CRIMINAL PATTERN JURY INSTRUCTIONS

Prepared by the
Criminal Pattern Jury
Instruction Committee
of the United States
Court of Appeals for the
Tenth Circuit

2011 Edition

The Uniform Criminal Jury Instructions Committee wishes to thank all who have assisted in the preparation of these instructions. We are especially appreciative of the efforts of Robert J. Tepper, Esq., permanent law clerk of Judge Kelly, and the Staff Attorneys of the Tenth Circuit. Special thanks are accorded to our Reporter, Professor Stephen J. Cribari, Esq., of the University of Denver Sturm College of Law for his guidance and patience.

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JUDICIAL COUNCIL OF THE TENTH CIRCUIT RESOLUTION

Resolved that the Committee on Pattern Jury Instructions of the Judicial Council of the Tenth Circuit is hereby authorized to distribute to the District Judges of the Circuit for their aid and assistance, and to otherwise publish, the Committee's Pattern Jury Instruction, Criminal Cases, Tenth Circuit (2005); provided, however, that this resolution shall not be construed as an adjudicative approval of the content of such instructions, which must await case-by-case review by the Court.

Chief Judge
United States Court of Appeals
For the Council

Date: September 1, 2005

BRIEF INTRODUCTION TO THE SECOND EDITION

In the five years since the first edition of these Instructions was issued, the Committee has engaged in a process of continual review and revision of the Instructions, Comments and Use Notes. Feedback has come not only from Supreme Court and Tenth Circuit decisions, but from trial judges, practitioners, and the Committee Members themselves.

The first edition's Introduction should be read by users of these pattern instructions as the principles set forth there are still applicable.

For this Second Edition, the Committee has updated all of the Apprendi v. New Jersey, 530 U.S. 466 (2000), references, in light of subsequent developments in case law. Many Comments and Use Notes have been updated. Some instructions have been revised substantially (such as the instructions for narcotics, coercion and duress, voluntariness of confessions, instructions before trial (in light of the problem of juror access to computers and cell phones) and the partial verdict instruction. Other instructions have been modified in light of case decisions. All references to unpublished decisions have been removed, as have most citations to cases from other circuits.

The Pattern Criminal Jury Instruction Committee wishes to thank all who have assisted in updating these instructions and preparing them for publication. We are especially appreciative to the efforts of Robert J. Tepper, Esq., permanent law clerk to Judge Kelly, to Niki Heller, Chief Staff Counsel to the Tenth Circuit, and to her staff.

INTRODUCTORY NOTE

The Committee notes that the use of these Instructions is a matter committed to the discretion of the trial court. They never need to be given *verbatim*, and the presence or absence of a particular instruction is not indicative of the Committee's view that the instruction should or should not be given. The Committee recommends that the titles of individual instructions not be given to the jury.

The Committee does not recommend the use of language lifted from cases when drafting instructions. Case law employs language written for lawyers, not for jurors. The Committee recommends drafting instructions in plain English.

While we recognize that the matter is ultimately left to the district court's discretion, the Committee suggests that the defendant's name be used in the instructions (rather than generically referring to the "defendant").

The pronoun "he" has been used throughout. It should be replaced as appropriate.

Brackets indicate optional material, or material that needs to be adapted to a given case. Where additional instructions would be helpful in light of certain defenses having been raised, the additional instructions may be found in the Use Notes following the model instructions. "Comment" indicates source material for instructions. "Use Note" indicates suggestions regarding use of instructions.

The Committee has attempted to insert a "Use Note" wherever Apprendi v. New Jersey, 530 U.S. 466 (2000), would require that "sentence enhancers" be proved before a jury at trial, beyond a reasonable doubt. The Committee recommends that wherever an issue raised under Apprendi v. New Jersey, 530 U.S. 466 (2000), and its progeny, is submitted to the jury, the resolution of that issue be included in the verdict form.

The absence of a Tenth Circuit case citation with a particular instruction indicates that no relevant Tenth Circuit case was found. Updates will be issued periodically by the Circuit, or by the publisher of these Instructions.

In its work, the Committee relied on the model instructions of other circuits, instructions submitted to the Committee by District Judges throughout the Tenth Circuit, the independent research by the members of the Committee, and comments made during the public comment period. In order to avoid confusion, source references are not indicated in the model instructions. The Committee was concerned that, should sources be indicated, alterations in the source material might be construed as implying alterations in the model instructions. Nevertheless, the Committee acknowledges that the RICO instructions and comments are derived from 3 Leonard B. Sand, John S. Siffert, Walter P. Loughlin & Steven A. Reiss, Modern Federal Jury Instructions, Criminal, ch. 52 (2002).

The Committee has used "Comments" and "Use Notes" to indicate source material and identify issues. The Committee's approach was to generate generic minimalist instructions that would be tailored to individual cases.

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CRIMINAL PATTERN JURY INSTRUCTIONS

(Criminal Cases)

GENERAL MATTERS

1.01

PRELIMINARY INSTRUCTIONS BEFORE TRIAL

Members of the Jury:

At the end of the trial I will give you detailed guidance on the law and on how you will go about reaching your decision. But now I simply want to generally explain how the trial will proceed.

This criminal case has been brought by the United States government. I will sometimes refer to the government as the prosecution. The government is represented by an assistant United States attorney, ____. The defendant, ____, is represented by his lawyer, ____. [*Alternative*: The defendant, ____, has decided to represent himself and not use the services of a lawyer. He has a perfect right to do this. His decision has no bearing on whether he is guilty or not guilty, and it should have no effect on your consideration of the case.]

The indictment charges the defendant with [read or summarize the indictment, *e.g.*: having intentionally sold heroin]. The indictment is simply the description of the charge made by the government against the defendant; it is not evidence of guilt or anything else. The defendant pleaded not guilty and is presumed innocent. He may not be found guilty by you unless all twelve of you unanimously find that the government has proved his guilt beyond a reasonable doubt. [*Addition for multi-defendant cases*: There are multiple defendants in this case and you will have to give separate consideration to the case against each defendant as each is entitled to individual consideration.]

The first step in the trial will be the opening statements. The government in its opening statement will tell you about the evidence which it intends to put before you. Just as the indictment is not evidence, neither is the opening statement. Its purpose is only to help you understand what the evidence will be. It is a road map to show you what is ahead.

After the government's opening statement, the defendant's attorney may make an opening statement. [Change if the defendant reserves his statement until later or omit if the defendant has decided not to make an opening statement.]

Evidence will be presented from which you will have to determine the facts. The evidence will consist of the testimony of the witnesses, documents and other things received into the record as exhibits, and

any facts about which the lawyers agree or to which they stipulate.

The government will offer its evidence. After the government's evidence, the defendant's lawyer may [make an opening statement and] present evidence, but he is not required to do so. I remind you that the defendant is presumed innocent and it is the government that must prove the defendant's guilt beyond a reasonable doubt. If the defendant submits evidence, the government may introduce rebuttal evidence.

At times during the trial, a lawyer may make an objection to a question asked by another lawyer, or to an answer by a witness. This simply means that the lawyer is requesting that I make a decision on a particular rule of law. Do not draw any conclusion from such objections or from my rulings on the objections. If I sustain an objection to a question, the witness may not answer it. Do not attempt to guess what answer might have been given if I had allowed the answer. If I overrule the objection, treat the answer as any other. If I tell you not to consider a particular statement, you may not refer to that statement in your later deliberations. Similarly, if I tell you to consider a particular piece of evidence for a specific purpose, you may consider it only for that purpose.

During the course of the trial I may have to interrupt the proceedings to confer with the attorneys about the rules of law that should apply. Sometimes we will talk briefly, at the bench. But some of these conferences may take more time, so I will excuse you from the courtroom. I will try to avoid such interruptions whenever possible, but please be patient even if the trial seems to be moving slowly because conferences often actually save time in the end.

You are to consider all the evidence received in this trial. It will be up to you to decide what evidence to believe and how much of any witness's testimony to accept or reject.

After you have heard all the evidence on both sides, the government and the defense will each be given time for their final arguments.

[The final part of the trial occurs when I instruct you on the rules of law which you are to use in reaching your verdict.]

During the course of the trial I may ask a question of a witness. If I do, that does not indicate I have any opinion about the facts in the case but am only trying to bring out facts that you may consider.

[Insert Instruction 1.02 here if material on note-taking by jurors is desired.]

[Insert discussion of the elements of the offense here if they are to be set out for the jury in the preliminary instruction.]

[Ordinarily, the attorneys will develop all the relevant evidence that will be necessary for you to reach your verdict. However, in rare situations, a juror may believe a question is critical to reaching a decision on a necessary element of the case. In that exceptional circumstance, you may write out a question and provide it to the courtroom deputy while the witness is on the stand. I will then consider that question with the lawyers. If it is determined to be a proper and necessary question, I will ask it. If I do not ask it, you should recognize that I have determined it is not a legally appropriate question and not worry about why it was not asked or what the answer would have been.]

During the course of the trial, you should not talk with any witness, or with the defendant, or with any of the lawyers at all. In addition, during the course of the trial you should not talk about the trial with anyone else. Do not discuss the case with anyone or provide any information about the trial to anyone outside the courtroom until the verdict is received. Do not use the internet or any other form of electronic communication to provide any information. Simply put, do not communicate with anyone about the trial until your verdict is received. Also, you should not discuss this case among yourselves until I have instructed you on the law and you have gone to the jury room to make your decision at the end of the trial. It is important that you wait until all the evidence is received and you have heard my instructions on the controlling rules of law before you deliberate among yourselves. Let me add that during the course of the trial you will receive all the evidence you properly may consider to decide the case. Because of this, you should not attempt to gather any information or do any research on your own. Do not attempt to visit any places mentioned in the case, either actually or on the internet, and do not in any other way try to learn about the case outside the courtroom.

The court reporter is making stenographic notes of everything that is said. This is basically to assist any appeals. However, a typewritten copy of the testimony will not be available for your use during deliberations. On the other hand, any exhibits will be available to you during your deliberations.

Now that the trial has begun you must not hear or read about it in the media. The reason for this is that your decision in this case must be made solely on the evidence presented at the trial.

With that introduction, Mr. ____, you may present the opening statement for the government.

Comment

The Tenth Circuit has recognized that the trial judge "must fairly and impartially state the issues and applicable law in logical sequence and in the common speech of man if the jury is to understand the issues and intelligently apply the law." *Elbel v. United States*, 364 F.2d 127, 134 (10th Cir. 1966). It is hoped these instructions will assist trial judges throughout the Circuit to fulfill this duty.

In *United States v. Blitstein*, 626 F.2d 774, 779 (10th Cir. 1980), the Tenth Circuit noted the district court had given a preliminary instruction noting the basic jury function is a search for the truth, that jurors were the sole judges of the facts and that, because of the presumption of innocence, defendant must be acquitted unless jurors, after an impartial trial of all the evidence, were convinced of guilt beyond a reasonable doubt. In *United States v. Coppola*, 526 F.2d 764, 775-76 (10th Cir. 1975), the Tenth Circuit recognized that while it is the better practice to repeat the admonition against receiving media coverage throughout the trial, the failure to do so was harmless where the preliminary instruction contained such a caution.

1.02

NOTE-TAKING BY JURORS

(Optional Addition to Preliminary Instructions)

ALTERNATIVE A

You may not take notes during the course of the trial. There are several reasons for this. It is difficult to take notes and, at the same time, pay attention to what a witness is saying. Furthermore, in a group the size of yours, certain persons will take better notes than others, and there is the risk that the jurors who do not take good notes will depend upon the notes of others. The jury system depends upon all twelve jurors paying close attention and arriving at a unanimous decision. I believe that the jury system works better when the jurors do not take notes.

ALTERNATIVE B

If you would like to take notes during the trial, you may. On the other hand, you are not required to take notes.

If you do decide to take notes, be careful not to get so involved in note taking that you become distracted, and remember that your notes will not necessarily reflect exactly what was said, so your notes should be used only as memory aids. Therefore, you should not give your notes precedence over your independent recollection of the evidence. You should also not be unduly influenced by the notes of other jurors. If you do take notes, leave them in the jury room at night and do not discuss the contents of your notes until you begin deliberations.

Comment

The Tenth Circuit held it was within the discretion of the district court to permit the jurors to take notes in *United States v. Riebold*, 557 F.2d 697, 705-06 (10th Cir. 1977).

1.03

INTRODUCTION TO FINAL INSTRUCTIONS

Members of the Jury:

In any jury trial there are, in effect, two judges. I am one of the judges, you are the other. I am the judge of the law. You, as jurors, are the judges of the facts. I presided over the trial and decided what evidence was proper for your consideration. It is also my duty at the end of the trial to explain to you the rules of law that you must follow and apply in arriving at your verdict.

In explaining the rules of law that you must follow, first, I will give you some general instructions which apply in every criminal case—for example, instructions about burden of proof and insights that may help you to judge the believability of witnesses. Then I will give you some specific rules of law that apply to this particular case and, finally, I will explain the procedures you should follow in your deliberations, and the possible verdicts you may return. These instructions will be given to you for use in the jury room, so you need not take notes.

1.04

DUTY TO FOLLOW INSTRUCTIONS

You, as jurors, are the judges of the facts. But in determining what actually happened—that is, in reaching your decision as to the facts—it is your sworn duty to follow all of the rules of law as I explain them to you.

You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences. However, you should not read into these instructions, or anything else I may have said or done, any suggestion as to what your verdict should be. That is entirely up to you.

It is also your duty to base your verdict solely upon the evidence, without prejudice or sympathy. That was the promise you made and the oath you took.

Comment

"The [jury] instructions as a whole need not be flawless, but . . . upon hearing the instructions, the jury [must be able to understand] the issues to be resolved and its duty to resolve them." *United States v. Fredette*, 315 F.3d 1235, 1240 (10th Cir. 2003) (quotation omitted).

1.05

PRESUMPTION OF INNOCENCE—BURDEN OF PROOF—REASONABLE DOUBT

The government has the burden of proving the defendant guilty beyond a reasonable doubt. The law does not require a defendant to prove his innocence or produce any evidence at all. The government has the burden of proving the defendant guilty beyond a reasonable doubt, and if it fails to do so, you must find the defendant not guilty.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. It is only required that the government's proof exclude any "reasonable doubt" concerning the defendant's guilt. A reasonable doubt is a doubt based on reason and common sense after careful and impartial consideration of all the evidence in the case. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Comment

"[T]he reasonable doubt standard is a constitutional cornerstone of the criminal justice system. A defendant is entitled to have his jury apprised of this standard and its corollary, the presumption of innocence, and is entitled to have the meaning of reasonable doubt explained to the jury." *United States v. Pepe*, 501 F.2d 1142, 1143 (10th Cir. 1974). In defining reasonable doubt, "[i]t is not required that the government prove guilt beyond all possible doubt." *United States v. Jacobson*, 578 F.2d 863, 866 (10th Cir. 1978) (quotation omitted). The Tenth Circuit has repeatedly criticized instructions which define reasonable doubt in terms of "substantial doubt" combined with "an abiding conviction of the defendant's guilt such as you would be willing to act upon in the more weighty and important matters relating to your own affairs." *Tillman v. Cook*, 215 F.3d 1116, 1126 (10th Cir. 2000); *United States v. Barrera-Gonzales*, 952 F.2d 1269, 1271 (10th Cir. 1992); *Monk v. Zelez*, 901 F.2d 885, 890 (10th Cir. 1990); *United States v. Smaldone*, 485 F.2d 1333, 1347-48 (10th Cir. 1973); *see also Victor v. Nebraska*, 511 U.S. 1, 24 (1994) (Ginsburg, J., concurring) (suggesting a fundamental difference between decisions people normally make and jury decisions). The definition of reasonable doubt derives primarily from Tillman and is also consistent with the instruction approved in *United States v. Litchfield*, 959 F.2d 1514, 1520-21 (10th Cir. 1992).

