

Committee Comment

The Court of Appeals for the Seventh Circuit has recognized that in determining a defendant's predisposition on the date of the offense, the defendant's personal background and the nature and degree of government involvement remain the principal factors to be considered by the jury. See United States v. Townsend, 555 F.2d 152, 155 n. 3 (7th Cir.), cert. denied, 434 U.S. 897 (1977); United States v. Lakich, 23 F.3d 1203, 1209-10 (7th Cir. 1994).

6.06 ENTRAPMENT - OPTIONAL ADDITIONS

PREDISPOSITION (Optional additions)

(a)

If the defendant was ready and willing or had a predisposition to commit the offense charged, then he was not entrapped, even though law enforcement officers or their agents provided a favorable opportunity to commit the offense, made committing the offense easier, or even participated in acts essential to the offense.

(b)

In addition to being ready and willing, the defendant must have had the ability by reason of previous training, experience, occupation, or acquaintances to commit the crime even if the government had not provided the opportunity to do so. Where the defendant is not in a position to become involved in the crime without the government's help, the defendant is not predisposed.

Committee Comment

The optional addition (a) may be used if the defense presentation or argument suggests the contrary to the jury.

The instruction (b) is to be given only when there is an issue whether the defendant had the ability to commit the crime without the assistance of the government. See United States v. Hollingsworth, 27 F.3d 1196 (7th Cir. 1994).

6.07 RELIANCE ON PUBLIC AUTHORITY

A defendant who acts in reliance on public authority does not act knowingly [or with the intent to (state intent requirement of statute, if any)], and should be found not guilty.

A defendant acts under public authority if:

(1) that defendant is affirmatively told that his/her conduct would be lawful;
(2) the defendant is told this by an official of the [United States] government; [and]
(3) the defendant actually relies on what the official tells him/her in taking the action; [and,
(4) the defendant's reliance on what he/she was told by the official is reasonable in light of the circumstances.]

In considering whether a defendant actually relied on representations by an official that his/her conduct would lawful, you should consider all of the circumstances of their discussion, including the identity of the official, the point of law discussed, the nature of what the defendant told, and was told by, the official, and whether that reliance was reasonable.

Committee Comment

This defense is also known as "entrapment by estoppel." It is "rarely available," United States v. Howell, 37 F.3d 1197, 1204 (7th Cir. 1994). The defense was first recognized by the Supreme Court in Raley v. State of Ohio, 360 U.S. 423 (1959). It is not actually a form of entrapment, but is instead a species of good faith. The jury should not be instructed, as it must be in entrapment cases, that the government has the burden of proving the negative of the defense. United States v. Austin, 915 F.2d 363, 365 (8th Cir. 1990), cert. denied, 499 U.S. 977 (1991).

The bracketed language "United States" in (2) will only be necessary if there is a factual dispute over whether the official who made representations to the defendant was a federal official or an official of some other type. If there is no dispute that the official was an official of some level of government other than federal, such as of a state, reliance on the official's representations as to the legality of conduct under federal law would not be objectively reasonable, and the instruction should not be given at all. United States v. Rector, 111 F.3d 503, 506-07 (7th Cir. 1997).

Note that a defendant's subjective reliance might be sufficient for offenses requiring proof of willfulness, such as tax crimes. In such cases, the fourth factor should be omitted and the concluding language should follow the third factor.

6.08 COERCION

If the defendant engaged in the conduct charged only because he/she reasonably feared that immediate, serious bodily harm or death would be inflicted upon him/her (or others) if he/she did not engage in the conduct, and he/she had no reasonable opportunity to avoid the injury, then the defendant is not guilty because he/she was coerced.

Committee Comment

This instruction, if given, should always be given immediately after the instruction setting forth the elements of the offense.

This coercion instruction does not limit "others" to members of the defendant's immediate family. The Committee concluded that an instruction limited to kinship could be too narrow in some circumstances. For instance, in some situations a person might violate the law in order to protect a small child who was a complete stranger. However, it should be noted that coercion is not a defense to murder and some other capital offenses. See R. I. Recreation Center v. Aetna Casualty & Surety Co., 177 F.2d 603, 605 (1st Cir. 1949).

It is important to note that if it is uncontested that a defendant had a full opportunity to avoid the criminal act without danger to himself or others he is not entitled to a coercion instruction. Shannon v. United States, 76 F.2d 490, 493 (10th Cir. 1935); United States v. Gordon, 526 F.2d 406 (9th Cir. 1975). The instruction is not mandated solely because a witness charged with contempt received threats of violence. There must also be a showing of present and immediate compulsion. United States v. Tanner, 941 F.2d 574, 587-88 (7th Cir. 1991), cert. denied, 502 U.S. 1102 (1992); United States v. Nickels, 502 F.2d 1173 (7th Cir. 1974), cert. denied, 430 U.S. 931 (1977). While the compulsion is generally physical threats, economic compulsion has been recognized in some civil cases. MCM Partners, Inc. v. Andrews-Bartlett & Associates, Inc., 62 F.3d 967, 980 (7th Cir. 1995)("Economic coercion or duress is generally an affirmative defense to a conspiracy charge").

Fear of bodily harm as a result of being deprived of narcotics may in some circumstances justify a type of coercion instruction. United States v. McKnight, 427 F.2d 75, 77 (7th Cir.), cert. denied, 400 U.S. 880 (1970). But fear of suicide of a friend or a relative is not a sufficient basis for a coercion instruction unless there is evidence indicating that the defendant took reasonable alternative steps to avoid the suicide such as calling for restraint or assistance. United States v. Stevison, 471 F.2d 143 (7th Cir. 1972), cert. denied, 411 U.S. 950 (1973). Nor is the threat of discharge from employment to a person who claims the Fifth Amendment before a grand jury sufficient coercion to excuse a witness from his obligation to testify truthfully. United States v. Nickels, 502 F.2d 1173 (7th Cir. 1974), cert. denied, 426 U.S. 911 (1976).

The Supreme Court in United States v. Bailey, 100 S.Ct. 624 (1980), in a prosecution for escape from a federal prison, held that in order to be entitled to an instruction on duress or necessity as a defense to the crime charged, an escapee must first offer evidence justifying his continued absence from custody as well as his initial departure and that an indispensable element of such an offer is testimony of a bona fide effort to surrender or return to custody as soon as the

claimed duress or necessity had lost its coercive force. Id. at 4108-09.

The defendant bears the burden to introduce some minimal evidence to require presenting the instruction to the jury. United States v. Patrick, 542 F.2d at 386; United States v. Toney, 27 F.3d 1245, 1248 (7th Cir. 1994).

The burden of proof is on the government to prove beyond a reasonable doubt the absence of coercion. The issues instruction must point this out by adding the coercion-negation as an element that must be proved beyond a reasonable doubt. Johnson v. United States, 291 F.2d 150 (8th Cir.), cert. denied, 368 U.S. 880 (1961); United States v. Toney, 27 F.3d 1245, 1248 (7th Cir. 1994).

6.09 INTOXICATION

You have heard evidence that the defendant was intoxicated at the time of the commission of the offense charged in the indictment. [Brief description of the state of mind required by the charged statute], as that term has been defined in these instructions, is an element of this offense. The evidence of intoxication may be sufficient to create a reasonable doubt whether the defendant formed the required [state of mind] to commit the offense.

Committee Comment

There have been no major changes in the law in this area. The law remains that voluntary intoxication is only a defense to "specific intent" crimes, but not to "general intent" crimes, although the Seventh Circuit has mentioned on numerous occasions that these terms should not be used in giving the jury instructions. Instead they advise determining the precise mental state required by the applicable statute and instructing thereon. See **Committee Comment** on "Specific Intent" -- "General Intent"; W. LaFave & A. Scott, Criminal Law §28 at 202 (1972); United States v. Arambasich, 597 F.2d 609, 611 (7th Cir. 1979) ("We are inclined to agree....that the labels 'specific intent' and 'general intent'....are not enlightening to juries. More specific and therefore more comprehensible information is conveyed by stating the precise mental state required for the particular crime.") United States v. Valencia, 907 F.2d 671, 681 (7th Cir. 1990). cf. United States v. Brighton Bldg. & Maintenance Co., 598 F.2d 1101, 1105 (7th Cir.), cert. denied, 444 U.S. 840 (1979). This is especially the case when intoxication, coercion or mistake are raised as defenses. See United States v. Nix, 501 F.2d 516, 518 (7th Cir. 1974) ("Whenever intoxication (or coercion or mistake) is raised as a mitigating factor, use of 'specific' and 'general' intent labels interferes with the crucial analysis a court should make...")

Thus, before giving this instruction, the court should determine what state of mind, if any, the crime charged requires. See also United States v. Bayless, 57 F.3d 535, 542 (7th Cir. 1995) and United States v. Fazzini, 871 F.2d 635, 639 (7th Cir.), cert. denied, 493 U.S. 982 (1989). If a particular intent is an essential element of the crime or the lack thereof is raised as an affirmative defense (see United States v. Mavrick, 601 F.2d 921 (7th Cir. 1979)), and the defendant has elicited evidence that he acted without that intent because of intoxication, this instruction should be given. See W. LaFave & A. Scott, Criminal Law § 45 at 344-45 (1972), and United States v. Nix, 501 F.2d 516 (7th Cir. 1974) for just such an analysis.

6.10 GOOD FAITH

Good faith on the part of the defendant is inconsistent with [intent to defraud, willfulness, etc.], an element of the charge. The burden is not on the defendant to prove his/her good faith; rather, the government must prove beyond a reasonable doubt that the defendant acted with [intent to defraud, willfulness, etc.]

Committee Comment

This instruction should be used, where appropriate, only in cases where "intent" is an element. It is not to be used in cases where it is required only that the defendant acted "knowingly."

6.11 GOOD FAITH - INCOME TAX CASES

A defendant does not act willfully if he/she believes in good faith that he/she is acting within the law, or that his/her actions comply with the law. Therefore, if the defendant actually believed that what he/she was doing was in accord with the tax statutes, he/she cannot be said to have had the criminal intent to willfully [evade taxes; fail to file tax returns; make a false statement on a tax return]. This is so even if the defendant's belief was not objectively reasonable, as long as he/she held the belief in good faith. However, you may consider the reasonableness of the defendant's belief together with all the other evidence in the case in determining whether the defendant held the belief in good faith.

Committee Comment

See Cheek v. United States, 111 S. Ct. 604, 611, 612-13 (1991); United States v. Becker, 965 F.2d 383 (7th Cir. 1992).

6.12 BUYER-SELLER RELATIONSHIP

The existence of a simple buyer-seller relationship between a defendant and another person, without more, is not sufficient to establish a conspiracy, even where the buyer intends to resell [name the goods.] The fact that a defendant may have bought [name of goods] from another person or sold [name of goods] to another person is not sufficient without more to establish that the defendant was a member of the charged conspiracy.

In considering whether a conspiracy or a simple buyer-seller relationship existed, you should consider all of the evidence, including the following factors:

(1) Whether the transaction involved large quantities of [name of goods];
(2) Whether the parties had a standardized way of doing business over time;
(3) Whether the sales were on credit or on consignment;
(4) Whether the parties had a continuing relationship;
(5) Whether the seller had a financial stake in a resale by the buyer;
(6) Whether the parties had an understanding that the [name of goods] would be resold.

No single factor necessarily indicates by itself that a defendant was or was not engaged in a simple buyer-seller relationship.

COMMENT

The buyer-seller instruction is a theory of defense instruction and should be given where requested if there is evidence to support it. United States v. Paters, 16 F.3d 188 (7th Cir. 1994). The Seventh Circuit has discussed the importance and meaning of the instruction many times. See, e.g., United States v. Berry, 133 F.3d 1020 (7th Cir. 1998); United States v. Lindsey, 123 F.3d 978 (7th Cir. 1997); United States v. Turner, 93 F.3d 276 (7th Cir. 1996); United States v. Mims, 92 F.3d 461 (7th Cir. 1996); United States v. Herrera, 54 F.3d 348 (7th Cir. 1995); United States v. Lechuga, 994 F.2d 346 (7th Cir.)(en banc), cert. denied, 114 S. Ct. 482 (1993).

Although the Committee has listed six possible factors the jury may consider in determining whether a buyer-seller relationship existed, the list is not intended to be exhaustive. In a particular case, some or even none of the factors may be relevant and the instruction should be tailored to fit the facts of the case. See United States v. Blankenship, 970 F.2d 283, 286 (7th Cir. 1992).

The buyer-seller issue arises primarily in drug cases. However, as the examples in United States v. Blankenship, supra, illustrate, it is not limited to drug cases and may arise in a variety of conspiracy or aiding and abetting cases.

This instruction should be given immediately following the conspiracy elements instruction.

7.01 SELECTION OF FOREPERSON -- GENERAL VERDICT

Upon retiring to the jury room, select one of your number as your foreperson. The foreperson will preside over your deliberations and will be your representative here in court.

Forms of verdict have been prepared for you.

[Forms of verdict read.]

(Take these forms to the jury room, and when you have reached unanimous agreement on the verdict, your foreperson will fill in, date, and sign the appropriate form.)

OR

(Take these forms to the jury room, and when you have reached unanimous agreement on the verdict, your foreperson will fill in and date the appropriate form, and each of you will sign it.)

Committee Comment

Use the paragraph which conforms to the local rule.

7.02 SELECTION OF FOREPERSON -- GENERAL VERDICT AS TO OFFENSE CHARGED -- GENERAL VERDICT AS TO LESSER INCLUDED OFFENSE

Upon retiring to the jury room, select one of your number as your foreperson. The foreperson will preside over your deliberations and be your representative here in court.

Forms of verdict have been prepared for you. One form is for recording your verdict that the defendant is guilty or not guilty of the crime of _____ charge in the indictment. The other form, in the event you should need it, is for recording your verdict that the defendant is guilty or not guilty of the lesser offense of _____.

[Forms of verdict read.]

If you find the defendant not guilty of the crime of ____ charged in the indictment (or if you cannot unanimously agree that the defendant is guilty of that crime), then you must proceed to determine whether the defendant is guilty or not guilty of the lesser offense of _____.

(Take these forms to the jury room, and when you have reached unanimous agreement on the verdict, your foreperson will fill in, date, and sign the appropriate form.)

OR

(Take these forms to the jury room, and when you have reached unanimous agreement on the verdict, your foreperson will fill in and date the appropriate form, and each of you will sign it.)

Committee Comment

Use the paragraph which conforms to the local rule.

7.03 SEPARATE CONSIDERATION OF CHARGES SINGLE DEFENDANT MULTIPLE COUNTS

Each count of the indictment charges the defendant with having committed a separate offense.

Each count and the evidence relating to it should be considered separately, and a separate verdict should be returned as to each count. Your verdict of guilty or not guilty of an offense charged in one count should not control your decision as to any other count.

7.04 SEPARATE CONSIDERATION OF CHARGES MULTIPLE DEFENDANTS MULTIPLE COUNTS

Each count of the indictment charges each defendant named in that count with having committed a separate offense.

You must give separate consideration both to each count and to each defendant. You must consider each count and the evidence relating to it separate and apart from every other count.

You should return a separate verdict as to each defendant and as to each count. Your verdict of guilty or not guilty of an offense charged in one count should not control your decision as to that defendant under any other count.

Committee Comment

There are some instances where the last line of this instruction requires modification. For example, the RICO statute requires that the government prove at least two acts which are separately indictable offenses of federal or state statutes. See United States v. Morris, 532 F.2d 436 (5th Cir. 1976). Since that statute requires proof of two predicate offenses, the jury's verdict on the RICO count may be controlled by its verdict on other counts which charge the predicate offenses.

7.05 COMMUNICATION WITH COURT

I do not anticipate that you will need to communicate with me. If you do, however, the only proper way is in writing, signed by the foreperson, or if he or she is unwilling to do so, by some other juror, and given to the marshal.

Committee Comment

This instruction encourages the jury to communicate with the court only by way of a writing. This will aid the trial judge in fulfilling his responsibility to maintain an accurate record of the proceedings and will guard against allegations of error. "The court should require a record to be kept of all communications received from a juror or the jury after the jury has been sworn, and he or she should not communicate with a juror or the jury on any aspect of the case itself (as distinguished from matters relating to physical comforts and the like), except after notice to all parties and reasonable opportunity for them to be present." ABA Standards for Criminal Justice, Trial by Jury Standards, Standard 15-4.1(b) (3d ed. 1996).

Counsel for both the defendant and the government should be given the opportunity to be heard before the trial judge responds to the jury's inquiry about any matter concerning the case. Communication in the defendant's absence is improper even though the judge merely declines to answer the jury's question, and in United States v. Widgery, 778 F.2d 325, 327 (7th Cir. 1985):

> To answer a note without consulting counsel may spoil a perfectly good trial for several reasons – not only because it denies the defendant a procedural right but also because consultation may help the court to cure a general problem in the deliberations before it is too late.

778 F.2d at 327. See also United States v. Clavey, 565 F.2d 111, 118-20 (7th Cir. 1977), cert. denied, 439 U.S. 954 (1978). This rule, of course, does not prohibit ex parte communications which only involve housekeeping matters such as lunch arrangements and the like. ABA Standards, supra, and accompanying commentary.

In general, communications between the court and the jury or any member thereof in the absence of either the defendant or his counsel are improper. See United States v. Rodriguez, 67 F.3d 1312, 1316 (7th Cir. 1995), cert. denied, 116 S. Ct. 1582 (1996) ("discussions between court and counsel regarding jury inquiries must take place on the record in the defendant's presence"); Rogers v. United States, 422 U.S. 35 (1975); Shields v. United States, 273 U.S. 583 (1927); Federal Rules of Criminal Procedure 43 (guaranteeing the defendant's right to be present "at every stage of the trial"); 3 C. Wright, Federal Practice and Procedure § 724 (1969). See also United States v. Smith, 31 F.3d 469, 471 (7th Cir. 1994); United States v. U.S. Gypsum Co., 438 U.S. 422, 459-62 (1978).

If the court does find it necessary to communicate with the jury in the absence of the defendant or counsel, the court's response should also be in writing and preserved in the record. Moreover, the court should inform counsel for the parties of the jury's request and the court's response at the earliest reasonable time and afford counsel the opportunity to argue in favor of a supplemental response. See DeGrave v. United States, 820 F.2d 870, 872 (7th Cir. 1987) ("We note that the court's practice of permitting ex parte communications with the jury presents problems."); United States v. Dellinger, 472 F.2d 340, 37-80 (7th Cir. 1972), cert. denied, 410

U.S. 970 (1973).

It may also be appropriate to instruct the jurors that, if any communication is made, it should not indicate the jury's numerical division.

7.06 DISAGREEMENT AMONG JURORS

The verdict must represent the considered judgment of each juror. Your verdict, whether it be guilty or not guilty, must be unanimous.

You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views, and listen to the opinions of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to re-examine your own views and change your opinion if you come to believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of your fellow jurors or for the purpose of returning a unanimous verdict.

The twelve of you should give fair and equal consideration to all the evidence and deliberate with the goal of reaching an agreement which is consistent with the individual judgment of each juror.

You are impartial judges of the facts. Your sole interest is to determine whether the government has proved its case beyond a reasonable doubt.

Committee Comment

In United States v. Silvern, 484 F.2d 879 (7th Cir. 1973) (en banc), the Seventh Circuit, in the exercise of its supervisory powers, established a particular procedure for giving a supplemental instruction in the event of an apparent deadlock. First, the court required that a particular instruction, taken verbatim from Jury Instructions and Forms for Federal Criminal Cases, 27 F.R.D. 39, 97-98 (1961), be given. That instruction has previously been endorsed by the ABA Project on Standards for Criminal Justice as "illustrative" of an instruction consistent with its standards. See ABA Standards, Trial by Jury 5.4, comment (approved Draft, 1968). See also United States v. Brown, 411 F.2d 930 (7th Cir. 1969), cert. denied, 396 U.S. 1017 (1970). The Seventh Circuit held that variants of or supplements to the form instruction were unacceptable: "If in any jury trial . . . a supplemental instruction relating to a deadlock is given other than in the above form, a resulting conviction will be reversed and remanded for a new trial." 484 F.2d at 883. Second, the court required that for the supplemental instruction to be proper, the district court must have first instructed the jury on the subject before it began its deliberations: "If a supplemental instruction is deemed necessary and provided that the [form] instruction has been given prior to the time the jury has retired, it may be repeated." Id. The procedure established in Silvern governs both civil and criminal cases. Id. At 882.

The above instruction rearranges the structure and modifies the wording of the instruction required by Silvern. The Committee is of the opinion that the modifications remove what seem to be inherent inconsistencies in the Silvern instruction and better explain to the jurors what is expected of them. At the same time, the instruction is consistent with the ABA standard on the subject which has been adopted by the Seventh Circuit. The court in Silvern recognized that the form instruction mandated there was not "'graven in stone,'" id. at 883 n. 7 (quoting United States v. Thomas, 146 U.S.App.D.C. 101, 449 F.2d 1177, 1188 (1971) (en banc), and left open the possibility of "further change in the future." Id. The citation to Thomas is significant because there the D.C. Circuit noted "it may be that in due course some modification will emerge as appropriate, either by virtue of general reconsideration or the need for adoption to

local conditions. But we think if there is to be any change in wording, it should be one that is carefully considered on a broad basis by a broadly representative body . . . that can make a wide-ranging inquiry as to the necessity for and possible consequences of modification."

As the court in Silvern recognized, the primary purpose of a required form instruction is not that it is the only acceptable means of instructing the jury in conformity with the ABA standards, but that it eliminates variants which create uncertainty and generate appeals. The Committee, although recommending changes in the language of the deadlock instruction, does not recommend abolition of the requirement that a particular form of instruction be used. The Committee therefore recommends approval of the above instruction in place of the Silvern instruction as the only acceptable deadlock charge for use in criminal cases.

As required by Silvern, this instruction may be given as a supplemental charge upon apparent deadlock only if it was also included as part of the general charge given prior to the time the jury initially retired for deliberations. However, there is no requirement that the instruction be repeated automatically whenever it appears that a jury is deadlocked. It is within the trial court's discretion to determine whether repetition of the instruction would help the jury reach a verdict and, hence, whether the instruction should be given. United States v. Medansky, 486 F.2d 807, 813 n. 6 (7th Cir. 1973), cert. denied, 415 U.S. 989 (1974). The instruction may be repeated orally by the trial judge even though the jury already has the charge in its copy of the written instructions. See United States v. Gabriel, 597 F.2d 95, 100 (7th Cir.), cert. denied, 100 S.Ct. 120 (1979).

7.07 RETURN OF JURY AFTER POLLING

A poll of the jury indicates that you may not have reached a unanimous verdict. For this reason I am asking you to return to the jury room for further consideration of your verdict. [then read Instruction 7.06 -- "Disagreement Among Jurors."]

Committee Comment

The above instruction is used only in situations where a jury poll has indicated the lack of a unanimous verdict. This is to be distinguished from the situation where the jury has reported it is unable to agree, and from the situation where the trial judge has called the jury to the courtroom to inquire whether they will be able to render a unanimous verdict. The instruction recognizes that the poll has indicated that the verdict is not unanimous and incorporates the instruction recommended by the Committee to be given in place of the "Allen" or "Silvern" charges.

INSTRUCTIONS FOR
18 U.S.C. § 1
THROUGH
18 U.S.C. § 1000

18 U.S.C. § 13
(Assimilative Crimes Act–Elements)

To sustain the charge of committing a crime upon or within a federal enclave, the government must prove the following propositions:

First, that the crime alleged was committed upon or within a federal jurisdiction;

Second, that the crime alleged, if committed within the jurisdiction of (name jurisdiction) in which the federal enclave is situated, is punishable by the laws of the State of (name state); and

Third, that the defendant: (here set out the elements of the State or Territorial crime).

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The purpose of the Assimilative Crimes Act, 18 U.S.C. § 13, is to supplement the United States Criminal Code by adopting state criminal statutes relating to acts or omissions committed within areas over which the federal government has exclusive jurisdiction and which are not made punishable by any enactment of Congress. United States v. Chaussee, 536 F.2d 637 (7th Cir.1976). The Act has no application if such acts or omissions are made penal by federal statutes. United States v. Patmore, 475 F.2d 752, 753 (10th Cir.1973). The Act makes applicable in federal prosecutions not only the particular state definition of an offense but also the punishment which state law makes applicable to that offense. United States v. Sosseur, 181 F.2d 873 (7th Cir.1950). Section 13 was amended in 1988 to expand the meaning of "punishment" in subsection (a) to authorize federal judges to impose non-jail sanctions such as license suspensions and alcohol education programs for drunk driving offenses. See 134 Cong. Rec. S17360-02. Section 13 was again amended in 1994 to require the imposition of additional imprisonment and/or fines when a minor is present during the commission of a drunk driving offense and the law of the state does not provide for such enhancements.

When there is no factual dispute as to whether the facility or site is a federal enclave, the court should take judicial notice of that fact in accordance with Instruction 1.07 of the Federal Criminal Jury Instructions of the Seventh Circuit or give a mandatory instruction that the facility or site is a federal enclave. See United States v. Piggie, 622 F.2d 486 (10th Cir.), cert. denied, 449 U.S. 863 (1980) (trial court could take judicial notice of the fact that the federal penitentiary at Leavenworth, Kansas, was a federal enclave).

On the other hand, if the nature of the location is in issue, the appropriate method for resolving that issue is by a pretrial motion to dismiss for lack of jurisdiction. See United States v. Keller, 451 F.Supp. 631 (D.P.R.1978). In Keller, the trial court considered whether a boat containing marijuana was owned by a United States citizen so as to fall within federal maritime jurisdiction under 18 U.S.C. § 7(1). The court held that ownership was a mixed question of law and fact to be determined by the court. Id. at 636. In most cases where there is a factual dispute as to the nature of the facility or site as a federal enclave, the question of jurisdiction will be resolved by the court. Because there may be a situation that the Committee cannot envision where the issue as to

whether the crime was committed upon a federal enclave requires submission to a jury, the instruction covers that contingency.

18 U.S.C. § 152(1)
(Elements)

To sustain the charge of concealment of property belonging to the estate of a debtor in a bankruptcy proceeding, the government must prove the following propositions:

First, a bankruptcy proceeding existed under Title 11;

Second, [identify property or assets] belonged to the bankrupt estate;

Third, the defendant concealed [identify property or assets] from [creditors, custodian, trustee, marshal, United States Trustee or other person charged with control of custody of such property]; and,

Fourth, the defendant acted knowingly and fraudulently.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 152
(Definition of Concealment)

"Concealment" means to secrete, falsify, mutilate, fraudulently transfer, withhold information or knowledge required by law to be made known, or to take any action preventing discovery. Since the offense of concealment is a continuing one, the acts of concealing may have begun before as well as after the bankruptcy proceeding began.

It is no defense that the concealment was unsuccessful. Even though the [property; document; books; records] [was/were] recovered for the debtor's estate, the defendant still may be guilty of the offense charged.

Similarly, the making of a demand on the defendant for such [property; document; books; records] is not necessary in order to establish concealment.

[NOTE: Choose appropriate terms contained in brackets.]

18 U.S.C. § 152
(Definition of Fraudulently)

An act is done fraudulently if done with intent to deceive any creditor, trustee, or bankruptcy judge.

Committee Comment

This instruction should be given whenever the elements instructions for False Claims, Destruction of Records, False Entries, or Withholding Records are given.

18 U.S.C. § 152(7)
(Concealment or Transfer of Assets in Contemplation of Bankruptcy or With Intent to Defeat the Provisions of the Bankruptcy Law--Elements)

To sustain the charge of [concealment; transfer] of property belonging to the estate of a debtor [in contemplation of bankruptcy; with intent to defeat the provisions of the bankruptcy law], the government must prove the following propositions:

First, [a proceeding in bankruptcy existed under Title 11; a bankruptcy proceeding was contemplated by [defendant; name of business; name of corporation]];

Second, [in contemplation of such bankruptcy proceeding; with intent to defeat the provisions of the bankruptcy law], the defendant transferred or concealed certain property, namely (identify the property), which belonged or would belong to the bankrupt estate; and,

Third, the defendant [concealed; transferred] such property knowingly and fraudulently.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 152
(Definition of "In Contemplation of Bankruptcy Proceeding")

The phrase "in contemplation of bankruptcy proceeding" means in expectation of, or planning for, the future probability of a bankruptcy proceeding.

18 U.S.C. § 152
(Definition of "Transfer")

"Transfer" as defined under the bankruptcy law includes every manner, direct or indirect, absolute or conditional, of disposing or parting with property or with an interest in property.