1.05.1

PREPONDERANCE OF EVIDENCE

Preponderance of evidence is evidence sufficient to persuade you that a fact is more likely present than not present.

1.06

EVIDENCE—DEFINED

You must make your decision based only on the evidence that you saw and heard here in court. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of court influence your decision in any way.

The evidence in this case includes only what the witnesses said while they were testifying under oath, the exhibits that I allowed into evidence, the stipulations that the lawyers agreed to, and the facts that I have judicially noticed.

Nothing else is evidence. The lawyers' statements and arguments are not evidence. Their questions and objections are not evidence. My legal rulings are not evidence. And my comments and questions are not evidence.

During the trial, I did not let you hear the answers to some of the questions that the lawyers asked. I also ruled that you could not see some of the exhibits that the lawyers wanted you to see. And sometimes I ordered you to disregard things that you saw or heard, or I struck things from the record. You must completely ignore all of these things. Do not even think about them. Do not speculate about what a witness might have said or what an exhibit might have shown. These things are not evidence, and you are bound by your oath not to let them influence your decision in any way.

Use Note

This instruction is consistent with federal practice generally. *United States v. Caballero*, 277 F.3d 1235, 1244 (10th Cir. 2002); *United States v. Sanders*, 929 F.2d 1466, 1470 (10th Cir. 1991).

Paragraph (2) should be tailored to delete any references to kinds of evidence not relevant to the particular trial. If the court has taken judicial notice of a fact, the term "judicial notice" should be explained to the jury.

Paragraph (4) should also be tailored depending on what has happened during trial.

It is settled practice to give a general instruction defining what is and is not evidence.

In some cases, there may not be any stipulations, or any judicially noticed facts. In such cases, paragraph (2) should be tailored to eliminate the

unnecessary and irrelevant language. The strongly worded admonition in paragraph (4) regarding proffered evidence that was rejected or stricken may be necessary to counteract the jurors' natural curiosity and inclination to speculate about these matters. This paragraph should be tailored to fit the particular facts of the case. If, for example, there was no occasion during the course of the trial to order that things the jurors saw or heard be stricken from the record, the language in this paragraph dealing with such matters should be omitted.

1.07

EVIDENCE—DIRECT AND CIRCUMSTANTIAL—INFERENCES

[There are, generally speaking, two types of evidence from which a jury may properly determine the facts of a case. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence, that is, the proof of a chain of facts which point to the existence or non-existence of certain other facts.]

[As a general rule, the law makes no distinction between direct and circumstantial evidence. The law simply requires that you find the facts in accord with all the evidence in the case, both direct and circumstantial.]

While you must consider only the evidence in this case, you are permitted to draw reasonable inferences from the testimony and exhibits, inferences you feel are justified in the light of common experience. An inference is a conclusion that reason and common sense may lead you to draw from facts which have been proved.

By permitting such reasonable inferences, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in this case.

Comment

See United States v. Rahseparian, 231 F.3d 1267, 1271-72 (10th Cir. 2000); *United States v. Ortiz-Ortiz*, 57 F.3d 892, 895 (10th Cir. 1995); *United States v. McIntyre*, 997 F.2d 687, 702-03 & nn.16-18 (10th Cir. 1993).

Use Note

The bracketed first two paragraphs are optional. Some judges instruct before closing argument, some after. If instructions are given after closing argument, the Committee suggests that this instruction be modified depending on whether the attorneys have referred to the distinction between direct and circumstantial evidence during their closing arguments.

1.08

CREDIBILITY OF WITNESSES

I remind you that it is your job to decide whether the government has proved the guilt of the defendant beyond a reasonable doubt. In doing so, you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to the witness's testimony. An important part of your job will be making judgments about the testimony of the witnesses [including the defendant] who testified in this case. You should think about the testimony of each witness you have heard and decide whether you believe all or any part of what each witness had to say, and how important that testimony was. In making that decision, I suggest that you ask yourself a few questions: Did the witness impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome in this case? Did the witness have any relationship with either the government or the defense? Did the witness seem to have a good memory? Did the witness clearly see or hear the things about which he/she testified? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses? When weighing the conflicting testimony, you should consider whether the discrepancy has to do with a material fact or with an unimportant detail. And you should keep in mind that innocent misrecollection—like failure of recollection—is not uncommon.

[The testimony of the defendant should be weighed and his credibility evaluated in the same way as that of any other witness.]

[The defendant did not testify and I remind you that you cannot consider his decision not to testify as evidence of guilt. I want you to clearly understand, please, that the Constitution of the United States grants to a defendant the right to remain silent. That means the right not to testify or call any witnesses. That is a constitutional right in this country, it is very carefully guarded, and you should understand that no presumption of guilt may be raised and no inference of any kind may be drawn from the fact that a defendant does not take the witness stand and testify or call any witnesses.]

In reaching a conclusion on particular point, or ultimately in reaching a verdict in this case, do not make any decisions simply because there were more witnesses on one side than on the other.

Comment

This instruction is consistent with *United States v. Arias-Santos*, 39 F.3d 1070, 1074 (10th Cir. 1994); *see also United States v. Coleman*, 7 F.3d 1500, 1505-06 (10th Cir. 1993).

Use Note

If the defendant did not testify, please refer to Instruction 1.08.1, which follows.

1.08.1

NON-TESTIFYING DEFENDANT

The defendant did not testify and I remind you that you cannot consider his decision not to testify as evidence of guilt. You must understand that the Constitution of the United States grants to a defendant the right to remain silent. That means the right not to testify. That is a constitutional right in this country, it is very carefully guarded, and you must not presume or infer guilt from the fact that a defendant does not take the witness stand and testify or call any witnesses.

Comment

This instruction is consistent with *United States v. Coleman*, 7 F.3d 1500, 1505-06 (10th Cir. 1993).

1.09

EVIDENCE OF GOOD CHARACTER

[The defendant has offered evidence of his reputation for good character.] [The defendant has offered evidence of someone's opinion as to his good character.] You should consider such evidence along with all the other evidence in the case.

Evidence of good character may be sufficient to raise a reasonable doubt whether the defendant is guilty, because you may think it improbable that a person of good character would commit such a crime. Evidence of a defendant's character, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt.

You should also consider any evidence offered to rebut the evidence offered by the defendant.

You should always bear in mind, however, that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Comment

The Committee suggests that *United States v. McMurray*, 656 F.2d 540, 550-51 (10th Cir. 1980), neither mandates nor precludes the use of the word "alone." *See United States v. Daily*, 921 F.2d 994, 1010 (10th Cir. 1990), *overruling on other grounds recognized by United States v. Schleibaum*, 130 F.3d 947, 949 (10th Cir. 1997). The matter is, however, subject to some debate.

There is no *per se* rule that the "evidence of good character *alone*" instruction must be given either sua sponte or upon request. The trial courts should consider this issue on a case-by-case basis, and give the "evidence of good character *alone*" instruction when the circumstances of a particular case so require. *See, e.g.*, *Michelson v. United States*, 335 U.S. 469, 476 (1948); *Edgington v. United States*, 164 U.S. 361, 366 (1896); *Oertle v. United States*, 370 F.2d 719, 727 (10th Cir. 1966) (en banc); *Bird City Equity Mercantile Exch. v. United States*, 338 F.2d 790, 791-92 (10th Cir. 1964).

Cf. Instruction 1.13 (Impeachment By Evidence of Untruthful Character).

Use Note

The word "alone" can be inserted in the second paragraph, when appropriate:

Evidence of good character alone may be sufficient . . . .

1.09.1

EVIDENCE OF REPUTATION FOR HONESTY

The defendant has offered evidence in the form of reputation for honesty and integrity. You should consider such evidence along with all the other evidence in the case.

Evidence in the form of reputation for honesty and integrity may be sufficient to raise a reasonable doubt whether the defendant is guilty, because you may think it improbable that a person of honesty and integrity would commit such a crime. Evidence in the form of reputation of a defendant's honesty and integrity may be inconsistent with those traits of character ordinarily involved in the commission of the crime charged, and may give rise to a reasonable doubt.

You should also consider any evidence offered to rebut the evidence offered by the defendant.

You will always bear in mind, however, that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Comment

Cf. Comment to preceding instruction, 1.09, for discussion of use of the word "alone."

It seems to be the better practice to give this instruction when the defense offers character evidence, especially if the character evidence may be the defense theory of the case. The instruction is consistent with *United States v. McMurray*, 656 F.2d 540, 550-51 (10th Cir. 1980), and *United States v. Daily*, 921 F.2d 994, 1010 (10th Cir. 1990), *overruling on other grounds recognized by United States v. Schleibaum*, 130 F.3d 947, 949 (10th Cir. 1997).

However, there is no *per se* rule that the "evidence of good character *alone*" instruction must be given either *sua sponte* or upon request. The trial courts should consider this issue on a case-by-case basis, and give the "evidence of good character *alone*" instruction when the circumstances of a particular case so require. *See, e.g.*, *Michelson v. United States*, 335 U.S. 469, 476 (1948); *Edgington v. United States*, 164 U.S. 361, 366 (1896); *Oertle v. United States*, 370 F.2d 719, 727 (10th Cir. 1966); *Bird City Equity Mercantile Exch. v. United States*, 338 F.2d 790, 791-92 (10th Cir. 1964).

Cf. Instruction 1.13 (Impeachment by Evidence of Untruthful Character).

Use Note

The word "alone" can be inserted in the second paragraph, when appropriate: "Evidence in the form of reputation for honesty and integrity alone may be sufficient . . . ."

1.10

IMPEACHMENT BY PRIOR INCONSISTENCIES

You have heard the testimony of [name of witness]. You have also heard that, before this trial, he made a statement that may be different from his testimony here in court.

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

Use Note

This instruction must be given when a prior inconsistent statement which does not fall within Fed. R. Evid. 801(d)(2)(A) has been admitted. If several prior inconsistent statements were admitted, some for impeachment purposes and others as substantive evidence, this instruction should identify which statements were offered for impeachment purposes. It should also be given during trial as a limiting instruction, if requested under Fed. R. Evid. 105. This seems consistent with *United States v. Carter*, 973 F.2d 1509, 1512 (10th Cir. 1992); *United States v. Orr*, 864 F.2d 1505, 1509 (10th Cir. 1988); *United States v. Soundingsides*, 825 F.2d 1468, 1470 (10th Cir. 1987).

1.11

IMPEACHMENT BY PRIOR CONVICTION

(Defendant's Testimony)

You have heard evidence that the defendant has been convicted of a felony, that is, a crime punishable by imprisonment for a term of years. This conviction has been brought to your attention only because you may wish to consider it when you decide, as with any witness, how much of his testimony you will believe in this trial. The fact that the defendant has been convicted of another crime does not mean that he committed the crime charged in this case, and you must not use his prior conviction as proof of the crime charged in this case. You may find him guilty of the crime charged here only if the government has proved beyond a reasonable doubt that he committed it.

Use Note

The court should consider giving this instruction at the conclusion of the defendant's testimony as well as at the conclusion of the trial.

1.12

IMPEACHMENT BY PRIOR CONVICTION

(Witness Other Than Defendant)

The testimony of a witness may be discredited or impeached by showing that the witness previously has been convicted of a [felony, that is, of a crime punishable by imprisonment for a term of years] or of a [crime of dishonesty or false statement]. A prior conviction does not mean that a witness is not qualified to testify, but is merely one circumstance that you may consider in determining the credibility of the witness. You may decide how much weight to give any [prior felony conviction] [crime of dishonesty] that was used to impeach a witness.

Use Note

Fed. R. Evid. 609 expressly requires that evidence of a felony conviction shall be admitted, subject to Rule 403. It is important that the court conduct, on the record, a Rule 403 balancing before determining whether to admit or exclude evidence of a felony conviction. *United States v. Howell*, 285 F.3d 1263, 1269-70 (10th Cir. 2002). Rule 403 balancing is not required if the prior crime involves dishonesty or false statements. *United States v. Begay*, 144 F.3d 1336, 1338 (10th Cir. 1998). A crime of dishonesty or false statement does not need to be a felony. Care must be exercised, however, because some offenses that may sound like crimes of dishonesty may not be. *See, e.g.*, *United States v. Dunson*, 142 F.3d 1213, 1215-16 (10th Cir. 1998) (holding that shoplifting is not "automatically" a crime of dishonesty or false statement).

The court should consider giving this instruction at the conclusion of the witness's testimony, as well as at conclusion of the trial.

1.13

IMPEACHMENT BY EVIDENCE OF UNTRUTHFUL CHARACTER

You have heard the testimony of [name of witness], who was a witness in the [government's] [defense] case. You also heard testimony from others concerning [their opinion about his character for truth-telling] [his reputation, in the community where he lives, for telling the truth]. It is up to you to decide from what you heard here whether [name of witness] was telling the truth in this trial. In deciding this, you should bear in mind the testimony concerning his [reputation for] truthfulness.

Comment

Under Fed. R. Evid. 608(a), a witness is not limited to reputation testimony, but may also state his opinion as to the character of another witness for truthfulness.

This instruction should be rarely, if ever, needed.

Cf. Instructions 1.09 (Evidence of Good Character) and 1.09.1 (Evidence of Reputation for Honesty).

1.14

ACCOMPLICE—INFORMANT—IMMUNITY

[as appropriate]

Accomplice

An accomplice is someone who joined with another person in committing a crime, voluntarily and with common intent. The testimony of an accomplice may be received in evidence and considered by you, even though it is not supported by other evidence. You may decide how much weight it should have.

You are to keep in mind, however, that accomplice testimony should be received with caution and considered with great care. You should not convict a defendant based on the unsupported testimony of an alleged accomplice, unless you believe the unsupported testimony beyond a reasonable doubt.

Informant

An informant is someone who provides evidence against someone else for a personal reason or advantage. The testimony of an informant alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilt, even though not corroborated or supported by other evidence. You must examine and weigh an informant's testimony with greater care than the testimony of an ordinary witness. You must determine whether the informant's testimony has been affected by self-interest, by an agreement he has with the government, by his own interest in the outcome of the case, or by prejudice against the defendant.

You should not convict a defendant based on the unsupported testimony of an informant, unless you believe the unsupported testimony beyond a reasonable doubt.

Immunity

A person may testify under a grant of immunity (an agreement with the government). His testimony alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilt even though it is not corroborated or supported by other evidence. You should consider testimony given under a grant of immunity with greater care and caution than the testimony of an ordinary witness. You should consider

whether testimony under a grant of immunity has been affected by the witness's own interest, the government's agreement, the witness's interest in the outcome of the case, or by prejudice against the defendant.

On the other hand, you should also consider that an immunized witness can be prosecuted for perjury for making a false statement. After considering these things, you may give testimony given under a grant of immunity such weight as you feel it deserves.

You should not convict a defendant based on the unsupported testimony of an immunized witness, unless you believe the unsupported testimony beyond a reasonable doubt.

Comment

United States v. Bridwell, 583 F.2d 1135, 1142 (10th Cir. 1978).

Use Note

When the immunity instruction is given, the nature of the agreement with the government should be spelled out in the instruction. *United States v. Valdez*, 225 F.3d 1137, 1139-41 (10th Cir. 2000).

1.15

ACCOMPLICE—CO-DEFENDANT—PLEA AGREEMENT

The government called as one of its witnesses an alleged accomplice, who was named as a co-defendant in the indictment. The government has entered into a plea agreement with the co-defendant, providing [*e.g.*, for the dismissal of some charges and a recommendation of a lesser sentence than the co-defendant would otherwise likely receive]. Plea bargaining is lawful and proper, and the rules of this court expressly provide for it.

An alleged accomplice, including one who has entered into a plea agreement with the government, is not prohibited from testifying. On the contrary, the testimony of an alleged accomplice may, by itself, support a guilty verdict. You should receive this type of testimony with caution and weigh it with great care. You should never convict a defendant upon the unsupported testimony of an alleged accomplice, unless you believe that testimony beyond a reasonable doubt. The fact that an accomplice has entered a guilty plea to the offense charged is not evidence of the guilt of any other person.

Use Note

The bracketed material in the first paragraph should be adapted to the particular case.

1.16

WITNESS'S USE OF ADDICTIVE DRUGS

The testimony of a drug abuser must be examined and weighed by the jury with greater caution than the testimony of a witness who does not abuse drugs.

[Name of witness] may be considered to be an abuser of drugs.

You must determine whether the testimony of that witness has been affected by the use of drugs or the need for drugs.

Comment

The use of an addict instruction was discussed with approval by the Tenth Circuit in *United States v. Smith*, 692 F.2d 658, 660-61 (10th Cir. 1982); there, however, the Court declined to find error in the trial court's refusal to give such instruction in light of the instructions read as a whole. *See also United States v. Nicholson*, 983 F.2d 983, 991 (10th Cir. 1993).

1.17

EXPERT WITNESS

[During the trial you heard the testimony of ____ who expressed opinions concerning ____.] In some cases, such as this one, scientific, technical, or other specialized knowledge may assist the jury in understanding the evidence or in determining a fact in issue. A witness who has knowledge, skill, experience, training or education, may testify and state an opinion concerning such matters.

You are not required to accept such an opinion. You should consider opinion testimony just as you consider other testimony in this trial. Give opinion testimony as much weight as you think it deserves, considering the education and experience of the witness, the soundness of the reasons given for the opinion, and other evidence in the trial.

Use Note

In the typical one-expert case (e.g., drugs), the bracketed sentence may be omitted. Where expert opinions are in issue, the names of the experts and a description of their opinions might be inserted.

1.18

ON OR ABOUT

You will note that the indictment charges that the crime was committed on or about [date]. The government must prove beyond a reasonable doubt that the defendant committed the crime reasonably near [date].

Comment

A similar instruction was approved in *United States v. Agnew*, 931 F.2d 1397, 1401, 1410-11 (10th Cir. 1991). In *United States v. Poole*, 929 F.2d 1476, 1482 (10th Cir. 1991), the court wrote: "the 'on or about' instruction . . . has been approved by this Circuit on numerous occasions."

Care should be taken in giving this instruction if the defendant has raised an alibi defense. *See* Brian H. Redmond, Annotation, *Propriety And Prejudicial Effect Of "On or About" Instruction Where Alibi Evidence In Federal Criminal Case Purports To Cover Specific Date Shown By Prosecution Evidence*, 92 A.L.R. Fed. 313 (1989).

The district court, however, retains the discretion to give an "on or about" instruction even when an alibi defense is raised. *United States v. Phillips*, 869 F.2d 1361, 1368-69 (10th Cir. 1988); *United States v. Lucero*, 601 F.2d 1147, 1150 (10th Cir. 1979). The district court will consider the coincidence, or lack thereof, of a specific date upon which the crime was committed, as alleged and proved, with the specific date of the alibi.

1.19

CAUTION—CONSIDER ONLY CRIME CHARGED

You are here to decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant is not on trial for any act, conduct, or crime not charged in the indictment.

It is not up to you to decide whether anyone who is not on trial in this case should be prosecuted for the crime charged. The fact that another person *also* may be guilty is no defense to a criminal charge.

The question of the possible guilt of others should not enter your thinking as you decide whether this defendant has been proved guilty of the crime charged.

Comment

See United States v. Oberle, 136 F.3d 1414, 1422-23 (10th Cir. 1998), approving instruction directing jury not to concern themselves with the guilt of anyone except the defendant over objection that it directed jurors to ignore defendant's defense of mistaken identity.

Use Note

The Committee suggests that this instruction be given if the defendant has an instruction as to a person other than the defendant being guilty of the crime.

Modification of this instruction will be necessary in those cases where the evidence necessarily raises the question of the guilt of others such as conspiracy or aiding and abetting.

Modification should also be considered in cases in which an alibi or mistaken identification is raised.

1.20

CAUTION—PUNISHMENT

(Non-Capital Cases)

If you find the defendant guilty, it will be my duty to decide what the punishment will be. You should not discuss or consider the possible punishment in any way while deciding your verdict.

1.21

MULTIPLE DEFENDANTS—SINGLE COUNT

The rights of each of the defendants in this case are separate and distinct. You must separately consider the evidence against each defendant and return a separate verdict for each.

Your verdict as to one defendant, whether it is guilty or not guilty, should not affect your verdict as to any other defendant.

Comment

This instruction is based on *Kotteakos v. United States*, 328 U.S. 750, 772 (1946); *United States v. Edwards*, 69 F.3d 419, 434 n.8 (10th Cir. 1995).

1.22

MULTIPLE DEFENDANTS—MULTIPLE COUNTS

A separate crime is charged against one or more of the defendants in each count of the indictment. You must separately consider the evidence against each defendant on each count and return a separate verdict for each defendant.

Your verdict as to any one defendant or count, whether it is guilty or not guilty, should not influence your verdict as to any other defendants or counts.

Comment

This instruction combines the concepts contained in "Single Defendants—Multiple Counts" and "Multiple Defendants—Single Count" instructions.

Use Note

The second paragraph should be modified when guilt of one charge is a prerequisite for conviction of another charge. *See, e.g.*, 18 U.S.C. §1961 (RICO conviction requires proof of two predicate offenses).

1.23

DUTY TO DELIBERATE—VERDICT FORM

In a moment the bailiff will escort you to the jury room and provide each of you with a copy of the instructions that I have just read. Any exhibits admitted into evidence will also be placed in the jury room for your review.

When you go to the jury room, you should first select a foreperson, who will help to guide your deliberations and will speak for you here in the courtroom. [The second thing you should do is review the instructions. Not only will your deliberations be more productive if you understand the legal principles upon which your verdict must be based, but for your verdict to be valid, you must follow the instructions throughout your deliberations. Remember, you are the judges of the facts, but you are bound by your oath to follow the law stated in the instructions.]

To reach a verdict, whether it is guilty or not guilty, all of you must agree. Your verdict must be unanimous on each count of the indictment. Your deliberations will be secret. You will never have to explain your verdict to anyone.

You must consult with one another and deliberate in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to reexamine your own opinions and change your mind if convinced that you were wrong. But do not give up your honest beliefs solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are judges—judges of the facts. You must decide whether the government has proved the defendant guilty beyond a reasonable doubt.

A form of verdict has been prepared for your convenience.

[Explain the Verdict Form]

The foreperson will write the unanimous answer of the jury in the space provided for each count of the indictment, either guilty or not guilty. At the conclusion of your deliberations, the foreperson should date and sign the verdict.

If you need to communicate with me during your deliberations, the foreperson should write the message and give it to the bailiff. I will either reply in writing or bring you back into the court to respond to your message. Under no circumstances should you reveal to me the numerical division of the jury.

Comment

Concerning the admonition against disclosure of the numerical division of the jury, *see Brasfield v. United States*, 272 U.S. 448, 449-50 (1926).

Use Note

The bracketed material in the second paragraph might be appropriate when the trial judge provides the jurors with written copies of the instructions.

The Committee recognizes that many judges do not routinely instruct on the verdict form. For those who do, the bracketed notation "Explain the Verdict Form" indicates an appropriate place for that instruction to be given.

1.24

UNANIMITY OF THEORY

Your verdict must be unanimous. Count ____ of the indictment accuses the defendant of committing the following acts: [description of individual acts].

The government does not have to prove all of these different acts for you to return a guilty verdict on count ____.

But in order to return a guilty verdict, all twelve of you must agree upon which of the listed acts, if any, the defendant committed *and* that he committed at least [number of acts identified above] of the acts listed.

Comment

This instruction is modeled on language from *Richardson v. United States*, 526 U.S. 813, 817-18, 824 (1999).

Use Note

This instruction should be used when the government introduces evidence that the defendant has committed multiple acts which may constitute an element of the crime. *See, e.g.*, 21 U.S.C. §848 (Continuing Criminal Enterprise) (may require proof of a series of federal drug violations). *See Richardson v. United States*, 526 U.S. 813, 817-18, 824 (1999). In that instance the jury must agree on which acts were committed and the requisite number of acts, if multiple acts are required by the statute, before a guilty verdict may be returned. This instruction should not be given when evidence concerning various means of committing the crime has been introduced. *See United States v. Weller*, 238 F.3d 1215, 1219-20 (10th Cir. 2001); *United States v. Powell*, 226 F.3d 1181, 1194-95 (10th Cir. 2000).

1.25

VOLUNTARINESS OF STATEMENT BY DEFENDANT

(Single Defendants)

Evidence has been presented about a statement attributed to the defendant alleged to have been made after the commission of the crime (or crimes) charged in this case but not made in court. Such evidence should always be considered by you with caution and weighed with care. You should give any such statement the weight you think it deserves, after considering all the circumstances under which the statement was made.

In determining whether any such statement is reliable and credible, consider factors bearing on the voluntariness of the statement. For example, consider the age, gender, training, education, occupation, and physical and mental condition of the defendant, and any evidence concerning his treatment while under interrogation if the statement was made in response to questioning by government officials, and all the other circumstances in evidence surrounding the making of the statement.

After considering all this evidence, you may give such weight to the statement as you feel it deserves under all the circumstances. If you determine that the statement is unreliable or not credible, you may disregard the statement entirely.

Comment

The Committee has not used the terms "confession" and "admission." These labels that the law gives to statements may be confusing in jury instructions. "'[S]tatements' is a more neutral description than 'confession,' and should be used in its place . . . unless the statements can be considered a 'complete and conscious admission of guilt—a strict confession,'" *Opper v. United States*, 348 U.S. 84, 91 (1954), in which case the instruction may be adapted by the trial judge.

In *Lego v. Twomey*, 404 U.S. 477 (1972), the Supreme Court set the minimum burden of proof required to establish that a confession is voluntary when such confession has been challenged as involuntary. The Court stated that the burden must be "at least by a preponderance of the evidence." The court stated that the states are free to adopt a higher standard as a matter of state law. In *United States v. McCullah*, 76 F.3d 1087, 1100 (10th Cir. 1996), the Tenth Circuit incorporated the language of *Lego*,"at least by a preponderance of the evidence," thereby establishing the burden for this circuit.

United States v. Toles, 297 F.3d 959, 965-66 (10th Cir. 2002), discusses voluntariness analysis but does not include gender specifically among factors to be considered. Nothing in *Toles* seems to suggest that those factors specifically referred to are exhaustive. According to *Toles*, the determination of voluntariness is based on the totality of circumstances, including the characteristics of the accused and the details of the interrogation. *See also United States v. Gonzales*, 164 F.3d 1285, 1289 (10th Cir. 1999). Such factors include age, intelligence, education of the defendant, length of detention, length and nature of questioning, whether defendant was advised of constitutional rights and whether defendant was subjected to physical punishment. *United States v. Glover*, 104 F.3d 1570, 1579 (10th Cir. 1997) *abrogated on other grounds*, *Corley v. United States*, 129 S. Ct. 1558 (2009).

The instruction is consistent with *United States v. March*, 999 F.2d 456, 462-63 (10th Cir. 1993), and *United States v. Janoe*, 720 F.2d 1156, 1163-64 (10th Cir. 1983).

For a discussion of how the length of time between a defendant's arrest and his presentation before a magistrate may affect the voluntariness of statements made in the interim, *see Corley v. United States*, 129 S. Ct. 1558 (2009).

Use Note

See Instruction 1.05.1 for "preponderance of evidence."

1.26

CONFESSION-STATEMENT—VOLUNTARINESS BY DEFENDANT

(Multiple Defendants)

Evidence relating to any statement attributed to the defendant alleged to have been made after the commission of the crime (or crimes) charged in this case but not made in court, should always be considered by you with caution and weighed with care. You should give any such statement the weight you think it deserves, after considering all the circumstances under which the statement was made.

In determining whether any such statement is reliable and credible, consider factors bearing on the voluntariness of the statement. For example, consider the age, gender, training, education, occupation, and physical and mental condition of the defendant, and any evidence concerning his treatment while under interrogation if the statement was made in response to questioning by government officials, and all the other circumstances in evidence surrounding the making of the statement.

After considering all this evidence, you may give such weight to the statement as you feel it deserves under all the circumstances. If you determine that the statement is unreliable or not credible, you may disregard the statement entirely.

Of course, any such statement should not be considered in any way whatsoever as evidence with respect to any other defendant on trial.

Comment

See Comment to Instruction 1.25.

1.27

ENTRAPMENT

As a defense to the crimes charged in the indictment, the defendant has asserted that he was entrapped.

The defendant was entrapped if

— the idea for committing the crime(s) originated with government agents, and

— the government agents then persuaded or talked the defendant into committing the crime(s), and

— the defendant was not already willing to commit the crime(s).

When a person has no previous intent or purpose to violate the law, but is induced or persuaded by officers or agents to commit a crime, he is entrapped and the law, as a matter of policy, forbids his conviction in such a case. On the other hand, when a person already has the readiness and willingness to violate the law, and the officers or agents merely provide him with an opportunity to commit the crime and do so even by disguise or ruse, there is no entrapment.

In order to return a verdict of guilty as to [the defendant] for the crime(s) of [name crime or crimes charged], you must find beyond a reasonable doubt that the defendant was not entrapped.

[Add as appropriate:

For purposes of this case, [____], the informant, was an agent of the law enforcement officers.]

Comment

The Committee has chosen not to use the word "predisposition" as it sounds overly technical and thus may be confusing to the average juror.

This instruction is based on *United States v. Scull*, 321 F.3d 1270, 1274-76 (10th Cir. 2003), and *United States v. Cerrato-Reyes*, 176 F.3d 1253, 1262-63 (10th Cir. 1999) (and Tenth Circuit cases cited therein).

To establish a defense of entrapment, *Scull* seems to require proof of more than persuasion by the government agent. "'Inducement' is 'government

conduct which creates a substantial risk that an undisposed person or otherwise law-abiding citizen would commit the offense.'" 321 F.3d at 1275 (quoting *United States v. Ortiz*, 804 F.2d 1161, 1165 (10th Cir. 1986)). Inducement is neither established by evidence of solicitation, standing alone, nor "'by evidence that the government agent initiated the contact with the defendant or proposed the crime.'" *Id.* (quoting *Ortiz*, 804 F.2d at 1165).

1.28

SELF-DEFENSE OR DEFENSE OF ANOTHER

The defendant [name the defendant] has offered evidence that he was acting in [self-defense] [defense of another].

A person is entitled to defend [himself] [another person] against the immediate use of unlawful force. But the right to use force in such a defense is limited to using only as much force as reasonably appears to be necessary under the circumstances.

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

To find the defendant guilty of the crime charged in the indictment, you must be convinced that the government has proved beyond a reasonable doubt:

Either, the defendant did not act in [self-defense] [defense of another],

Or, it was not reasonable for the defendant to think that the force he used was necessary to defend [himself] [another person] against an immediate threat.

Comment

As with most affirmative defenses, once the defendant raises the defense, the government must establish beyond a reasonable doubt that the defendant's action was not in self-defense. *United States v. Corrigan*, 548 F.2d 879, 881-84 (10th Cir. 1977).

1.29

IDENTIFICATION TESTIMONY

The government must prove, beyond a reasonable doubt, that the offense(s) charged in this case was actually committed and that it was the defendant who committed it. Thus, the identification of the defendant as the person who committed the offense(s) charged is a necessary and important part of the government's case.