18 U.S.C. § 152(2) & (3)
(False Oath, False Declaration Under Penalty of Perjury--Elements)

To sustain the charge of making [a false oath; a false account; a false declaration under penalty of perjury] in a bankruptcy proceeding, the government must prove the following propositions:

First, a proceeding in bankruptcy existed under Title 11;

Second, the defendant made [an oath; account; declaration; certification; verification; statement under penalty of perjury] in relation to the bankruptcy proceeding;

Third, the [oath; account; declaration; certification; verification; statement under penalty of perjury] related to some material matter;

Fourth, the [oath; account; declaration; certification; verification; statement under penalty of perjury was false; and,

Fifth, the defendant made such [oath; account; declaration; certification; verification; statement under penalty of perjury] knowingly and fraudulently.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 152
(False Declaration Under Penalty of Perjury--Definition of Materiality)

A statement is material if it had the effect of influencing the court, the trustee, or the creditors, or was capable of or had the potential to do so. [It is not necessary that the statement actually have that influence or be relied on by the court, the trustee, or the creditors, so long as it had the potential or capability to do so.]

[Materiality does not require a showing that creditors were harmed by the false statement.]

18 U.S.C. § 152(4)
(Presenting or Using a False Claim--Elements)

To sustain the charge of [presenting; using] a false claim in a bankruptcy proceeding, the government must prove the following propositions:

First, a proceeding in bankruptcy existed under Title 11; and,

Second, the defendant [personally; by agent; by proxy; by attorney as agent, proxy or attorney] [presented; used] a claim for proof against the estate of a debtor;

Third, such claim was false;

Fourth, such claim was [presented; used] knowingly and fraudulently.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 152(6)
(Bribery--Elements)

To sustain the charge of bribery or attempted bribery for acting or failing to act in any bankruptcy proceeding, the government must prove the following propositions:

First, a bankruptcy proceeding existed under Title 11; and,

Second, the defendant [gave; offered; received; attempted to obtain] [money; property; remuneration; compensation; reward; advantage, or promise thereof] for [acting; failing to act] in such bankruptcy proceeding; and

Third, the defendant acted knowingly and fraudulently.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that either of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 152
(Destruction of Records; False Entries--Elements)

To sustain the charge of [concealment of records; destruction of records; making a false entry in a document] relating to the property or the affairs of a debtor [in contemplation of bankruptcy; after filing a case in bankruptcy], the government must prove the following propositions:

First, a bankruptcy proceeding [was contemplated; existed] under Title 11;

Second, the defendant [concealed; destroyed; mutilated; falsified; made a false entry in] document(s);

Third, the document(s) affected or related to the property or affairs of the debtor;

Fourth, the defendant acted knowingly and fraudulently.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 152
(Withholding Records--Elements)

To sustain the charge of withholding records after filing a case in bankruptcy, the government must prove the following propositions:

First, a bankruptcy proceeding existed under Title 11;

Second, the defendant withheld from [the custodian; the trustee; the marshal; an officer of the court; a United States Trustee] entitled to its possession any [recorded information; books; documents; records; papers];

Third, such [recorded information; books; documents; records; papers] related to the property or financial affairs of the debtor;

Fourth, the defendant acted knowingly and fraudulently.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 201
(Giving a Bribe--Elements)

To sustain the charge of giving a bribe, the government must prove the following propositions:

First, that the defendant directly or indirectly [promised, gave, offered] something of value to a public official;

Second, that the defendant acted with intent to influence an official act; and

Third, that the defendant acted corruptly, that is, with the purpose, at least in part, of accomplishing either an unlawful end result, or a lawful end result by some unlawful method or means.

If you find from your consideration of all the evidence that both of these propositions have been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that either of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The third element is derived from United States v. Bonito, 57 F.3d 167, 171 (2d Cir. 1995). It should be noted that Bonito was a case involving 18 U.S.C. § 666, not 18 U.S.C. § 201. The term "corruptly" has been defined somewhat differently in the context of other criminal statutes. See, e.g. Roma Construction Co. v. aRusso, 96 F.3d 566, 573-74 (1st Cir. 1996).

18 U.S.C. § 201
(Making an Illegal Payment--Elements)

To sustain the charge of making an illegal payment, the government must prove the following propositions:

First, that the defendant directly or indirectly [promised, gave, offered] a thing of value personally to a public official;

Second, that the giving of the promise or gift was not provided for by law;

Third, that the thing of value was promised or given for or because of an official act performed or to be performed by the public official; and

Fourth, that the defendant acted knowingly.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

[NOTE: Choose appropriate term contained in brackets.]

18 U.S.C. § 201
(Receiving an Illegal Payment--Elements)

To sustain the charge of receiving an illegal payment, the government must prove the following propositions:

First, that the defendant was a public official;

Second, that the defendant personally [asked, demanded, exacted, solicited, sought, accepted, received, agreed to receive] something of value not provided for by law; and

Third, that the defendant knew that what he [asked, demanded, exacted, solicited, sought, accepted, received, agreed to receive] was [asked, demanded, exacted, solicited, sought, accepted, received, agreed to receive] because of an official act performed or to be performed by him.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

[NOTE: Choose appropriate term contained in brackets.]

18 U.S.C. § 201
(Definition of a Public Official)

A public official includes an officer, employee, or person acting on behalf of the United States, or any department, agency, or branch of the United States Government in any official function under or by authority of any such department, agency, or branch.

Committee Comment

This instruction should be given along with the elements instructions of § 201 Giving a Bribe, Receiving a Bribe, Making an Illegal Payment, and Receiving an Illegal Payment.

Several cases deal with state or local officials administering federally funded programs and focus on whether the operative state or local employee is a "public official" within the meaning of s 201. Federal funding for a project, even 100% funding, is not enough. United States v. Del Toro, 513 F.2d 656 (2d Cir.), cert. denied, 423 U.S. 826 (1975). Rather, the jury should be told that a state or local person is a public official within the meaning of § 201 if there is administrative involvement by the federal government and if the state or local employee is acting under the direct supervision of a federal official in the agency responsible for the program. United States v. Gallegos, 510 F.Supp. 1112 (D.N.M.1981). See also United States v. Kirby, 587 F.2d 876 (7th Cir.1978).

18 U.S.C. § 201
(Definition of Official Act)

An official act is any decision or action on any question which may at any time be pending, or which may by law be brought before any public official in his/her official capacity or in his/her position of trust.

18 U.S.C. § 201
(Definition of Gift)

The government must prove that the giving of a promise or gift was not provided for by law. It is unlawful for an officer or employee of the United States government to receive anything of value for his official services from any source other than the government of the United States, except as may be contributed out of the treasury of any state, county, or municipality.

Committee Comment

See 18 U.S.C. § 209(a).

18 U.S.C. § 201
(Receiving an Illegal Payment--Definition of Illegal Payment)

It is unlawful for an officer or employee of the United States government to receive anything of value for his official services from any source other than the government of the United States, except as may be contributed out of the treasury of any state, county, or municipality.

Committee Comment

See 18 U.S.C. § 209(a).

18 U.S.C. § 201
(Intent to Influence)

It is not necessary that the [public official; defendant] had the power to or did perform the act for which he [was promised; was given; received; agreed to receive] something of value; it is sufficient if the matter was one that was before him in his official capacity.

[Nor is it necessary that the defendant in fact intended to be influenced. It is sufficient if the defendant knew that the thing of value was offered with the intent to influence official action.]

18 U.S.C. § 208
ACTS AFFECTING A PERSONAL FINANCIAL INTEREST
(Elements)

To sustain the charge of (here insert crime), the government must prove the following propositions:

First, that the defendant was an officer or employee of (here name department or agency). A _____ is an officer or employee of the _____; and

Second, that the defendant, in (his/her) capacity as an employee or officer of the government, participated personally and substantially in a matter in which (he/she) knew that [he personally, some member of his family, some organization in which he had an interest] had a substantial financial interest [or with which he was negotiating or had arranged for employment].

If you find from your consideration of all the evidence that both of these propositions have been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that either of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The number of variables in this statute make it impossible to draft one standard instruction to cover all situations that can arise. The purpose of the law is to prevent persons who work with the government from profiting from this relationship by private arrangements with organizations with which the government does business. It does not, however, make criminal every contact or connection between an agent of the United States government and a private organization, but only contacts which are significant. Similarly, the statute does not prevent an agent of the United States government from having any investment whatsoever in an organization with which the government does business, but only an investment which is substantial. On the other hand, the statute is violated regardless of whether the United States loses any money as a result of a defendant's conflict of interest. It is the conflict itself which violates the law and not the injury to the United States.

Unlike § 209, this statute does apply to “special government employees.” A “special government employee” is one who performs temporary--even if full- time--duties, with or without government compensation, for a period not to exceed 130 days during any 365 consecutive days.

18 U.S.C. § 241
(Elements)

To sustain the charge of conspiracy against civil rights, the government must prove the following propositions:

First, that the defendant entered into a conspiracy to [injure,] [oppress,] [threaten,] [or] [intimidate] one or more victims;

Second, that the conspiracy was directed at the victim's[s'] free exercise or enjoyment of his [their] right to _____, which is secured by the Constitution or laws of the United States;

Third, that the defendant intended to deprive the victim of the right described above; [and]

Fourth, that one or more of the intended victims was present in any State, Territory, or District of the United States.

[Fifth, that (name) died as a result of the conspiracy of the defendants.] [FNa1]

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

See the Comment to the instruction for 18 U.S.C. § 242. This instruction should be given in conjunction with instructions concerning conspiracy, but without language requiring proof of an overt act.

18 U.S.C. § 241
(Definition of Injure, Oppress, Threaten, or Intimidate)

The word[s] ["injure,"] ["oppress,"] ["threaten,"] [or] ["intimidate"] cover[s] a variety of conduct intended to harm, frighten, or inhibit the free action of other persons. Furthermore, to threaten or intimidate does not require the possibility of physical force or of physical harm.

Committee Comment

See United States v. Guest, 383 U.S. 745 (1966); Posey v. United States, 416 F.2d 545 (5th Cir.1969), cert. denied, 397 U.S. 946 (1970).

18 U.S.C. § 241
(Definition of Constitutional Rights)

The indictment charges that the defendant and others conspired to deprive (victim) of the following right[s]: (describe right[s]).

This right is [These rights are], in fact, [a] constitutional right[s] recognized by law.

18 U.S.C. § 241
(Definition of Liberty)

The word "liberty" includes the liberty to be free from unlawful attacks upon the victim's person. "Liberty" includes the principle that no person may ever be physically assaulted, intimidated, or otherwise abused intentionally and without justification by a person acting under the color of the laws of any state.

[Although (name) had been arrested and had been deprived of his liberty to come and go without restraint, he retained his constitutional liberty to be free from physical assaults or beatings that were beyond the lawful authority of the officer.]

Committee Comment

See United States v. Price, 383 U.S. 787 (1966); Screws v. United States, 325 U.S. 91 (1945); Logan v. United States, 144 U.S. 263 (1892); United States v. Stokes, 506 F.2d 771 (5th Cir.1975).

18 U.S.C. § 241
(Death)

The government must prove that (name) died as a result of the conspiracy of the defendants.

It is not necessary for the prosecution to prove that the defendants intended (name) to die as a result of their conspiracy. This element would be satisfied if you find that the conduct of one or more of the defendants contributed to or hastened the death of (name), even if that conduct alone would not have caused his death.

Committee Comment

To be used when the indictment charges that the victim died as a result of the conspiracy. This instruction should be given with an appropriate "right" instruction.

See United States v. Hayes, 589 F.2d 811 (5th Cir.), cert. denied, 444 U.S. 847 (1979); United States v. Guillette, 547 F.2d 743, 749 (2d Cir.1976), cert. denied, 434 U.S. 839 (1977); United States v. Hamilton, 182 F.Supp. 548, 550-51 (D.D.C.1960).

18 U.S.C. § 242
(Deprivation of Rights Under Color of Law - Elements)

To sustain the charge of deprivation of rights under color of law, the government must prove the following propositions:

First, that the defendant was acting under color of law;

Second, that the defendant deprived (name of person) of (his/her) right to (name of right), which is secured or protected by the Constitution or laws of the United States;

Third, that the defendant intended to deprive the victim of the right described above;

Fourth, that (name of person) was present in (name of State, Territory, or District of the United States).

[Fifth, that (name) died as a result of the defendant's conduct.]

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, Title XXXII, § 320201(b), 108 State 1796, 2113 (1994), amended Section 242 to extend civil rights protections to all persons present in States, Territories, and Districts of the United States. As amended, Section 242 no longer requires persons who have been deprived of their rights to be "inhabitants of" a State, Territory, or District of the United States; rather, such persons need only be "persons in" those places. Little legislative history exists concerning the reasons for this change. As introduced by Senator Joseph Biden, the change was meant to "[e]xtend the protections of the criminal civil rights statute to any person in a state." 139 Cong. Rec. S12388-04, S12445.

The same change had also been proposed in Title X, Section 1006 of the Comprehensive Violent Crime Control Act of 1991, introduced by Senators Strom Thurmond and Robert Dole. Senator Thurmond had explained that proposed change as follows:

> In United States v. Maravilla, 907 F.2d 216 (1st Cir. 1990), the court overturned the convictions of two customs agents for killing an alien who was briefly present in the United States. The rationale was that such a person did not qualify as an "inhabitant" for purposes of 18 U.S.C. 242. This section amends 18 U.S.C. 241 and 242 to ensure protection of all persons within the United States by these important provisions of the federal civil rights laws, regardless of whether they are "inhabitants."

137 Cong. Rec. S3191-02, S3245. While there were hearings on the 1991 bill, it was never enacted.

For additional general information, see United States v. Price, 383 U.S. 787, 794 (1966); Williams v. United States, 341 U.S. 97 (1951); Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299, 327-29 (1941).

Footnote 1 formerly read: "To be used when the indictment charges that the victim died as a result of the conspiracy." Nothing in the old or new statute ties the victim's death to a conspiracy. As it now stands, the conspiracy language in the footnote is unnecessary and was probably a mistake in the original version.

18 U.S.C. § 242
(Rights)

The right[s] to _____ [is; are] secured by the Constitution or laws of the United States. The defendant need not have known that [this; these] right[s] [was; were] secured by the Constitution or the laws of the United States.

18 U.S.C. § 242
(Definition of Color of Law)

Acts are performed under color of law when the defendant acts in his/her official capacity or purports or claims to act in his/her official capacity. The act of the defendant must consist of the abuse or misuse of the power possessed by the defendant by virtue of his/her office.

[A defendant who is not an officer acts under color of law when he/she participates with a person acting under color of law whom he/she knows to be an officer, in the commission of the unlawful acts charged in the indictment.]

18 U.S.C. § 242
(Definition of Liberty)

The word "liberty" includes the liberty to be free from unlawful attacks upon the victim's person. "Liberty" includes the principle that no person may ever be physically assaulted, intimidated, or otherwise abused intentionally and without justification by a person acting under the color of the laws of any state.

[Although (name) had been arrested and had been deprived of his liberty to come and go without restraint, (he/she) retained (his/her) constitutional liberty to be free from physical assaults or beatings that were beyond the lawful authority of the officer.]

18 U.S.C. § 242
(Death)

The government must prove that (name) died as a result of [defendant's; defendants'] conduct.

It is not necessary for the prosecution to prove that the defendants intended (name) to die as a result of [his/her] conduct. This element is satisfied if you find that the defendant's conduct contributed to or hastened the death of (name), even if that conduct alone did not cause [his/her] death.

Committee Comment

See United States v. Hayes, 589 F.2d 811 (5th Cir.), cert. denied, 444 U.S. 847 (1979).

18 U.S.C. § 286
(Conspiracy to Defraud the Government with Respect to Claims - Elements)

To sustain the charge of conspiracy to defraud the government with respect to claims, the government must prove the following propositions:

First, the defendant entered into a conspiracy to obtain [payment; allowance; aid in obtaining payment; aid in obtaining allowance] of a claim against [the United States" a department or agency of the United States];

Second, the claim was false, fictitious, or fraudulent;

Third, the defendant knew at the time that the claim was false, fictitious, or fraudulent; and

Fourth, that the defendant acted with the intent to defraud.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Section 286 does not require proof of an overt act. United States v. Sassi, 966 F.2d 283, 284 (7th Cir.), cert. denied, 506 U.S. 991 (1992); United States v. Umentum, 547 F.2d 987, 989-91 (7th Cir. 1976). All that is required is proof of an agreement between two or more persons to commit an offense under § 286. United States v. Cova, 755 F.2d 595 (7th Cir. 1985); United States v. Cortwright, 528 F.2d 168 (7th Cir. 1975). See also United States v. Morado, 454 F.2d 167 (5th Cir.), cert. denied, 406 U.S. 917 (1972).

18 U.S.C. § 287
(False, Fictitious, or Fraudulent Claims - Elements)

To sustain the charge of making a false claim, the government must prove the following propositions:

First, that the defendant [made, presented] a claim against [the United States, a department or agency of the United States];

Second, that the claim was [false, fictitious, fraudulent];

Third, that the defendant knew the claim was [false, fictitious, fraudulent];

[Fourth, that the defendant acted with the intent to defraud.]

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Although the pattern instruction requires proof of intent to defraud, the issue remains unresolved in this Circuit. Most recently, in United States v. Catton, ___ F.3d ____ (7th Cir. 1996), the Court opined in dicta that an intent to defraud is implicit when one knowingly files a false claim. For that reason, the Court concluded, again in dicta, that a willfulness instruction is not required under § 287 (although one was given in Catton). In support, the Court cited United States v. Ferguson, 793 F.2d 828, cert. denied, 477 U.S. 933 (1986), which held that the government need not prove willfulness in a false claims case. Although the issue of intent to defraud was not raised in Ferguson, the Court did cite to United States v. Blecker, 657 F.2d 629, 654 (4th Cir. 1981), for the proposition that § 287 does not require a showing of specific intent to defraud the government.

Further complicating the issues are the Court's decisions in United States v. Nazon, 940 F.2d 255 (7th Cir. 1991) and United States v. Haddon, 927 F.2d 942, 951 (7th Cir. 1991). In Nazon, the jury was instructed that it must find that the defendant submitted his claim with an intent to defraud. On appeal, the defendant objected to the district court's failure to define the phrase intent to defraud for the jury. Although the Seventh Circuit held that the failure to define intent to defraud was not plain error, it assumed that the jury was required to find intent to defraud. In Haddon, the Court explicitly endorsed an instruction requiring the government to prove intent to defraud on a § 287 count.

In November of 1997, in Bates v. U.S., 118 S.Ct. 285 (1997), the Supreme Court declined to read an intent to defraud into 20 U.S.C. Sec. 1097(a), which statute prohibits the knowing and willful misapplication of student loan funds. In refusing to read the intent element into the statute, the Court did not lay down a blanket rule. Instead, it considered a number of factors, including the plain language of the statute, the fact that other subsections of the same statute included the intent to defraud language, and the history of the statute.

The Seventh Circuit has not yet determined whether intent to defraud should be read into Sec. 287 in light of the Supreme Court's decision in Bates. The key to the analysis will be whether there is an historical basis for requiring an intent to defraud. This analysis is particularly suited to the adversary process. See, for example, the Seventh Circuit's decision in United States v. Bates,

852 F.2d 212 (7th Cir. 1988), where the court held in a case unrelated to the more recent Supreme Court case of the same name, that an intent to defraud requirement should be read into 18 U.S.C. Sec. 656, prohibiting the willful misapplication of bank funds and its decision in United States v. Ranum, 96 F.3d 1020 (1996) (predating the Supreme Court's decision in Bates) where the court held that an intent to defraud requirement should not be read into 18 U.S.C. Sec. 1097(a), prohibiting the making of false statements to obtain student loan funds.

Because this question is an interpretive question of first impression, the Committee believes it is more appropriate to leave to the court the initial determination of whether intent to defraud is an element in Sec. 287.

If intent to defraud is an element, the court should add the bracketed language.

A separate unresolved question exists as to whether the government must prove that the defendant knew the false claim would be presented to the United States or whether that point is a jurisdictional fact which need not be presented to the jury. The case law is surprisingly silent. The issue turns on whether the requirement is more like the requirement in United States v. X-Citement Video, Inc., 115 S. Ct. 464 (1994)(proof that a defendant knowingly transported visual depictions of minors engaging in sexually explicit conduct in violation of 18 U.S.C. § 2252 requires proof that defendant knew depiction was of a minor) or more like United States v. Feola, 95 S. Ct. 1255 (1975)(proof that a defendant conspired to assault a federal officer in violation of 18 U.S.C. § 111 does not require proof that defendant knew person was federal officer).

18 U.S.C. § 287
(Claims Submitted to Third Parties)

To make a claim, the defendant need not directly submit the claim to an employee or agency of the United States. It is sufficient if the defendant submits the claim to a third party knowing that the third party will submit the claim or seek reimbursement from the United States [or a department or agency thereof].

Committee Comment

See United States v. Precision Medical Laboratories, Inc., 593 F.2d 434, 442-443 (2d Cir. 1978); United States v. Catena, 500 F.2d 1319 (3d Cir.), cert. denied, 419 U.S. 1047 (1974). See generally 18 U.S.C. § 2(b). See also United States ex rel. Marcus v. Hess, 317 U.S. 537 (1949) (interpreting R.S. § 5438, forerunner of 18 U.S.C. § 287); United States v. Beasley, 550 F.2d 261 (5th Cir.), cert. denied, 434 U.S. 938 (1977).

18 U.S.C. § 401
(Criminal Contempt)

Committee Comment

Because of the paucity of jury trials brought under the statute, no pattern instruction is proposed.

The Committee has not drafted an instruction for § 401 because so few jury trials occur under it. This is because judges may decide in advance of trial whether, upon conviction, they will impose a sentence of six months or less. Where the sentence to be imposed is less than six months, a jury trial is not required. See generally Frank v. United States, 395 U.S. 147, 148-150 (1969) ("Congress, perhaps in recognition of the scope of criminal contempt, has authorized courts to impose penalties but has not placed any specific limits on their discretion; it has not categorized contempts as 'serious' or 'petty.' 18 U.S.C. § § 401, 402. Accordingly, this Court has held that in prosecutions for criminal contempt where no maximum penalty is authorized, the severity of the penalty actually imposed is the best indication of the seriousness of the particular offense. [Footnotes omitted])"; Bloom v. Illinois, 391 U.S. 194, 198 (1968)("criminal contempt is a petty offense unless the punishment makes it a serious one"); Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966); United States v. Seale, 461 F.2d 345, 352 (7th Cir. 1972) ("If the penalty actually imposed [for criminal contempt] exceeds six months' imprisonment, the maximum sentence for a `petty offense' under 18 U.S.C. § 1, the contempt is serious, and a jury trial must be afforded")(citing Frank at 151, Cheff at 379-80).

For information about the elements required for conviction under 18 U.S.C. § 401(1), see United States v. Seale, 461 F.2d 345 (7th Cir. 1972); for 18 U.S.C. § 401(3), see In re Betts, 927 F.2d 983, 986 (7th Cir. 1991), rev'd on other grounds, Betts v. United States, 10 F.3d 1278 (7th Cir. 1993). For general information regarding 18 U.S.C. 401(2), see Cammer v. United States, 350 U.S. 399, 405-06 (1956).

18 U.S.C. § 402
(Criminal Contempt)

Committee Comment

Because of the paucity of jury trials brought under the statute, no pattern instruction is proposed.

Although a jury trial is mandated for § 402 offenses (when the act or omission giving rise to the contempt charge also is itself a criminal offense) under 18 U.S.C. § 3691, the exceptions enumerated in § 3691 have the practical effect of sharply limiting the number of jury trials under § 402. The Committee therefore believes that an instruction for § 402 is unnecessary.

For judicial interpretation of 18 U.S.C. § § 402 and 3691, see United States v. Pyle, 518 F. Supp. 139, 145-56 (E.D. Pa. 1981), aff'd, 722 F.2d 736 (3d Cir. 1983); United States v. Wright, 516 F. Supp. 1113 (E.D. Pa. 1981).

18 U.S.C. § 471
(Falsely Making, Forging, Counterfeiting, or Altering a Security or Obligation--Elements)

To sustain the charge of [making, forging, counterfeiting, altering] a (specific security or obligation involved), the government must prove the following propositions:

First, that the defendant [falsely made, forged, counterfeited, altered] a (specify security or obligation involved); and

Second, that the defendant did so with the intent to defraud.

I instruct you as a matter of law that a (specific security or obligation involved) is an obligation or other security of the United States.

If you find from your consideration of all the evidence that both of these propositions have been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that either of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Whether a specific security or obligation is an obligation or security of the United States is a question of law and is to be decided by the trial court. See 18 U.S.C. § 8; United States v. Anzalone, 626 F.2d 239 (2d Cir. 1980).

18 U.S.C. § 472
(Uttering Counterfeit Obligations or Securities - Elements)

To sustain the charge of [passing, uttering, publishing, selling, bringing into the United States, possessing, concealing] [falsely made, forged, counterfeited, altered] (specific security or obligation involved), the government must prove the following propositions:

First, that the defendant [passed, uttered, published, sold, brought into the United States, possessed, concealed] [falsely made, forged, counterfeited, altered] (specific security or obligation involved);

Second, that the defendant knew at the time that the (specific security or obligation involved) was [falsely made, forged, counterfeited, altered]; and

Third, that the defendant did so with the intent to defraud.

I instruct you as a matter of law that a (specific security or obligation involved) is an obligation or other security of the United States.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Section 472 includes attempting to pass, utter, publish, or sell counterfeit obligations. When attempt is charged, general instruction ___, which defines attempt, should be given.

Whether a specific security or obligation is an obligation or security of the United States is a question of law and is to be decided by the trial court. See 18 U.S.C. § 8; United States v. Anzalone, 626 F.2d 239 (2d Cir. 1980).

18 U.S.C. § 473
(Dealing in Counterfeit Obligations or Securities - Elements)

To sustain the charge of [buying, selling, exchanging, transferring, receiving, delivering] [false, forged, counterfeited, altered] (specific security or obligation), the government must prove the following propositions:

First, that the defendant [bought, sold, exchanged, transferred, received, delivered] [false, forged, counterfeited, altered] (specific security or obligation);

Second, that the defendant knew at the time that the (specific security or obligation) was [false, forged, counterfeit, altered]; and

Third, that the defendant did so with the intent that the (specific security or obligation) be [passed, published, used] as true and genuine.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 474
(Plates or Stones for Counterfeiting Obligations or Securities)

Committee Comment

This section does not lend itself to a pattern instruction. Note that all of the sections do not have the same intent requirements. The instructions for sections 472 and 473 may be of assistance in drafting an instruction for this section.

18 U.S.C. § 495
(Falsely Making, Forging, Counterfeiting, or Altering a Document--Elements)

To sustain the charge of (here insert crime), the government must prove the following propositions:

First, that the defendant [falsely made, forged, counterfeited, altered] the (document) in question;

Second, that the defendant did so for the purpose of [obtaining money, enabling (name) to obtain money] from the United States; and

Third, that the defendant knew the claim was [false, fictitious, fraudulent];

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

In United States v. Bates, 118 S.Ct. 285 (1997), the Supreme Court declined to read a requirement of proof of an intent to defraud into 20 U.S.C. Sec. 1097(a), which statute prohibits the knowing and willful misapplication of student loan funds. In refusing to read the intent element into the statute, the Court did not lay down a blanket rule. Instead, it considered a number of factors, including the plain language of the statute, the fact that other subsections of the same statute included the intent to defraud language, and the history of the statute.

The Seventh Circuit has not yet determined whether an intent to defraud requirement should be read into Sec. 495 in light of the Supreme Court's decision in Bates. The key to the analysis will be whether there is an historical basis for requiring an intent to defraud. This analysis is particularly suited to the adversary process. See, for example, the Seventh Circuit's decision in United States v. Bates, 852 F.2d 212 (7th Cir. 1988), where the court held, in a case unrelated to the more recent Supreme Court case of the same name, that an intent to defraud requirement should be read into 18 U.S.C. Sec. 656, prohibiting the willful misapplication of bank funds and its decision in United States v. Ranum, 96 F.3d 1020 (7th Cir. 1996) (predating the Supreme Court's decision in Bates) where the court held that an intent to defraud requirement should not be read into 18 U.S.C. Sec. 1097(a), prohibiting the making of false statements to obtain student loan funds.

Because this question is an interpretive question of first impression, the Committee believes it is more appropriate to leave to the courts the initial determination of whether intent to defraud is an element in Sec. 495.

18 U.S.C. § 495
(Uttering or Publishing a False Document--Elements)

To sustain the charge of uttering or publishing a false document, the government must prove the following propositions:

First, that the defendant offered a document;

Second, that when the defendant did so, he falsely represented in some way or manner that the document was genuine;

Third, that when the defendant did so, the document was [false, forged, counterfeited, altered] in that (specific allegation);

Fourth, that when the defendant did so he knew that the document was [false, forged, counterfeited, altered]; and

Fifth, that the defendant did so with the intent to defraud the United States.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 495
(Presenting a False Document--Elements)

To sustain the charge of presenting a false document, the government must prove the following propositions:

First, that the defendant [transmitted, presented] the (document) to (name), who was an officer of the United States;

Second, that the document was [transmitted, presented] in support of or in relation to any account or claim;

Third, that when the defendant [transmitted, presented] the (document), it was [false, forged, counterfeited, altered] in that (specific allegation);

Fourth, that when the defendant [transmitted, presented] the (document), the defendant knew it was [false, forged, counterfeited, altered]; and

Fifth, that when the defendant [transmitted, presented] the (document), he did so with the intent to defraud the United States.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 500
(Falsely Making, Forging, Counterfeiting, Engraving, or Printing a Money Order--Elements)

To sustain the charge of (here insert crime), the government must prove the following propositions:

First, that the defendant [falsely made, forged, counterfeited, engraved, printed] a document;

Second, that the document was an imitation of or purported to be a [blank money order, money order issued by or under the direction of the United States Postal Service]; and

Third, that the defendant made the document with the intent to defraud.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 500
(Falsely Making, Forging, Counterfeiting, Engraving, or Printing a Money Order--Definition of intent to defraud)

The phrase "intent to defraud" means that the acts charged were done knowingly with the intent to deceive or cheat the victim in order to cause [[a gain of money or property to the defendant] [or] [the [potential] loss of money or property to another].

Committee Comment

This instruction was adapted from the parallel instruction under the mail / wire fraud statutes, 18 U.S.C. § § 1341 & 1343.

18 U.S.C. § 500
(Forging or Counterfeiting a Signature or Initials of any Person Authorized to Issue a Money Order--Elements)

To sustain the charge of (here insert crime), the government must prove the following propositions:

First, that the defendant [forged, counterfeited] the [signature, initials] of (name);

Second, that (name) was authorized to issue money orders;

Third, that the defendant [forged, counterfeited] the [signature, initials] on a [money order, postal note, blank provided or issued by or under the direction of the (United States Postal Service, post office department, corporation of any foreign country)] which was payable in the United States; and,

[Fourth, that the defendant acted with the intent to defraud.]

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

In United States v. Bates, 118 S.Ct. 285 (1997), the Supreme Court declined to read a requirement of proof of an intent to defraud into 20 U.S.C. Sec. 1097(a), which statute prohibits the knowing and willful misapplication of student loan funds. In refusing to read the intent element into the statute, the Court did not lay down a blanket rule. Instead, it considered a number of factors, including the plain language of the statute, the fact that other subsections of the same statute included the intent to defraud language, and the history of the statute.

The Seventh Circuit has not yet determined whether an intent to defraud requirement should be read into Sec. 500 in light of the Supreme Court's decision in Bates. The key to the analysis will be whether there is an historical basis for requiring an intent to defraud. This analysis is particularly suited to the adversary process. See, for example, the Seventh Circuit's decision in United States v. Bates, 852 F.2d 212 (7th Cir. 1988), where the court held, in a case unrelated to the more recent Supreme Court case of the same name, that an intent to defraud requirement should be read into 18 U.S.C. Sec. 656, prohibiting the willful misapplication of bank funds and its decision in United States v. Ranum, 96 F.3d 1020 (7th Cir. 1996) (predating the Supreme Court's decision in Bates) where the court held that an intent to defraud requirement should not be read into 18 U.S.C. Sec. 1097(a), prohibiting the making of false statements to obtain student loan funds.

Because this question is an interpretive question of first impression, the Committee believes it is more appropriate to leave to the courts the initial determination of whether intent to defraud is an element in Sec. 500.

If intent to defraud is an element, the court should add the bracketed language.

18 U.S.C. § 500
(Forging or Counterfeiting a Signature or Endorsement on a Money Order, Postal Note, or Blank--Elements)

To sustain the charge of (here insert crime), the government must prove the following propositions:

First, that the defendant [forged, counterfeited] any material [signature, indorsement];

Second, that the defendant did so on a [money order, postal note, blank provided or issued by or under the direction of the (United States Postal Service, post office department, corporation of any foreign country)] which was payable in the United States; and

[Third, that the defendant acted with the intent to defraud.]

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

In United States v. Bates, 118 S.Ct. 285 (1997), the Supreme Court declined to read a requirement of proof of an intent to defraud into 20 U.S.C. Sec. 1097(a), which statute prohibits the knowing and willful misapplication of student loan funds. In refusing to read the intent element into the statute, the Court did not lay down a blanket rule. Instead, it considered a number of factors, including the plain language of the statute, the fact that other subsections of the same statute included the intent to defraud language, and the history of the statute.

The Seventh Circuit has not yet determined whether an intent to defraud requirement should be read into Sec. 500 in light of the Supreme Court's decision in Bates. The key to the analysis will be whether there is an historical basis for requiring an intent to defraud. This analysis is particularly suited to the adversary process. See, for example, the Seventh Circuit's decision in United States v. Bates, 852 F.2d 212 (7th Cir. 1988), where the court held, in a case unrelated to the more recent Supreme Court case of the same name, that an intent to defraud requirement should be read into 18 U.S.C. Sec. 656, prohibiting the willful misapplication of bank funds and its decision in United States v. Ranum, 96 F.3d 1020 (7th Cir. 1996) (predating the Supreme Court's decision in Bates) where the court held that an intent to defraud requirement should not be read into 18 U.S.C. Sec. 1097(a), prohibiting the making of false statements to obtain student loan funds.

Because this question is an interpretive question of first impression, the Committee believes it is more appropriate to leave to the courts the initial determination of whether intent to defraud is an element in Sec. 500.

If intent to defraud is an element, the court should add the bracketed language.

18 U.S.C. § 500
(Forging or Counterfeiting a Signature or Endorsement on a Receipt or Certificate of Identification--Elements)

To sustain the charge of (here insert crime), the government must prove the following propositions:

First, that the defendant [forged, counterfeited] a material signature or indorsement;

Second, that the signature or indorsement was on a receipt or certificate of identification of a [money order, postal note, blank provided or issued by or under the direction of the (United States Postal Service, post office department, corporation of any foreign country)] which was payable in the United States; and

[Third, that the defendant acted with the intent to defraud.]

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

In November of 1997, in United States v. Bates, 118 S.Ct. 285 (1997), the Supreme Court declined to read a requirement of proof of an intent to defraud into 20 U.S.C. Sec. 1097(a), which statute prohibits the knowing and willful misapplication of student loan funds. In refusing to read the intent element into the statute, the Court did not lay down a blanket rule. Instead, it considered a number of factors, including the plain language of the statute, the fact that other subsections of the same statute included the intent to defraud language, and the history of the statute.

The Seventh Circuit has not yet determined whether an intent to defraud requirement should be read into Sec. 500 in light of the Supreme Court's decision in Bates. The key to the analysis will be whether there is an historical basis for requiring an intent to defraud. This analysis is particularly suited to the adversary process. See, for example, the Seventh Circuit's decision in United States v. Bates, 852 F.2d 212 (7th Cir. 1988), where the court held, in a case unrelated to the more recent Supreme Court case of the same name, that an intent to defraud requirement should be read into 18 U.S.C. Sec. 656, prohibiting the willful misapplication of bank funds and its decision in United States v. Ranum, 96 F.3d 1020 (7th Cir. 1996) (predating the Supreme Court's decision in Bates) where the court held that an intent to defraud requirement should not be read into 18 U.S.C. Sec. 1097(a), prohibiting the making of false statements to obtain student loan funds.

Because this question is an interpretive question of first impression, the Committee believes it is more appropriate to leave to the courts the initial determination of whether intent to defraud is an element in Sec. 500.

If intent to defraud is an element, the court should add the bracketed language.

18 U.S.C. § 500
(Falsely Altering a Money Order--Elements)

To sustain the charge of falsely altering a money order, the government must prove the following propositions:

First, that the defendant falsely altered a document;

Second, that the document was a [money order, postal note, blank provided or issued by or under the direction of the (United States Postal Service, post office department, corporation of any foreign country)] which was payable in the United States; and

Third, that the alteration was material.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

[NOTE: Choose appropriate terms contained in brackets and parentheses.]

18 U.S.C. § 500
(Falsely Altering a Money Order--Materiality)

An alteration is material if it had the effect of influencing the action of the recipient or was capable of or had the potential to do so. [It is not necessary that the alteration actually have that influence or be relied upon by the recipient, so long as it had the potential or capability to do so.]

Committee Comment

This instruction was adapted from the instruction defining materiality under the false statement statute, 18 U.S.C. § 1001.

18 U.S.C. § 500
(Passing, Uttering, or Publishing Forged or Altered Money Orders--Elements)

To sustain the charge of passing, uttering, or publishing forged or altered money orders, the government must prove the following propositions:

First, that the defendant passed or placed in circulation a [money order, postal note];

Second, that when the defendant did so he falsely represented in some way or manner that the [money order, postal note] was genuine;

Third, that when the defendant did so the [money order, postal note] was forged or materially altered;

Fourth, that when the defendant did so, he knew that [any material (initials, signature, stamp impression, indorsement) thereon was (false, forged, counterfeited)] or [a material alteration on the (money order, postal note) was falsely made]; and

Fifth, that the defendant did so with the intent to defraud the United States.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

[NOTE: Choose appropriate terms contained in brackets and parentheses.]

18 U.S.C. § 500
(Fraudulently Issuing a Money Order--Elements)

To sustain the charge of fraudulently issuing a money order, the government must prove the following propositions:

First, that the defendant issued a money order or postal note without having previously received or paid the full amount of money payable on the order or note;

Second, that the defendant did so for the purpose of [obtaining or receiving money, enabling another person to obtain or receive money] from the United States or its agents or employees; and

Third, that the defendant did so with the intent to defraud the United States.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

[NOTE: Choose appropriate term contained in brackets.]

18 U.S.C. § 500
(Theft of A Money Order--Elements)

To sustain the charge of theft of money orders, the government must prove the following propositions:

First, that the defendant [embezzled, stole, converted to his own use or the use of another, converted or disposed of without authority] a document;

Second, that the defendant did so with the intent to deprive the owner of the use or benefit of the document; and

Third, that the document was a blank money order form provided under the authority of the United States Postal Service.

If you find from your consideration of all the evidence that both of these propositions have been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that either of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

[NOTE: Choose appropriate term contained in brackets.]

18 U.S.C. § 500
(Receipt or Possession of a Stolen Money Order--Elements)

To sustain the charge of receipt of stolen money order, the government must prove the following propositions:

First, that the defendant received or possessed a document;

Second, that the document was a blank money order form provided under the authority of the United States Postal Service;

Third, that the defendant received or possessed the document with the intent to convert it to his own use or gain or the use or gain of another; and

Fourth, that the defendant received or possessed the document knowing that it had been [embezzled, stolen, converted].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

[NOTE: Choose appropriate term contained in brackets.]

18 U.S.C. § 500
(False Presentment of a Money Order or Postal Note--Elements)

To sustain the charge of false presentment of a money order or postal note, the government must prove the following propositions:

First, that the defendant [transmitted, presented, caused to be transmitted or presented] a document;

Second, that the document was a money order or postal note;

Third, that at the time of transmission or presentment, the defendant knew that the money order or postal note [contained any forged or counterfeited (signatures, initials, stamped impression)] or [contained any material alteration which was unlawfully made] or [was unlawfully issued without previous payment of the amount required to have been paid upon issue] or [was stamped without lawful authority]; and

Fourth, that the defendant [transmitted, presented] the document with the intent to defraud.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

[NOTE: Choose appropriate terms contained in brackets and parentheses.]

18 U.S.C. § 500
(Theft or Receipt of Money Order Machines or Instruments--Elements)

To sustain the charge of theft or receipt of money order machines or instruments, the government must prove the following propositions:

First, that the defendant [stole, received, possessed, disposed of, attempted to dispose of] (here name item);

Second, that (here name item) was a postal money order machine or stamp, tool, or instrument specifically designed to be used in preparing or filling out the blanks on postal money order forms; [and]

[Third, that the defendant [received, possessed, disposed of, attempted to dispose of] (here name item) with the intent to defraud or without being lawfully authorized by the Post Office Department or Postal Service.]

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

When the defendant is charged with stealing the item, this instruction should include only the first two elements.

18 U.S.C. § 511
(Altering or Removing Vehicle Identification Numbers)

Committee Comment

Because this statute is so little-used, the Committee has not drafted a pattern instruction for it. For cases discussing the statute generally, see United States v. Chorman, 901 F.2d 102, 110 (4th Cir. 1990)("knowingly" under statute means "knowing action"); United States v. Podell, 869 F.2d 328, 332 (7th Cir. 1989) (discussing appropriate unit of prosecution under statute); United States v. Enochs, 857 F.2d 491, 492-93 (8th Cir. 1988), cert. denied, 490 U.S. 1022 (1989)(discussing intent element of statute).

18 U.S.C. § 542
(Entry of Goods by Means of False Statements - Whether or Not United States Shall or May Be Deprived of Any Lawful Duties--Elements)

To sustain the charge of entering goods into commerce by means of a false statement, the government must prove the following propositions:

First, (here specify merchandise named in indictment) was imported;

Second, the defendant [entered; introduced; attempted to enter; attempted to introduce] (here specify merchandise named in indictment) into the commerce of the United States;

Third, the defendant did so by means of a [fraudulent, false] [invoice; declaration; affidavit; letter; paper; practice] [written or verbal false statement], which he knew was [false; fraudulent]; and,

OR

Third, the defendant made a false statement in a declaration without reasonable cause to believe that the statement was true; and,

OR

Third, the defendant procured the making of a false statement in a declaration without reasonable cause to believe the truth of the statement; and,

[Fourth, the [invoice; declaration; affidavit; letter; paper; statement; practice] was material to the entry of the merchandise.]

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The Committee believes that materiality of the statements is not an element of the offense except in cases where the defendant is alleged to have procured the making of a false statement. See United States v. Wells, 117 S.Ct.. 921 (1997) where the Court held that a materiality element should not ordinarily be read into a statute. The Court considered the plain language of the statute (18 U.S.C. § 1014), the actions of Congress after its passage and the rule of lenity. Nevertheless, the Seventh Circuit has not yet decided whether materiality is an element under 18 U.S.C. § 542, so the question remains open.

The statute also requires proof that the goods in question were imported and that the defendant entered or attempted to enter them into the commerce of the United States. Whether each of these elements has been proved is a question of fact for the jury. See Lee v. United States, 14 F.2d 400, 402 (1st Cir. 1926) and Romano v. United States, 9 F.2d 522, 524 (2d Cir. 1925) (both holding that issue of whether goods were "imported" is a question for the jury); United States v. One Trunk, 171 F. 772, 774 (S.D.N.Y. 1909) and United States v. Mescall, 164 F. 580, 582 (C.C.E.D.N.Y. 1908) (both holding that question of whether entry occurred is question for the jury). Entry is defined for the jury in instruction 18 U.S.C. § 542, Definition of Entry.

18 U.S.C. § 542
(Entry of Goods by Means of False Statements - Definition of False or Fraudulent)

A [statement; document] is false if untrue when made and known to be untrue by the person making it or causing it to be made at the time it was made.

A [statement; document; practice] is fraudulent if known to be untrue when [made; conducted] and [made; conducted; caused to be made; caused to be conducted] with intent to deceive.

18 U.S.C. § 542
(Definition of Material)

A statement is material if it had the effect of influencing the action of the [body or agency], or was capable of or had the potential to do so. [It is not necessary that the statement actually have that influence or be relied on by the [body or agency], so long as it had the potential or capability to do so.]

Committee Comment

This instruction is derived from the materiality instruction for 18 U.S.C. § 1001.

18 U.S.C. § 542
(Entry of Goods by Means of False Statements - Definition of Entry)

The entering or introducing of merchandise into the commerce of the United States does not begin until after the merchandise has arrived in this country and after the importer or owner of the merchandise has begun that series of acts through which he may gain lawful possession of the merchandise. The process is not completed until all duties owed are paid.

Committee Comment

See United States v. Mescall, 215 U.S. 26, 32 (1909); Heike v. United States, 192 F. 83, 99 (2d Cir. 1911).

18 U.S.C. § 542
(Entry of Goods by Means of False Statements - Definition of Imported Merchandise)

Committee Comment

Because the meaning of the term imported varies in different contexts, the court must formulate a definition for the term on a case by case basis. See e.g., Schiavone-Chase Corp. v. United States, 553 F.2d 658, 663-64 (Ct. Cl. 1977); Kee Co. v. United States, 13 C.C.P.A. 106, 109 (1925).

18 U.S.C. § 542
(Entry of Goods by Means of False Statements - United States Has Been or May Have Been Deprived of Any Lawful Duties--Elements)

Committee Comment

The Committee has not drafted an instruction for the second paragraph of § 542 because the only reported case which discusses the paragraph, United States v. 218 ½ Carats Loose Emeralds, 153 F. 643 (S.D.N.Y. 1907), fails to make clear whether the entry of the merchandise must be concealed, whether the duties owed must be owed in fact, whether the defendant must have made the underlying false statement as well as have acted or failed to act and whether and how the acts prohibited in the second paragraph differ from those prohibited in the first paragraph.

18 U.S.C. § 549
(Breaking / Removing Customs Seal--Elements)

To sustain the charge of breaking seals of customs goods, the government must prove the following propositions:

First, the defendant [removed; broke; injured; defaced] any customs seal or other fastening or mark placed upon any [vessel; vehicle; warehouse; package]; [FNa1]

Second, the [vessel; vehicle; warehouse; package] contained merchandise or baggage in bond or in customs custody; and,

Third, the defendant did so without authority and with intent to steal.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 549
(Entering; Removing Goods From Customs--Elements)

To sustain the charge of [removing goods from customs custody; entering with the intent to remove goods from customs custody] the government must prove the following propositions:

First, the defendant entered [a bonded warehouse or vessel or vehicle containing bonded merchandise]; and,

Second, the defendant entered with the intent to steal therefrom any merchandise or baggage.

OR

Second, the defendant removed merchandise or baggage that was [in the vessel, vehicle, or bonded warehouse; otherwise in customs custody or control], and the defendant did so with the intent to steal.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that either of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 549
(Receiving or Transporting Customs Goods--Elements)
(Vol. 3, p. 37)

To sustain the charge of [receiving; transporting] customs goods, the government must prove the following propositions:

First, the defendant knowingly [received; transported] merchandise or baggage;

Second, someone had previously stolen the merchandise or baggage from [a bonded warehouse or any vessel or vehicle containing bonded merchandise]; and,

Third, at the time the defendant [received; transported] the merchandise or baggage he knew that it had been stolen [from customs custody]. [FNa2]

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 549
(Definition of Customs Custody)

Imported goods are in the custody of customs from the moment of their arrival in the United States port until merchandise has been inspected, found to be correctly invoiced and found to otherwise comply with the laws of the United States. [Once the inspection and findings have been made, however, or once a proper bond is filed, the goods can be released from customs custody before the statutory requirements are carried out.]

Committee Comment

Give the bracketed language when appropriate.

This definition was approved in United States v. Garber, 626 F.2d 1144, 1155 (3d Cir.1980). Whether an item is within customs custody or control appears to be a question of fact. See United States v. Radtke, 799 F.2d 298, 306 (7th Cir. 1986); United States v. Harold, 588 F.2d 1136, 1140 (5th Cir.1979). In Mungo v. United States, 423 F.2d 1351, 1353 (4th Cir.1970), however, the question was raised as one of jurisdiction. Because there are so few cases that have discussed the issue, the law is less than clear. Nonetheless, it is at least clear that the government must introduce sufficient facts to prove that the merchandise was legally in customs custody at the time it was allegedly removed by the defendant. United States v. Garber, supra; United States v. Harold, supra.

18 U.S.C. § 641
(Theft of government property - elements)
(Combined felony & misdemeanor instruction)

To sustain the charge of theft of government property, the government must prove the following propositions:

First, that the [money or] thing of value described in the indictment belonged to the United States and had a value [in excess of] [less than] $1000 at the time charged;

Second, that the defendant stole [or converted] that [money or] thing of value to [the defendant's own or another's use]; and

[Second, that the defendant [sold, conveyed, disposed of] that [money or] thing of value without authorization; and]

Third, that the defendant did so with the intent to deprive the United States of the use or benefit of that [money or] thing of value.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Use the alternate second element when appropriate.

The term "thing of value" is used instead of the former "property" to conform the instruction to the statutory language.

Other more descriptive "theft" terms, such as embezzlement, may be more appropriate in certain cases.

Section 641 of Title 18 consolidated theft, embezzlement, and receipt of stolen property previously found in Sections 82, 87, 100, and 101 of Title 18. Section 641 contains a lesser included misdemeanor for violations when the money of property in question is valued at less than $1000. "Value" is specifically defined in the statute.

The Committee has drafted this instruction to be used alternatively in felony and misdemeanor cases. Where there is a real dispute as to whether the value of the property is more or less than $1000, the Committee recommends that two separate instructions be given, in each of the alternative forms above, as opposed to use of a special interrogatory. See Fifth Circuit Pattern Instruction No. 8; Devitt & Blackmar, Federal Jury Practice and Instructions § 46.06 (Supp.1980): See also United States v. DeGilio, 538 F.2d 972 (3d Cir.1976), cert. denied, 429 U.S. 1038 (1977); United States v. Cabbell, 427 F.2d 147 (4th Cir.1970) (absent sufficient proof that value of the property exceed $100, court could only sentence under misdemeanor provision). Note that the value is established at the time of possession rather than at the time of theft. United States v. Ditata, 469 F.2d 1270 (7th Cir.1972). See also United States v. Brookins, 52 F.3d 615,619 (7th Cir. 1995).

On the question of intent to deprive the United States the jury may require additional instruction if defendant offers an argument based upon Morrissette v. United States, 342 U.S. 246 (1952).

18 U.S.C. § 641
(Definition of Value)

The word "value" means face value, market value [wholesale or retail], or a price actually paid for the item in question, whichever is greater. [Market value is the price someone would be willing to pay for the item to someone else willing to sell it.] [To have value a thing need not be a physical object [, and may be something like (information, labor, etc.), as long as it has economic worth.]

Committee Comment

See 18 U.S.C. § 641; United States v. Smith, 489 F.2d 1330 (7th Cir.1973), cert. denied, 416 U.S. 994 (1974).

Regarding market value, see United States v. Brookins, 52 F.3d 615 (7th Cir. 1995). Regarding intangible property, see United States v. Howard, 30 F.3d 871 (7th Cir. 1994). The term "par value" is eliminated because it is covered by the remaining terms. Relevant illustration is encouraged in intangible property cases.

18 U.S.C. § 656
(Theft, Embezzlement, or Misapplication by Bank Officer or Employee - Elements)

To sustain the charge of [embezzlement, abstraction, purloinment, misapplication] by a bank [officer, director, agent, employee], the government must prove the following propositions:

First, that at the time of the offense charged the defendant was [an officer, a director, an agent, an employee of or connected in any capacity with] the (here designate bank);

Second, that the (here designate bank) was a [Federal Reserve bank, member bank, national bank, insured bank or a receiver of the same];

Third, that the defendant used his / her position as [an officer, a director, an agent, an employee] to [embezzle, abstract, purloin, knowingly misapply] [moneys, funds, credits] belonging to the bank or entrusted to its care;

Fourth, that the defendant did so with the intent to injure or defraud the bank; and

Fifth, that the amount of the [moneys, funds, credits] [embezzled, abstracted, purloined, willfully misapplied] exceeded $1000.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Although the question of whether the institution is a federal bank must be proved, it is a question the jury rarely reaches, because this proof is usually met by stipulation or introduction of the certificate of insurance. If proof is lacking, then the judge will enter a directed verdict of not guilty.

Also, if the value is in question, then an alternate instruction patterned after the instruction on § 641 Misdemeanor should be given.

This instruction is adapted from United States v. Dreitzler, 577 F.2d 539 (9th Cir.1978), cert. denied, 400 U.S. 921 (1979). For a discussion of 18 U.S.C. § 656, its background, and judicial interpretation, see Annot., 51 A.L.R.Fed. 420 (1981).

18 U.S.C. § 656
(Theft, Embezzlement, or Misapplication by Bank Officer or Employee - definition of "intent to injure or defraud")

A bank [officer] [employee] acts with the intent to injure or defraud a bank when [he/she] uses [his/her] relationship with or position in the bank for [his/her] own [or another's] personal advantage [, or when [he/she]]acts with the intent to injure the bank's interests or with reckless disregard for the interests of the bank.]

Committee Comment

See United States v. Crabtree, 979 F.2d 1261, 1268-69 (7th Cir. 1992). The final clause in the proposed instruction should only be used if the case is tried on the theory set forth therein.

18 U.S.C. § 659
(Embezzlement or Theft of Goods from Interstate Shipment--Elements)

To sustain the charge of [embezzling, stealing, or unlawfully taking, carrying away, concealing, or by fraud or deception obtaining] goods or chattels [moving as interstate commerce, which are a part of or which constitute an interstate shipment of freight], the government must prove the following propositions:

First, that the defendant [embezzled, stole, or unlawfully took, carried away, concealed, or obtained by fraud or deception] the goods or chattels described in the indictment;

Second, that the defendant did so with the intent to convert the goods or chattels to his own use; and

Third, that the goods or chattels were moving as, or were a part of, [an interstate, a foreign] shipment of property.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Section 659 describes six distinct offenses, and further provides that if the goods or chattels in question do not exceed the value $1000, the offense is a misdemeanor. See Instruction on § 641 Misdemeanor--Elements.

If the value of the goods or chattels is in issue, the court should give a lesser included offense instruction. In cases in which "value" is in issue, the Committee recommends using the proposed definition of "value" found in the pattern instructions for 18 U.S.C. 641.

18 U.S.C. § 659
(Possession of Goods Stolen from Interstate Shipment--Elements)

To sustain the charge of possession of goods or chattels stolen from an interstate shipment, the government must prove the following propositions:

First, that the goods or chattels described in the indictment were [embezzled, stolen, or unlawfully taken, carried away, concealed, or obtained by fraud or deception];

Second, that the defendant possessed the goods or chattels with knowledge that they were [embezzled, stolen, or unlawfully taken, carried away or concealed, or obtained by fraud or deception]; and

Third, that the goods or chattels were moving as, or were a part of, [an interstate, a foreign] shipment of property.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Choose appropriate terms contained in brackets.

United States v. Zarattini, 552 F.2d 753 (7th Cir.), cert. denied, 431 U.S. 942 (1977), indicates that intent to convert is not an element under a charge of possession.

The government must prove beyond a reasonable doubt that goods were stolen from an interstate shipment and the person possessing the goods knew they had been stolen.

United States v. DeGeratto, 727 F. Supp. 1254,1265 (N.D. Ind. 1990); United States v. Green, 779 F.2d 1313, 1318 (7th Cir. 1985).

In cases in which "value" is in issue, the Committee recommends using the proposed definition of "value" found in the pattern instructions for 18 U.S.C. § 641.

18 U.S.C. § 666(a)(1)(A)
(Theft concerning federally funded program - Elements)

To sustain the charge of [embezzlement] [theft] [fraud] [conversion] [misapplication], the government must prove the following propositions:

First, that the defendant was an agent of [an organization] [a [state] [local] [Indian tribal] government, or any agency of that government] [, such as [name charged entity here if status is not in dispute]];

Second, that the defendant [embezzled] [stole] [obtained by fraud] [knowingly and without authority converted to the use of someone other than the rightful owner] [intentionally misapplied] some [money] [property];

Third, that the [money] [property] was owned by, or was under the care, custody or control of the [organization] [government or agency];

Fourth, that the [money] [property] had a value of $5,000 or more; and

Fifth, that the [organization] [government or agency], in a one year period, received benefits of more than $10,000 under any Federal program involving a grant, contract subsidy, loan, guarantee, insurance or other assistance. [The one year period must begin no more than 12 months before the defendant committed these acts and must end no more than 12 months afterward.]

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The government is not required to prove that the theft affected the federal funds received by the organization or agency. Salinas v. United States, 118 S.Ct. 469, 473-75 (1997). The jury should be so instructed in the event a contrary argument is raised.

18 U.S.C. § 666(a)(1)(B)
(Bribery concerning federally funded program - Elements)

To sustain the charge of bribery, the government must prove the following propositions:

First, that the defendant was an agent of [an organization] [a [state] [local] [Indian tribal] government, or any agency of that government] [, such as [name charged entity here if status is not in dispute]];

Second, that the defendant solicited, demanded, accepted or agreed to accept anything of value from another person;

Third, that the defendant did so corruptly with the intent to be influenced or rewarded in connection with some business, transaction or series of transactions of the [organization] [government or agency];

Fourth, that this business, transaction or series of transactions involved any thing of a value of $5,000 or more; and

Fifth, that the [organization] [government or agency], in a one year period, received benefits of more than $10,000 under any Federal program involving a grant, contract subsidy, loan, guarantee, insurance or other assistance. [The one year period must begin no more than 12 months before the defendant committed these acts and must end no more than 12 months afterward.]