You should evaluate the credibility of any witness making an identification in the same manner as you would any other witness. You should also consider at least the following questions:

Did the witness have the ability and an adequate opportunity to observe the person who committed the offense(s) charged? You should consider, in this regard, such matters as the length of time the witness had to observe the person in question, the lighting conditions at that time, the prevailing visibility, the distance between the witness and the person observed, and whether the witness had known or observed the person before.

Is the testimony about an identification made after the commission of the crime(s) the product of the witness's own recollection? In this regard, you should consider very carefully the circumstances under which the later identification was made, including the manner in which the defendant was presented to the witness for identification and the length of time that elapsed between the crime(s) and the witness's subsequent identification.

If, after examining all of the testimony and evidence in this case, you have a reasonable doubt as to the identity of the defendant as the person who committed the offense(s) charged, you must find the defendant not guilty.

Comment

This instruction should be given whenever identification testimony has become an issue because of lack of corroboration or limited opportunity for observation, because the witness's memory has faded by the time of trial, or because of law-enforcement induced problems that might affect the reliability of identification testimony.

This instruction takes account of *United States v. Telfaire*, 469 F.2d 552, 558 (D.C. Cir. 1972). An instruction consisting only of the first and last paragraphs may be consistent with *United States v. Pena*, 930 F.2d 1486,

1492-93 (10th Cir. 1991), and *United States v. Thoma*, 713 F.2d 604, 607-08 (10th Cir. 1983) (discussing when cautionary instruction is needed).

The Committee believes that elaboration on the specific circumstances surrounding an identification is best left to argument at trial.

1.30

SIMILAR ACTS

You have heard evidence of other [crimes] [acts] [wrongs] engaged in by the defendant. You may consider that evidence only as it bears on the defendant's [e.g., motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident] and for no other purpose. Of course, the fact that the defendant may have previously committed an act similar to the one charged in this case does not mean that the defendant necessarily committed the act charged in this case.

Comment

This instruction is based on the Ninth Circuit's Model Jury Instruction (criminal) 4.3. It follows Tenth Circuit precedent. *See, e.g.*, *United States v. Cuch*, 842 F.2d 1173, 1177 (10th Cir. 1988). It respects the four factors of proper limited purpose, relevance, prejudice analysis, and the right to a limiting instruction mentioned in *Huddleston v. United States*, 485 U.S. 681, 691-92 (1988).

Use Note

Merely reading the text of Federal Rule of Evidence 404(b) is not the best way to instruct the jury. *United States v. Doran*, 882 F.2d 1511, 1524 (10th Cir. 1989). This instruction should be given during trial when requested under Fed. R. Evid. 105, *see Huddleston v. United States*, 485 U.S. 681, 691-92 (1988), and in closing instructions.

The government bears the burden of demonstrating how the proffered evidence is relevant to an issue in the case. In demonstrating the relevance of proffered other acts evidence, "'[t]he Government must articulate precisely the evidentiary hypothesis by which a fact of consequence may be inferred from the evidence of other acts.'" *Cuch*, 842 F.2d at 1176 (quoting *United States v. Kendall*, 766 F.2d 1426, 1436 (10th Cir. 1985)). Before such evidence is admitted "it must tend to establish intent, knowledge, motive or one of the enumerated exceptions; must have real probative value, not just possible worth; and must be reasonably close in time to the crime charged." *Id.*

1.31

ACTUAL OR CONSTRUCTIVE POSSESSION

The law recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over an object or thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, knowingly has the power at a given time to exercise dominion or control over an object, either directly or through another person or persons, is then in constructive possession of it.

[More than one person can be in possession of an object if each knows of its presence and has the power to control it.]

[A defendant has joint possession of an object when two or more persons share actual or constructive possession of it. However, merely being present with others who have possession of the object does not constitute possession.]

[In the situation where the object is found in a place (such as a room or car) occupied by more than one person, you may not infer control over the object based solely on joint occupancy. Mere control over the place in which the object is found is not sufficient to establish constructive possession. Instead, in this situation, the government must prove some connection between the particular defendant and the object.]

[In addition, momentary or transitory control of an object is not possession. You should not find that the defendant possessed the object if he possessed it only momentarily, or did not know that he possessed it.]

Comment

United States v. Colonna, 360 F.3d 1169, 1178-79 (10th Cir. 2004); *United States v. Holland*, 116 F.3d 1353, 1358 (10th Cir. 1997) (possession instruction set out and not challenged), *overruled on other grounds by Bousley v. United States*, 523 U.S. 614, 622-24 (1998); *United States v. Valadez-Gallegos*, 162 F.3d 1256, 1262 (10th Cir. 1998) (in joint occupancy case, government must show connection linking defendant to contraband); *United States v. McKissick*, 204 F.3d 1282, 1291 (10th Cir. 2000) (control of premises alone is insufficient); *United States v. Adkins*, 196 F.3d 1112, 1114-15 (10th Cir. 1999) (discussing "fleeting possession" instruction). *See*

United States v. Avery, 295 F.3d 1158, 1177-81 (10th Cir. 2002) (discussing possession in various situations).

1.32

ATTEMPT

The defendant may be found guilty of attempting to commit a crime, even though he did not do all of the acts necessary in order to commit the crime. However, the defendant may not be found guilty of attempting to commit any crime merely by thinking about it, or even by making some plans or some preparation for the commission of a crime.

Instead, in order to prove an attempt, the government must prove beyond a reasonable doubt that (1) the defendant intended to commit the crime; and that (2) the defendant took a substantial step towards commission of that crime.

A "substantial step" is something beyond mere preparation. A substantial step is an act which, in the ordinary and likely course of events, would lead to the commission of the particular crime. The step must be a strong indication of the defendant's criminal intent, and must unequivocally mark the defendant's acts as criminal. It should demonstrate commitment to the crime charged.

Comment

United States v. Monholland, 607 F.2d 1311, 1318 (10th Cir. 1979) (discussing necessary element of overt act for attempt); *United States v. DeSantiago-Flores*, 107 F.3d 1472, 1478-79 (10th Cir. 1997) (defining elements and 'substantial step'), *overruled on other grounds by United States v. Holland*, 116 F.3d 1353, 1359 n.4 (10th Cir. 1997); *United States v. Smith*, 264 F.3d 1012, 1016-17 (10th Cir. 2001) (same).

"Under Fed. R. Crim. P. 31(c), '[t]he defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.'" *United States v. Dhinsa*, 243 F.3d 635, 674 (2d Cir. 2001).

"[I]t is well settled that the only attempts to commit crimes which are made Federal crimes are those specifically so proscribed by Federal Law." *United States v. Joe*, 452 F.2d 653, 654 (10th Cir. 1971); *see also United States v. Padilla*, 374 F.2d 782, 787 n.7 (2d Cir. 1967) ("An attempt to commit a federal crime is punishable only where the section defining the crime specifically includes an attempt within its proscription."); *United States v. Hopkins*, 703 F.2d 1102, 1104 (9th Cir. 1983) ("There is no general federal 'attempt' statute," and hence, the trial court properly refused to give the proposed lesser included offense instruction of attempted bank larceny under 18 U.S.C. §2113 (b)). "A number of federal criminal statutes specifically mention attempts." *Padilla*, 374 F.2d at 787 n.7. *And see* 18 U.S.C. §751

(escape or attempt to escape by prisoners); 18 U.S.C. §472 (uttering counterfeit obligations or attempt to do so); 18 U.S.C. §1113 (attempt to commit murder or manslaughter); 18 U.S.C. §2113(a) (bank robbery or attempt).

1.33

LESSER INCLUDED OFFENSE

If you unanimously find the defendant not guilty of the offense charged, or if, after all reasonable efforts, you are unable to agree on a verdict as to that offense, then you must determine whether the defendant is guilty or not guilty of [____].

The difference between these two offenses is that, to convict the defendant of [____], the government does not have to prove [insert element]. This is an element of the greater offense, but not of the lesser included offense.

For you to find the defendant guilty of [____], the government must prove each of the following elements beyond a reasonable doubt: [insert elements of lesser offense].

If you are convinced that the government has proved all of these elements beyond a reasonable doubt, you may find the defendant guilty of the lesser included offense. If you have a reasonable doubt about any of these elements, then you must find the defendant not guilty of the lesser included offense.

Comment

Schmuck v. United States, 489 U.S. 705, 716 (1989) (offense is not necessarily included within another unless the elements of the lesser are a subset of the greater offense); *United States v. Moore*, 108 F.3d 270, 273 (10th Cir. 1997) (noting that "[o]nly when an appellate court is convinced that the evidence issues are such that a rational jury could acquit on the charged crime but convict on the lesser crime may the denial of a lesser included offense be reversed," and, based on the evidence, holding no error in refusing to charge on simple possession as a lesser included offense of possession with intent to distribute).

This instruction has been drafted to allow a lesser included instruction to be given, not only when the jury finds the defendant not guilty of the greater offense, but also when the jury cannot unanimously reach a verdict, and the defendant requests such instruction. Although the Tenth Circuit has not decided whether such an instruction is appropriate, the weight of authority supports giving such instruction, at least when the defendant requests it. *See Darks v. Mullin*, 327 F.3d 1001, 1008 n.2 (10th Cir. 2003).

Use Note

This Court applies a four-part test in determining whether a lesser-included-offense instruction should be given. *See United States v.*

Bruce, 458 F.3d 1157, 1162 (10th Cir. 2006), *cert. denied*, 127 S.Ct. 999 (2007): (1) the defendant must make a proper request, (2) the elements of the lesser included offense must be a subset of the elements of the charged offense, (3) the element required for the greater, charged offense, which is not an element of the lesser offense, must be in dispute, and (4) the evidence must be such that the jury could rationally acquit the defendant of the greater offense and convict him of the lesser offense.

1.34

INSANITY

If you conclude that the government has proved beyond a reasonable doubt that the defendant committed the crime charged, you must then consider whether the defendant should be found "not guilty by reason of insanity." Under the law, a person is not criminally liable for his conduct while insane. Insanity is therefore a defense to the crime charged. The defendant has presented evidence of insanity at the time he committed the crime charged.

For you to return a verdict of not guilty by reason of insanity, the defendant must prove 1) that he suffered from a severe mental disease or defect when he committed the crime; *and* (2) that, as a result of this mental disease or defect, he was not able to understand what he was doing or to understand that it was wrong.

Insanity may be temporary or permanent. You may consider evidence of the defendant's mental condition before, during, and after the crime, in deciding whether he was legally insane at the time of the crime.

Unlike other aspects of a criminal trial, the defendant has the burden of proving an insanity defense. The defendant does not have to prove insanity beyond a reasonable doubt, however, but only by clear and convincing evidence. Clear and convincing evidence is evidence that makes it highly probable that the defendant was insane. You should render a verdict of "not guilty by reason of insanity" if you find, by clear and convincing evidence, that the defendant was insane when he committed the crime charged.

Although the defendant has raised the issue of insanity, the government still has the burden of proving all of the essential elements of the offense charged beyond a reasonable doubt. Remember that there are three possible verdicts in this case: guilty, not guilty, and not guilty only by reason of insanity.

Comment

18 U.S.C. §17(a) provides that insanity is an affirmative defense:

> It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting 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 acts. Mental disease or defect does not otherwise constitute a defense.

A defendant is not entitled to an insanity instruction unless the evidence shows a mental disease or defect that rendered him unable to appreciate the nature and quality or wrongfulness of his acts. *United States v. Holsey*, 995 F.2d 960, 963 (10th Cir. 1993).

18 U.S.C. §17(b) places the burden of proof by clear and convincing evidence upon the defendant. While the "clear and convincing" standard is a fairly high one, it does not call for the highest levels of proof. "If evidence would permit the jury to find to a high probability that the defendant was insane, an insanity instruction is required." *United States v. Denny-Shaffer*, 2 F.3d 999, 1016 (10th Cir. 1993) (discussing multiple personality disorder for purposes of insanity defense) (italics and quotations omitted).

The Supreme Court has held that the Insanity Defense Reform Act of 1984, 18 U.S.C. §4241 to 4247, does not require an instruction concerning the consequences of a not guilty by reason of insanity (NGI) verdict, and that "such an instruction is not to be given as a matter of general practice." *Shannon v. United States*, 512 U.S. 573, 587 (1994); *see Neely v. Newton*, 149 F.3d 1074, 1085-86 (10th Cir. 1998) (rejecting claims that the New Mexico guilty but mentally ill (GBMI) statute violated due process, and that the jury should have been told of consequences of NGRI and GBMI).

The three possible verdicts are set forth in 18 U.S.C. §4242(b), special verdict.

1.35

DEFENDANT'S NON-INVOLVEMENT (ALIBI)

Evidence has been introduced tending to establish an alibi—that the defendant was not present at the time when, or at the place where, the defendant is alleged to have committed the offense charged in the indictment.

The government has the burden of proving that the defendant was present at that time and place. Unless the government proves this beyond a reasonable doubt, you must find the defendant not guilty.

Comment

United States v. Haala, 532 F.2d 1324, 1329-30 (10th Cir. 1976) (discussing when alibi defense instruction not necessary). Alibi is not an affirmative defense, but an evidentiary matter. Popularization of the term "alibi" has led to a negative connotation. This draft instruction tries to avoid that negative connotation and to avoid confusion as to the burden of proof.

1.36

COERCION OR DURESS

The defendant claims that if he committed the acts charged in the indictment, he did so only because he was forced to commit the crime. If you conclude that the government has proved beyond a reasonable doubt that the defendant committed the crime as charged, you must then consider whether the defendant should nevertheless be found "not guilty" because his actions are excusable because they were performed under duress or coercion.

If you find that the defendant committed the crime as charged, his actions are justified by duress or coercion only if you find that he has proven the following three elements:

1. the defendant was under an unlawful and present, imminent and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury to himself [or a family member, or others];

2. the defendant had no reasonable, legal alternative to violating the law, that he had no chance both to refuse to do the criminal act and also to avoid the threatened harm;

3. a direct causal relationship could have been reasonably anticipated between engaging in the criminal action and avoiding the threatened harm.

The defendant must prove these elements by a preponderance of the evidence. To prove a fact by a preponderance of the evidence means to prove that the fact is more likely so than not so. This is a lesser burden of proof than to prove a fact beyond a reasonable doubt.

Comment

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

This instruction does not limit "others" to members of the defendant's immediate family.

The Committee has 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 is a complete stranger.

The defense bears the ultimate burden of proving duress or coercion by a preponderance of the evidence. *Dixon v. United States*, 548 U.S. 1, 17 (2006); *United States v. Portillo-Vega*, 478 F.3d 1194, 1197 (10th Cir. 2007). The government is not required to disprove any of the elements of the defense beyond a reasonable doubt in order for the defense to fail. *United States v. Al-Rekabi*, 454 F.3d 1113, 1123 (10th Cir. 2006).

It should be emphasized 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 the coercion instruction. *Shannon v. United States*, 76 F.2d 490, 493 (10th Cir. 1935).

In *United States v. Bailey*, 444 U.S. 394 (1980) (prosecution for escape from federal prison), the Supreme Court held that in order to be entitled to an instruction on duress or necessity as a defense to the crime charged, the 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 has lost its coercive force. *Id.* at 412-13; *United States v. Butler*, 485 F.3d 569, 573 (10th Cir. 2007) ("Butler failed to relinquish the gun 'at the earliest possible opportunity.'") (quoting *Bailey*, 444 U.S. at 415).

There may be crimes which require the government to disprove the elements of duress or coercion in order to satisfy its burden of proving the mens rea component of the crime. *See Dixon v. United States*, 548 U.S. 1, 7 n.4 (2006). For example, where the government is required to prove that the crime was committed maliciously, the court may reasonably require that the government disprove duress in order to meet its burden beyond a reasonable doubt. *See* BLACK'S LAW DICTIONARY 968 (7th ed. 1999) (defining malice as "[t]he intent, without justification or excuse, to commit a wrongful act"); *see also Dixon*, 548 U.S. at 7 n.1. However, "in the usual case, the defendant will bear the burden of proving the duress defense by a preponderance of the evidence." *United States v. Portillo-Vega*, 478 F.3d 1194, 1197 (10th Cir. 2007) (citing *Dixon*, 548 U.S. 1).