[A person acts corruptly when that person acts with the understanding that something of value is to be offered or given to reward or influence him/her in connection with his/her [organizational] [official] duties.]

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The government is not required to prove that the bribe or other payment affected the federal funds received by the organization or agency. Salinas v. United States, 118 S.Ct. 469, 473-75 (1997). The jury should be so instructed in the event a contrary position is raised.

The definition of "corruptly" set forth above is derived from United States v. Bonito, 57 F.3d 167, 171 (2nd Cir. 1995). The term has been defined somewhat differently in the context of other criminal statutes. See, e.g., Roma Construction Co. v. aRusso, 96 F.3d 566, 573-74 (1st Cir. 1996). It is not necessary that this instruction contain the word "bribe" or "bribery," but it must define the term "corruptly." See United States v. Medley, 913 F.2d 1248 (7th Cir. 1990).

A defendant need only be partially motivated by the expectation of or desire for reward. United States v. Coyne, 4 F.3d 100 (2nd Cir. 1993).

18 U.S.C. § 666
("Agent" - definition)

An agent is a person who is authorized to act on behalf of an [organization] [government or agency], including an employee, officer or representative.

18 U.S.C. § 751
(Escape - Elements)

To sustain the charge of [attempted] escape, the government must prove the following propositions:

First, that the defendant was in the custody of [name or describe custodial official, institution or agency] pursuant to [describe authority for custody, e.g. judgment of conviction, arrest, court order]; and

Second, that the defendant knowingly [left] [attempted to leave] [intentionally failed to return to] that custody without authorization to do so.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Comment

Some additional definition of "custody" should be offered in cases where it is minimal or constructive, as opposed to those obvious cases involving arrest, jail or prison.

18 U.S.C. § 842
(Importing Explosive Materials Without a License--Elements)

To sustain the charge of engaging in the business of importing explosive materials without a license, the government must prove the following propositions:

First, the defendant was an importer of explosive materials; and,

Second, the defendant did not have a license, issued by the Secretary of the Treasury, permitting him to act as an importer of explosive materials.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that either of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 842
(Manufacturing Explosive Materials Without a License--Elements)

To sustain the charge of manufacturing explosive materials without a license, the government must prove the following propositions:

First, the defendant was a manufacturer of explosive materials; and,

Second, the defendant did not have a license, issued by the Secretary of the Treasury, permitting him to act as a manufacturer of explosive materials.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that either of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 842
(Dealing in Explosive Materials Without a License--Elements)

To sustain the charge of dealing in explosive materials without a license, the government must prove the following propositions:

First, the defendant was dealing in explosive materials; and,

Second, the defendant did not have a license, issued by the Secretary of the Treasury, permitting him to act as a dealer in explosive materials.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that either of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 842
(False Statement to Obtain Explosive Materials--Elements)

To sustain the charge of making a false [written; oral] statement, intended or likely to deceive, for the purpose of obtaining explosive materials, the government must prove the following propositions:

First, the defendant knowingly made a false statement [to the Secretary of the Treasury or his delegate; to a licensed importer, manufacturer, or dealer in explosive materials];

Second, the false [written; oral] statement was intended or likely to deceive; and,

Third, the false [written; oral] statement was made for the purpose of obtaining explosive materials.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 842
(Definition of Importer of Explosive Materials)

An importer of explosive materials is any person engaged in the business of bringing explosive materials into the United States for purposes of sale or distribution.

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18 U.S.C. § 842
(Definition of Explosive Materials)

Explosive materials means explosives, blasting agents, and detonators.

Committee Comment

If necessary to define "explosives, blasting agents, or detonators," use the statutory definitions found in 18 U.S.C. § 841.

18 U.S.C. § 842
(Definition of Manufacturer of Explosive Materials)

A manufacturer of explosive materials is any person engaged in the business of manufacturing explosive materials for the purposes of sale or distribution or for his own use.

18 U.S.C. § 842
(Definition of Dealer in Explosive Materials)

A dealer in explosive materials is any person engaged in the business of distributing explosive materials at wholesale or retail.

18 U.S.C. § 892
(Extortionate extension of credit - Elements)

To sustain the charge of making an extortionate extension of credit, the government must prove the following propositions:

First, that the defendant knowingly made an extension of credit to any person, including the making [or extending] of any loan or other thing of value for which repayment is expected[, or the deferring of repayment of any debt][, whether valid or invalid][, whether disputed or acknowledged]; and

Second, that the defendant and the debtor understood, at the time the extension of credit was made, that delay in making repayment or failure to make repayment could result in the use of violence [or other criminal means] to cause harm to the [person] [reputation] [property] of anyone.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

See United States v. Scotti, 47 F.3d 1237, 1245 (2d Cir. 1995); United States v. Natale, 526 F.2d 1160, 1168 (2d Cir. 1975).

The statute contains a list of possible factors to consider in determining whether an extension of credit was extortionate (e.g. legal enforceability, interest rate); the court should point out any that may be applicable in individual cases.

18 U.S.C. § 892
(Definition of "Debtor")

The term "debtor" includes a person to whom an extension of credit was made and any other person who guarantees repayment or otherwise agrees or attempts to cover any loss to the defendant because of a failure to repay that extension of credit.

18 U.S.C. § 894
(Extortionate collection of debt - Elements)

To sustain the charge of collection of an extension of credit by extortionate means, the government must prove the following propositions:

[First, that there was a[n] [attempt to collect] [collection of] an extension of credit, including [inducing] [attempting to induce] in any way the repayment by anyone of any loan or other thing of value for which repayment was expected[, or the deferring of repayment of any debt][, whether valid or invalid][, whether disputed or acknowledged];] [or]

[First, that a person was punished for the nonrepayment of an extension of credit, including any loan or other thing of value for which repayment was expected,[or the deferring of repayment of any debt][, whether valid or invalid][, whether disputed or acknowledged];]

Second, that the [attempt to collect] [collection] [punishment] involved the use of extortionate means, that is, the[, or [express or implied] threat of the use] of violence [or other criminal means] to cause harm to the [person] [reputation] [property] of anyone; and

Third, that the defendant knowingly participated in some way in the use of such extortionate means in that [attempted] [collection] [punishment].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 894
(Definition of Threat)

Acts or statements constitute a threat if they would reasonably induce fear of such harm in an ordinary person[, but the government need not prove that the recipient of a threat actually feared its consequences].

Committee Comment

Although there is no Seventh Circuit case on point, the cases to discuss the issue have held that the production of actual fear in the recipient is not an element of the offense. See, e.g., United States v. DiSalvo, 34 F.3d 1204, 1211 (3d Cir. 1994); United States v. Polizzi, 801 F.2d 1543, 1547-48 (9th Cir. 1986); United States v. Joseph, 781 F.2d 549, 553 (6th Cir. 1986); United States v. Natale, 526 F.2d 1160, 1168 (2d Cir. 1975). Instead, the government must prove that the defendant intended to take actions which would reasonably induce fear in an ordinary person. Natale, supra at 1168. It is the nature of the actions of the person seeking to collect the indebtedness, not the mental state produced in the debtor, that is the focus of the inquiry for the jury. Polizzi, supra at 1548. Thus, a simple demand for money is not a threat under this section. United States v. Joseph, 781 F.2d 549, 554 (6th Cir. 1986).

18 U.S.C. § 922(g)
(Felon in possession of firearm - elements)

To sustain the charge of unlawful possession of a firearm, the government must prove the following propositions:

First, that, prior to [date of the charged possession] the defendant had been convicted of a crime that was punishable by a term of imprisonment of more than one year;

Second, that on [date of the charged possession] the defendant knowingly possessed a firearm; and

Third, that the firearm possessed by the defendant had traveled in interstate commerce prior to defendant's possession of it on that date.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

In a prosecution for the receipt of firearms in commerce and affecting commerce after conviction of a felony, it was required only that the defendant be shown knowingly to have received or possessed the firearm, despite his contention that the evidence failed to show that the defendant knew that he had been convicted of a felony. United States v. Sutton, 521 F.2d 1385, 1391 (7th Cir. 1975)

Possession by the defendant who was a convicted felon of a shotgun that previously had moved in interstate commerce satisfied the requirement of in commerce or affecting commerce, and the government was not required to show that the defendant knew the gun had traveled in interstate commerce or that the defendant intended to violate this section. United States v. Horton, 503 F.2d 810, 813 (7th Cir. 1974). There is no requirement in the statute that a defendant must know the weapon traveled interstate. United States v. Castor, 937 F.2d 293, 298 (7th Cir. 1991).

18 U.S.C. § 922(g)
(Definition of commerce)

A firearm has traveled in interstate commerce if it has traveled between one state and any other state [or country], or across a state [or national] boundary line. [The government need not prove [how the firearm traveled in interstate commerce] [or] that the firearm's travel was related to the defendant's possession of it] [or] [that the defendant knew the firearm had traveled in interstate commerce].]

Committee Comment

What is required to satisfy the in commerce or affecting commerce element is proof that the firearm traveled at some time in interstate commerce. Proof of that nature satisfies the required nexus between possession and commerce. Scarborough v. United States, 431 U.S. 563 (1977). Only a minimal nexus that firearm at some time had been in interstate commerce is required. United States v. Lowe, 860 F.2d 1370, 1374 (7th Cir.), cert. denied, 490 U.S. 1005 (1988). See also United States v. Maloney, 71 F.3d 645 (7th Cir. 1995); United States v. Bell, 70 F.3d 495, 497 (7th Cir. 1995); and United States v. Bradford, 78 F.3d 1216, 1222 (7th Cir.), cert. denied, 116 S.Ct. 1581 (1996).

18 U.S.C. § 922(g)
(Definition of possession)

Possession of an object is the ability to control it. Possession may exist even when a person is not in physical contact with the object, but knowingly has the power and intention to exercise direction or control over it, either directly or through others.

Committee Comment

The possession instruction is based upon that approved in United States v. Lloyd, 71 F.3d 1256, 1266-67 (7th Cir. 1995), with two changes. First, instead of "dominion", a rather non-ordinary word, we have used "direction". Second, the Committee has eliminated use of the term "constructive possession," though the concept remains within the instruction. This instruction may also be used in connection with other possession statutes, such as 21 U.S.C. § 841(a)(1).

18 U.S.C. § 924(c)
(Using / carrying firearm in drug or violent crime - Elements)

To sustain the charge of [using] [carrying] a firearm during or in relation to a [drug] [violent] crime, the government must prove the following propositions:

First, that the defendant committed the crime of [title of offense] [as charged in Count ___]; and

Second, that the defendant knowingly [used] [or] [carried] a firearm during and in relation to that crime.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 924(C)
(Definition of "carry")

A defendant carries a firearm when he/she transports the firearm on his/her person [or in a vehicle] and does so during and in relation to the [drug] [violent] crime that he/she is committing.

[A defendant may carry a firearm even when the firearm is not immediately accessible because it is contained in a locked case or compartment.]

Committee Comment

This instruction reflects the Supreme Court's holding in Muscarello v. United States, 1998 WL 292058 (June 8, 1998) which in turn approved United States v. Molina, 102 F.3d 928 (7th Cir. 1996).

In some cases, it might be advisable to define vehicle as including motor vehicles, boats, airplanes and other means of transport.

The bracketed language should be used only when there is evidence the firearm was in a locked place.

18 U.S.C. § 924(C)
(Definition of "use")

A defendant uses a firearm when he/she actively employs it in some way that is related to the [drug] [violent] crime that he/she is committing. [“Use” may include [brandishing] [displaying] [trading or attempting to trade] [striking with] [firing or attempting to fire] a firearm] [making reference to a firearm in the defendant's possession.] [Mere presence of a firearm at the scene of the crime without active employment of that kind is not sufficient to constitute use of that firearm.]

Committee Comment

This instruction reflects the Supreme Court's holding in Bailey v. United States, 116 S.Ct. 501 (1995) regarding the term "use." The bracketed language is from post-Bailey Seventh Circuit cases, as is the mere presence line. See United States v. Abdul, 75 F.3d 327 (7th Cir. 1996); United States v. Booker, 73 F.3d 706, 709 (7th Cir. 1996).

INSTRUCTIONS FOR
18 U.S.C. § 1001
THROUGH
18 U.S.C. § 1964

18 U.S.C. § 1001
(Concealing a Material Fact--Elements)

To sustain the charge of concealing a material fact, the government must prove the following propositions:

First, the defendant [concealed; covered up] a fact by trick, scheme or device;

Second, the fact was material;

Third, the defendant did so knowingly and willfully; and,

Fourth, the material fact related to a matter within the jurisdiction of the [executive] [legislative] [judicial] branch of the government of the United States.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The language of the fourth element results from an amendment to § 1001 that became effective on October 11, 1996. The amended statute includes certain exceptions which may require the drafting of an additional instruction in an appropriate case. In cases involving conduct occurring prior to the amendment, the language of the former instruction, "a federal department or agency," should be used.

18 U.S.C. § 1001
(Making a False Statement or Representation--Elements)

To sustain the charge of making a [false; fictitious] [statement; representation], the government must prove the following propositions:

First, the defendant made a [false; fictitious; fraudulent] [statement; representation];

Second, the [statement; representation] was material;

Third, the [statement; representation] was made knowingly and willfully; and,

Fourth, the [statement; representation] was made in a matter within the jurisdiction of the [executive] [legislative] [judicial] branch of the government of the United States.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The language of the fourth element results from an amendment to § 1001 that became effective on October 11, 1996. The amended statute includes certain exceptions which may require the drafting of an additional instruction in an appropriate case. In cases involving conduct occurring prior to the amendment, the language of the former instruction, "a federal department or agency," should be used.

18 U.S.C. § 1001
(Making or Using a False Writing or Document--Elements)

To sustain the charge of [making; using] a false [writing; document] knowing it to contain any [false; fictitious; fraudulent] [statement; entry], the government must prove the following propositions:

First, the defendant [made; used] a false [writing; document];

Second, the defendant knew the [writing; document] contained a [false; fictitious; fraudulent] [statement; entry];

Third, the [statement; entry] was material;

Fourth, the defendant [made; used] the [document; writing] knowingly and willfully; and

Fifth, the [writing; document] was [made; used] in a matter within the jurisdiction of the [executive] [legislative] [judicial] branch of the government of the United States.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The language of the fifth element results from an amendment to § 1001 that became effective on October 11, 1996. The amended statute includes certain exceptions which may require the drafting of an additional instruction in an appropriate case. In cases involving conduct occurring prior to the amendment, the language of the former instruction, "a federal department or agency," should be used.

18 U.S.C. § 1001
(Definition of Scheme and Device)

A scheme or device includes any plan or course of action intended to deceive others.

18 U.S.C. § 1001
(Definition of False, Fictitious)

A statement is false or fictitious if untrue when made and then known to be untrue by the person making it [or causing it to be made].

18 U.S.C. § 1001
(Definition of Fraudulent)

A statement or representation is fraudulent if known to be untrue, and made [or caused to be made] with intent to deceive.

18 U.S.C. § 1001
(Materiality - definition)

A statement is material if it had the effect of influencing the action of the [body or agency], or was capable of or had the potential to do so. [It is not necessary that the statement actually have that influence or be relied on by the [body or agency], so long as it had the potential or capability to do so.]

Committee Comment

See United States v. Gaudin, 115 S.Ct. 2310, 2314 (1995).

18 U.S.C. § 1001
(Willfully - Definitions)

An act is done willfully if done voluntarily and intentionally, and with the intent to do something the law forbids.

Committee Comment

If used for § 1001, part 3, these instructions apply to the fourth element.

See 4.09 of these Instructions for the Committee's recommendation on the use of an instruction defining "willfully." See 4.06 of these Instructions for a definition of "knowingly."

18 U.S.C. § 1001
(Department or Agency)

The (name of department, agency, or office) is a part of the [executive] [legislative] [judicial] branch of the government of the United States, and [statements; representations; facts] concerning (specify) are within the jurisdiction of that branch.

Committee Comment

The statement need not be made directly to a United States agency. If made to a local entity administering a totally or partially federally funded program then such a statement may also be within the jurisdiction of a federal agency. See United States v. Petullo, 709 F.2d 1178, 1180 (7th Cir. 1983). See also United States v. Ross, 77 F.3d 1525, 1544 (7th Cir. 1996) ("This court has repeatedly found the submission of a fraudulent statement to a private (or non federal government) entity to be within the jurisdiction of a federal agency where the agency has given funding to the entity and fraudulent statements cause the entity to utilize the funds improperly.")

Whether or not the government has suffered monetary loss or in fact was deceived by the acts charged is of no consequence to the jury's determination of the case.

18 U.S.C. § 1005, para. 4
(Fraudulently benefitting from a loan by a federally insured institution)

To sustain the charge of fraudulently benefitting from a loan made by a financial institution as charged in Count ___ of the indictment, the government must prove the following propositions:

First, that the defendant received or otherwise benefitted, directly or indirectly, from a loan made by a financial institution as described in the indictment;

Second, that the defendant did so with the intent to defraud the financial institution; and

Third, that the deposits of the [name the financial institution] were then insured by the Federal Deposit Insurance Corporation.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

For the definition of intent to defraud, see pattern instruction applicable to 18 U.S.C. §§ 1341 and 1343.

18 U.S.C. § 1006
(Insider fraud on a federally insured financial institution)

To sustain the charge of defrauding a federally insured financial institution as charged in Count ___ of the indictment, the government must prove the following propositions:

First, the defendant was an [officer, agent or employee of or connected in some capacity with] [name of qualifying institution as listed in the statute];

Second, the defendant [choose one of these three]:

> (A) made a false entry in a book, report or statement of (name of institution);
> (B) without authorization drew an [order] or [bill of exchange], [made an acceptance], [issued, put forth or assigned a note], debenture, bond, draft, bill of exchange, mortgage, judgment, or decree;
> (C) participated or shared in or received directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of the institution; and

Third, the defendant acted with the intent to defraud the [name of defrauded institution, corporation, association, or individual].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

For the definition of intent to defraud, see pattern instruction applicable to 18 U.S.C. §§ 1341 and 1343.

18 U.S.C. § 1007
(False statements to influence the FDIC)

To sustain the charge of making [or inviting reliance on] a false statement [document or other thing] to influence the Federal Deposit Insurance Corporation, the government must prove the following propositions:

First, the defendant knowingly made [invited reliance on] a [false; forged; or counterfeit] [statement; document, or thing] as alleged in Count ___ of the indictment;

Second, the defendant did so for the purpose of influencing in any way an action of the Federal Deposit Insurance Corporation.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 1014
(False statement to financial institution - Elements)

To sustain the charge of making a false statement to a [bank] [financial institution], the government must prove the following propositions:

First, that the defendant made a false statement to a [bank] [financial institution], [orally or in writing];

Second, that the defendant knew the statement was not true at the time it was made;

Third, that the defendant made the statement with the intent to influence the action of the [bank] [financial institution] with respect to a[n] [describe type of action: application, loan, etc.]; and

Fourth, that the accounts of the [bank] [financial institution] were insured by the Federal Deposit Insurance Corporation].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

There are several types of institutions listed in the statute for which this instruction should be modified, but the vast majority of § 1014 cases are based on statements to banks.

Proof of materiality is not required under this section. See United States v. Wells, 117 S. Ct. 921 (1997).

18 U.S.C. § 1029(a)(2)
(Access device fraud - Elements)

To sustain the charge of fraud in connection with the [use] [attempt to use] [a] [an] [credit card[s]] [access device[s]], the government must prove the following propositions:

First, that the defendant knowingly [used] [trafficked in] one or more unauthorized [credit cards] [other specified access devices] to obtain any [money] [good[s]] [or] service[s]] [or any other thing of value] with a total value of at least $1,000 during a one-year period;

Second, that the defendant did so with the intent to defraud; and

Third, that the defendant's conduct affected interstate [or foreign] commerce.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 1029(a)(2)
(Access device fraud - Definitions)

Interstate [or foreign] commerce involves business, trade, travel, transportation or communication between any place in a state and any place outside that state[, or any two places within a state but through any place outside that state]. A defendant's conduct affects commerce if the natural consequences of the defendant's actions were some effect on commerce, however minimal.

[An access device is a card, plate, code or combination of letters and/or numbers, including account numbers, or other means of gaining access to an account that can be used[, alone or in combination with some other device,] to obtain money, goods, services or anything else of value.]

A[n] [credit card] [access device] is unauthorized if it has been [lost] [stolen] [expired] [revoked] [cancelled] [obtained with intent to defraud].

A person acts with intent to defraud if they intend to deceive some person or entity in order to cause [the loss of [money] [goods] [services]] [a financial gain].

Committee Comment

The "access device" definition should only be used if the nature of the charged device is an issue at trial. In other cases courts ought to specify which access device type is involved; most cases will involve credit cards.

There are no cases construing the commerce requirement in § 1029. The language here is derived from the arson statute and the Hobbs Act instructions, which use the same phrase "affect commerce." The Committee encourages courts to craft particularized instructions tailored to specific effects on commerce in appropriate cases.

18 U.S.C. § 1029(a)(3)
(Possession of multiple fraudulent access devices - elements)

To sustain the charge of possession of multiple access devices with intent to defraud, the government must prove the following propositions:

First, that the defendant knowingly possessed fifteen or more access devices;

Second, that those devices were [counterfeit] [or] [unauthorized];

Third, that the defendant possessed those devices with the intent to defraud; and

Fourth, that the defendant's conduct affected interstate [or foreign] commerce.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 1029(a)(4)
(Possession of access device-making equipment - elements)

To sustain the charge of fraud involving access device-making equipment, the government must prove the following propositions:

First, that the defendant knowingly [produced] [or] [trafficked in] [or] [had] [control] [or] [custody] [of] [or] [possessed] access device-making equipment;

Second, the defendant possessed that equipment with the intent to defraud; and

Third, that the defendant's conduct affected interstate [or foreign] commerce.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 1029(a)(4)
(Access device-making equipment - definition)

Access device-making equipment consists of any piece of equipment, mechanism or impression that is designed for us in making [a counterfeit] [an] access device.

18 U.S.C. § 1029(a)(4)
(Access devices issued to others- elements)

To sustain the charge of fraud in connection with access devices issued to others, the government must prove the following propositions:

First, that the defendant knowingly caused or conducted transactions with one or more access devices that had been issued to someone other than [himself] [herself] to obtain any [money] [good(s)] [or] [service(s)] [or any other thing of value with a total value of at least $1,000 during a one year period;

Second, that the defendant did so with the intent to defraud; and

Third, that the defendant's conduct affected interstate [or foreign] commerce.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § § 1341 & 1343
(Mail / Wire / Carrier Fraud--Elements)

To sustain the charge of [mail] [wire][carrier] fraud, the government must prove the following propositions:

First, that the defendant knowingly [devised] [or] [participated in] the scheme [to defraud] [or] [to obtain money or property by means of false pretenses, representations or promises], as described in Count[s] ____ of the indictment;

Second, that the defendant did so knowingly and with the intent to defraud; and

Third, that for the purpose of carrying out the scheme or attempting to do so, the defendant [used [or caused the use of]] [the United States Mails] [a private or commercial interstate carrier]] [caused interstate wire communications to take place] in the manner charged in the particular count.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This instruction combines the mail and wire fraud instructions, which were previously offered separately. The substantive change involves the addition of private carrier language in § 1341 (effective September 13, 1994).

18 U.S.C. §§ 1341 & 1343
(Definition of Scheme to Defraud)

A scheme is a plan or course of action formed with the intent to accomplish some purpose.

In considering whether the government has proven a scheme to [defraud] [obtain money or property by means of false pretenses, representations or promises,] it is essential that one or more of the [false pretenses, representations, promises and] acts charged in the portion of the indictment describing the scheme be proved establishing the existence of the scheme beyond a reasonable doubt. However, the government is not required prove all of them.

[A scheme to defraud is a scheme that is intended to deceive or cheat another and [to obtain money or property or cause the [potential] loss of money or property to another] [or] [to deprive another of [description of honest services, including source text of rule or statute]].

Committee Comment

The case law says that, although "scheme to defraud" and "intent to defraud" substantially overlap, they are not the same; in fact, one case specifically rejects the previous "scheme to defraud" instruction because it treats the two as the same. United States v. Doherty, 969 F.2d 425, 429 (7th Cir. 1992). The scheme to defraud definition set forth here, and included in part in the following instruction on intent, is from United States v. Moede, 48 F.3d 238, 241 and n. 4 (7th Cir. 1995).

Unanimity as to facts should be explicitly required in cases where there is a danger that jurors may disagree on the facts of the case, e.g. where the facts are particularly complex, where multiple schemes are charged, where there is a variance between charge and proof.

18 U.S.C. §§ 1341 & 1343
(Definition of Intent to Defraud)

The phrase "intent to defraud" means that the acts charged were done knowingly with the intent to deceive or cheat the victim in order to cause [[a gain of money or property to the defendant] [or] [the [potential] loss of money or property to another] [or] [to deprive another of [description of honest services, including (insert definition taken from rule or statute)].

Committee Comment

This instruction includes the concept of deprivation of honest services as expressed in 18 U.S.C. § 1346. Courts are urged to draft specific instructions tailored to particular statutes or rules defining the honest services duty at issue.

18 U.S.C. § § 1341 & 1343
(Loss)

The [mail] [interstate carrier] [wire] fraud statute can be violated whether or not there is any [loss or damage to the victim of the crime] [or] [gain to the defendant].

18 U.S.C. §§ 1341 and 1343
(Use of Mails / Interstate Carrier / Interstate Communication Facility)

The government must prove that [the United States mails] [[a] private or commercial interstate carrier[s]] [interstate communication facilities] [was] [were] used to carry out the scheme, or [was] [were] incidental to an essential part of the scheme.

In order to [use [or cause the use of]] [the United States mails] [a private or commercial interstate carrier]] [cause interstate wire communications to take place], the [a] defendant need not actually intend that use to take place. You must find that the defendant knew this use would actually occur, or that the defendant knew that it would occur in the ordinary course of business, or that the defendant knew facts from which that use could reasonably have been foreseen. [However, the government does not have to prove that [the/a] defendant knew that [the wire communication was of an interstate nature][the carrier was an interstate carrier].]

[The defendant need not actually or personally use [the mail] [an interstate carrier] [interstate communication facilities].]

[Although an item [mailed] [sent by interstate carrier] [communicated interstate] need not itself contain a fraudulent representation or promise or a request for money, it must further or attempt to further the scheme.]

[Each separate use of [the mail] [an interstate carrier] [interstate communication facilities] in furtherance of the scheme to defraud constitutes a separate offense.]

Committee Comment

A defendant does not actually have to use the mail or wire or a carrier to violate § 1341; he only needs to cause mailing to be done as a part of the scheme. The two essential elements are a scheme to defraud and that mailing or wiring or use of a carrier occurred as a part of that scheme. Pereira v. United States, 347 U.S. 1, 8-9 (1954). The use of mail need not be intended but must be reasonably foreseeable and follow in the course of business of furthering the scheme. United States v. Ashman, 979 F.2d 469, 481-84 (7th Cir. 1992); United States v. Draiman, 784 F.2d 248, 251 (7th Cir.1986) United States v. Briscoe, 65 F.3d 576,583 (7th Cir. 1995) United States v. Hickok, 77 F.3d 992, 1004 (7th Cir.), cert. denied, 116 S.Ct. 1071 (1996). See also United States v. Kenofskey, 243 U.S. 440 (1917); United States v. Calvert, 523 F.2d 895 (8th Cir.1975), cert. denied, 424 U.S. 911 (1976); and Hart v. United States, 112 F.2d 128 (5th Cir.), *cert. denied*, 311 U.S. 684 (1940).

In United States v. Briscoe, 65 F.3d 576, 583 (7th Cir. 1995) it was held that wire fraud parallels mail fraud. Consequently, the government is not required to prove the scheme was successful, but only that use of a wire communication was reasonably foreseeable, and actual wiring occurred in furtherance of the scheme. See also United States v. Kenofskey, 243 U.S. 440 (1917); United States v. Clavert, 523 F.2d 895 (8th Cir.1975), cert. denied, 424 U.S. 911 (1976); and Hart v. United States, 112 F.2d 128 (5th Cir.), *cert. denied*, 311 U.S. 684 (1940).

The Committee has combined separate mail and wire instructions, and has added interstate carrier language. It has also added the "incidental to" line in response to Schmuck v. United States, 489 U.S. 705, 710-11 (1989). The Committee has also amended the knowledge requirement to conform with Pereira v. United States, 347 U.S. 1 (1954) and, in the case of interstate wire / interstate carrier communications, with United States v. Lindemann, 85 F.3d 1232 (7th Cir. 1996).

Finally, it has merged the last line, in brackets, for use in multiple count cases.

18 U.S.C. § 1343
(Interstate Communication)

(Nature of the communication) constitutes a transmission by means of wire communication in interstate commerce within the meaning of the wire fraud statute.

Committee Comment

This instruction can be adapted for other communication facilities and for foreign transmissions.

18 U.S.C. § 1344
(Financial institution fraud - elements)

To sustain the charge of [bank] [financial institution] fraud, the government must prove the following propositions:

First, that there was a scheme [to defraud a [bank] [financial institution]] [or] [to obtain moneys, funds, credits, assets, securities, or other property owned by, or in the custody or control of, a [bank] [financial institution] by means of false or fraudulent pretenses, representations or promises] as charged in the indictment;

Second, that the defendant [attempted to] execute[d] the scheme;

Third, that the defendant did so knowingly and with the intent to defraud; and

Fourth, that at the time of the charged offense the deposits of the [bank] [financial institution] were insured by the Federal Deposit Insurance Corporation.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

As with the false-statement-to-bank statute (§ 1014, see above), there are many specified types of institutions covered by the statute, and courts should draft particularized language for appropriate non-bank cases. To the extent that a case involves a dispute over whether an entity is a "financial institution," see 18 U.S.C. § 20, which defines the term.

18 U.S.C. § 1344
(Scheme - definition)

A scheme is a plan or course of action formed with the intent to accomplish some purpose.

[In considering whether the government has proven a scheme to obtain moneys, funds, credits, assets, securities, or other property from a [bank] [financial institution] by means of false pretenses, representations or promises, the government must prove at least one of the [false pretenses, representations, promises, or] acts charged in the portion of the indictment describing the scheme. However, the government is not required to prove all of them.]

[A scheme to defraud a [bank] [financial institution] means a plan or course of action intended to deceive or cheat that [bank] [financial institution] and [to obtain money or property or to cause the [potential] loss of money or property by the [bank] [financial institution] [to deprive the [bank] [financial institution] of [description of honest services, including source text of rule or statute]. [A scheme to defraud need not involve any false statement or misrepresentation of fact.]]

Committee Comment

This follows the instructions offered for the mail/wire fraud statutes, 18 U.S.C. § § 1341 and 1343.

Unanimity as to facts should be explicitly required in cases where there is a danger that jurors may disagree on the facts of the case, e.g. where the facts are particularly complex, where multiple schemes are charged, where there is a variance between charge and proof.

The first bracketed paragraph should be given in a case in which a scheme to obtain money from a bank by means of false pretenses, representations or promises is charged. The second bracketed paragraph should be given in a case in which a scheme to defraud a bank is charged. Where both methods of violating the statute are charged, both paragraphs should be given.

18 U.S.C. § 1426
(Reproduction of naturalization or citizenship papers - general note)

Committee Comment

This section covers a wide variety of offenses involving the reproduction and sale of naturalization or citizenship papers. Accordingly, pattern instructions are not suitable for this section.

18 U.S.C. § 1503
(Influencing or Injuring Officer--Elements)

To sustain the charge of obstruction of justice, the government must prove the following propositions:

First, that (name) was an officer in or of any court of the United States;

Second, that the defendant endeavored to [influence, intimidate, impede] (name) by (here insert act as described in the indictment) on account of his/her being an officer in or of any court of the United States;

Third, that the defendant acted knowingly; and

Fourth, that the defendant's acts were done corruptly, that is, with the purpose of wrongfully impeding the due administration of justice.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Several cases have held that the term "corruptly" means that a defendant acted with an improper motive or with an evil or wicked purpose. See United States v. Partin, 552 F.2d 621, 641 (5th Cir.), cert. denied, 434 U.S. 903 (1977); United States v. Ryan, 4555 F.2d 728, 734 (9th Cir. 1971); United States v. Haldeman, 559 F.2d 31, 115 n. 229 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977). The Seventh Circuit has not yet addressed this question.

18 U.S.C. § 1503
(Influencing or Injuring Juror--Elements)

To sustain the charge of obstruction of justice, the government must prove the following propositions:

First, that (name) was a juror or prospective juror;

Second, that the defendant endeavored to [influence, intimidate, impede] (name) by (here insert act as described in the indictment) on account of his/her being a juror or prospective juror;

Third, that the defendant acted knowingly; and

Fourth, that the defendant's acts were done corruptly, that is, with the purpose of wrongfully impeding the due administration of justice.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all of the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This statute also applies to venire members who have not been sworn or selected as jurors and are prospective jurors. United States v. Russell, 255 U.S. 138 (1921); United States v. Jackson, 607 F.2d 1219 (8th Cir.1979); cert. denied, 444 U.S. 1080 (1980).

Several cases have held that the term "corruptly" means that a defendant acted with an improper motive or with an evil or wicked purpose. See United States v. Partin, 552 F.2d 621, 641 (5th Cir.), cert. denied, 434 U.S. 903 (1977); United States v. Ryan, 4555 F.2d 728, 734 (9th Cir. 1971); United States v. Haldeman, 559 F.2d 31, 115 n. 229 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977). The Seventh Circuit has not yet addressed this question.

18 U.S.C. § 1503
(Influencing or Injuring Witness--Elements)

To sustain the charge of obstruction of justice, the government must prove the following propositions:

First, that (name) was a witness;

Second, that the defendant endeavored to [influence, intimidate, impede] (name) by (here insert act as described in the indictment) on account of his being a witness;

Third, that the defendant acted knowingly; and

Fourth, that the defendant's acts were done corruptly, that is, with the purpose of wrongfully impeding the due administration of justice.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all of the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Several cases have held that the term "corruptly" means that a defendant acted with an improper motive or with an evil or wicked purpose. See United States v. Partin, 552 F.2d 621, 641 (5th Cir.), cert. denied, 434 U.S. 903 (1977); United States v. Ryan, 4555 F.2d 728, 734 (9th Cir. 1971); United States v. Haldeman, 559 F.2d 31, 115 n. 229 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977). The Seventh Circuit has not yet addressed this question.

18 U.S.C. § 1503
(Obstruction of Justice Generally-Elements)

To sustain the charge of obstruction of justice, the government must prove the following propositions:

First, that the defendant [influenced, obstructed, impeded] or endeavored to [influence, obstruct, impede] the due administration of justice;

Second, that the defendant acted knowingly; and

Third, that the defendant's acts were done [corruptly], that is, [by threats, by force, by threatening letter or communication] with the purpose of wrongfully impeding the due administration of justice.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all of the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This instruction is for use when the omnibus, or catch-all, provision of Section 1503 is used. This provision has been widely applied to cover virtually any circumstance in which there is an effort to obstruct or interfere with the administration of justice. See United States v. Howard, 569 F.2d 1331 (5th Cir.), cert. denied sub nom., 439 U.S. 834 (1978); United States v. Walasek, 527 F.2d 676 (3d Cir.1975); United States v. Solow, 138 F. Supp. 812 (S.D.N.Y.1956).

Several cases have held that the term “corruptly” means that a defendant acted with an improper motive or with an evil or wicked purpose. See United States v. Partin, 552 F.2d 621, 641 (5th Cir.), cert. denied, 434 U.S. 903 (1977); United States v. Ryan, 4555 F.2d 728, 734 (9th Cir. 1971); United States v. Haldeman, 559 F.2d 31, 115 n. 229 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977). The Seventh Circuit has not yet addressed this question.

18 U.S.C. § 1503
(Definition of Witness)

A witness is a person who is expected by the defendant to be called to testify in a pending judicial proceeding or grand jury investigation. It is not necessary that the witness actually have been subpoenaed to testify in a pending judicial proceeding or grand jury investigation.

Committee Comment

The matter must be a grand jury investigation or a judicial proceeding pending before a judge or magistrate. United States v. Brown, 688 F.2d 596 (9th Cir. 1982); United States v. Shoup, 608 F.2d 950 (3d Cir. 1979).

The witness in question need not know of the existence of the proceedings or of the likelihood that he may testify . The focus is on the defendant's mental state, i.e., did the defendant expect the witness to be called to testify? United States v. Berardi, 675 F.2d 894 (7th Cir.1982).

This instruction should be given only if the matters referred to in the instruction are the subject of a factual dispute.

18 U.S.C. § 1503
(Influencing-Definition of Endeavor)

The word endeavor describes any effort or act to influence [a witness, a juror, an officer in or of any court of the United States]. The endeavor need not be successful, but it must have at least a reasonable tendency to impede the [witness, juror, officer] in the discharge of his duties.

Committee Comment

See United States v. Nicosia, 638 F.2d 970 (7th Cir.1980), cert. denied, 452 U.S. 961 (1981); United States v. Harris, 558 F.2d 366 (7th Cir.1977); United States v. Jackson, 513 F.2d 456 (D.C.Cir.1975); United States v. DeStephano, 476 F.2d 324 (7th Cir.1973).

Use when applicable. United States v. Nicosia, supra.

It is no defense that the result intended by the defendant was impossible.

18 U.S.C. § 1503
(Obstruction of Justice Generally--Definition of Endeavor)

The word endeavor describes any effort or act to influence, obstruct, or impede the due administration of justice. The endeavor need not be successful, but it must have at least a reasonable tendency to influence, obstruct, or impede the due administration of justice.

Committee Comment

See United States v. Nicosia, 638 F.2d 970 (7th Cir.1980), cert. denied, 452 U.S. 961 (1981); United States v. Harris, 558 F.2d 366 (7th Cir.1977); United States v. Jackson, 513 F.2d 456 (D.C.Cir.1975); United States v. DeStephano, 476 F.2d 324 (7th Cir.1973).

It is no defense that the result intended by the defendant was impossible.

18 U.S.C. § 1623
(False declarations before grand jury or court -Elements)

To sustain the charge of false declaration before a grand jury or in a court, the government must prove the following propositions:

First, that the defendant, while under oath, testified falsely before a [United States grand jury, Court of the United States] as charged in the indictment;

Second, that the defendant's testimony related to some material matter; and

Third, that the defendant knew the testimony was false.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Willfulness is not an element required to establish a violation of 18 U.S.C. § 1623. United States v. Watson, 623 F.2d 1198, 1207 (7th Cir. 1980). Watson is still good law on the absence of willfulness as an element after United States v. Gaudin, 115 S.Ct. 2310, 2314 (1995).

Also, if recantation is a defense, see instruction on § 1623 Recantation, and add a fourth element to this instruction.

18 U.S.C. § 1623
(Materiality - definition)

A statement is material if it had the effect of impeding, interfering with or influencing the [court] [jury] [grand jury] in the matter it was considering, or had the potential or capability of doing so. [It is not necessary that the statement actually have that effect, so long as it had the potential or capability of doing so.]

Comment

United States v. Watson, 623 F.2d 1198, 1207 (7th Cir. 1980) defined materiality as "effect or tendency of statement to impede, influence, or dissuade a grand jury from pursuing its investigation." Watson held that materiality is a question of law. However, the Supreme Court has ruled that materiality is a mixed question and should be given to the jury. United States v. Gaudin, 115 S.Ct. 2310, 2314 (1995). See also United States v. DiDomenico, 78 F.3d 294,302 (7th Cir.1996); Waldeimer v. United States, 911 F.Supp. 1105,1113 (S.D.Ill. 1996); Kraut v. Wisconsin Laborers Health Fund, 992 F.2d 113 (7th Cir.1993). United States v. Martellano, 675 F.2d 940, 942 (7th Cir.1982); and United States v. Picketts, 655 F.2d 837, 840 (7th Cir.), cert. denied, 454 U.S. 1056 (1981).

18 U.S.C. § 1623
(Records or Documents)

Making or using a record or document knowing it to be false or to contain a false declaration constitutes making or using a false declaration.

18 U.S.C. § 1623
(Sequence of Questions)

In determining whether an answer to a question is false, you should consider the sequence of questions in which the question and answer occurred as an aid to understanding the defendant's intent when making the declaration.

Committee Comment

See United States v. Bonacorsa, 528 F.2d 1218 (2d Cir.), cert. denied, 426 U.S. 935 (1976).

18 U.S.C. § 1623
(Inconsistent Statements)

If you find that the defendant under oath has knowingly made two or more declarations which are so inconsistent that one of them is necessarily false, you need not find which of the two declarations is false. If you find that the defendant believed each declaration to be true when made, then you must find the defendant not guilty.

18 U.S.C. § 1623
(Recantation)

The defendant recants his false declarations when, in the same continuous proceeding, he admits to the [grand jury, court] that his earlier declarations were false. However, in order for the defendant to recant his testimony, he must admit the falsities: (1) before the proceeding has been substantially affected by the testimony, and (2) before it has become manifest to the defendant that the false declarations have been or will be exposed to the [grand jury, court].

Committee Comment

The recantation bar of Section 1623(d) is available under limited circumstances in false declaration prosecutions. The subsection lists two seemingly alternative conditions precedent which must be fulfilled before the admission of falsity may bar prosecution with the use of the disjunctive "or". In United States v. Moore, 613 F.2d 1029 (D.C. Cir. 1979), cert. denied, 446 U.S. 954 (1980), however, the court held that the two conditions must be read with the conjunctive "and" -- otherwise the intent of Congress would be defeated. The Fifth Circuit has adopted the Moore court's reasoning and conclusion. United States v. Scrimgeour, 636 F.2d 1019 (5th Cir.), cert. denied, 454 U.S. 878 (1981).

The Second Circuit recently acknowledged the issue of the use of "or" between the two conditions but found it unnecessary in the case before it to resolve the matter. United States v. D'Auria, 672 F. 2d 1085 (2d Cir. 1982). The Seventh Circuit and remaining circuits have not directly addressed the issue.

United States v. Denison, 663 F.2d 611 (5th Cir 1981), construed the "had become manifest" clause as referring to whether the witness knew at the rime of recantation that the grand jury or trial court knew or would come to learn of the declaration's falsity. United States v. Moore, supra, implicitly accepts the Denison view. In the Seventh Circuit, both Judge Swygert and Judge Pell, in separate statements following a per curiam en banc opinion in United States v. Clavey, 578 F.2d 1219 (7th Cir.), cert. denied, 439 U.S. 954 (1978), adopted the view that "manifest" refers to the witness.

The only circuit opinion that addresses the phrase "substantially affected" does so by reviewing the standards for materiality in perjury prosecutions. That court concluded that false testimony which had not had a substantial effect for purposes of Section 1623(d) may still be material in the Section 1623(d) sense. United States v. Moore, 613 F.2d at 1038. United States v. Krogh, 366 F.Supp. 1255 (D.D.C.1973), concluded as a matter of law that the grand jury had been substantially affected when it "acted" on issues that encompassed the given matter of the testimony which had been falsely given. United States v. Tucker, 495 F.Supp. 607 (E.D.N.Y. 1980), citing Krogh's approach, found that a grand jury had been substantially affected when it was unable to indict a suspect due to the defendant's false declaration.

A valid recantation is a bar to prosecution, accordingly, the defense must be raised before trial, and failure to raise the defense constitutes a waiver. United States v. Denison, supra; United States v. Swainson, 548 F.2d 657 (6th Cir.), cert. denied, 431 U.S. 937 (1977); accord, United

States v. Kahn, 472 F.2d 272 (2d Cir.), cert. denied, 411 U.S. 982 (1973). The government must prove by a preponderance of the evidence on the pretrial motion to dismiss that the defendant did not recant within the meaning of Section 1623(d). United States v. Tucker, supra.

18 U.S.C. § 1701
(Obstruction of mails)

Committee Comment

Because there is no present statutory or constitutional right to a jury trial under this section, the Committee has not drafted a jury instruction to cover this section.

18 U.S.C. § 1708
(Theft of Mail from Authorized Depository--Elements)

To sustain the charge of theft of mail, the government must prove the following propositions:

First, that the defendant [stole, obtained by fraud or deception, attempted to obtain by fraud or deception] (here name specific mail matter as charged in the indictment); and

Second, that the defendant [stole, obtained by fraud or deception, attempted to obtain by fraud or deception] (here name specific mail matter as charged in the indictment) from [the mail, a post office, a letter box, a mail receptacle, a mail route, an authorized depository for mail, a mail carrier].

If you find from your consideration of all the evidence that both of these propositions have been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that either of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Three situations commonly arise under § 1708 involving improperly addressed or misdelivered mail.

In the first situation, the sender mistakenly addresses a letter to the defendant instead of the intended recipient, and the post office subsequently delivers the letter to the defendant addressee. At one time, it was held that when the defendant removed the letter from the mail, § 1708 was not violated because there was no intent to steal. United States v. Lampson, 627 F.2d 62,66 (7th Cir.1980); Allen v. United States, 387 F.2d 641, 643 (5th Cir.1968); Goodman v. United States, 341 F.2d 272,273 (5th Cir.1965) all The purpose of the statute is to protect against theft generally. Allen v. United States, 387 F.2d at 642. However, United States v. Palmer, 864 F.2d 524,526 (7th Cir.1988), cert. denied, 490 U.S. 1110 (1989), determined that § 1708 applies to all misdelivered mail whether it be miscarried or misaddressed. The court in Palmer, did not see why misaddressed mail should be treated differently than misdelivered mail. In both cases, the job of the postal system is not complete until the letter is delivered to the intended recipient or back to the sender. The 7th Circuit is in accord with the First and Tenth Circuits on this point.

In the second situation, mail is correctly addressed, but is constructively delivered to a third person. In United States v. Logwood, 360 F.2d 905 (7th Cir.1966), for example, mail for all rooming house tenants always delivered to the landlady who delivered it to her tenants. When the landlady's son stole a letter from his mother's windowsill, the court held that the letter was not stolen from an authorized mail receptacle and that the theft was therefore outside the purview of § 1708. Accord United States v. Patterson, 664 F.2d 1346 (9th Cir.1982) (mail delivered to front desk of YMCA and held there in boxes for guests not in authorized mail receptacle under § 1708.) Palmer does not apply here because the mail was out of the control of the postal service and they were effectively powerless to prevent the theft.

In the third situation, mail is delivered to someone other than the addressee. Under United States v. Lampson, supra, a defendant who removes mail from his mail box does not intend to steal at the time the mail is removed from the receptacle. This was not viewed as a violation of § 1708. While Lampson is not cited in Palmer, supra, Palmer clearly states that § 1708 covers all

misdelivered mail, whether it be misaddressed or given to the wrong person. Therefore, it is no longer necessary to draw a distinction between misaddressed and misdelivered mail.

18 U.S.C. § 1708
(Definition of Stolen)

Mail is "stolen" when it has been taken willfully from the mails with the intent to deprive the owner of the rights and benefits of ownership. That intent must exist at the time the item[s] is [are] taken from the mails.

Committee Comment

See United States v. Turley, 352 U.S. 407, 417 (1957); United States v. Lampson, 627 F.2d 62, 66 (7th Cir.1980); United States v. Ashford, 403 F.Supp. 461, 464-65 (N.D.Ia.1975), aff'd, 530 F.2d 792 (8th Cir.1976).

18 U.S.C. § 1708
(Mail Theft; Next to a Depository--Elements)

To sustain the charge of theft of mail next to a depository of mail, the government must prove the following propositions:

First, the defendant [stole; obtained by fraud or deception] (here name specific mail matter); and

Second, at the time defendant [stole; obtained by fraud or deception] (here name specific mail matter), it had been left for collection on or next to an authorized depository for mail.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that either of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 1708
(Buying, Receiving, Concealing, or Unlawfully Possessing Stolen Mail--Elements)

To sustain the charge of [buying, receiving, concealing, possessing] stolen mail, the government must prove the following propositions:

First, that the defendant knowingly [bought, received, concealed, possessed] (here name specific mail matter as charged in the indictment);

Second, that the (here name specific mail matter as charged in the indictment) previously had been [stolen, taken, embezzled] from [the mail, a post office, a letter box, a mail receptacle, a mail route, an authorized depository for mail, a mail carrier); and

Third, that the defendant knew that (here name specific mail matter as charged in the indictment) previously had been [stolen, taken, embezzled].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The wording of the second paragraph is intended to make clear to the jury, without burdening it with an additional instruction, that the defendant need not have stolen the mail himself.

18 U.S.C. § 1708
(Removing contents of / secreting / embezzling / destroying mail)

Committee Comment

Because the second and third sections of the first paragraph of 18 U.S.C. § 1708, which proscribe removing the contents of a piece of mail or secreting, embezzling or destroying mail or its contents, are unclear, little-used, and apparently repetitive of other sections of Title 18, the Committee has not drafted pattern instructions for them.

18 U.S.C. § 1709
(Theft of mail by officer of employee - elements)

To sustain the charge of [embezzlement, theft] of mail by a Postal Service employee, the government must prove the following propositions:

First, that the defendant was a Postal Service [employee, officer];

Second, that [the (here name specific mail matter involved), any article or thing contained within the (here name specific mail matter involved)] was [entrusted to the defendant, came into the defendant's possession] for the purpose of being [conveyed by mail, carried or delivered by any person employed in any department of the Postal Service, forwarded through or delivered from any post office or station thereof established by authority of the Postmaster General or of the Postal Service]; and

Third, that the defendant embezzled [the (here name specific mail matter involved), any article or thing contained within the (here name specific mail matter involved)].

[Third, that defendant [stole, wrongfully removed with intent to convert to his own use] any article or thing contained within the (here name specific mail matter involved).]

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Section 1709 charges two crimes: embezzlement and theft. A defendant can be charged with embezzlement of both mail matter and any article or thing contained therein, but can be charged with theft only of any article or thing contained within mail matter and not theft of the matter itself. United States v. Trevino, 491 F.2d 74, 75 (5th Cir.1974). When the defendant is charged with embezzlement, an instruction defining embezzlement must be given.

Courts define the word "removed" in the alternate third element generally to encompass felonious intent to convert the property of another to one's own use. United States v. Coleman, 449 F.2d 772, 773 (5th Cir.1971); United States v. Rush, 551 F.Supp. 148, 151 (S.D.Ia.1982). Contra United States v. Greene, 349 F.Supp. 1112, 1114 (D.Md.1971), aff'd, 468 F.2d 920 (4th Cir.1972).

Use the initial third element when the defendant is charged with embezzlement. Use the bracketed alternate third element when the defendant is charged with theft. Use separate instructions when the defendant is charged with both embezzlement and theft.

18 U.S.C. § 1951
(Extortion - non-robbery - elements)

To sustain the charge of extortion, as charged in Count ___, the government must prove the following propositions:

First, that the defendant knowingly obtained money or property from [name of victim];

Second, that the defendant did so by means of extortion [by] [threatened] [force] [violence] [fear] [under color of official right], as that term is defined in these instructions;

Third, that [name of victim] consented to part with the money or property because of the extortion;

Fourth, that the defendant believed that [name of victim] parted with the money or property because of the extortion; and

Fifth, that the conduct of the defendant affected interstate commerce.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 1951
Attempted Extortion - Elements

To sustain the charge of attempted extortion, as charged in Count ___, the government must prove the following propositions:

First, that the defendant knowingly [obtained or] attempted to obtain money or property from _____;

Second, that the defendant did so by means of extortion [by] [threatened] [force] [violence] [fear] [under color of official right], as that term is defined in these instructions;

Third, that the defendant believed that _____ [would have] parted with the money or property because of the extortion; and

Fourth, that the conduct of the defendant affected, would have affected or had the potential to affect interstate commerce.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 1951
(Extortion - robbery - elements)

To sustain the charge of extortion by robbery, as charged in Count ___, the government must prove the following propositions:

First, that the defendant knowingly obtained money or property from or in the presence of [name of victim];

Second, that the defendant did so by means of robbery, as that term is defined in these instructions;

Third, that the defendant believed that [name of victim] parted with the money or property because of the robbery; and

Fourth, that the robbery affected interstate commerce.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 1951
(Definition of Robbery)

Robbery means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence [or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining].

Committee Comment

Use material in brackets when appropriate.

18 U.S.C. § 1951
(Color of official right - definition)

[Attempted] Extortion under color of official right occurs when a public official receives [or attempts to obtain] money or property to which he/she is not entitled, knowing [believing] that the money or property is being [would be] given to him/her in return for the taking, withholding or other influencing of official action. [Although the official must receive [or attempt to obtain] the money or property, the government does not have to prove that the public official first suggested the giving of money or property, or that the official asked for or solicited it.] [While the official must receive [or attempt to obtain] the money or property in return for the official action, the government does not have to prove [that the official actually took or intended to take that action] [or] [that the official could have actually taken the action in return for which payment was made] [or] [that the official would not have taken the same action even without payment].]

[Acceptance by an elected official of a campaign contribution, by itself, does not constitute extortion under color of official right, even if the person making the contribution has business pending before the official. However, if a public official receives [or attempts to obtain] money or property, knowing [believing] that it is [would be] given in exchange for a specific requested exercise of his/her official power, he/she has committed extortion under color of official right, even if the money or property is [to be] given to the official in the form of a campaign contribution.]

Committee Comment

See Evans v. United States, 584 U.S. 255 (1992); McCormick v. United States, 500 U.S. 257 (1991); United States v. Allen, 10 F.3d 405 (7th Cir. 1993) (suggesting that McCormick applies to state bribery violations charged under RICO).

18 U.S.C. § 1951
(Extortion - definition)

[Attempted] Extortion by [threatened] [force] [or] [violence] [or] [fear] means the wrongful use of [threatened] [force] [or] [violence] [or] [fear] to obtain [or attempt to obtain] money or property. "Wrongful" means that the defendant had no lawful right to obtain [money] [property] in that way. ["Fear" includes fear of economic loss. This includes fear of a direct loss of money, fear of harm to future business operations or a fear of some loss of ability to compete in the marketplace in the future if the victim did not pay the defendant.] The government must prove that the victim's fear was [would have been] reasonable under the circumstances. [However, the government need not prove that the defendant actually intended to cause the harm threatened.]

Committee Comment

See United States v. Capo, 791 F.2d 1054, 1062 (2d Cir. 1986); United States v. Beeler, 587 F.2d 340, 344 (6th Cir. 1978); United States v. Brecht, 540 F.2d 45, 51-52 (2d Cir. 1976); United States v. Crowley, 504 F.2d 992, 997 (7th Cir. 1974); United States v. DeMet, 486 F.2d 816, 819-20 (7th Cir. 1973); United States v. Biondo, 483 F.2d 635, 640 (8th Cir. 1973); United States v. Varlack, 225 F.2d 665, 668-69 (2d Cir. 1955).

18 U.S.C. § 1951
(Property - definition)

The term property includes (here name that which was extorted as charged in the indictment).

Committee Comment

In cases where there is no dispute that the item at issue is property (such as in cases in which the "property" is money), the Committee suggests that the appropriate term be incorporated into the Elements instruction rather than using a separate definitional instruction.

18 U.S.C. § 1951
(Interstate commerce - definition)

With respect to Count _____, the government must prove that the defendant's actions affected [had the potential to affect] interstate commerce in any way or degree. This means that the natural consequences of the defendant's actions were [would have been] some effect on interstate commerce, however minimal. [This would include reducing the assets of a [person who] [or] [business that] customarily purchased goods from outside the state of _____ or actually engaged in business outside the state of _____, and if those assets would have been available to the [person] [or] [business] for the purchase of such goods or the conducting of such business if not for defendant's conduct.] It is not necessary for you to find that the defendant knew or intended that his actions would affect interstate commerce[, or that there have been an actual effect on interstate commerce].

[Even though money was provided by a law enforcement agency as part of an investigation, a potential effect on interstate commerce can be established by proof that the money, if it had come from _____, would have affected interstate commerce as I have described above.]

Committee Comment

Much of the language in brackets is designed for undercover cases charged as attempted extortion.

Courts should feel free to customize the bracketed sentence in the first paragraph regarding the "asset depletion" theory to fit the allegations in particular cases.

18 U.S.C. § 1952
(Interstate and foreign travel or transportation in aid of racketeering enterprises - elements)

To sustain the charge of interstate or foreign [travel; transportation] in aid of racketeering enterprises, the government must prove the following propositions:

First, the defendant traveled or caused another to travel in interstate or foreign commerce, or used or caused to be used a facility in interstate or foreign commerce, including the mail;

Second, the defendant did so with the intent to [distribute the proceeds of an unlawful activity; commit a crime of violence to further unlawful activity; promote, manage, establish, carry on an unlawful activity; facilitate the promotion, management, establishment or carrying on of an unlawful activity]; and,

Third, thereafter the defendant did [distribute or attempt to distribute the proceeds of an unlawful activity; commit or attempt to commit a crime of violence to further unlawful activity; promote, manage, establish, carry on an unlawful activity; attempt to promote, manage, establish, carry on an unlawful activity; facilitate the promotion, management, establishment, or carrying on of an unlawful activity; attempt to facilitate the promotion, management, or carrying on of an unlawful activity].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 1952
(Interstate Commerce - definition)

The term "interstate commerce" means travel between one state and another state or use of an interstate facility, including the mail.

The [interstate travel; use of an interstate facility] must relate significantly to the illegal activity charged in the indictment; that is, the relationship must be more than minimal or incidental. The [interstate travel; use of an interstate facility], however, need not be essential to the success of such illegal activity.