1.37

KNOWINGLY—DELIBERATE IGNORANCE

When the word "knowingly" is used in these instructions, it means that the act was done voluntarily and intentionally, and not because of mistake or accident. Although knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact. Knowledge can be inferred if the defendant was aware of a high probability of the existence of [the fact in question], unless the defendant did not actually believe [the fact in question].

Comment

Although the deliberate ignorance instruction in general was discouraged, it may be given "when the presents evidence that the defendant purposely contrived to avoid learning all of the facts in order to have a defense in the event of prosecution." *United States v. Delreal-Ordones*, 213 F.3d 1263, 1268 (10th Cir. 2000) (internal quotation marks omitted). *See also United States v. McConnel*, 464 F.3d 1152, 1159 (10th Cir. 2006), *cert. denied* 127 S. Ct. 2085 (2007) (deliberate ignorance instruction only appropriate in rare circumstances). Where warranted, the instruction may be given. *United States v. Baz*, 442 F.3d 1269, 1271-72 (2006). If given, a similar deliberate ignorance instruction was approved as the preferred language in *Delreal-Ordones*. *Id.* at 1267; *see also United States v. Glick*, 710 F.2d 639, 643 (10th Cir. 1983). "The purpose of the instruction is to alert the jury that the act of avoidance could be motivated by sufficient guilty knowledge to satisfy the knowing element of the crime." *Delreal-Ordones*, 213 F.3d at 1268-69 (quotation marks and brackets omitted). "The district court need not insist upon direct evidence of conscious avoidance of a fact before tendering a deliberate ignorance instruction. To establish a defendant's 'deliberate ignorance,' the is entitled to rely on circumstantial evidence and the benefit of the favorable inferences to be drawn therefrom." *Id.* at 1268 (citation omitted).

1.38

WILLFULLY—TO ACT

Comment

The Committee does not recommend any general instruction defining the term "willfully" because no single instruction can accurately encompass the different meanings this term has in federal criminal law. This term is "a word 'of many meanings, its construction often being influenced by its context.'" *Screws v. United States*, 325 U.S. 91, 101 (1945), quoting *Spies v. United States*, 317 U.S. 492, 497 (1943).

In light of the confusion in the law regarding the meaning of the word "willful," the Committee suggests that, when a statute uses this word, care should be taken to distinguish between its meanings. A "willfulness" requirement may impose on the government the burden of proving that the defendant had knowledge of his conduct, or that his conduct was unlawful, or of the precise legal duty, the violation of which forms the substance of the charges against the defendant.

The following commentary is intended to highlight the difficulty surrounding the willfulness requirement.

"The word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears." *Bryan v. United States*, 524 U.S. 184, 191 (1998). "Most obviously it differentiates between deliberate and unwitting conduct, but in the criminal law it also typically refers to a culpable state of mind." *Id.* "As a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.'" *Id.*

Although the term "willful" can denote a specific intent requirement, this is not always the case. *See United States v. Blair*, 54 F.3d 639, 643 (10th Cir. 1995) (discussing specific intent); *United States v. Jackson*, 248 F.3d 1028, 1031 n.2 (10th Cir. 2001) ("the word 'willfully' does not always require specific intent"); *United States v. Youts*, 229 F.3d 1312, 1315-16 (10th Cir. 2000) (term "willfully" used in train wreck statute does not require for conviction proof of specific intent to wreck a train).

An example of willfulness understood as *intentional conduct* is found in *United States v. Hilliard*, 31 F.3d 1509, 1517 n.5 (10th Cir. 1994) ("willfully" is proved where the defendant "knowingly performed an act, deliberately and intentionally 'on purpose' as contrasted with accidently, carelessly or unintentionally").

Willfulness understood as intentional conduct *that the actor knows to be a violation of law* is developed in a series of Supreme Court cases. In *Cheek v. United States*, 498 U.S. 192 (1991), the Court held that, because of the

complexity of the tax laws, "willfulness" requires proof of a "voluntary, intentional violation of a known legal duty." *Id.* at 201.

The Supreme Court applied the teachings of *Cheek* to the *Bank Secrecy Act in Ratzlaf v. United States*, 510 U.S. 135, 149 (1994) (willful violation of antistructuring provision required proof that defendant "knew the structuring in which he engaged was unlawful").

More recently, in *Bryan*, 524 U.S. at 196-98, the Supreme Court examined the federal firearm licensing requirement of 18 U.S.C. §924(a)(1)(D), and interpreted the willfulness element to require proof that the defendant knew his conduct was unlawful, but not that the defendant knew the precise legal duty which he was charged with violating.

1.39

INTERSTATE AND FOREIGN COMMERCE— DEFINED 18 U.S.C. § 10

Interstate commerce means commerce or travel between one state, territory or possession of the United States and another state, territory or possession of the United States, including the District of Columbia. Commerce includes travel, trade, transportation and communication.

Foreign commerce means commerce between any part of the United States (including its territorial waters), and any other country (including its territorial waters).

Comment

18 U.S.C. section 10 provides as follows: "The term 'interstate commerce', as used in this title, includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia.

"The term 'foreign commerce', as used in this title, includes commerce with a foreign country."

"Commerce" is taken from *United States v. Grassie*, 237 F.3d 1199, 1206 n.5 (10th Cir. 2001).

"Interstate commerce" is discussed at length in *Grassie*, *id.* at 1205-12, from which the interstate commerce portion of this instruction is taken almost *verbatim*. *See id.* at 1206 n.5. *Grassie* follows *Jones v. United States*, 529 U.S. 848 (2000), which also discusses interstate commerce at length.

1.39.1

INTERSTATE AND FOREIGN COMMERCE— EFFECT ON 18 U.S.C. § 10

If you decide that there was any effect at all on [interstate] [foreign] commerce, then that is enough to satisfy this element. All that is necessary is that the natural and probable consequence of the acts the defendant took would be to affect [interstate] [foreign] commerce.

Comment

18 U.S.C. section 10 provides as follows: "The term 'interstate commerce', as used in this title, includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia.

"The term 'foreign commerce', as used in this title, includes commerce with a foreign country."

"Interstate commerce" is discussed at length in *United States v. Grassie*, 237 F.3d 1199, 1205-12 (10th Cir. 2001). *Grassie* follows *Jones v. United States*, 529 U.S. 848 (2000), which also discusses interstate commerce at length.

1.40

CAUTIONARY INSTRUCTION DURING TRIAL

Transcript of Recorded Conversation

During this trial, you have heard sound recordings of certain conversations. These conversations were legally recorded; they are a proper form of evidence and may be considered by you as you would any other evidence. You were also given transcripts of those recorded conversations.

Keep in mind that the transcripts are not evidence. They were given to you only as a guide to help you follow what was being said. The recordings themselves are the evidence. If you noticed any differences 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. If you could not hear or understand certain parts of the recordings, you must ignore the transcript as far as those parts are concerned.

Comment

The decision to admit sound recordings into evidence rests with the trial court. *See* United States v. Watson, 594 F.2d 1330, 1335 (10th Cir. 1979). Transcripts may be admitted to assist the trier of fact. United States v. Gomez, 67 F.3d 1515, 1526 (10th Cir. 1995). When transcripts are used, a cautionary instruction that the transcripts are only an aid in understanding the sound recording is preferred. *Id.* at 1527 n.15; United States v. Davis, 929 F.2d 554, 559 (10th Cir. 1991); United States v. Mayes, 917 F.2d 457, 463 (10th Cir. 1990); *see also* United States v. Caballero, 277 F.3d 1235, 1248 (10th Cir. 2002). A similar instruction was approved in United States v. Devous, 764 F.2d 1349, 1353 n.3 (10th Cir. 1985); *see also Gomez*, 67 F.3d at 1527 n.15 (citing Robinson); United States v. Lucero, 601 F.2d 1147, 1149 (10th Cir. 1979) (discussing a cautionary instruction). In the event of a dispute concerning the accuracy of a transcript, the Tenth Circuit has suggested various procedures, including the possibility of a government and defense transcript. *See Devous*, 764 F.2d at 1355; *Lucero*, 601 F.2d at 1149.

Use Note

This instruction should be given when the sound recording is played and again in the final charge.

1.41

SUMMARIES AND CHARTS

Not Received in Evidence

Certain charts and summaries have been shown to you to help explain the evidence in this case. Their only purpose is to help explain the evidence. These charts and summaries are not evidence or proof of any facts.

Received in Evidence

No instruction.

Comment

Summaries not in evidence should only be used with a limiting instruction. *Daniel v. Ben E. Keith Co.,* 97 F.3d 1329, 1335 (10th Cir. 1996).

No instruction should be given if the summaries and charts have been admitted into evidence under Fed. R Evid. 1006 and the underlying materials have not been. Under Fed. R. Evid. 1006, the underlying materials need not be admitted, but they must be admissible. *United States v. Samaniego*, 187 F.3d 1222, 1223 (10th Cir. 1999). In such a case, the charts or summaries are themselves evidence. *See United States v. Osum*, 943 F.2d 1394, 1405 n.9 (5th Cir. 1991).

Where the underlying evidence has been introduced along with the summaries or charts, the Tenth Circuit has suggested, in the context of tax prosecutions, that limiting instructions are proper. *See United States v. Mann*, 884 F.2d 532, 539 (10th Cir. 1989); *United States v. Kapnison*, 743 F.2d 1450, 1458 (10th Cir. 1984); *United States v. Harenberg*, 732 F.2d 1507, 1513-14 (10th Cir. 1984); *United States v. Kaatz*, 705 F.2d 1237, 1245 (10th Cir. 1983). Such a cautionary instruction might explain: "Summaries or charts are not themselves evidence, but are summaries, the accuracy and reliability of which are to be determined by the testimony and exhibits admitted into evidence." *Mann*, 884 F.2d at 539 n.4; *Kapnison*, 743 F.2d at 1457.

1.42

MODIFIED *ALLEN* INSTRUCTION

Members of the jury, I am going to ask that you return to the jury room and deliberate further. I realize that you are having some difficulty reaching a unanimous agreement, but that is not unusual. Sometimes, after further discussion, jurors are able to work out their differences and agree.

This is an important case. If you should fail to agree upon a verdict, the case is left open and must be tried again. Obviously, another trial would require the parties to make another large investment of time and effort, and there is no reason to believe that the case can be tried again by either side better or more exhaustively than it has been tried before you.

You are reminded that the defendant is presumed innocent, and that the government, not the defendant, has the burden of proof and it must prove the defendant guilty beyond a reasonable doubt. Those of you who believe that the government has proved the defendant guilty beyond a reasonable doubt should stop and ask yourselves if the evidence is really convincing enough, given that other members of the jury are not convinced. And those of you who believe that the government has not proved the defendant guilty beyond a reasonable doubt should stop and ask yourselves if the doubt you have is a reasonable one, given that other members of the jury do not share your doubt. In short, every individual juror should reconsider his or her views.

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

What I have just said is not meant to rush or pressure you into agreeing on a verdict. Take as much time as you need to discuss things. There is no hurry.

I will ask now that you retire once again and continue your deliberations with these additional comments in mind to be applied, of course, in conjunction with all of the instructions I have previously given you.

Use Note

This instruction is designed for use when the court concludes that the jury has reached an impasse and that a modified *Allen* charge is appropriate. It is the preferred practice that the substance of this instruction be given as part of the court's original set of jury instructions, before the jury reaches impasse or deadlock. *United States v. Rodriguez-Mejia*, 20 F.3d 1090, 1092 (10th Cir. 1994). The ultimate issue concerning the use of an *Allen* charge is whether it is impermissibly coercive given the facts and circumstances of each case. *Lowenfield v. Phelps*, 484 U.S. 231, 237-41 (1988). Several cases have upheld the use of a modified *Allen* charge after the jury reached deadlock upon finding the circumstances did not render the instruction coercive. *See, e.g.*, *United States v. Arney*, 248 F.3d 984, 987 (10th Cir. 2001); *United States v. Butler*, 904 F.2d 1482, 1488 (10th Cir. 1990); *United States v. McKinney*, 822 F.2d 946, 951 (10th Cir. 1987). In *United States v. McElhiney*, 275 F.3d 928, 949 (10th Cir. 2001), the Tenth Circuit strongly urged that to avoid impermissible coercion, the instruction should incorporate cautionary language "(1) that no juror should relinquish his or her conscientiously held convictions simply to secure a verdict and (2) that every individual juror should reconsider his or her views, whether in the majority or in the minority." *Id.* Additionally, there should be "a reminder to the jury of the burden of proof." *Id.*

1.43

PARTIAL VERDICT INSTRUCTION

Members of the Jury:

(1) You do not have to reach a unanimous agreement on [all the charges] or [all defendants] before returning a verdict on some of the charges. If you have reached a unanimous agreement [on some of the charges] [as to one of the defendants], you may return a verdict on [those charges] or [that defendant] and then continue deliberating on the others. You do not have to do this, but you can if you wish.

(2) If you do choose to return a partial verdict, that verdict will be final. YOU WILL NOT BE ABLE TO CHANGE YOUR MINDS ABOUT IT LATER ON.

(3) Your other option is to wait until the end of your deliberations, and return all your verdicts then. The choice is entirely yours.

Comment

The Tenth Circuit upheld the use of a partial verdict instruction in *United States v. Patterson*, 472 F.3d 767 (10th Cir. 2006), and held it was error to require the jury to return partial verdicts in *United States v. LaVallee*, 439 F.3d 670, 691 (10th Cir. 2006). The present instruction was patterned on that given by the District Court in *United States v. Walters*, 89 F. Supp.2d 1206 (D. Kan. 2000).

Use Note

In trials with multiple defendants, Federal Rule of Criminal Procedure 31(b) permits a jury to return a verdict at any time during its deliberations as to any defendant. *United States v. LaVallee*, 439 F.3d 670, 691 (10th Cir. 2006). That Rule also provides that "[i]f the jury cannot agree as to all counts as to any defendant, the jury may return a verdict on those counts on which it has agreed." This instruction should only be given when appropriate, e.g., should the jury ask if it may return a partial verdict. It would be error for the trial court to order a jury to return a partial verdict, or to refuse to accept a partial verdict if the jury indicates it wishes to return such a verdict. *Id.* (citing *United States v. DiLapi*, 651 F.2d 140 (2d Cir. 1981) ("We think that juries should be neither encouraged nor discouraged to return a partial verdict, but should understand their options, especially when they have reached a state in their deliberations at which they may well wish to report a partial verdict as to some counts or some defendants." 651 F.2d at 146.)

1.44

COMMUNICATION WITH THE COURT

If you want to communicate with me at any time during your deliberations, please write down your message or question and give it to [the marshal] [the bailiff] [my law clerk], who will bring it to my attention. I will respond as promptly as possible, either in writing or by having you return to the courtroom so that I can address you orally. I caution you, however, that with any message or question you might send, you should not tell me any details of your deliberations or indicate how many of you are voting in a particular way on any issue.

Let me remind you again that nothing I have said in these instructions, nor anything I have said or done during the trial and sentencing proceedings, was meant to suggest to you what I think your decision should be. That is your exclusive responsibility.

SUBSTANTIVE OFFENSES

2.01

FOOD STAMPS—UNAUTHORIZED USE
7 U.S.C. § 2024(b)

The defendant is charged in count ____ with a violation of 7 U.S.C. section 2024(b).

This law makes it a crime to knowingly use, transfer, acquire, alter, or possess United States Department of Agriculture food stamp coupons, authorization cards, or access devices in any manner contrary to the laws and/or Department regulations governing the food stamp program, where the coupons, cards, or devices have a value of $100 or more. [The statute makes it a more serious crime if the value of the coupons, cards, or devices equals or exceeds $5000.]