The defendant need not have contemplated or knowingly caused the [interstate travel; use of an interstate facility].

Committee Comment

To support a conviction under § 1952, interstate travel need not be indispensable to illegal activity, it is necessary only that such use facilitates illegal activity. United States v. McNeal, 77 F.3d 938, 944 (7th Cir. 1996). The defendants need not cross state lines personally to be liable under § 1952. United States v. Shields, 793 F.Supp. 768, 774-75 (N.D.Ill. 1991) (defendants guilty where FBI agents had to travel and engage in interstate commerce to attempt bribe of defendant judge), aff'd, 999 F.2d 1090 (7th Cir. 1993). For additional cases discussing § 1952, see United States v. Antobella, 442 F.2d 310,315 (7th Cir. 1971) see United States v. Raineri, 670 F.2d 702, 717 (7th Cir. 1982); and United States v. McCormick, 442 F.2d 316, 318 (7th Cir. 1971). For cases discussing § 2314, see United States v. Bell, 577 F.2d 1313, 1316, 1319-20 (5th Cir. 1978); United States v. Kelly, 569 F.2d 928, 934-35 (5th Cir.), cert. denied, 439 U.S. 829 (1978).

The requirements of a significant relationship between the interstate commerce and the illegal activity apparently may not apply to statutes other than the Travel Act.

18 U.S.C. § 1952
(Definition of Unlawful Activity--Business Enterprise)

"Unlawful activity" means any business enterprise involving [gambling; liquor on which the federal excise tax has not been paid; narcotics or controlled substance; prostitution], in violation of the laws of the state in which they are committed or of the United States.

OR

"Unlawful activity" means [extortion; bribery; arson], in violation of the laws of the state in which it is committed or of the United States.

Committee Comment

The first paragraph refers to a business enterprise involving the offenses listed, while the second paragraph refers to offenses that are not referred to in the statute as part of a business enterprise.

18 U.S.C. § 1952
(Definition of Unlawful Business Activity--Controlled Substances)

I instruct you that (specify) is a controlled substance.

Committee Comment

The controlled substances within the purview of 18 U.S.C. § 1952 are those drugs, other substances or immediate precursors included in Schedule I, II, III, IV, or V, of 21 U.S.C. § 812(6). See 18 U.S.C. § 1952(6)(1) (1986).

18 U.S.C. § 1956 (a)(1)(A)(i)
(Money Laundering -- Promoting Unlawful Activity)

To sustain the charge of money laundering as charged in Count ___ of the indictment, the government must prove the following propositions:

First, the defendant knowingly conducted or attempted to conduct a financial transaction;

Second, the property involved in the financial transaction in fact involved the proceeds of [name of specified unlawful activity]; and

Third, the defendant knew that the property involved in the financial transaction represented the proceeds of some form of unlawful activity;

Fourth, the defendant engaged in the financial transaction with the intent to promote the carrying on of [name of specified unlawful activity].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt then your should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 1956 (a)(1)(A)(ii)
(Money Laundering -- Tax Violations)

To sustain the charge of money laundering as charged in Count ___ of the indictment, the government must prove the following propositions:

First, the defendant knowingly conducted or attempted to conduct a financial transaction;

Second, the property involved in the financial transaction in fact involved the proceeds of [name of specified unlawful activity]; and

Third, the defendant knew that the property involved in the financial transaction represented the proceeds of some form of unlawful activity;

Fourth, the defendant engaged in the financial transaction with the intent to engage in [tax evasion; willfully making or subscribing false statements on a tax, return, document or statement made under penalty of perjury].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt then your should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Modify as necessary if the fourth element constitutes a violation of 26 U.S.C. § 7206(2), 7206(3), 7206(4), or 7206(5).

18 U.S.C. § 1956 (a)(1)(B)(i)
(Money Laundering -- Concealing or Disguising)

To sustain the charge of money laundering as charged in Count ___ of the indictment, the government must prove the following propositions:

First, the defendant knowingly conducted or attempted to conduct a financial transaction;

Second, the property involved in the financial transaction in fact involved the proceeds of [name of specified unlawful activity]; and

Third, the defendant knew that the property involved in the financial transaction represented the proceeds of some form of unlawful activity;

Fourth, the defendant knew that the transaction was designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of [name of specified unlawful activity].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt then your should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 1956 (a)(1)(B)(ii)
(Money Laundering -- Avoiding Reporting)

To sustain the charge of money laundering as charged in Count ___ of the indictment, the government must prove the following propositions:

First, the defendant knowingly conducted or attempted to conduct a financial transaction;

Second, the property involved in the financial transaction in fact involved the proceeds of [name of specified unlawful activity]; and

Third, the defendant knew that the property involved in the financial transaction represented the proceeds of some form of unlawful activity;

Fourth, the defendant knew that the transaction was designed in whole or in part to avoid [a transaction reporting requirement under state or federal law.] [the filing of a Currency Transaction Report Form 4789.]

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt then your should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This statute is most commonly applied in cases involving Currency Transaction Reports; a specific language is provided for these cases.

18 U.S.C. § 1956
(Definition of "financial transaction")

[The term "financial transaction" means a purchase, sale, transfer, delivery, or other disposition involving one or more monetary instruments, which in any way or degree affects interstate [or foreign] commerce.]

[The term "financial transaction" means a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or use of a safe deposit box involving the use of a financial institution which is engaged in or the activities of which affect interstate [or foreign] commerce.]

[The term "monetary instruments" includes coin or currency of the United States, personal checks, bank checks, and money orders.]

[The term "financial institution" includes, for example, commercial banks, trust companies, businesses engaged in vehicle sales including automobile sales, and businesses and persons engaged in real estate closings and settlements.]

"Interstate commerce" means trade, transactions, transportation or communication between any point in a state and any place outside that state, or between two points within a state through a place outside the state. "Foreign commerce" means trade, transactions, transportation, or communication between a point in one country and a place outside that country, or between two points within a country through a place outside that country.

When [a financial institution][a business][an individual] in [name the state] is engaged in commerce outside of that state, or when [a financial institution][a business][an individual] in [name of state] purchases goods or services which come from outside that state, then the activities of that [financial institution][business][individual] affect interstate commerce.

[The government must prove that the foreseeable consequences of the defendant's acts would be to affect interstate or foreign commerce. It is not necessary for you to find that the defendant knew or intended that the defendant's actions would affect interstate or foreign commerce.]

Committee Comment

With respect to most charges, the two definitions of "financial transaction" are alternatives.

This instruction includes only the most common types of transactions prosecuted under this statute. Courts may expand upon the instruction as required by particular cases.

See 31 U.S.C. § 5312(a) (for additional qualified institutions).

18 U.S.C. § 1956
(Knowledge)

The government must prove that the defendant knew that the property represented the proceeds of some form of activity that constitutes a felony under State or Federal law.
The government is not required to prove that the defendant knew that the property involved in the transaction represented the proceeds of [fill in specified unlawful activity].

18 U.S.C. § 1957
(Unlawful monetary transactions - Elements)

To sustain the charge of money laundering as charged in count ___ of the indictment, the government must prove the following propositions:

First, the defendant engaged or attempted to engage in a monetary transaction;

Second, that defendant knew the transaction involved criminally derived property;

Third, the property had a value greater than $10,000;

Fourth, the property was derived from [name of specified unlawful activity] and

Fifth, the transaction occurred in the [United States]

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The statute also allows for prosecution where the offense occurs within the special maritime and territorial jurisdiction of the United States, and where the offense occurs outside the United States but by qualifying persons as defined in reference 31 U.S.C. § 3077.

Section 1957(c) clearly states that the government need not prove that the defendant knew the offense from which the criminally derived property was derived was specified unlawful activity.

18 U.S.C. § 1957
(Definition of "criminally derived property")

The term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense.

18 U.S.C. § 1957
(Definition of "monetary transaction" and "interstate commerce")

The term "monetary transaction" means the deposit, withdrawal, transfer or exchange, in or affecting interstate commerce, of funds or a monetary instrument, by, through, or to a financial institution.

"Interstate commerce" means trade, transactions, transportation or communication between any point in a state and any place outside that state or between two points within a state through a place outside the state.

The term "financial institution" includes [commercial banks, trust companies, businesses engaged in vehicle sales including automobile sales, and businesses and persons engaged in real estate closings or settlements.]

Committee Comment

Financial institutions are defined in 31 U.S.C. § 5312 (a)(2), and specific cases may require giving the statutory language to the jury.

18 U.S.C. § 1957
(Knowledge)

The government must prove that the defendant knew that the property represented the proceeds of some form of activity that constitutes a felony under State or Federal law.
The government is not required to prove that the defendant knew that the property involved in the transaction represented the proceeds of [fill in specified unlawful activity].

18 U.S.C. § 1962(c)
(Substantive Racketeering - Elements)

To prove the [a] defendant guilty of racketeering, as charged in Count ___, the government must prove the following propositions:

First, that [insert name] was an enterprise;

Second, that the defendant was associated with [or employed by] the enterprise;

Third, that the defendant knowingly conducted or participated in the conduct of the affairs of [insert name] through a pattern of racketeering activity as described in Count ___; and

Fourth, that the activities of [insert name] affected interstate commerce.

[Fifth, that the commission of at least one of the racketeering acts described in Count ___ occurred on or after {five years prior to the return of the indictment}.]

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt as to the [a] defendant, you should find the [that] defendant guilty of Count ___.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt as to the [a] defendant, then you should find the [that] defendant not guilty of Count ___.

18 U.S.C. § 1962(c)
(Pattern Requirement - Substantive Racketeering)

In order to find a "pattern of racketeering activity" for purposes of Count ___, you must find beyond a reasonable doubt that the defendant committed [or caused another person to commit] at least two racketeering acts described in Count ___, and that those acts were in some way related to each other and that there was continuity between them[, and that they were separate acts]. Although a pattern of racketeering activity must consist of two or more acts, deciding that two such acts were committed, by itself, may not be enough for you to find that a pattern exists.

Acts are related to each other if they are not isolated events, that is, if they have similar purposes, or results, or participants, or victims, or are committed a similar way[, or have other similar distinguishing characteristics] [or are part of the affairs of the same enterprise].

There is continuity between acts if, for example, they are ongoing over a substantial period, or if they are part of the regular way some entity does business or conducts its affairs.

The government need not prove that all the acts described in Count ___ were committed, but you must unanimously agree as to which two or more racketeering acts the defendant committed [or caused to be committed] in order to find the defendant guilty of that count.

18 U.S.C. § 1962(d)
(Racketeering conspiracy - Elements)

To prove the [a] defendant guilty of conspiracy to commit racketeering, as charged in Count ___, the government must prove the following propositions:

First, that the defendant knowingly conspired to conduct or participate in the conduct of the affairs of [insert name], an enterprise, through a pattern of racketeering activity as described in Count ___; and

Second, that [insert name] [was][would be] an enterprise,

Third, that the activities of [insert name] would affect interstate commerce.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt as to the [a] defendant, then you should find the [that] defendant guilty of Count ___.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt as to the [a] defendant, then you should find the [that] defendant not guilty of Count ___.

Committee Comment

The "Conspiracy" elements instruction, without the overt act requirement, should be given in conjunction with this instruction. There are other conspiracy charges under 1962(a), (b) and (c). This pattern instruction covers the most commonly charged offense. 1962(d).

18 U.S.C. § 1962(d)
(Pattern requirement - Racketeering conspiracy)

In order to find a "pattern of racketeering activity" for purposes of Count ___, you must find beyond a reasonable doubt that the defendant agreed that some member[s] of the conspiracy would commit at least two acts of racketeering as described in Count ___ [, and that they were separate acts]. You must also find that those acts were in some way related to each other and that there was continuity between them.

Acts are related to each other if they are not isolated events, that is, if they have similar purposes, or results, or participants, or victims, or are committed a similar way[, or have other similar distinguishing characteristics] [or are part of the affairs of the same enterprise].

There is continuity between acts if, for example, they are ongoing over a substantial period of time, or had the potential to continue over a substantial period, or if they are part of the regular way some entity does business or conducts its affairs.

For purposes of Count ___, the government does not have to prove that any racketeering acts were actually committed at all, or that the defendant agreed to personally commit any such acts, or that the defendant agreed that two or more specific acts would be committed.

Committee Comment

See Salinas v. United States, 118 S.Ct. 469 (1997); United States v. Neapolitan, 791 F.2d 489 (7th Cir.), cert. denied, 479 U.S. 939, 479 U.S. 940 (1986); United States v. Glecier, 923 F.2d 496 (7th Cir.), cert. denied, 502 U.S. 810 (1991); H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 237 (1989).

18 U.S.C. § 1961(4)
(Enterprise - Legal Entity)

The term "enterprise" includes a[n] [type of entity].

Committee Comment

Where there is no dispute as to whether the "enterprise" charged in the indictment falls within the statutory definition, that enterprise should be inserted in the bracketed portion of this instruction. Where there is a dispute, all potential forms of enterprise listed in the statute should be included.

18 U.S.C. § 1961(4)
(Enterprise - Association in Fact)

The term "enterprise" can include a group of people [or legal entities] associated together for a common purpose of engaging in a course of conduct. This group may be associated together for purposes that are both legal and illegal.

In considering whether a group is an "enterprise," you should consider whether it has an ongoing organization or structure, either formal or informal, and whether the various members of the group functioned as a continuing unit. [A group may continue to be an "enterprise" even if it changes membership by gaining or losing members over time.]

The government must prove that the group described in the indictment was the "enterprise" charged, but need not prove each and every allegation in the indictment about the enterprise or the manner in which the enterprise operated. The government must prove the association had some form or structure beyond the minimum necessary to conduct the charged pattern of racketeering.

Committee Comment

In appropriate cases, the court should include language indicating that an "association in fact" may include legal entities. See United States v. Masters, 924 F.2d 1362 (7th Cir. 1991).

18 U.S.C. § 1962(c&d)
(Conduct - definition)

A person conducts or participates in the conduct of the affairs of an enterprise if that person uses his/her position in, or association with, the enterprise to perform acts which are involved in some way in the operation or management of the enterprise, directly or indirectly, or if the person causes another to do so.

In order to have conducted or participated in the conduct of the affairs of an enterprise, a person need not have participated in all the activity alleged in [the RICO counts].

18 U.S.C. § 1962(c&d)
(Associate - definition)

To be associated with an enterprise, a person must be involved with the enterprise in a way that is related to its affairs [or common purpose] [, although the person [need not have a stake in the goals of the enterprise [and] [may even act in a way that subverts those goals]]. A person may be associated with an enterprise without being so throughout its existence.

18 U.S.C. § 1962(c)
(Subparts of Racketeering Acts)

Each of the racketeering acts described in [the substantive RICO count] is numbered and [some] consist[s] of multiple offenses set out in separate, lettered sub-paragraphs [(a), (b), (c), (d), etc]. To prove that a defendant committed a particular "racketeering act" that is made up of multiple offenses, it is sufficient if the government proves beyond a reasonable doubt that the defendant committed at least one of the offenses identified in the sub-paragraphs of that racketeering act. However, you must unanimously agree upon which of the different offenses alleged within a racketeering act the defendant committed.

Committee Comment

This instruction is provided for use in cases in which the indictment breaks up specified racketeering acts into alternative subparts.

18 U.S.C. § 1962
(Interstate Commerce - definition)

Interstate commerce includes the movement of money, goods, services or persons from one state to another [or between another country and the United States]. This would include the purchase or sale of goods or supplies from outside [the state[s] in which the enterprise was located], the use of interstate mail or wire facilities, or the causing of any of those things. If you find that beyond a reasonable doubt either (a) that [the enterprise] made, purchased, sold or moved goods or services that had their origin or destination outside [the state[s] in which the enterprise was located], or (b) that the actions of [the enterprise] affected in any degree the movement of money, goods or services across state lines, then interstate commerce was engaged in or affected.

The government need only prove that [the enterprise] as a whole engaged in interstate commerce or that its activity affected interstate commerce to any degree, although proof that racketeering acts did affect interstate commerce meets that requirement. The government need not prove that the [a] defendant engaged in interstate commerce, or that the acts of the [a] defendant affected interstate commerce.

INSTRUCTIONS FOR
18 U.S.C. § 2113
THROUGH
31 U.S.C. § 5324

18 U.S.C. §2113
(Bank Robbery--Elements)

To sustain the charge of bank robbery, the government must prove the following propositions:

First, the defendant [took; attempted to take] from the person or presence of another [money; property; specific thing of value] belonging to or in the care, custody, control, management or possession of (here name bank, savings and loan, or credit union named in the indictment);

Second, at the time charged in the indictment the (here name bank, savings and loan, or credit union named in the indictment) had its deposits insured by the [Federal Deposit Insurance Corporation; Federal Savings & Loan Insurance Corporation; National Credit Union Administration); and

Third, the defendant acted to take such [money; property; specific thing of value] by force and violence, or by intimidation.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The statute includes "any bank operating under the laws of the United States" regardless of the status of the insurance. There are such banks, and the instruction should be tailored to the situation, if appropriate.

18 U.S.C. § 2113
(Intimidation)

Intimidation means to say or do something in such a way as would place a reasonable person in fear.

Committee Comment

Actual fear is not required since intimidation may be inferred from conduct, words or circumstances, reasonably calculated to produce fear. United States v. Jacquillon, 469 F.2d 380, 385 (5th Cir. 1972), cert. denied, 410 U.S. 938 (1973). Additionally, court found that even though there was no express threat of injury, display of a weapon, or verbal threats there was still "intimidation" as under § 2113. Intimidation in § 2113 means "to make fearful or to put into fear." United States v. Higdon, 832 F.2d 312, 315 (5th Cir. 1987), cert. denied, 484 U.S. 1075 (1988).

A special circumstance arises when, for example, a bank officer is induced by threats of violence to leave the bank's money at a prearranged drop site. The predominant view is that this type of situation satisfies a taking "from the person or presence of another." See United Stated v. Alessandrello, 637 F.2d 131, 145 (3d Cir. 1980); United States v. Hackett, 623 F.2d 343, 345 (4th Cir. 1980); Brinkley v. United States, 560 F.2d 871, 873 (8th Cir. 1977); United States v. Beck, 511 F.2d 997, 1003 (6th Cir. 1975); United States v. Marx, 485 F.2d 1179, 1182 (10th Cir. 1973); contra, United States v. Culbert, 548 F.2d 1355, 1356 (9th Cir. 1977); rev'd on other grounds, 435 U.S. 371, 372 n. 1 (1978), opinion on remand, 581 F.2d 799 (9th Cir. 1978).

18 U.S.C. § 2113
(Entering to Commit Bank Robbery or Another Felony--Elements)

To sustain the charge of entering to commit bank robbery or another felony, the government must prove the following propositions:

First, the defendant [entered; attempted to enter] the [bank; savings and loan; credit union; building] used in whole or part as [bank; savings and loan; credit union];

Second, at the time charged in the indictment the defendant [entered; attempted to enter] the [bank; savings and loan; credit union; building] used in whole or part as [bank; savings and loan; credit union] with the intent to commit a felony or any larceny affecting such [bank; savings and loan; credit union; building]; and,

Third, the (here name bank, savings and loan, credit union, or building named in the indictment) had its deposits insured by the [Federal Deposit Insurance Corporation; Federal Savings and Loan Insurance Corporation; National Credit Union Administration].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The intended felony or larceny need not be accomplished. See Brunjes v. United States, 329 F.2d 339, 341 (7th Cir. 1964); United States v. Goudy, 792 F.2d 664, 677 (7th Cir. 1986). The statute includes "any bank operating under the laws of the United States" regardless of the status of the insurance. There are such banks, and the instruction should be tailored to the situation, if appropriate.

18 U.S.C. § 2113
(Bank Theft--Elements)

To sustain the charge of bank theft, the government must prove the following propositions:

First, the defendant took and carried away [property; money; something of value] belonging to or in the [care; custody; control; management] of (here name bank, credit union, savings and loan named in the indictment);

Second, at the time the (here name bank, credit union, or savings and loan named in the indictment) had its deposits insured by the [Federal Deposit Insurance Corporation; Federal Savings and Loan Insurance Corporation; National Credit Union Administration];

Third, the defendant took and carried away such [property; money; thing of value] with the intent to steal; and,

Fourth, such [money; property; thing of value] [exceeded; did not exceed] $100.00 in value.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The scope of 18 U.S.C. § 2113(b) is not limited to common law larceny. It also proscribes the crime of taking under false pretenses. Bell v. United States, 462 U.S. 356, 362 (1983). See also United States v. Kucik, 844 F.2d 493, 494 (7th Cir. 1988), cert. denied, 498 U.S. 1076 (1991). The statute includes "any bank operating under the laws of the United States" regardless of the status of the insurance. There are such banks, and the instruction should be tailored to the situation, if appropriate.

18 U.S.C. § 2113
(Definition of Steal)

The term steal as used in these instructions means to take with the intent to deprive the owner of the rights and benefits of ownership.

Committee Comment

"Steal" for the purposes of § 2113(b) means "felonious takings with intent to deprive the owner of rights and benefits of ownership." United States v. Kucik, 909 F.2d 206, 212 (7th Cir. 1990), cert. denied, 498 U.S. 1076 (1991); United States v. Goudy, 792 F.2d 664, 677 (7th Cir. 1986). See also United States v. Guiffre, 576 F.2d 126, 128 (7th Cir.), cert. denied, 439 U.S. 833 (1978).

18 U.S.C. § 2113
(Possession of Stolen Bank Money or Property--Elements)

To sustain the charge of possession of stolen bank money or property, the government must prove the following propositions:

First, the defendant [received; possessed; concealed; stored; bartered; sold; disposed of] [property; money; a thing of value] having a value [of $100.00 or less; in excess of $100.00];

Second, the [property; money; thing of value] was taken from (here name bank, savings and loan, credit union, described in the indictment);

Third, at the time charged in the indictment the [bank; savings and loan; credit union] had its deposits insured by the [Federal Deposit Insurance Corporation; Federal Savings and Loan Insurance Corporation; National Credit Union Administration]; and

Fourth, the defendant knew that the [money; property; thing of value] was stolen at the time he [possessed; received; concealed; stored; bartered; sold; disposed] of it.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The statute includes "any bank operating under the laws of the United States" regardless of the status of the insurance. There are such banks, and the instruction should be tailored to the situation, if appropriate.

The defendant need not know the exact bank robbed or that the bank was FDIC insured in order to satisfy the knowledge element. It is sufficient that the defendant knew he was possessing, concealing, or disposing of money stolen from a banking institution. United States v. Kaplan, 586 F.2d 980, 982 (2d Cir. 1978); United States v. Whitney, 425 F.2d 169, 171 (8th Cir. 1970); United States v. Bolin, 423 F.2d 834, 836 (9th Cir.), cert. denied, 398 U.S. 954 (1970); Nelson v. United States, 415 F.2d 483, 486 (5th Cir. 1969).

There is a conflict between circuits as to whether punishment under Section 2113(c) is measured by the value of the property received by the defendant or by the value of the property taken by the thief. In one circuit, the degree of punishment is determined by the value of the stolen property received or possessed by the defendant. United States v. Evans, 446 F.2d 998, 1001 (8th Cir. 1971). The predominant view allocates punishment according to the amount stolen from the bank. See United States v. Bolin, 423 F.2d 834, 838 (9th Cir.), cert. denied, 398 U.S. 954 (1970); United States v. Wright, 540 F.2d 1247, 1248 (4th Cir. 1976), cert. denied, 429 U.S. 1046 (1977); United States v. McKenzie, 441 F.Supp. 244, 247 (E.D.Pa.1977), aff'd without op., 577 F.2d 729 (3d Cir. 1978), cert. denied, 439 U.S. 855 (1978). Under this majority view, the defendant possessing under $100 of the stolen money need not have knowledge that over $100 was stolen in order to be punished as a felon under Section 2113(b). The Seventh Circuit apparently agrees with the majority view. It cited Bolin, supra, with approval, stating: The purpose behind statutes penalizing the knowing receipt of stolen goods is not only to discourage the actual receipt, but also to discourage the initial taking that the receipt encourages. United States v. Gardner, 516 F.2d 334, 349 (7th Cir.), cert. denied, 423 U.S. 861 (1975).

18 U.S.C. § 2113
(Aggravated Bank Robbery--Elements)

To sustain the charge of aggravated bank robbery, the government must prove the following propositions:

First, the defendant took or attempted to take, from the person or presence of another [money; property; a thing of value] belonging to or in the [care; custody; control; management, possession] of (here name bank, savings and loan, credit union, named in the indictment);

Second, at the time charged in the indictment the [bank; savings and loan; credit union] had its deposits insured by the [Federal Deposit Insurance Corporation; Federal Savings and Loan Insurance Corporation; National Credit Union Administration];

Third, the defendant took or attempted to take such [money; property; thing of value] by means of force and violence, or by means of intimidation; and

Fourth, the defendant assaulted or put in jeopardy the life of (here name person(s) named in the indictment) by the use of a dangerous weapon or device, while committing or attempting to commit the theft or burglary.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The statute includes "any bank operating under the laws of the United States" regardless of the status of the insurance. There are such banks, and the instruction should be tailored to the situation, if appropriate.

The phrase, "use of a dangerous weapon or device" modifies both the "assault" and the "jeopardy" portions of § 2113(d). If only the latter was modified, the "assault" would be equated with the "force or violence" aspect of § 2113(a) so as to justify the additional five year penalty of § 2113(d). A defendant may not be sentenced under both § 924(c) and § 2113(a) and (d) for firearms violations and robbery arising out of a single transaction. Simpson v. United States, 435 U.S. 6, 11 n.6 (1978). However, since Simpson, Congress has amended § 924(c) so that a defendant can be sentenced under the firearms statute and also be sentenced to an additional five years under § 2113(d) for using a firearm in bank robbery. It is clear that Congress did intend to authorize an additional penalty for the use of a firearm in a bank robbery. United States v. Harris, 832 F.2d 88, 90 (7th Cir. 1987); United States v. Larkin, 978 F.2d 964, 972 (7th Cir. 1992), cert. denied 507 U.S. 935 (1993).

The Seventh Circuit still follows the "objective" test for finding whether the victim's life has been "jeopardized". United States v. Rousito, 455 F.2d 366, 371 (7th Cir. 1972); United States v. Richardson, 562 F.2d 476, 481 (7th Cir. 1977), cert. denied sub nom. Wilson v. United States, 434 U.S. 1021 (1978).

18 U.S.C. § 2113(d)
(Put in jeopardy the life of another person)

The phrase "put in jeopardy the life of any person" as used in these instructions means to knowingly do an act which exposes another person to risk of death. In considering this element, you must focus on the actual risk of death created by the use of the dangerous weapon or device. This risk might include direct risk to bank employees and indirect risk through a violent response by a customer or the police.

Committee Comment

In United States v. Smith, 103 F.3d 600 (7th Cir. 1996), the Seventh Circuit reviewed the "put in jeopardy" language and concluded that the focus of the analysis should be on the actual risk created by the robber's use of a dangerous weapon and that the reasonable fears of the victims are to be considered when a defendant is charged under the "assault" provision of § 2113(d).

18 U.S.C. § 2113
(Kidnaping or Murder During a Bank Robbery--Elements)

To sustain the charge of [kidnaping; murder] during a bank robbery, the government must prove the following propositions:

First, the defendant [killed (specify person(s) named in the indictment); forced (specify person(s) named in the indictment) to accompany the defendant without the consent of (specify person(s) named in the indictment)];

Second, the defendant performed such act or acts during the course of [committing any offense defined in 18 U.S.C. § 2113; avoiding or attempting to avoid apprehension for the commission of such offense] [freeing himself or attempting to free himself from arrest or confinement for such offense]; and,

Third, at the time charged in the indictment, the [bank; savings and loan; credit union] had its deposits insured by the [Federal Deposit Insurance Corporation; Federal Savings and Loan Insurance Corporation; National Credit Union Administration].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The statute includes "any bank operating under the laws of the United States" regardless of the status of the insurance. There are such banks, and the instruction should be tailored to the situation, if appropriate.

The "kidnaping" aspect of 18 U.S.C. § 2113(e) connotes substantial transportation, and not simply forcing one to enter his own home or to move from one room to another. United States v. Marx, 485 F.2d 1179, 1186 (10th Cir. 1973), cert. denied, 416 U.S. 986 (1974).

FNa1. In most cases, the parties stipulate that the bank, savings and loan, or credit union is federally insured. When this occurs, the jury should be instructed regarding the stipulation.

18 U.S.C. § 2114
(Assault With Intent to Rob Any Mail Matter or Money or Other Property of the United States--Elements)

To sustain the charge of assault with intent to rob [any mail matter; money or other property of the United States], the government must prove the following propositions:

First, the defendant assaulted the person of another having lawful [charge; control; custody] of [any mail matter; money or other property of the United States]; and,

Second, while committing the assault the defendant intended to rob or steal such [mail matter; money or other property of the United States].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that either of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This and the succeeding three instructions apply to the four offenses defined in 18 U.S.C. § 2114: (1) assault with the intent to rob mail matter, money or other property of the United States; (2) robbery of such property; (3) aggravated assault with intent to rob such property; and (4) aggravated robbery of such property.

18 U.S.C. § 2114
(Robbery of Mail Matter or Money or Other Property of the United States--Elements)

To sustain the charge of robbery of mail matter or other property of the United States, the government must prove the following propositions:

First, the defendant took [mail matter; money or other property of the United States] from the person or presence of another having lawful [charge; control; custody] of the [mail matter; money; property]; and,

Second, the defendant took such [mail matter; money or other property of the United States] by means of force and violence, or by means of intimidation.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that either of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

See Comment to 18 U.S.C. § 2114, Assault With Intent to Rob Any Mail Matter or Money or Other Property of the United States, supra.

18 U.S.C. § 2114
(Aggravated Assault With Intent to Rob Any Mail Matter or Money or Other Property of the United States--Elements)

To sustain the charge of aggravated assault with intent to rob [any mail matter; money or other property of the United States], the government must prove the following propositions:

First, the defendant assaulted the person of another having lawful [charge; control; custody] of [any mail matter; money or other property of the United States];

Second, at the time charged in the indictment, the defendant intended to rob or steal such [mail matter; money or other property of the United States]; and,

Third, in committing or attempting to commit such robbery, the defendant [wounded (name person having charge, control or custody) over (describe property); put (name of person) life in jeopardy by use of a dangerous weapon].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

See Comment to 18 U.S.C. § 2114, Assault With Intent to Rob Any Mail Matter or Money or Other Property of the United States, supra.

18 U.S.C. § 2114
(Aggravated Robbery of Mail Matter or Money or Other Property of the United States--Elements)

To sustain the charge of aggravated robbery of [mail matter; money or other property of the United States], the government must prove the following propositions:

First, the defendant took [mail matter; money or other property of the United States] from the person or presence of another having lawful [charge; control; custody] of the [mail matter; money; property];

Second, the defendant took such [mail matter; money or other property of the United States] by means of force and violence, or by means of intimidation; and,

Third, in committing or attempting to commit such robbery, the defendant [wounded (name of person having charge, control or custody) over (describe property; put (name of person)'s life in jeopardy by use of a dangerous weapon].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

See Comment to 18 U.S.C. § 2114, Assault With Intent to Rob Any Mail Matter or Money or Other Property of the United States, supra.

18 U.S.C. 2114(b)
(Possession of Stolen Mail Matter or Money or Other Property of the United States--Elements)

To sustain the charge of possession of stolen [mail] [money of the United States] [property of the United States], the government must prove the following propositions:

First, the defendant [received; possessed; concealed; disposed of] [mail; money of the United States; property of the United States];

Second, the [mail; money of the United States; property of the United States] had been obtained by [assault; robbery];

Third, the defendant knew that the [mail; money of the United States; property of the United States] had been unlawfully obtained;

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 2242(1)
(Sexual abuse by threat - elements)

To sustain the charge of sexual abuse, the government must prove the following propositions:

First, that the defendant knowingly caused [name of victim] to engage in a sexual act;

Second, that the defendant did so by threatening [name of victim] or placing [name of victim] in fear; and

Third, that the defendant's actions took place [within the special maritime jurisdiction of the United States] [within the territorial jurisdiction of the United States] [in a Federal prison].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 2242(2)
(Sexual abuse - incapacitated victim - elements)

To sustain the charge of sexual abuse, the government must prove the following propositions:

First, that the defendant knowingly engaged in a sexual act with [name of victim];

Second, [name of victim] was [incapable of recognizing the nature of the conduct] [physically incapable of declining participation in, or communicating unwillingness to engage in that sexual act]; and

Third, that the defendant's actions took place [within the special maritime jurisdiction of the United States] [within the territorial jurisdiction of the United States] [in a Federal prison].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 2243(a)
(Sexual abuse of minor - elements)

To sustain the charge of sexual abuse, the government must prove the following propositions:

First, that the defendant knowingly engaged in a sexual act with [name of victim] ;

Second, [name of victim] had reached the age of twelve years but had not yet reached the age of sixteen years; and

Third, [name of victim] was at least four years younger than the defendant.

Fourth, that the defendant's actions took place [within the special maritime jurisdiction of the United States] [within the territorial jurisdiction of the United States] [in a Federal prison].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 2243(a)
(Crossing state line with intent to engage in sexual act with minor - elements)

To sustain the charge of sexual abuse, the government must prove the following propositions:

First, that the defendant crossed a state line with intent to engage in a sexual act with [name of victim];

Second, [name of victim] had reached the age of twelve years but had not yet reached the age of sixteen years; and

Third, [name of victim] was at least four years younger than the defendant.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

It is not necessary for the government to prove that a criminal sexual act was the sole purpose for a defendant traveling from one state to another, but the government must prove that it was a dominant purpose, as opposed to an incidental one. A person may have more than one dominant purpose for traveling across a state line. United States v. Vang, 128 F.3d 1065, 1070-72 (7th Cir. 1997) (interpreting 18 U.S.C. § 2423(b)).

18 U.S.C. § 2243(c)(1)
(Defense of reasonable belief of minor's age)

It is a defense to the charge of sexual abuse of a minor that the defendant reasonably believed that [name of victim] had attained the age of 16 years. The defendant has the burden of proving that it is more probably true than not true that he reasonably believed that [name of victim] had attained the age of 16 years.

If you find that the defendant reasonably believed that [name of victim] had attained the age of 16 years, you must find the defendant not guilty.

18 U.S.C. § 2243(b)
(Sexual abuse of person in official detention - elements)

To sustain the charge of sexual abuse, the government must prove the following propositions:

First, the defendant knowingly engaged in a sexual act with [name of victim] ;

Second, at the time, [name of victim] was in official detention at the [name of institution];

Third, at the time, [name of victim] was under the custodial, supervisory or disciplinary authority of the defendant.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 2243(b)
(Definition of "official detention")

As used in these instructions, the term "official detention" means detention [custody] by [under the direction of] a Federal officer or employee, following [arrest] [surrender in lieu of arrest] [a charge or conviction of an offense].

Committee Comment

The Committee has selected the most frequently charged types of "official detention." The statute contains a more exhaustive list which should be consulted in particular cases.

18 U.S.C. § 2244(a)
(Abusive sexual contact - elements)

To sustain the charge of abusive sexual contact, the government must prove the following propositions:

First, that the defendant knowingly [engaged in] [caused] sexual contact with [name of victim];

Second, that the defendant did so by threatening [name of victim] or placing [name of victim] in fear; and

Third, that the defendant's actions took place [within the special maritime jurisdiction of the United States] [within the territorial jurisdiction of the United States] [in a Federal prison].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 2244(a)
(Abusive sexual contact - incapacitated victim - elements)

To sustain the charge of abusive sexual contact, the government must prove the following propositions:

First, that the defendant knowingly [engaged in] [caused] sexual contact with [name of victim];

Second, [name of victim] was [incapable of recognizing the nature of the conduct] [physically incapable of declining participation in, or communicating unwillingness to engage in that sexual act]; and

Third, that the defendant's actions took place [within the special maritime jurisdiction of the United States] [within the territorial jurisdiction of the United States] [in a Federal prison].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 2244(b)
(Abusive sexual contact without permission - elements)

To sustain the charge of abusive sexual contact, the government must prove the following propositions:

First, the defendant knowingly had sexual contact with [name of victim] at [name of institution], and

Second, the sexual contact was without [name of victim]'s permission.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 2246(2)
(Definition of "sexual act")

As used in these instructions, the term "sexual act" means

- [penetration, however slight, of the [vulva] [anus] by the penis]

- [contact between the mouth and the {penis} {vulva} {anus}]

- [penetration, however slight, of the {anal} {genital} opening of another by {a hand} {a finger} {any object} with an intent to abuse, humiliate, harass, or degrade, arouse or gratify the sexual desire of any person]

- [the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, or degrade, arouse or gratify the sexual desire of any person].

18 U.S.C. § 2246(3)
(Definition of "sexual contact")

As used in these instructions, the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, or degrade, or to arouse or gratify the sexual desire of any person.

18 U.S.C. § 2312
(Transportation of stolen vehicle - Elements)

To sustain the charge of transporting a stolen [car; truck; motorcycle; airplane; helicopter] in [interstate; foreign] commerce, the government must prove the following propositions:

First, the (describe vehicle charged in the indictment) was stolen;

Second, the defendant transported the (describe vehicle charged in the indictment) in [interstate; foreign] commerce; and

Third, the defendant knew at the time that the (describe vehicle charged in the indictment) was stolen.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

[NOTE: Choose appropriate terms contained in brackets.]

Committee Comment

The statute uses the terms "motor vehicle" and "aircraft" in describing the articles to which the transportation prohibition pertains. Rather than using the statutory terms, we suggest using a generic description of the vehicle which is the subject of the prosecution.

To constitute a "motor vehicle," the vehicle must be self-propelled. 18 U.S.C. s 2311. Thus, a trailer, without the capability of self-propulsion and absent a tractor to pull it, would not fall within the proscription of the transportation prohibition. In this instance, however, the trailer could constitute a "good" for the purpose of 18 U.S.C. 2315. On the other hand, if the trailer were connected to a tractor or other vehicle capable of self- propulsion, both vehicles would be subject to a single charge of unlawful transportation. United States v. Kidding, 560 F.2d 1303, 1308 (7th Cir.), cert. denied sub nom. Brown v. United States, 434 U.S. 872 (1977).

To fall within the meaning of the term "aircraft," the vehicle must be capable of air navigation. 18 U.S.C. s 2311.

The statute also uses the phrase "transports in interstate or foreign commerce" and the term "stolen." We believe both are proper subjects for independent instructions.

18 U.S.C. § 2312
(Definition of Interstate Commerce)

The term interstate commerce means movement across state lines. (The term foreign commerce means movement in or out of the United States.)

18 U.S.C. § 2312
(Definition of Stolen)

The word "stolen" as used in these instructions means any taking with the intent to deprive the owner of his rights and benefits of ownership. [The taking may be accomplished through the seizure of the (here describe vehicle) or through the use of false pretenses, trickery, or misrepresentation in obtaining possession.] [It is not necessary, however, that the taking be initially unlawful. Even if possession is first acquired lawfully, the taking falls within the meaning of "stolen" if the defendant thereafter forms the intent to deprive the owner of his ownership interests.]

Committee Comment

Use bracketed material only when necessary.

The meaning of the word "stolen" was, in part, resolved by the United States Supreme Court in United States v. Turley, 352 U.S. 407, 417 (1957). There, the Court found that the term included all takings performed with the intent to deprive the owner of the rights and benefits of ownership regardless of whether the initial taking was authorized. Thus, the statute proscribes the transportation of a vehicle in interstate or foreign commerce which initially was obtained by lawful means, such as through a rental contract, and thereafter converted entirely to the defendant's use without the permission of the owner, United States v. Baker, 429 F.2d 1344, 1346 (7th Cir. 1970), or which was obtained unlawfully through the use of a bogus check or stolen credit card in purportedly purchasing or renting the vehicle, United States v. Ellis, 428 F.2d 818, 820 (8th Cir. 1970).

The taking does not need to be done with the intent to permanently deprive the owner of the vehicle. United States v. Bruton, 414 F.2d 905, 908 (8th Cir. 1969). It is enough that the defendant intends to use the vehicle as long as it serves his convenience and thereafter intends to abandon it or dispose of it. United States v. Dillinger, 341 F.2d 696, 697-98 (4th Cir. 1965). See also United States v. Epperson, 451 F.2d 178, 179 (9th Cir. 1971) (intent to permanently deprive owner of ownership interest not an element of the offense); United States v. Berlin, 472 F.2d 13, 14 n. 2 (9th Cir. 1973) (defendant must have intent to permanently or temporarily deprive the owner of the rights and benefits of ownership).

18 U.S.C. § 2313
(Sale or receipt of stolen vehicles - Elements)

To sustain the charge of [selling; possessing; receiving; concealing; disposing of] a stolen [car; truck; motorcycle; airplane; helicopter] in [interstate; foreign] commerce, the government must prove the following propositions:

First, the (here describe the vehicle charged in the indictment) was stolen;

Second, after the (here describe the vehicle charged in the indictment) was stolen, it was moved across a [state line; United States border];

Third, the defendant [sold; possessed; received; concealed; disposed of] the (here describe the vehicle charged in the indictment); and

Fourth, at the time the defendant [sold; possessed; received; concealed; disposed of] the (here describe the vehicle charged in the indictment), the defendant knew that it had been stolen.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

See Comment to 18 U.S.C. § 2312, supra.

18 U.S.C. § 2313
(Definition of Stolen)

Committee Comment

See Instruction for 18 U.S.C. § 2312, supra.

18 U.S.C. § 2313
(Definition of Interstate and Foreign Commerce)

Committee Comment

This instruction was eliminated, as a result of a 1984 change in the "interstate commerce" element of section 2313.

18 U.S.C. § 2314
(Transportation of Stolen Goods - Elements)

To sustain the charge of interstate transportation of stolen goods, the government must prove the following propositions:

First, the [identify goods charged in the indictment] had been stolen; and

Second, the [identify goods charged in the indictment] had a value of at least $5,000;

Third, the defendant transported or caused to be transported [identify goods charged in the indictment] in [interstate commerce; foreign commerce] from _____ to _____;

Fourth, at the time the defendant transported or caused to be transported the [identify goods charged in the indictment], he/she knew they had been stolen.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The first element may be adapted more specifically to describe the stolen goods if this can be done without complicating the instruction. Otherwise, reference to the indictment is preferred. The terms "wares, merchandise, securities or money" may be substituted for "goods" where charged in the indictment.

In addition to stolen goods, the statute covers goods converted or obtained by fraud. The instruction may be modified where appropriate.

18 U.S.C. § 2314
(Interstate Travel to Execute or Conceal Fraud - Elements)

To sustain the charge of [transporting a person; causing a person to be transported; inducing a person to travel or be transported] in interstate commerce in the execution or concealment of a scheme to defraud, the government must prove the following propositions:

First, the defendant devised or intended to devise a scheme to [defraud; obtain money by false or fraudulent pretenses, representations, or promises] as charged in the indictment;

Second, the defendant [transported a person; caused a person to be transported; induced a person to travel or be transported] in interstate commerce;

Third, the defendant acted in the execution or concealment of the scheme or artifice to defraud that person of money or property; and,

Fourth, the money or property had a value of $5,000 or more.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 2314
(Interstate Transportation of Falsely Made, Forged, Altered or Counterfeited Securities or Tax Stamps--Elements)

To sustain the charge of interstate transportation of [falsely made; forged; altered; counterfeited] securities or tax stamps, the government must prove the following propositions:

First, the defendant [transported; caused to be transported], in interstate commerce, the securities described in the indictment;

Second, at the time the defendant transported the securities, they were [falsely made; forged; altered; counterfeited];

Third, at the time the defendant transported the securities, the defendant knew they were [falsely made; forged; altered; counterfeited]; and

Fourth, at the time the defendant transported the securities, the defendant acted with unlawful or fraudulent intent.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

In McElroy v. United States, 455 U.S. 642 (1982), the Supreme Court held that this statute does not require proof that the forgery occurred *before* the securities were transported across state lines. The Court's holding was based on a reading of the statutory phrase "interstate commerce" to include transportation within the state or destination if such transportation is part of a movement that began out of state. Accordingly, in some cases, an instruction incorporating the Court's holding in McElroy will be appropriate.

The elements of this offense do not require proof that the defendant knew the securities moved in interstate commerce. See, e.g., United States v. Squires, 581 F.2d 408, 410 (4th Cir. 1978). Nor does the statute require proof that the interstate transportation was for the purpose of executing the scheme to defraud. See, e.g., United States v. Gundersen, 518 F.2d 960, 961 (9th Cir. 1975); United States v. Vaccaro, 816 F.2d 443, 455 (7th Cir.), cert. denied, 484 U.S. 914 (1987).

18 U.S.C. § 2314
(Interstate Transportation of a Traveler's Check Bearing a Forged Countersignature--Elements)

To sustain the charge of interstate transportation of a traveler's check bearing a forged countersignature, the government must prove the following propositions:

First, the defendant [transported; caused to be transported], in interstate commerce, the traveler's check described in the indictment;

Second, at the time the defendant transported the traveler's check, it bore a forged countersignature;

Third, at the time the defendant transported the traveler's check, the defendant knew it bore a forged countersignature; and,

Fourth, at the time the defendant transported the traveler's check, the defendant acted with unlawful or fraudulent intent.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 2314
(Interstate Transportation of Tools Used in Making, Forging, Altering, or Counterfeiting Any Security or Tax Stamps--Elements)

To sustain the charge of interstate transportation of any [tool; implement; thing] [used; fitted for use] in [falsely making; forging; altering; counterfeiting] any security, the government must prove the following propositions:

First, the defendant [transported; caused to be transported] the [tool; implement; item described in the indictment];

Second, at the time the defendant transported the [tool; implement; item described in the indictment], it could be [used; fitted for use] in [falsely making; forging; altering; counterfeiting] any security or tax stamps, or any part thereof;

Third, at the time the defendant transported the [tool; implement; item described in the indictment], the defendant knew that it could be [used; fitted for use] in [falsely making; forging; altering; counterfeiting] any security or tax stamps or any part thereof; and,

Fourth, at the time the defendant transported the [tool; implement; other item described in the indictment], the defendant acted with unlawful or fraudulent intent.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 2314
(Definition of Interstate Commerce)

Committee Comment

See corresponding Instruction for 18 U.S.C. § 2312, supra.

18 U.S.C. § 2314
(Definition of Stolen)

Committee Comment

See corresponding Instruction for 18 U.S.C. § 2312, supra.

18 U.S.C. § 2314
(Definition of Value)

The government is required to establish that the goods in question had a value of at least $5,000 at the time they were stolen or at the time they were transported in interstate commerce.

Value means market value, that is, the price that a willing buyer would pay to a willing seller.

Committee Comment

See United States v. Lehning, 742 F.2d 1113, 1115 (7th Cir. 1984); United States v. Williams, 657 F.2d 199, 202 (8th Cir. 1981); United States v. McMahan, 548 F.2d 712, 713-14 (7th Cir.), *cert. denied*, 430 U.S. 986 (1977). Value at the time of theft or value at the time of transportation may be used under § 2314 and § 2315. See, e.g. United States v. Gardner, 516 F.2d 334, 349 (7th Cir.), cert. denied, 423 U.S. 861 (1975).

Where there is no market value, the jury may be told that it can consider other reasonable methods of valuation. In most cases, however, some method of arriving at market value will be used. In United States v. McGinnis, 783 F.2d 755, 757 the court allowed the owner of stolen property to give testimony about value of goods to establish the applicability of § 2315. Depending on the circumstances of the case, the retail market value may prevail over the wholesale market value or replacement value. See, e.g., Cave v. United States, 390 F.2d 58, 67 (8th Cir.), cert. denied, 392 U.S. 906 (1968).

18 U.S.C. § 2315
(Receipt of Stolen Property--Elements)

To sustain the charge of [receiving; possessing; concealing; storing; bartering; selling; disposing of] stolen property, the government must prove the following propositions:

First, the defendant [received; possessed; concealed; stored; bartered; sold; disposed of] the property described in the indictment;

Second, the property had been [stolen; unlawfully converted; unlawfully taken] and the defendant knew the property had been [stolen; unlawfully converted; unlawfully taken];

Third, after the property was [stolen; unlawfully converted; unlawfully taken] it was moved across the boundary line of [a state; the United States] and

Fourth, the property had a value of $5,000 or more.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 2315
(Receipt of Counterfeit Securities or Tax Stamps--Elements)

To sustain the charge of [receiving; possessing; concealing; storing; bartering; selling; disposing of; pledging as security for a loan; accepting as security for a loan], in [interstate; foreign] commerce, any [falsely made; forged; altered; counterfeited] [securities; tax stamps], the government must prove the following propositions:

First, the defendant [received; possessed; concealed; stored; bartered; sold; disposed of; pledged as security for a loan; accepted as security for a loan] [securities; tax stamps];

Second, the [securities; tax stamps] had been [falsely made; forged; altered; counterfeited] and the defendant knew the [securities; tax stamps] had been [falsely made; forged; altered; counterfeited]; and,

Third, at the time the [securities; tax stamps] were [received; concealed; stored; bartered; sold; disposed of; pledged as security for a loan; accepted as security for a loan] they were moving as, were a part of, or constituted [interstate; foreign] commerce.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 2315
(Receipt of Counterfeiting Tools--Elements)

To sustain the charge of [receiving; concealing; storing; bartering; selling; disposing of], in [interstate; foreign] commerce, any [tool; implement; item] [used; intended to be used] in [falsely making; forging; altering; counterfeiting] any [security or any part thereof; tax stamp or any part thereof], the government must prove the following propositions:

First, the defendant [received; concealed; stored; bartered; sold; disposed of] in [interstate; foreign] commerce, any [tool; implement; item] [used; intended to be used] in [falsely making; forging; altering; counterfeiting] any [security or any part thereof; tax stamp or any part thereof];

Second, the item was moving as, was part of, or constituted [interstate; foreign] commerce; and,

Third, the defendant knew the [tool; implement; item] was [fitted to be used; had been used] in [falsely making; forging; altering; counterfeiting] any [security or any part thereof; tax stamp or any part thereof].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 2315
(Definition of Interstate and Foreign Commerce)

The term [interstate; foreign] commerce as used in these instructions means the movement across [state; territorial] lines, including any movement before or after the crossing of [state; territorial] lines which constitutes a part of the [interstate; foreign] travel.

[Property that was [received; concealed; stored; bartered; sold; disposed of] a period of time after it crossed state lines still may constitute interstate commerce if the [receipt; concealment; storage; barter; sale; disposition] is a continuation of the movement that began out of state.]

21 U.S.C. § 841(a)(1)
(Distribution of a Controlled Substance--Elements)

To sustain the charge of distributing (identify controlled substance), the government must prove the following propositions:

First, the defendant distributed (identify controlled substance);

Second, the defendant did so knowingly or intentionally; and,

Third, the defendant knew the substance was a controlled substance.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Where the defendant has challenged the government's proof that the substance in question falls within the statutory definition, more detailed instructions may be required. For examples of such instructions, see United States v. Luschen, 614 F.2d 1164, 1169 n.2 (8th Cir. 1980); United States v. Umentum, 547 F.2d 987, 992 n.3 (7th Cir. 1976), cert. denied, 430 U.S. 983 (1977); United States v. Orzechowski, 547 F.2d 978, 982-83 n.3, 983 n.4 (7th Cir. 1976), cert. denied, 431 U.S. 906 (1977).

21 U.S.C. § 841(a)(1)
(Definition of Distribution)

Distribution is the [transfer; attempted transfer] of possession from one person to another.

21 U.S.C. § 841(a)(1)
(Knowledge of identity of substance)

It is sufficient that the defendant knew that the substance was some kind of prohibited drug. It does not matter whether the defendant knew that the substance was (identify controlled substance).

21 U.S.C. § 841(a)(1)
(Possession With Intent to Distribute--Elements)

To sustain the charge of possession of (identify controlled substance); with intent to distribute as charged in Count __, the government must prove the following propositions:

First, the defendant knowingly or intentionally possessed (identify controlled substance);

Second, the defendant possessed (identify controlled substance) with the intent to deliver it to another person.

It does not matter whether the defendant knew the substance was (identify controlled substance). It is sufficient that the defendant knew that it was some kind of prohibited drug.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Where the defendant has challenged the government's proof that the substance in question falls within the statutory definition, more detailed instructions may be required. For examples of such instructions, see United States v. Luschen, 614 F.2d 1164, 1169 n.2 (8th Cir. 1980); United States v. Umentum, 547 F.2d 987, 992 n.3 (7th Cir. 1976), cert. denied, 430 U.S. 983 (1977); United States v. Orzechowski, 547 F.2d 978, 982-83 n.3, 983 n.4 (7th Cir. 1976), cert. denied, 431 U.S. 906 (1977).

21 U.S.C. § 841(a)(1)
(Definition of Possession)

Possession of an object is the ability to control it. Possession may exist even when a person is not in physical contact with the object, but knowingly has the power and intention to exercise direction and control over it, either directly or through others.

Committee Comment

The possession instruction is based on that approved in United States v. Lloyd, 71 F.3d 1256, 1266-67 (7th Cir. 1995), with two changes. First, instead of "dominion," a non-ordinary word, we have used "direction." Second, the Committee has eliminated the use of the term "constructive possession," though the concept remains within the instruction. This instruction may also be used in connection with other possession statutes, such as 18 U.S.C. § 922(g).

21 U.S.C. § 841(a)(1)
(Definition of Controlled Substance)

You are instructed that (identify the controlled substance) is a controlled substance.

Committee Comment

Where the defendant has challenged the government's proof that the substance in question falls within the statutory definition of the substance charged, more detailed instructions may be required. Such instructions should make clear that the government must prove beyond a reasonable doubt that the substance in question was in fact the substance charged as defined in the appropriate Schedule of 21 U.S.C. § 812. The instructions may also need to include a definition of the substance as articulated in § 802(16) (definition of "narcotic" drug) and § 812. For examples of such instructions, see United States v. Luschen, 614 F.2d 1164, 1169 n.2 (8th Cir. 1980); United States v. Umentum, 547 F.2d 987, 992 n.3 (7th Cir. 1976), cert. denied, 430 U.S. 983 (1977); United States v. Orzechowski, 547 F.2d 978, 982-83 n.3, 983 n.4 (7th Cir. 1976), cert. denied, 431 U.S. 906 (1977).

Where a question arises as to whether the drug is a narcotic or non- narcotic drug, both the definition of narcotic drug and the elements instruction for 21 U.S.C. § 952(b) (lesser-included offense) should be given.

21 U.S.C. § 843(b)
Use of Communication Facility in Aid of Narcotics Offense - Elements

To sustain the charge in Count ___ that a [the] defendant used or caused to be used, a [telephone] [other communication facility] to facilitate a violation of the narcotics laws, the government must prove each of the following propositions beyond a reasonable doubt:

First, the defendant used a [telephone] [other communication facility];

Second, that use of the [telephone] [other communication facility] was accomplished as part of the committing of, or to cause or facilitate the committing of, [list possible predicate offenses, including possession with intent to distribute, unlawful distribution, or conspiracy]; and

Third, that such use of a telephone was knowing or intentional.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty of the charge in Count ___.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty of the charge in Count ___.

Committee Comment

See United States v. Rey, 641 F.2d 222, 224 n.6 (5th Cir.), cert. denied, 454 U.S. 861 (1981).

Telephones are the most common form of communication facility charged under 21 U.S.C. § 843(b). If another type of facility is charged, and it if falls within the list included in the statute, it should be listed specifically in this instruction.

21 U.S.C. § 843(b)
Use of Communication Facility in Aid of Narcotics Offense - Definitions

A [call] [transmission] facilitates the committing of an offense if it makes that offense easier, or if it assists in the committing of the offense.

[A "communication facility" can be any [public or private] device that is [or can be] used to transmit writing, signs, signals, or pictures of all kinds. This includes the mail, a telephone, a radio, or any method of wire or other means of communication.]

Committee Comment

Regarding the definition of "facilitate," see United States v. Aquilla, 976 F.2d 1044, 1049 (7th Cir. 1992); United States v. Alvarez, 860 F.2d 801, 813 (7th Cir. 1988).

If there is no dispute as to whether the device allegedly used was a "communication facility" (which should be true in most cases), the second paragraph should not be given and the facility used should be specified in the elements instruction.

21 U.S.C. § 846
(Conspiracy--Elements)

Committee Comment

The Committee recommends the use of the general Conspiracy instruction, without the overt act requirement. See Committee Comment following that instruction. United States v. Shabani, 115 S.Ct. 382 (1994); see also United States v. Umentum, 547 F.2d 987, 991 (7th Cir. 1976), cert. denied, 430 U.S. 983 (1977); United States v. Sassi, 966 F.2d 283, 285 (7th Cir.), cert. denied, 506 U.S. 991 (1992).

21 U.S.C. § 848
(Continuing Criminal Enterprise - Elements)

To sustain the charge in Count ___ that a [the] defendant engaged in a continuing criminal enterprise, the government must prove each of the following propositions beyond a reasonable doubt:

First, that the defendant committed a continuing series of at least three or more of the narcotics offenses alleged in Count ___;

Second, the defendant committed the offenses acting in concert with five or more other persons;

Third, the defendant acted as an organizer, supervisor or manager of those five or more other persons; and

Fourth, the defendant obtained substantial income or resources from the offenses.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty on Count ___.