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

> *First*: the defendant used [transferred] [acquired] [altered] [possessed] food stamp coupons [authorization cards] [access devices] in a manner contrary to the law or Department of Agriculture regulations;
>
> *Second*: the defendant knew he acted contrary to the law or Department regulations; and
>
> *Third*: the [food stamp coupons] [authorization cards] [access devices] had a value of $100 [$5,000] or more.

It is contrary to the law and Department regulations for anyone [to sell or purchase] [food stamp coupons] [authorization cards] [access devices for cash] [to use, transfer, or acquire food stamp coupons, authorization cards, or access devices for non-food items, including, for example, clothes, drugs, cigarettes, or liquor]. The government need not show that the defendant knew of specific laws or regulations prohibiting his conduct; it is sufficient if the government shows by reference to facts and circumstances surrounding the case that the defendant knew his conduct was unauthorized or illegal. Finally, in determining the value of [food stamp coupons] [authorization cards] [access devices], you should rely on their face value [if specified or otherwise determinable].

Comment

As the Supreme Court took pains to clarify in *Liparota v. United States*, 471 U.S. 419 (1985), although section 2024(b) speaks of intentional conduct "contrary to this chapter or the regulations issued pursuant to this chapter," to prove a section 2024(b) violation

> the Government need not show that [the defendant] had knowledge of specific regulations governing food stamp acquisition or possession . . . . Rather, as in any other criminal prosecution requiring *mens rea*, the Government may prove by reference to facts and circumstances surrounding the case that [the defendant] knew that his conduct was unauthorized or illegal.

Id. at 433; *see also id.* at 434 n.17 (identifying circumstantial evidence in record from which jury could have inferred requisite *mens rea*). The instruction closely tracks this passage.

2.02

BRINGING IN AN ALIEN
8 U.S.C. § 1324(a)(1)(A)(i)

(Bringing in—not port of entry)

The defendant is charged in count ____ with a violation of 8 U.S.C. section 1324(a)(1)(A)(i).

This law makes it a crime to bring an alien into the United States at a place other than a designated port of entry.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant [brought] [attempted to bring] an alien into the United States,

Second: that entry was [attempted] at a place other than a designated port of entry;

Third: the defendant knew that the person was an alien; and

Fourth: the defendant acted with the intent to violate the law.

An alien is a person who is not a citizen or national of the United States.

Comment

Specific intent does not require that a defendant know which law that he is violating. He need only know he is violating some law. *See United States v. Blair*, 54 F.3d 639, 642-43 (10th Cir. 1995) ("Thus, a specific intent crime 'normally does not necessitate proof that the defendant was specifically aware of the law penalizing his conduct.'"). Although there are no Tenth Circuit cases discussing the elements of this crime, in *United States v. Alvillar*, 575 F.2d 1316, 1318 n.3 (10th Cir. 1978), the court implied knowledge of the alien's status was necessary to support the related charge of causing transportation within the United States.

Section 1182 lists aliens who are excluded from the United States. An alien who falls within one of the categories is not lawfully entitled to enter or reside in the United States. Where there is evidence that the alien falls within one of the excluded classes, the last clause of the instruction may be so worded as to require the jury to make a finding that the person is within that class. If

the defendant raises the defenses that he or she is "a national," *see United States v. Jimenez-Alcala*, 353 F.3d 858, 861-62 (10th Cir. 2003).

The statute also describes aggravating factors raising the statutory maximum penalty, which must be submitted as additional elements if charged in the indictment. These include: whether the offense was done for the purpose of commercial advantage or private gain, 8 U.S.C. §1324(a)(1)(B)(i); whether the defendant caused serious bodily injury, 8 U.S.C. §1324(a)(1)(B)(iii); or whether death resulted, 8 U.S.C. §1324(a)(1)(B)(iv).

2.02.1

BRINGING IN AN ALIEN
8 U.S.C. § 1324(a)(2)

(Bringing in—without authorization)

The defendant is charged in count ____ with a violation of 8 U.S.C. section 1324(a)(2).

This law makes it a crime to bring an alien into the United States who has not received prior official authorization to enter.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant [brought] [attempted to bring] an alien into the United States;

Second: the defendant knew that the person was an alien;

Third: the alien had not received prior official authorization to enter and the defendant knew, or recklessly disregarded, the fact that the alien had no prior authorization; and

Fourth: the defendant acted with the intent to violate the law.

An alien is a person who is not a citizen or national of the United States.

Comment

This is a completely separate crime from the "bringing in—not port of entry" covered by Instruction 2.02. The two crimes share the same elements except (a)(1)(i) requires that the entry be at a place not designated as a port of entry and (a)(2) requires that the alien lack prior authorization to enter the United States. *Validity, Construction and Application of §§274(a)(1)(A)(I) and 274 (A)(2) of Immigration and Nationality Act Making It Unlawful To Bring Alien To United States*, 136 A.L.R. Fed. 511, §2 (1997).

The statute also describes aggravating factors raising the statutory maximum penalty, which must be submitted as additional elements if charged in the indictment. These include: whether the offense was committed with the intent or with reason to believe that the alien unlawfully brought into the United States will commit an offense against the United States or any State, 8 U.S.C. §1324(a)(2)(B)(i); whether the offense was done for the purpose of

commercial advantage or private gain, 8 U.S.C. §1324(a)(2)(B)(ii); or whether the alien was not immediately brought and presented to an immigration officer at a designated port of entry, 8 U.S.C. §1324(a)(2)(B)(iii).

2.03
ALIEN—ILLEGAL TRANSPORTATION
8 U.S.C. § 1324(a)(1)(A)(ii)

The defendant is charged in count ____ with a violation of 8 U.S.C. section 1324(a)(1)(A)(ii).

This law makes it a crime to illegally transport an alien.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: [name of alien] was an alien;

Second: [name of alien] entered or remained in the United States unlawfully;

Third: the defendant knew, or recklessly disregarded the fact, that [name of alien] was not lawfully in the United States; and

Fourth: the defendant transported or moved, or attempted to transport or move, [name of alien], intending to help [him/her] remain in the United States illegally.

When determining whether the defendant intended to help the alien remain in the United States illegally, the jury should consider all relevant evidence including the time of the trip, place, distance of the intended trip, reason for the trip, the overall impact of the trip and the defendant's role.

"Reckless disregard" means deliberate indifference to facts which, if considered and weighed in a reasonable manner, indicate the highest probability that the alleged aliens were in fact aliens and were in the United States unlawfully.

Comment

See Comment to Instruction 2.02 (Alien—Bringing in—not port of entry).

"Reckless disregard" is not defined in Title 8, United States Code, but in *United States v. Uresti-Hernandez*, 968 F.2d 1042, 1046 (10th Cir. 1992), on a "plain error" standard, the court upheld the use of an instruction defining reckless indifference as "deliberate indifference to facts which, if considered and weighed in a reasonable manner, indicate the highest probability that the

alleged aliens were in fact aliens and were in the United States unlawfully." If the defendant raises the defense that he or she is a national, *see United States v. Jimenez-Alcala*, 353 F.3d 858, 861-62 (10th Cir. 2003).

When making the determination of whether the defendant was acting with the intent to assist the defendant's illegal presence, the fact-finder should consider all relevant evidence including the time, place, distance, reason for the trip, overall impact of the trip as well as defendant's role. *United States v. Barajas-Chavez*, 162 F.3d 1285, 1289 (10th Cir. 1999); *see also United States v. Hernandez*, 327 F.3d 1110, 1113-14 (10th Cir. 2003). In *United States v. Martinez-Nava*, 838 F.2d 411, 414 (10th Cir. 1988), the jury, during deliberation, sent out a question as to whether the jury instruction which required the government prove only that the defendant transport or move or attempt to transport or move the alleged alien included transportation within Albuquerque since the indictment charged defendant "'knowingly did transport by vehicle from El Paso, Texas, to Albuquerque, New Mexico,'" an alien. The Tenth Circuit affirmed use of a supplemental instruction which concluded "that any transportation between points in El Paso and points in Albuquerque or between points within El Paso or between points within Albuquerque is comprehended within the language of the indictment," saying "the trial court should clear away the difficulty with 'concrete accuracy,'" quoting *United States v. Walker*, 557 F.2d 741, 746 (10th Cir. 1977) (further quotation omitted).

The statute describes aggravating factors raising the statutory maximum penalty, which must be submitted as additional elements if charged in the indictment. These include: whether the offense was done for the purpose of commercial advantage or private gain, 8 U.S.C. §1324(a)(1)(B)(i); whether the defendant caused serious bodily injury, 8 U.S.C. §1324(a)(1)(B)(iii); or whether death resulted, 8 U.S.C. §1324(a)(1)(B)(iv).

2.04

ALIEN—CONCEALMENT
8 U.S.C. § 1324(a)(1)(A)(iii)

The defendant is charged in count ____ with a violation of 8 U.S.C. section 1324(a)(1)(A)(iii).

This law makes it a crime to conceal, shield from detection or harbor an alien.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: [name of alien] was an alien;

Second: [name of alien] entered or remained in the United States unlawfully;

Third: the defendant [knew] [or] [recklessly disregarded the fact] that [name of alien] was not lawfully in the United States; and

Fourth: the defendant concealed, shielded from detection, or harbored the alien;

Fifth: the defendant intended the concealment, shield from detection or harboring to facilitate the alien's continued illegal presence.

An alien is a person who is not a citizen or national of the United States.

Comment

The statute describes aggravating factors raising the statutory maximum penalty, which must be submitted as additional elements if charged in the indictment. These include: whether the offense was done for the purpose of commercial advantage or private gain, 8 U.S.C. §1324(a)(1)(B)(i); whether the defendant caused serious bodily injury, 8 U.S.C. §1324(a)(1)(B)(iii); or whether death resulted, 8 U.S.C. §1324(a)(1)(B)(iv).

2.05

REENTRY OF DEPORTED ALIEN
8 U.S.C. § 1326(a)

The defendant is charged in count ____ with a violation of 8 U.S.C. section 1326(a).

This law makes it a crime for an alien [to enter] [to attempt to enter] [to be found in] the United States after having been [deported] [excluded] [removed] from the United States.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant was an alien at the time alleged in the indictment;

Second: the defendant had previously been [denied admission] [excluded] [deported] [removed] from the United States; and

Third: the defendant [knowingly entered] [knowingly attempted to enter] [was found in the United States having entered knowingly].

Fourth: the defendant had not received the consent of the proper legal authority to reapply for admission to the United States.

An alien is a person who is not a citizen or national of the United States.

Comment

See United States v. Sierra-Ledesma, 645 F.3d 1213, 1227, 1228 (10th Cir. 2011) (Kelly, J. concurring).

This instruction is patterned on the instruction approved in *United States v. Martinez-Morel*, 118 F.3d 710 (10th Cir. 1997) and modified to clarify that the "knowingly" requirement in the third element does not pertain to being found in the United States. *See United States v. Hernandez-Hernandez*, 519 F.3d 1236, 1239 n.4 (10th Cir. 2008). As of April 1, 1997, the statute was amended to delete "arrest" as an element of the crime. *United States v. Wittgenstein*, 163 F.3d 1164, 1168 (10th Cir. 1998). In *Martinez-Morel*, the Tenth Circuit recognized 8 U.S.C. §1326(a) was a regulatory statute which required only general intent and thus the alien's belief he had not previously been deported was irrelevant. 118 F.3d at 713.

The statute criminalizes not only "entering," but attempting to enter and being found in the United States. *See United States v. Rosales-Garay*, 283 F.3d 1200, 1201-02 (10th Cir. 2002) (section 1326(a) "provides that a previously deported alien who, without permission, 'enters, attempts to enter, or is at any time found in, the United States' is guilty of the crime of unlawful reentry"). The statute applies not only to aliens who have been deported, but also to aliens denied admission, excluded or removed. 8 U.S.C. 1326(a)(1). The jury must find that the defendant was an alien at the time alleged in the indictment. *United States v. Miranda-Enriquez*, 842 F.2d 1211, 1212 (10th Cir. 1988). The fourth element as modified quotes directly from the relevant statute, 8 U.S.C. §1326(a)(2): "to reapply for admission to the United States."

There is a presumption that prior deportation proceedings were legal and the defendant carries the burden to prove the contrary. *United States v. Arevalo-Tavares*, 210 F.3d 1198, 1200 (10th Cir. 2000). If the defendant raises the defense that he or she is a national, *see United States v. Jimenez-Alcala*, 353 F.3d 858 (10th Cir. 2003).

Use Note

In the unusual case where a defense is based on the involuntary presence of the defendant, counsel should address that matter specifically at trial. *See, e.g., Hernandez-Hernandez*, 519 F.3d 1236. *See also United States v. Sierra-Ledesma*, 645 F.3d 1213, 1223 n.6 (10th Cir. 2011).

2.06

AID AND ABET
18 U.S.C. § 2(a)

Each count of the indictment also charges a violation of 18 U.S.C. section 2, which provides that: "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

This law makes it a crime to intentionally help someone else commit a crime. To find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: someone else committed the charged crime, and

Second: the defendant intentionally associated himself in some way with the crime and intentionally participated in it as he would in something he wished to bring about. This means that the government must prove that the defendant consciously shared the other person's knowledge of the underlying criminal act and intended to help him.

The defendant need not perform the underlying criminal act, be present when it is performed, or be aware of the details of its commission to be guilty of aiding and abetting. But a general suspicion that an unlawful act may occur or that something criminal is happening is not enough. Mere presence at the scene of a crime and knowledge that a crime is being committed are also not sufficient to establish aiding and abetting.

Comment

The Committee believes that this instruction is consistent with *Nye & Nissen v. United States*, 336 U.S. 613, 618-19 (1949); *United States v. Anderson*, 189 F.3d 1201, 1207 (10th Cir. 1999); *United States v. Scroger*, 98 F.3d 1256, 1262 (10th Cir. 1996).

When the government has charged a defendant with aiding and abetting a violation of 18 U.S.C. § 924(c), a third element should be added:

Third: the defendant knew in advance that the other person would use or carry a firearm in relation to [specify crime of violence or drug trafficking crime]. You are instructed that if the defendant knew nothing of the firearm until it appeared at the scene of [the crime of violence or drug trafficking crime] and had either (1) completed his acts of assistance, or (2) had not completed his acts of assistance, but had no realistic opportunity to withdraw from the criminal enterprise at that point, this element cannot be met.

2.07

ACCESSORY AFTER THE FACT
18 U.S.C. § 3

The defendant is charged in count ____ with a violation of 18 U.S.C. section 3.

This law makes it a crime for anyone, knowing that a crime against the United States has been committed, to obstruct justice by giving assistance to another person who committed that crime, in order to hinder or prevent that person's apprehension or punishment. A person who does this is called an accessory after the fact.

In this case, the defendant is not charged with actually committing the crime of [____]. Instead, he is charged with helping someone else try to avoid being arrested, prosecuted or punished for that crime.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant knew someone else had already committed the crime of [____].

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

Third: the defendant did so with the intent to help that person avoid being arrested, prosecuted or punished.

Comment

This instruction is consistent with *United States v. McGuire*, 200 F.3d 668, 674-76 (10th Cir. 1999); *United States v. Lepanto*, 817 F.2d 1463, 1467-69 (10th Cir. 1987); *United States v. Balano*, 618 F.2d 624, 631 (10th Cir. 1979), *overruled on other grounds by Richardson v. United States*, 468 U.S. 317, 325-26 (1984).

2.08

MISPRISION OF A FELONY
18 U.S.C. § 4

The defendant is charged in count ____ with a violation of 18 U.S.C. section 4.

This law makes it a crime to conceal from the authorities the fact that a federal felony has been committed. [Predicate offense] is a federal felony.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: a federal felony was committed, as charged in count ____ of the Indictment;

Second: the defendant had knowledge of the commission of that felony;

Third: the defendant failed to notify an authority as soon as possible. An "authority" includes a federal judge or some other federal civil or military authority, such as a federal grand jury, Secret Service or FBI agent; and

Fourth: the defendant did an affirmative act, as charged, to conceal the crime.

Mere failure to report a felony is not a crime. The defendant must commit some affirmative act designed to conceal the fact that a federal felony has been committed.

Comment

This instruction is supported by *United States v. Baez*, 732 F.2d 780, 782 (10th Cir. 1984) (stating elements of "misprision" of felony).

2.09

ASSAULTING A FEDERAL OFFICER
18 U.S.C. § 111

The defendant is charged in count ____ with a violation of 18 U.S.C. section 111.

This law makes it a crime to forcibly [assault] [resist] [oppose] [impede] [intimidate] or [interfere with] a federal officer while the officer is engaged in the performance of his official duties.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant forcibly [assaulted] [resisted] [opposed] [impeded] [intimidated] or [interfered with] [the person described in the indictment];

Second: the person [assaulted] [resisted] [opposed] [impeded] [intimidated] or [interfered with] was a federal officer who was then engaged in the performance of his official duty, as charged; and

Third: the defendant did such act[s] intentionally.

[*Fourth*: in doing such acts, the defendant [used a deadly or dangerous weapon] [inflicted bodily injury]].

[The term "forcible assault" means any intentional attempt or threat to inflict injury upon someone else, when coupled with an apparent present ability to do so, and includes any intentional display of force that would give a reasonable person cause to expect immediate bodily harm, whether or not the threat or attempt is actually carried out or the victim is injured.]

[The term "deadly or dangerous weapon" includes any object capable of inflicting death or serious bodily injury. For such a weapon to have been "used," the government must prove that the defendant not only possessed the weapon, but that the defendant intentionally displayed it in some manner while forcibly [assaulting] [resisting] [opposing] [impeding] [intimidating] or [interfering with] the federal officer. The term "bodily injury" means an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought.]

You are instructed that a [name agent] is a federal officer, and that it is a part of the official duty of such an officer to [name duty performed, e.g., execute arrest warrants issued by a judge or magistrate of this court].

It is not necessary to show that the defendant knew the person being forcibly [assaulted] [resisted] [opposed] [impeded] [intimidated] or [interfered with] was, at that time, a federal officer carrying out an official duty so long as it is established beyond a reasonable doubt that the victim was, in fact, a federal officer acting in the course of his duty and that the defendant intentionally forcibly [assaulted] [resisted] [opposed] [impeded] [intimidated] or [interfered with] that officer.

[On the other hand, the defendant would not be guilty of [assaulting] [resisting] [opposing] [impeding] [intimidating] or [interfering with] an officer if the defendant had no knowledge of the officer's identity and reasonably believed he was the subject of a hostile attack against his person such that he was entitled to use reasonable force in his defense. The government must establish beyond a reasonable doubt that the defendant did not act in self defense.]

Comment

This statute creates three separate offenses, each element of which must be charged in the indictment and proven to the jury beyond a reasonable doubt. *United States v. Hathaway*, 318 F.3d 1001, 1007 (10th Cir. 2003); *see also Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). The fourth element above and the accompanying bracketed definitions constitute a felony offense carrying a maximum penalty of 20 years imprisonment. Without that element, the above instruction defines the misdemeanor crime of "simple assault," carrying a maximum penalty of not more than one year confinement. "Simple assault" means "assault which does not involve actual physical contact, a deadly or dangerous weapon, bodily injury, or the intent to commit murder or any felony other than those referred to in [18 U.S.C.] §113(a)(2)." *Hathaway*, 318 F.3d at 1008. The third crime is under the category of "all other cases," carrying a maximum penalty of eight years imprisonment. "All other cases" assault means

> any assault that is neither "simple assault" . . . nor assault as defined in [18 U.S.C.] §111(b). Thus, "all other cases" assault . . . includes any assault that involves actual physical contact or the intent to commit murder or any felony other than those referred to in §113(a)(2) but does not involve a deadly or dangerous weapon or bodily injury.

Id. at 1008-09. The instruction above would have to be modified accordingly to fit this category.

A federal officer is "engaged in the performance of his official duties" if he is acting within the scope of what he is employed to do, rather than engaging in a personal frolic of his own. *United States v. Young*, 614 F.2d 243, 244 (10th Cir. 1980) (Internal Revenue Service agent was engaged in the performance of his official duties even if summons he was serving was invalid).

In addition to prohibiting assaults and similar conduct on certain federal officials "while engaged in" their official duties, a prosecution under this statute also would be proper if the defendant forcibly assaulted a federal official "on account of" some official duty during such person's term of service. 18 U.S.C. §111(a)(2); *see generally United States v. Treff*, 924 F.2d 975 (10th Cir. 1991). The above instruction would have to be modified accordingly for such a charge.

18 U.S.C. §111 gives a person of ordinary intelligence fair notice of what conduct is proscribed and is not unconstitutionally vague, indefinite, or ambiguous. *United States v. Linn*, 438 F.2d 456, 458 (10th Cir. 1971).

The Committee has not drafted a separate instruction on assaults within the maritime and territorial jurisdiction of the United States. *See* 18 U.S.C. §113. The Court's decision in *United States v. Bruce*, 458 F.3d 1157, 1162 (10th Cir. 2006), *cert. denied*, 127 S.Ct. 999 (2007), discusses how the various subsections of the statute, §113(a)(1) to (7), relate in terms of lesser-included offenses.

Use Note

The last paragraph of the instruction is appropriate only when the evidence raises self defense or other justifiable action. *United States v. Corrigan*, 548 F.2d 879, 883 (10th Cir. 1977); *see also United States v. Feola*, 420 U.S. 671, 685-86 (1975).

If the government seeks to prove the "forcibly" element by proof of threats rather than by proof of actual touching, the threat must have been of immediate harm. In other words, the defendant must have had the present ability to harm the federal officer at the time he made the threat against the officer. *United States v. Disney*, 253 F.3d 1211, 1214-15 (10th Cir. 2001).

2.10

BANKRUPTCY FRAUD (PROPERTY CONCEALMENT)
18 U.S.C. § 152(1)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 152(1).

This law makes it a crime to conceal property belonging to the estate of a debtor in bankruptcy.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: a bankruptcy proceeding was pending on or about [date], in which [_] was the debtor;

Second: [description of the property alleged in indictment] was a part of the debtor's bankruptcy estate;

Third: [defendant name] knowingly concealed the property from the [custodian *or* trustee *or* marshal *or* other officer of the court, who was charged with control or custody of the property] [*in Ch. 11 cases:* creditors *or* United States Trustee]; and

Fourth: [defendant name] concealed the property fraudulently.

The "bankruptcy estate" includes all property in which the debtor has a legal or equitable interest at the time the bankruptcy case is filed. It also includes proceeds, products, rents, or profits from the estate's property.

"Conceal" means not only to hide or secrete, but also to prevent discovery or withhold knowledge of an asset. In addition, preventing disclosure or recognition of an asset is to conceal it. Concealment of property of the estate may include transferring property to a third party or entity, destroying the property, withholding knowledge about the property's existence or location, or knowingly doing anything else that hinders, unreasonably delays, or defrauds any creditors. Concealment is a continuing offense, so the actions taken toward concealment may have begun either before or after the bankruptcy proceeding began.

An act is done fraudulently if it is done with intent to deceive in order to cause financial loss or loss of property or property rights, or in

order to cause a financial gain, either to oneself or another, to the detriment of a third party.

Comment

For a case defining "concealment," *see United States v. Arge*, 418 F.2d 721, 724 (10th Cir. 1969).

Description of the property in the indictment should not be "*so general that it would inhibit the preparation of a defense*." *Arge*, 418 F.2d at 724. It follows that the property should be sufficiently identified in the instructions.

Although 18 U.S.C. §152(1) does not state that the concealment of property must be material, the Tenth Circuit has implied that materiality requirement with regard to other subsections of this statute. *See United States v. McIntosh*, 124 F.3d 1330, 1337 (10th Cir. 1997) (holding that the instructions as a whole correctly stated the governing law where they referred to the materiality of a concealed fact and a false statement in connection with bankruptcy fraud under §§152(3) and (7)). The court did not discuss, however, the then-seven-month-old Supreme Court decision in *United States v. Wells*, 519 U.S. 482 (1997). That case held that materiality was not an element of 18 U.S.C. §1014 (which makes it a crime to knowingly make a false statement or report to influence a bank with regard to a loan) where, among other things, the statute does not mention materiality of the false statement or the facts underlying the false statement. *Id.* at 489-90. Casting further doubt on "materiality" as an element of §152, the Committee notes that, of the nine subsections in that statute, only subsection (5) explicitly requires materiality.

"Property of the estate" is defined at 11 U.S.C. §541. The definition is extensive, so the Committee recommends that the court tailor the definition of "property of the estate" to the particular facts of the case.

Use Note

In appropriate cases, where the defense is raised, the trial court might add the following instruction(s):

> It is no defense that the concealment may have proved unsuccessful. Even though the property [document] [books] [records] in question may have been recovered for the debtor's estate, the defendant still may be guilty of the offense charged.
>
> Similarly, it is no defense that there was no demand by any officer of the court or creditor for the property [document] [books] [records] alleged to have been concealed. Demand on the defendant for such property [document] [books] [records] is not necessary in order to establish concealment.

2.11

BRIBERY OF A PUBLIC OFFICIAL
18 U.S.C. § 201(b)(1)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 201(b)(1).

This law makes it a crime to bribe a public official.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant [gave] [offered] [promised] [directly] [indirectly] anything of value to [name of official]; and

Second: at the time [name of official] was a public official, and

Third: the defendant did this act [i.e., (specify what defendant is alleged to have done)], intentionally and with the unlawful purpose to influence an official act by [name of official].

Comment

"Public official" and "official act" are defined by 18 U.S.C. §201(a)(1-3):

> (1) the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of, or a juror;
>
> (2) the term "person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed; and
>
> (3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

2.12

RECEIVING A BRIBE BY A PUBLIC OFFICIAL
18 U.S.C. § 201(b)(2)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 201(b)(2).

This law makes it a crime for a public official to [demand] [seek] [receive] [accept] [agree to receive or accept] a bribe.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant, a public official, directly or indirectly [demanded] [sought] [received] [accepted] [agreed to receive or accept] personally [for another person] [for an entity] something of value; and

Second: the defendant did so intentionally and with an unlawful purpose in return for being [influenced in his performance of an official act] [persuaded to omit an act in violation of his official duty] [persuaded to do an act in violation of his official duty].

Use Note

Refer to Instruction 2.11 (Comment) for appropriate definitions.

2.13

ILLEGAL GRATUITY TO A PUBLIC OFFICIAL
18 U.S.C. § 201(c)(1)(A)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 201(c)(1)(A).

This law makes it a crime to [give] [offer] [promise] anything of value to a public official [for] [because of] an official act [performed] [to be performed] by that official.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant [gave] [offered] [promised] anything of value not authorized by law to [name of official] [directly or indirectly] and

Second: at that time, [name of official] was a public official, and

Third: the defendant did so [for] [because of] an official act [performed] [to be performed] by [name of official].

Use Note

Refer to Instruction 2.11 (Comment) for appropriate definitions.

2.14

RECEIVING AN ILLEGAL GRATUITY BY A PUBLIC OFFICIAL
18 U.S.C. § 201(c)(1)(B)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 201(c)(1)(B).

This law makes it a crime for a public official to [demand] [seek] [receive] [accept] [agree to receive or accept] anything of value personally [for] [because of] an official act [performed] [to be performed] by that official.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant was a public official;

Second: the defendant directly or indirectly [demanded] [sought] [received] [accepted] [agreed to receive or accept] something of value personally, and

Third: the defendant did so [for] [because of] an official act [performed] [to be performed] by the defendant.

Use Note

Refer to Instruction 2.11 (Comment) for appropriate definitions.

2.15

BRIBERY OR REWARD OF A BANK OFFICER
18 U.S.C. § 215(a)(1)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 215(a)(1).

This law makes it a crime to corruptly [give] [offer] [promise] anything of value to any person, with the intent to influence or reward an officer, director, employee, agent, or attorney of a financial institution in connection with any business or transaction of that financial institution.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant [gave] [offered] [promised] anything of value in excess of $1,000 to [name of bank officer], and

Second: the defendant did so intentionally and with the unlawful purpose to [influence] [reward] an [officer] [director] [employee] [agent] [attorney] of a financial institution in connection with any [business] [transaction] of that institution.

Use Note

If there is a dispute as to whether the value exceeds $1,000 (felony), a lesser included misdemeanor instruction should be given.

2.16

CONSPIRACY TO DEPRIVE PERSON OF CIVIL RIGHTS
18 U.S.C. § 241

The defendant is charged in count ____ with a violation of 18 U.S.C. section 241.

This law makes it a crime for two or more persons to conspire to [injure] [oppress] [threaten] [intimidate] someone in the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant knowingly agreed with another to [injure] [oppress] [threaten] [intimidate] one or more persons; and

Second: in doing so, the defendant intended to [hinder] [prevent] [interfere with] [name of person's] exercise or enjoyment of [his] [her] right [name right, e.g., to vote], which is a right secured by the Constitution or laws of the United States.

[*Third*: include any statutory enhancement element, e.g., [name of person] died as a result of acts committed in furtherance of the conspiracy.]

[The government need not prove that the defendant intended for [name of person] to die. It must prove that [name of person]'s death was a foreseeable result of the defendant's conduct.]

Comment

The elements of Section 241 are set forth in *United States v. Whitney*, 229 F.3d 1296, 1301 (10th Cir. 2000). *See also United States v. Magleby*, 241 F.3d 1306, 1314 (10th Cir. 2001). Section 241 does not require proof of an overt act in furtherance of the conspiracy. *Whitney*, at 1301.

This instruction must be accompanied by appropriate defining language from the standard conspiracy instruction for 18 U.S.C. §371, excluding the element requiring a conspirator to commit at least one overt act.

If the indictment alleges any of the several statutory enhancement elements, that element must be submitted to the jury.

Certain constitutional rights such as those under the Equal Protection Clause "arise only when there has been involvement of the state or of one acting under color of its authority." *United States v. Guest*, 383 U.S. 745, 755 (1966). If these rights are alleged in a section 241 case, the jury must be required to find that the defendant acted "under color of law," as defined in Instruction 2.17 for Deprivation of Civil Rights, 18 U.S.C. §242.

2.17

DEPRIVATION OF CIVIL RIGHTS
18 U.S.C. § 242

The defendant is charged in count ____ with a violation of 18 U.S.C. section 242.

This law makes it a crime for anyone acting under color of law willfully to deprive someone of a right secured by the Constitution or laws of the United States.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant was acting under color of law when he committed the acts charged in the indictment.

Second: the defendant deprived [name of person] of [his] [her] right to [name right], which is a right secured by the Constitution or laws of the United States.

Third: the defendant acted willfully, that is, the defendant acted with a bad purpose, intending to deprive [name of person] of that right.

[*Fourth*: (Include any appropriate enhancement element), e.g., [name of person] died as a result of defendant's conduct.] [The government need not prove that the defendant intended for [name of person] to die. The government must prove only that [name of person]'s death was a foreseeable result of the defendant's willful deprivation of [name of person]'s constitutional rights.]

"Under color of law" means acts done under any state law, county or city ordinance, or other governmental regulation, and includes acts done according to a custom of some governmental agency. It means that the defendant acted in his official capacity or else claimed to do so, but abused or misused his power by going beyond the bounds of lawful authority. [If a private citizen is charged, substitute the following: A private person acts "under color of law" if that person participates in joint activity with someone that person knows to be a public official.]