If, on the other hand, you find from your consideration of all of the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty on Count ___.

Committee Comment

See United States v. Gibbs, 61 F.3d 536, 537 (7th Cir. 1995); United States v. Herrera-Rivera, 25 F.3d 491, 498 (7th Cir. 1994).

21 U.S.C. § 848
(Continuing Criminal Enterprise - Continuing Series of Offenses)

The narcotics offenses you may consider in determining whether the defendant committed a continuing series of at least three offenses include:

[List possible predicate offenses (including those charged in the indictment), e.g. distribution of a controlled substance, possession of a controlled substance with the intent to distribute, or use of telephones to facilitate the commission of a narcotics offense.]

In determining whether the defendant engaged in a continuing series of at least three narcotics offenses, you may consider the offenses alleged in the indictment [as well as other alleged offenses of these types.] You must find that the government has proved that the defendant committed any offense beyond a reasonable doubt in order to consider it to be part of a continuing series.

Committee Comment

See Garrett v. United States, 471 U.S. 773 (1985); United States v. Baker, 905 F.2d 1100, 1103 (7th Cir. 1990); United States v. Young, 745 F.2d 733 (2nd Cir. 1984); cf. United States v. Markowski, 772 F.2d 358, 361 n.1 (7th Cir. 1985). Note that the Seventh circuit, in accord with the majority of circuits that have considered the question, does not require unanimity on the jury's part as to which specific offenses make up the continuing series. United States v. Canino, 949 F.2d 928 (7th Cir. 1991); but see United States v. Edmonds, 80 F.3d 810 (3rd Cir. 1996) (en banc).

The bracketed language should only be used if the indictment charges a continuing series of offenses consisting of specified acts, as opposed to a series of consisting of statutory categories of offenses such as “multiple acts of possession of controlled substances with intent to distribute and distribution of controlled substances.”

21 U.S.C. § 848
(Continuing Criminal Enterprise - Five or More Persons)

If you find that the defendant committed a continuing series of narcotics offenses, you must also decide whether the defendant committed this series of offenses in concert with five or more persons whom he/she organized, supervised or managed. [Those persons do not have to be named in the indictment.]

In order to find that the defendant acted in concert with five or more persons, you must unanimously agree that the defendant organized, supervised or managed five or more persons in committing the series of offenses. However, you do not have to agree on the identity of five or more persons with whom the defendant acted. [You do not have to find that the five or more persons acted together at the same time, or that the defendant personally dealt with them, or that all five persons were present at the same time.] [It is not required that the defendant acted in concert with five or more persons in the commission of any single offense that is one of the series of offenses constituting the continuing criminal enterprise.] [You do not have to find that the defendant had the same relationship with each of the five or more persons.]

Committee Comment

See United States v. Gibbs, 61 F.3d 536, 538, 539 n.1 (7th Cir. 1995); United States v. Bafia, 949 F.2d 1465, 1470-71 (7th Cir. 1991); United States v. Markowski, 772 F.2d 358, 364 (7th Cir. 1985), cert. denied, 475 U.S. 1018 (1986).

The bracketed instructions should be given only where the question addressed is raised.

21 U.S.C. § 848
(Continuing Criminal Enterprise - Organizing, Managing, Supervising)

The terms "organizer," "supervisory position," and "any other position of management" are used in their ordinary meaning. As to each of the five or more people, the government must prove that the defendant organized or supervised or managed them in accomplishing the activities that contribute to the continuing enterprise.

The defendant need not have had personal contact with each of the five or more persons whom he organized, supervised or managed. [The defendant may still be considered an organizer, supervisor or manager even if he delegated the authority to personally hire those whom he is alleged to have organized, supervised or managed.]

Committee Comment

See United States v. Gibbs, 61 F.3d 536, 538 (7th Cir. 1995); United States v. Mannino, 635 F.2d 110, 116-17 (2nd Cir. 1980); United States v. Ray, 731 F.2d 1361, 1367 (9th Cir. 1984); United States v. Dickey, 736 F.2d 571, 587 (10th Cir. 1984); United States v. Phillips, 664 F.2d 971, 1013 and 1034 (5th Cir. 1981) cert. denied, 457 U.S. 1136 (1982); United States v. Rhodes, 779 F.2d 1019, 1026 (4th Cir. 1985).

21 U.S.C. § 848
(Continuing Criminal Enterprise - Substantial Income or Resources)

The term "substantial" means of real worth and importance, or of considerable value. The term "resources" includes money, drugs or other items of material value.

The element of "substantial income or resources" can be proved circumstantially. For example, evidence of substantial gross receipts, substantial gross income or expenditures, receipt or possession of a large amount of narcotics, a large cash flow, a substantial amount of money changing hands, or anticipated profits from future sales may be considered by you in determining whether defendant obtained "substantial income and resources" from the continuing criminal enterprise. [Substantial income or resources is not limited to substantial "net" income or profit.]

Committee Comment

See United States v. Herrera-Rivera, 25 F.3d 491, 499 (7th Cir. 1994); United States v. Dickey, 736 F.2d 571, 588 (10th Cir. 1984) (substantial gross receipts, gross income, or gross expenditures); United States v. Graziano, 710 F.2d 691, 698 (11th Cir. 1983) (receipt of narcotics constitutes income), cert. denied, 466 U.S. 937 (1984); United States v. Chagra, 669 F.2d 241, 257-58 (5th Cir.) ("accounts receivable" from drug transaction constitutes income; circumstantial evidence permissible; lavish personal expenditures with no legitimate source of income), cert. denied, 459 U.S. 846 (1982); United States v. Thomas, 632 F.2d 837, 847 (10th Cir.) (large cash flow), cert. denied, 449 U.S. 960 (1980); United States v. Bolts, 558 F.2d 316, 321 (5th Cir. 1977) (substantial amounts of money changing hands), cert. denied, 434 U.S. 930, 439 U.S. 898 (1978); United States v. Jeffers, 532 F.2d 1101, 1116-17 (7th Cir. 1976) (gross receipts), rev'd in part on other grounds, 432 U.S. 137 (1977).

21 U.S.C. § 951(a)(1)
(Definition of Import)

The term import means that the substance in question was brought from a point outside the United States into [the United States; customs territory of the United States].

Committee Comment

The term import is defined in 21 U.S.C. § 951(a)(1). This section has been interpreted to mean that the government must prove beyond a reasonable doubt that the substance emanated from a point outside the United States and that it was then brought into the United States or a United States customs territory. United States v. Seni, 662 F.2d 277, 286-87 (4th Cir. 1981), cert. denied, 455 U.S. 950 (1982); United States v. Watkins, 662 F.2d 1090, 1098 (4th Cir. 1981), cert. denied sub nom. Watkins v. United States, 455 U.S. 989 (1982).

21 U.S.C. § 951(a)(2)
(Definition of Customs Territory of the United States)
(Vol. 3, p. 123)

Customs territory of the United States includes only the States, the District of Columbia, and Puerto Rico.

Committee Comment

Section 951(a)(2) defines this term by reference to general headnote 2 to the Tariff Schedules of the United States. As of 1984, this headnote defined "customs territory" as set out in this instruction.

21 U.S.C. § 952(a)
(Importation of controlled substances - elements)

To sustain the charge of importation of controlled substances, the government must prove the following propositions:

First, the defendant imported [identify the substance] into [the United States; customs territory of the United States];

Second, the defendant knew the substance he possessed was a controlled substance;

[Third, the (specify substance here) was not imported pursuant to regulations prescribed by the Attorney General.]

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Comment

The cases make clear that proof of importation alone is insufficient under this statute. The government must prove not only that the substance was imported as defined in Instruction 21 U.S.C. s 951(a)(1) (Definition of Import), supra p. 132, but also that the defendant imported the substance. United States v. Koua Thao, 712 F.2d 369, 371 (8th Cir. 1983); United States v. Seni, 662 F.2d 277, 280 (4th Cir. 1981), cert. denied sub nom. Minton v. United States; 455 U.S. 950 (1982).

Although the statute itself contains no intent requirement, the cases also make clear that the statute is a specific intent statute which requires the government to prove both that the defendant knowingly imported the substance in question and that the defendant knew the substance was a controlled substance. United States v. Galvan, 693 F.2d 417, 421 (5th Cir. 1982) (§ 952 is specific intent statute which requires proof of knowledge "that a controlled substance is being imported"); United States v. Lopez, 663 F.2d 532, 534 (5th Cir. 1981) (importation must be done "knowingly and intentionally"); United States v. Seni, 662 F.2d at 280 (importation must be done "knowingly and willfully").

Several circuits have held that the government need not prove the defendant knew specifically which drug he was importing as long as it proves that the defendant knew he was importing a controlled substance. See United States v. Lopez-Martinez, 725 F.2d 471, 475 (9th Cir.), cert. denied, 469 U.S. 837 (1984); Quintero v. United States, 33 F.3d 1133, 1136 (9th Cir. 1994). See also United States v. Lewis, 676 F.2d 147, 149 (9th Cir), cert. denied, 429 U.S. 837 (1976); United States v. Gomez, 905 F.2d 1513, 1514 (11th Cir.), cert. denied, 498 U.S. 1092 (1990); United States v. Ramierz-Ramierz, 875 F.2d 772, 774 (9th Cir. 1989); United States v. Restrepo-Granda, 575 F.2d 524, 527 (5th Cir.), cert. denied, 439 U.S. 935 (1978); and United States v. Rea, 532 F.2d 147, 149 (9th Cir.), cert. denied, 429 U.S. 837 (1976).. Although the Seventh Circuit never has specifically ruled on the issue, its decisions in United States v. Vargas, 583 F.2d 380, 384 (7th Cir. 1978) and United States v. Moser, 509 F.2d 1089, 1092 (7th Cir. 1975), both of which require some sort of proof that the defendant have knowledge of the specific type of drug as charged in the indictment, appear contrary to the above position. However, in United States v. Herrero, 893 F.2d 1512, 1535 (7th Cir.), cert. denied, 496 U.S. 927 (1990), the 7th Circuit cited

both Lopez-Martinez and Lewis in holding that a co-conspirator need only have knowledge that his partner is dealing in controlled substances and not that he is distributing a specific drug.

The cases are silent on the issue of whether the defendants must know they are actually crossing a border; *i.e.* knowingly importing something. Although this silence indicates that the question remains open, because it has never been raised, the Committee decided not to include it as an element in the instruction.

Section 952(a), which is contained in Chapter II of Chapter 13 of Title 21, enumerates several exceptions to its prohibitions which are permitted pursuant to various regulations prescribed by the Attorney General. Other exceptions to § 952 are enumerated in 21 U.S.C. § 956. Under 21 U.S.C. § 885(a)(1), the burden of going forward with evidence to support these exceptions is on the defendant. Although this section applies only to Subchapter I, § 965 of Title 21 makes § 885(a)(1) applicable to charges brought under Subchapter II. Thus, it appears that the burden of going forward with evidence to support an exception to § 952(a) is on the defendant.

The Seventh Circuit has so interpreted § 885(a)(1) for offenses included in Subchapter I. United States v. Felts, 602 F.2d 146, 148 (7th Cir. 1979), cert. denied, 444 U.S. 1046 (1980); United States v. Kelly, 500 F.2d 72, 73 (7th Cir. 1974). Although the Seventh Circuit has never ruled on the application of § 885(a)(1) to § 952 or to any other statute included in Subchapter II, in United States v. Murray, 618 F.2d 892, 901 (2d. Cir. 1980), the Second Circuit citing *Felts*, did apply § 885(a)(1) to statutes included in Subchapter II.

Once a defendant introduces evidence to show that one of the exceptions listed in § 952(a) may be applicable to him, the government must prove the nonapplicability of the exception beyond a reasonable doubt and the exception must be included as an element in the elements instruction. United States v. Kelly, supra at 74.

21 U.S.C. § 952(a)
(Definition of Controlled Substance)

I instruct you that (identify the substance) is a [controlled substance; narcotic drug; non-narcotic drug].

Committee Comment

Where the defendant has challenged the government's proof that the substance in question falls within the statutory definition of the substance charged, more detailed instructions may be required. Such instructions should make clear that the government must prove beyond a reasonable doubt that the substance in question was in fact the substance charged as defined in the appropriate Schedule of 21 U.S.C. s 812. The instructions may also need to include a definition of the substance as articulated in s 802(16) (definition of "narcotic" drug) and s 812. For examples of such instructions, see United States v. Luschen, 614 F.2d 1164, 1169 n.2 (8th Cir. 1980); United States v. Umentum, 547 F.2d 987, 992 n.3 (7th Cir. 1976), cert. denied, 430 U.S. 983 (1977); United States v. Orzechowski, 547 F.2d 978, 982-83 n.3, 983 n.4 (7th Cir. 1976), cert. denied, 431 U.S. 906 (1977).

21 U.S.C. 952(a)
(Knowledge of identity of controlled substance)

It is sufficient that the defendant knew that the substance was some kind of prohibited drug. It does not matter whether the defendant knew that the substance was (identify the substance).

21 U.S.C. § 952(b)
(Importation of non-narcotic Drugs--Elements)

To sustain the charge of importation of controlled substances, the government must prove the following propositions:

First, the defendant imported (here specify substance) into [the United States; customs territory of the United States];

Second, the defendant knew the substance was a controlled substance;

[Third, the (here specify substance) was not imported pursuant to regulations prescribed by the Attorney General.]

It does not matter whether the defendant knew that the substance was _____. It is sufficient that the defendant knew that it was some kind of prohibited drug.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

See United States v. Osmani, 20 F.3d 266 (7th Cir. 1994).

26 U.S.C. § 5845
(Definition of Make)

The term make includes manufacturing (other than by one qualified to engage in such business), putting together, altering, any combination of these, or otherwise producing a firearm.

26 U.S.C. § 5845
(Definition of Transfer)

The term transfer includes selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of.

26 U.S.C. § 5845
(Definition of Dealer)

The term dealer means any person, not a manufacturer or importer, engaged in the business of selling, renting, leasing, or loaning firearms.

26 U.S.C. § 5845
MACHINE GUNS, DESTRUCTIVE DEVICES, AND CERTAIN OTHER FIREARMS
(Definition of Importer)

The term "importer" means any person who is engaged in the business of importing or bringing firearms into the United States.

26 U.S.C. § 5845
(Definition of Manufacturer)

The term "manufacturer" means any person who is engaged in the business of manufacturing firearms.

Committee Comment

The terms "firearm," "machine gun," "rifle," "shotgun," "any other weapon," "destructive device," "antique firearm," and "unserviceable firearm" are statutorily defined. Definitions of those terms for the jury should, if necessary, be taken from the statute.

26 U.S.C. § 5861
(Failure to Pay Tax or Register--Elements)

To sustain the charge of engaging in business as a [manufacturer of; importer of; dealer in] firearms [without having paid the special tax; without having registered] as required by law, the government must prove the following propositions:

First, the defendant was engaged in business as a [manufacturer of; importer of; dealer in] firearms; and,

Second, the defendant engaged in the business [without having first paid the special tax; without having registered] as required by law.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that either of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Instructions on the mechanics of paying the tax (§ 5801) and registering (§ 5802) are not included as the need to use them appears to be remote.

26 U.S.C. § 5861
(Receiving or Possessing an Unregistered Firearm--Elements)

To sustain the charge of [receiving; possessing] a firearm which is not registered in the National Firearms Registration and Transfer Record the government must prove the following propositions:

First, the defendant knowingly [received; possessed] a firearm; and,

Second, the defendant knew that the firearm possessed the characteristic[s] of [list characteristics].

Third, the firearm was not registered in the National Firearms Registration and Transfer Record.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that either of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

In the second element, the court must provide a list of all the characteristics in the appropriate statutory definition of the particular firearm or firearms which are the subject of the prosecution. These definitions are found at 26 U.S.C. § 5845. Staples v. United States, 511 U.S. 600 (1994), United States v. Meadows, 91 F.3d 851 (7th Cir. 1996).

26 U.S.C. § 5861
(Other Prohibited Acts)

Committee Comment

Title 26 U.S.C. 5861 lists twelve separate acts prohibited by the National Firearms Act. Because most of the acts are specific, and the foreseeable charges are so numerous and individualistic, the Committee believes that the balance of the statute should not be the subject of pattern instructions.

26 U.S.C. § 7201
(Attempt to evade or defeat tax - elements)

To sustain a charge of attempting to evade or defeat the defendant's individual tax, the government must prove the following propositions:

First, on April 15 [or date of a legal extension] of the year following the tax year, federal income tax was due and owing by the defendant;

Second, the defendant intended to evade or defeat the ascertainment, assessment, computation or payment of the tax; and

Third, the defendant willfully did some act in furtherance of the intent to evade tax or payment of the tax.

If you find from your consideration or of all of the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

See Sansone v. United States, 380 U.S. 343, 351 (1965); United States v. Marabelles, 724 F.2d 1374, 1380 (9th Cir. 1984); United States v. Dwoskin, 644 F.2d 418, 419 (5th Cir. 1981); United States v. Grasso, 629 F.2d 805, 807 (2d Cir. 1980). This section includes both attempts to avoid payment of taxes and attempts to avoid assessment of taxes. United States v. Voorhies, 658 F.2d 710, 713 (9th Cir. 1981).

If the government uses a "net worth" theory to prove underpayment of taxes, then the government must prove that the increase in the defendant's net worth, added to his nondeductible expenditures and excluding his known nontaxable receipts, exceeded his reported taxable income by a substantial amount. See United States v. Sorrentino, 726 F.2d 876, 879 (1st Cir. 1984). This added burden of proof is imposed under the net worth theory because that method of proof is "fraught with danger for the innocent ...." Holland v. United States, 348 U.S. 121, 125 (1954). Accordingly, the Committee recommends that the phrase "substantial tax" be inserted into the first element in place of the word "tax" when the government employs a net worth theory of proof in a prosecution under Section 7201.

Where specific acts of evasion are charged, the court should consider whether to give a unanimity instruction (See Instruction No.)

26 U.S.C. § 7201
(Definition of Willfully)

The term "willfully" means the voluntary and intentional violation of a known legal duty, in other words, acting with the specific intent to avoid paying a tax imposed by the income tax laws or to avoid assessment of a tax that it was the legal duty of the defendant to pay to the government, and that the defendant knew it was his/her legal duty to pay.

Committee Comment

"Willfulness" is "any conduct, the likely effect of which would be to mislead or conceal." Spies v. United States, 317 U.S. 492, 499 (1943); United States v. Voorhies, 658 F.2d 710, 715 (9th Cir. 1981). "Willfulness" may be inferred from concealment of assets or covering up sources of information, or handling one's affairs to avoid making the records usually generated by a particular transaction. United States v. Kaatz, 705 F.2d 1237, 1246 (10th Cir. 1983); United States v. Scott, 660 F.2d 1145, 1160 (7th Cir. 1981), cert. denied, 455 U.S. 907 (1982).

26 U.S.C. § 7201
(Date tax is due and owing)

If you find beyond a reasonable doubt that the defendant had a tax liability for a particular year, then I instruct you as a matter of law, that tax was due and owing on April 15 [or other date set by law or legal extension] of the following year.

26 U.S.C. § 7201
(No need for tax assessment)

If the defendant has incurred a tax liability, it exists from the date the return is due. A taxpayer's tax liability exists independent of any administrative assessment. It is not necessary that a taxpayer receive a tax assessment before he is charged with a criminal violation of willful attempt to evade or defeat income tax.

Committee Comment

This instruction should be given only if the contrary position is argued by the defendant.

26 U.S.C. § 7201
(Failure to file does not constitute evasion)

Failure to file a tax return, without any additional act, does not establish the crime of willful attempt to evade or defeat income tax.

Committee Comment

See Spies v. United States, 317 U.S. 492, 499 (1942).

26 U.S.C. § 7201
(Unanimity as to acts charged)

The committee suggests reference to Instruction 4.03, supra, regarding this issue.

26 U.S.C. § 7203
(Failure to file - elements)

To sustain the charge of willful failure to file an [individual, partnership, corporate, trust] income [or other] tax return, the government must prove the following propositions:

First, the defendant was a person required by law to file an [individual, partnership, corporate, trust, or other] income [or other] tax return for [calendar or fiscal year in question];

Second, the defendant failed to file the return as required by law; and

Third, the defendant acted willfully.

If you find from your consideration of all the evidence as to a particular count that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty of that count.

If, on the other hand, you find from your consideration of all the evidence as to a particular count that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty of that count.

26 U.S.C. § 7203
(Gross income - definition)

"Gross income" means all income from whatever source derived, including [wages and compensation for services, tips, compensation in the form of personal expenses paid for by defendant's corporation, income from fraud, embezzlement, etc.]

26 U.S.C. § 7203
(Exact amount due not required)

The government must prove that the defendant's gross income [or net income from business] exceeded the statutory amount creating the obligation to file a return. The government is not required to prove the exact amount of gross income [or net income from business] alleged in the indictment.

26 U.S.C. § 7203
(When person is obligated to file return)

A [single individual, married individual filing separately, etc.] [under] [over] 65 years old was required to make and file an individual income tax return if that individual had a gross income of $____ or more.

A married individual was required to file a federal income tax return if he/she had a separate gross income in excess of $_____ and a total gross income, when combined with that of his/her spouse, in excess of $_____ where [either] [both] [is] [are] [over] [under] 65 years old.

Any person who received more than $____ net income from business (Schedule C), was required to make and file an individual income tax return.

Committee Comment

This instruction should be adapted for particular years, as filing requirements change.

26 U.S.C. § 7203
(When entity is obligated to file return)

I instruct you, as a matter of law, that for the years ____, a corporation [partnership, trust] was required to make and file a corporate [partnership, trust] income tax return, whether or not that corporation had income.

26 U.S.C. § 7203
(Definition of willfully)

The word "willfully" means the voluntary and intentional violation of a known legal duty or the purposeful omission to do what the law requires. The defendant acted willfully if he/she was required by law to file an income tax return and intentionally failed to do so.

26 U.S.C. § 7206(1)
(Fraud and False Statements-Elements)

To sustain the charge that the defendant willfully made [and caused to be made] a false individual [corporate, partnership, trust] income tax return, the government must prove the following proposition:

First, the defendant made [or caused to be made] the income tax return;

Second, the defendant signed the income tax return, which contained a written declaration that it was made under penalties of perjury;

Third, the defendant filed the income tax return [or caused the income tax return to be filed] with the Internal Revenue Service;

Fourth, the income tax return was false as to a material matter, as charged in the count; and

Fifth, when the defendant made and signed the tax return, the defendant did so willfully and did not believe that the tax return was true, correct and complete as to every material matter.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt as to the particular count, then you should find the defendant guilty of the particular count.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt as to the particular count, then you should find the defendant not guilty of that particular count.

26 U.S.C. § 7206
(Definition of Willfully)

The word willfully means the voluntary and intentional violation of a known legal duty or the purposeful omission to do what the law requires. The defendant acted willfully if he/she knew it was his/her legal duty to file truthful [individual, corporate, partnership, trust] tax returns, and intentionally filed [a] false return[s].

26 U.S.C. § 7206
(Materiality)

A line on a tax return is a material matter if the information required to be reported on that line is capable of influencing the correct computation of the amount of tax liability of the individual [corporation] or the verification of the accuracy of the return.

[If you find that the defendant willfully understated the amount of gross income [gross receipts of the corporation, partnership, trust etc.] on his/her individual [corporate, partnership, trust, etc.] tax return, or that the defendant willfully overstated the amount of deductions he/she was entitled to claim at any of the specified lines of his/her individual [corporate, partnership, trust] return, and if you find that the amount of gross receipts or the amount of deductions claimed on a tax return is essential to a correct computation of the amount of taxable income or tax or to the verification of that return, then you may find that the false and fraudulent statements were false as to a material matter.]

OR

A false matter is material if the matter was capable of influencing the Internal Revenue Service.

Committee Comment

The general definition is from United States v. Gaudin, 115 S.Ct. 2310, 2314 (1995), which was a case involving 18 U.S.C. § 1001. There is law suggesting that under § 7206, the test for materiality is whether the information required to be reported on the particular line of the return is essential to a correct computation and reporting of taxable income and tax liability. The Committee takes no position on whether this is required. For this reason, two alternative definitions are provided.

26 U.S.C. 7212
(Corruptly endeavoring to obstruct or impede due administration of laws - elements)

To sustain the charge of corruptly endeavoring to obstruct or impede the due administration of the internal revenue laws, the government must prove the following propositions:

First, the defendant corruptly endeavored to obstruct or impede the due administration of the internal revenue laws;

Second, that the defendant did so knowingly and intentionally.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty of that count.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty of that count.

26 U.S.C. § 7212
(Definition of due administration of laws)

The phrase "due administration of the internal revenue laws" includes the Internal Revenue Service of the Department of the Treasury carrying out its lawful functions in the ascertaining of income; the computing, assessing and collecting of income taxes; the auditing of tax returns and records; and the investigation of possible criminal violations of the internal revenue laws, such as the filing of false or fraudulent individual [corporate, partnership, trust] income tax returns.

26 U.S.C. § 7212
(Endeavor - definition)

The term "endeavor" describes any effort or act to obstruct or impede the due administration of the internal revenue laws. The endeavor need not be successful, but it must have at least a reasonable tendency to obstruct or impede the due administration of the internal revenue laws.

26 U.S.C. § 7212
(Corruptly - definition)

The word "corruptly" means that the act or acts were done with the purpose to secure an unlawful benefit for oneself or another by obstructing or impeding the administration of the internal revenue laws.

Committee Comment

This definition is derived from United States v. Popkin, 943 F. 2d 1535, 1539-40 (11th Cir. 1991), and United States v. Reeves, 752 F.2d 995, 998 (5th Cir.), cert. denied, 474 U.S. 834 (1985). See United States v. Valenti, Nos. 96-2517 & 96-2726 (7th Cir. Aug. 14, 1997), citing with approval United States v. Hanson, 2 F.3d 942, 946-47 (9th Cir. 1993) (employing a similar definition).

26 U.S.C. 7212
(Good faith)

A defendant does not act willfully if he/she believes in good faith that he/she is acting within the law, or that his/her actions comply with the law. Therefore, if the defendant actually believed that what he/she was doing was in accord with the tax statutes, he/she cannot be said to have had the criminal intent to impede or obstruct the administration of the internal revenue laws. This is so even if the defendant's belief was not objectively reasonable, as long as he/she held the belief in good faith. However, you may consider the reasonableness of the defendant's belief together with all the other evidence in the case in determining whether the defendant held the belief in good faith.

Committee Comment

See Cheek v. United States, 111 S. Ct. 604, 611, 612-13 (1991); United States v. Becker, 965 F.2d 383 (7th Cir. 1992).

31 U.S.C. § 5324
(Structuring financial transactions - Elements)

To sustain the charge of unlawfully structuring a financial transaction as alleged in Count __, the government must prove the following propositions:

First, the defendant structured or attempted to structure a transaction for the purpose of evading the currency transaction reporting requirements; and

Second, that the transaction involved one or more domestic financial institutions.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

In cases arising from acts predating the September 1994 amendments to 31 U.S.C. § 5324, the instruction should read as follows:

> To sustain the charge of unlawfully structuring a financial transaction as alleged in Count __, the government must prove the following propositions:
>
> First, that the defendant had knowledge of [a financial institution's duty to report currency transactions in excess of $10,000] [the currency transaction reporting requirements];
>
> Second, with such knowledge, the defendant willfully structured or attempted to structure the transaction for the purpose of evading the currency transaction reporting requirements; and
>
> Third, that the transaction involved one or more domestic financial institutions.
>
> If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.
>
> If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.
>
> As used in these instructions, the term "willfully" means the voluntary and intentional violation of a known legal duty, that is, with a purpose to evade a known federal currency transaction reporting requirement. An act is done willfully if it is done voluntarily and intentionally, as distinguished form negligently, accidentally, or inadvertently.

31 U.S.C. § 5324
(Filing of report)

You may find the defendant guilty of unlawfully structuring a transaction whether or not the financial institution filed, or failed to file, a true and accurate currency transaction report.

31 U.S.C. § 5324
(Definition of "currency transaction")

The term "currency transaction" means the physical transfer of currency from one person to another.

31 U.S.C. § 5324
(Definition of "structure")

As used in these instructions, the term "structure" refers to the manner in which a transaction was carried out.

Structuring occurs when a person [acting alone or with or on behalf of others] conducts or attempts to conduct one or more currency transactions at one or more financial institutions [or different branches of the same financial institution], on one or more days, with the purpose of evading currency transaction reporting requirements in any manner. Structuring includes breaking down a single sum of currency over $10,000 into smaller sums, or conducting a series of cash transactions all at or below $10,000, with the purpose of evading currency transaction reporting requirements.

Committee Comment

This is a representative instruction using the most common example. If it does not fit the particular case, a more applicable example may need to be devised.