Comment

A conviction under section 242 requires proof that the defendant acted with the specific intent to deprive a person of some constitutional right. *See*

Screws v. United States, 325 U.S. 91, 106 (1945) (charging violation of section 242 predecessor, 18 U.S.C. section 52). "[I]t was not sufficient that the defendants may have had a general bad purpose; . . . it was necessary that they have the actual purpose of depriving [victim] of the constitutional rights enumerated in the indictment, ..." *Apodaca v. United States*, 188 F.2d 932, 937 (10th Cir. 1951).

Section 242 includes a number of elements which enhance punishment. If such an element is charged in the indictment, it should be submitted to the jury. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000).

2.18

FALSE CLAIMS AGAINST THE GOVERNMENT
18 U.S.C. § 287

The defendant is charged in count ____ with a violation of 18 U.S.C. section 287.

This law makes it a crime to knowingly make a false or fraudulent claim against any department or agency of the United States. The [name of entity] is a department or agency of the United States within the meaning of that law.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant knowingly made and presented to the [name of entity] a false or fraudulent claim against the United States;

Second: the defendant knew that the claim was false or fraudulent.

It is not necessary to show that the government agency or department was in fact deceived or misled.

To make a claim, the defendant need not directly submit the claim to an employee or agency or department 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.

Comment

The elements of 18 U.S.C. §287 are set forth in *United States v. Kline*, 922 F.2d 610, 611 (10th Cir. 1990).

Materiality is not an element of a false claims charge.

2.19

CONSPIRACY
18 U.S.C. § 371

The defendant is charged in count ____ with a violation of 18 U.S.C. section 371.

This law makes it a crime to conspire to commit an offense against the United States.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant agreed with at least one other person to violate the law.

Second: one of the conspirators engaged in at least one overt act furthering the conspiracy's objective.

Third: the defendant knew the essential objective of the conspiracy.

Fourth: the defendant knowingly and voluntarily participated.

Fifth: there was interdependence among the members of the conspiracy; that is, the members, in some way or manner, intended to act together for their shared mutual benefit within the scope of the conspiracy charged.

Comment

United States v. Rahseparian, 231 F.3d 1267, 1272 (10th Cir. 2000); *United States v. Hanzlicek*, 187 F.3d 1228, 1232 (10th Cir. 1999); *United States v. McVeigh*, 153 F.3d 1166, 1196 (10th Cir. 1998); *United States v. Edwards*, 69 F.3d 419, 431 (10th Cir. 1995); *United States v. Johnson*, 12 F.3d 1540, 1545 (10th Cir. 1993); *United States v. Arutunoff*, 1 F.3d 1112, 1116 (10th Cir. 1993).

In drafting Instruction 2.19 (and the correlative drug conspiracy instruction, 2.87), the Committee considered the state of Tenth Circuit conspiracy law.

The United States Code contains a number of conspiracy statutes in addition to the general conspiracy statute, 18 U.S.C. section 371, and the narcotics conspiracy statute, 21 U.S.C. section 846. *See, e.g.*, 18 U.S.C. section

241 (conspiracy against rights of citizens); 18 U.S.C. section 286 (conspiracy to defraud the government with respect to claims); 18 U.S.C. section 1951 (interference with commerce by threats or violence); and 21 U.S.C. section 963 (conspiracy to import or export controlled substances). These statutes are necessarily affected by the instructions given in the more common conspiracy cases brought under the general and drug conspiracy statutes.

Proof of an overt act is a required element in conspiracies charged under 18 U.S.C. section 371, but proof of an overt act is not required in 21 U.S.C. section 846 conspiracies. *United States v. Shabani*, 513 U.S. 10, 13 (1994). This important distinction between these two statutes has become blurred in recent Tenth Circuit conspiracy cases. *See, e.g.*, *Rahseparian*, 213 F.3d at 1272. In stating the elements of a section 371 conspiracy, *Rahseparian* omits the overt act requirement. *Id.* (citing *United States v. Edwards*, 69 F.3d 419, 430 (10th Cir. 1995), a section 846 case).

The Tenth Circuit is unique, at least among federal jurisdictions, in requiring the inclusion of "interdependence" between or among conspirators as an essential element of conspiracies charged under 18 U.S.C. section 371 and 21 U.S.C. section 846. Interdependence, as an essential element of §371 conspiracy, is an innovation of Tenth Circuit jurisprudence that evolved during the 1990s. It now appears to be settled law. *See, e.g.*, *United States v. Quarrell*, 310 F.3d 664, 678 (10th Cir. 2002) (including interdependence as an element of 18 U.S.C. §371) (citing *Hanzlicek*, 187 F.3d at 1232)); *United States v. (Jalal) Rahseparian*, 231 F.3d 1257, 1262 (10th Cir. 2000) (same); *Rahseparian*, 231 F.3d at 1272 (same); *United States v. Lampley*, 127 F.3d 1231, 1243 (10th Cir. 1997) (same); *United States v. Dimeck*, 24 F.3d 1239, 1242 (10th Cir. 1994) (same); *Arutunoff*, 1 F.3d at 1116 (same).

Use Note

Conspiracy to commit a particular substantive offense requires at least the degree of criminal intent necessary to commit the underlying offense. *United States v. Feola*, 420 U.S. 671, 686 (1975). If the underlying offense requires a special criminal intent (for example, premeditation or malice), further instruction on that intent would be necessary.

The verdict form should include a finding as to the overt act.

Regarding the notion of interdependence, please refer to Instruction 2.87.

Regarding aiding and abetting, if there is an aiding and abetting count, a separate instruction should be given. A suggested instruction follows:

> Sometimes jurors have difficulty understanding the legal difference between the criminal offenses of "conspiracy" and "aiding and abetting."
>
> "Conspiracy" depends and is based on any agreement, unspoken or expressed, whether carried over into a

conspiratorial act or not; whereas "aiding and abetting" depends on a showing of conscious participation in a criminal act, i.e., knowingly assisting in the performance of the criminal act charged.

It is the element of "agreement" that distinguishes conspiracy from aiding and abetting.

2.20

CONSPIRACY: EVIDENCE OF MULTIPLE CONSPIRACIES

Count ____ of the indictment charges that [the defendant was a] [the defendants were all] member[s] of one single conspiracy to commit the crime of _____.

[The defendant has] [Some of the defendants have] argued that there were really two or more separate conspiracies, instead of the single conspiracy charged in the indictment.

You must determine whether the single conspiracy, as charged in the indictment, existed, and if it did, whether the defendant was a member of it.

Proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment, unless one of the several conspiracies which is proved is the single conspiracy charged in the indictment.

If you find that the defendant was not a member of the conspiracy charged, then you must find the defendant not guilty, even though the defendant may have been a member of some other conspiracy. This is because proof that a defendant was a member of some other conspiracy is not enough to convict.

But proof that a defendant was a member of some other conspiracy would not prevent you from returning a guilty verdict, if the government proved that he was also a member of the conspiracy charged in the indictment.

Comment

A multiple conspiracy instruction should "instruct [] the jury to acquit if it finds that the defendant was not a member of the indicted conspiracy but rather was involved in another conspiracy." *United States v. Edwards*, 69 F.3d 419, 433 (10th Cir. 1995).

"[T]he question whether there existed evidence sufficient to establish a single conspiracy is one of fact for the jury to decide." *United States v. Evans*, 970 F.2d 663, 671 (10th Cir. 1992) (quotation omitted).

"A variance arises when the evidence adduced at trial establishes facts different from those alleged in an indictment." *United States v. Ailsworth*, 138 F.3d 843, 848 (10th Cir. 1998) (quotation omitted). "Accordingly, where a single conspiracy is charged in the indictment, and the government proves

only multiple conspiracies, a defendant who suffers substantial prejudice must have his conviction reversed." *Edwards*, 69 F.3d at 432.

"The inquiry focuses on whether the necessary interdependence existed between the coconspirators." *United States v. Hanzlicek*, 187 F.3d 1228, 1232 (10th Cir. 1999). In the context of a wheel conspiracy, this court has held that an element to be proved is that the conspirators were interdependent. *Evans*, 970 F.2d at 668.

"Separate spokes meeting at a common center constitute a wheel conspiracy only if those spokes are enclosed by a 'rim.'" *Evans*, 970 F.2d at 668 n.8 (quoting *Kotteakos v. United States*, 328 U.S. 750, 755 (1946)).

Use Note

A multiple conspiracy instruction is generally required when the indictment charges several defendants with one overall conspiracy, but the proof at trial indicates that some of the defendants were only involved in separate conspiracies, and not in the overall conspiracy charged in the indictment.

2.21

CONSPIRATOR'S LIABILITY FOR SUBSTANTIVE COUNT

If you find the defendant guilty of the conspiracy charged in count ____ and you find beyond a reasonable doubt that during the time the defendant was a member of that conspiracy another coconspirator committed the offense in count ____, and the offense in count ____ was committed to achieve an objective of or was a foreseeable consequence of that conspiracy, then you may find the defendant guilty of count ____, even though the defendant may not have participated in any of the acts which constitute the offense[s] described in count ____.

Comment

This instruction charges the jury on the *Pinkerton* principle. *Pinkerton v. United States*, 328 U.S. 640, 645-47 (1946). This instruction is supported by *United States v. Cherry*, 217 F.3d 811, 817 (10th Cir. 2000); *United States v. Russell*, 963 F.2d 1320, 1322 (10th Cir. 1992); *see also United States v. Dumas*, 688 F.2d 84, 87 (10th Cir. 1982).

2.22

WITHDRAWAL INSTRUCTION

The defendant has raised the affirmative defense of withdrawal from the conspiracy.

If you have first found the defendant was a member of the conspiracy charged in count ____, then you must determine whether the defendant thereafter withdrew from the conspiracy.

In order to find that the defendant withdrew from the conspiracy, you must be convinced that the defendant has proven by a preponderance of the evidence that he took an affirmative step to either defeat the purpose of the conspiracy or to tell his coconspirators that he was no longer participating in the conspiracy.

Comment

United States v. Cherry, 217 F.3d 811, 817-18 (10th Cir. 2000); *United States v. Parnell*, 581 F.2d 1374, 1384 (10th Cir. 1978); *Hyde v. United States*, 225 U.S. 347, 369-70 (1912).

Use Note

Withdrawal is typically raised in one of the following situations: (1) as a defense to *Pinkerton* liability, when the defendant claims he withdrew from the conspiracy prior to the commission of substantive offenses by other conspirators; (2) as a defense based on the statute of limitations, when the defendant claims that his involvement in the conspiracy ended beyond the limitations period; or (3) as a defense to the conspiracy charge itself, when the defendant claims withdrawal prior to the commission of any overt act and the charged conspiracy requires an overt act. The judge might wish to add language to the opening paragraph explaining which situation applies in the case.

2.23

COUNTERFEITING
18 U.S.C. § 471

The defendant is charged in count ____ with a violation of 18 U.S.C. section 471.

This law makes it a crime to, with intent to defraud, falsely make, forge, counterfeit, or alter any obligation or other security of the United States.

[Name obligation or security] is an obligation or security of the United States within the meaning of the law.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant made counterfeit [name obligation or security]; and

Second: the defendant did so with intent to defraud.

An item is "counterfeit" if it bears such a likeness to a genuine item as is calculated to deceive an unsuspecting person of ordinary observation and care.

To act with "intent to defraud" means to act with intent to cheat or deceive. It does not matter, however, whether anyone was in fact cheated or deceived.

Comment

The definition of "counterfeit" is a shorter version of an instruction approved in *United States v. Cantwell*, 806 F.2d 1463, 1470 (10th Cir. 1986). While shorter, the pattern instruction retains the content of the instruction approved in *Cantwell*. The actual instruction approved in *Cantwell* was:

> An item is "counterfeit" if it bears such a likeness or resemblance to a genuine obligation or security issued under the authority of the United States as is calculated to deceive an honest, sensible, and unsuspecting person of ordinary observation and care dealing with a person supposed to be honest and upright.

Cantwell, 806 F.2d at 1470.

Use Note

Where whether the item is an "obligation or other security of the United States" is in dispute, the question should be submitted to the jury. *See United States v. Hanzlicek*, 187 F.3d 1228, 1229 (10th Cir. 1999). "Obligation or other security of the United States" is defined in 18 U.S.C. §8.

2.24

PASSING COUNTERFEIT OBLIGATIONS OR SECURITIES
18 U.S.C. § 472

The defendant is charged in count ____ with a violation of 18 U.S.C. section 472.

This law makes it a crime to, with intent to defraud, pass any falsely made, forged, counterfeited, or altered obligation or other security of the United States.

[Name obligation or security] is an obligation or security of the United States within the meaning of that law.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant passed counterfeit [name obligation or security];

Second: the defendant knew that the [name obligation or security] was counterfeit; and

Third: the defendant did so with intent to defraud.

An item is "counterfeit" if it bears such a likeness to a genuine item as is calculated to deceive an unsuspecting person of ordinary observation and care.

To "pass" means to spend, attempt to spend, or otherwise to place, or attempt to place, in circulation.

To act with "intent to defraud" means to act with intent to cheat or deceive. It does not matter, however, whether anyone was in fact cheated or deceived.

Comment

This instruction is consistent with *United States v. Drumright*, 534 F.2d 1383, 1385 (10th Cir. 1976), in which the Tenth Circuit stated that: "The elements of the offense proscribed by §472 are the passing or uttering of a falsely made and altered obligation of the United States with intent to defraud."

The definition of "counterfeit" is drawn from *United States v. Cantwell*, 806 F.2d 1463, 1470 (10th Cir. 1986). *See* Comment accompanying instruction 2.23.

2.24.1

IMPORTATION, POSSESSION OR CONCEALMENT OF COUNTERFEIT OBLIGATIONS OR SECURITIES 18 U.S.C. § 472

The defendant is charged in count ____ with a violation of 18 U.S.C. section 472.

This law makes it a crime to, with intent to defraud, bring into the United States, or keep in possession or conceal, any falsely made, forged, counterfeited, or altered obligation or other security of the United States.

[Name security or obligation] is an obligation or security of the United States within the meaning of that law.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant [brought into the United States] [kept in his possession] [concealed] counterfeit [name obligation or security];

Second: the defendant knew that the [name obligation or security] was counterfeit; and

Third: the defendant did so with intent to defraud.

An item is "counterfeit" if it bears such a likeness to a genuine item as is calculated to deceive an unsuspecting person of ordinary observation and care.

To act with "intent to defraud" means to act with intent to cheat or deceive. It does not matter, however, whether anyone was in fact cheated or deceived.

Comment

See Comment accompanying previous instruction.

2.25

FORGERY
18 U.S.C. § 495

The defendant is charged in count ____ with a violation of 18 U.S.C. section 495.

This law makes it a crime to forge a signature on any paper [for the purpose of obtaining] [for the purpose of enabling another person to obtain] money from the United States or any of its officers or agents.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant wrote the signature of [name payee] on a [describe written instrument] without his permission; and

Second: the defendant [did so for the purpose of obtaining money from the United States when he knew he had no right to have it] [did so for the purpose of enabling another person to obtain money from the United States when the defendant knew the other person had no right to have it].

The "payee" of a check is the true owner or person to whom the check is payable.

The evidence does not have to show that the defendant or anyone else actually obtained any money.

2.26

PASSING A FORGED WRITING
18 U.S.C. § 495

The defendant is charged in count ____ with a violation of 18 U.S.C. section 495.

This law makes it a crime to pass any false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant passed a [name written instrument];

Second: the defendant knew at the time that the [name written instrument] was [forged] [false] [altered] [counterfeit]; and

Third: the defendant did so with intent to defraud.

To "pass" means to spend, attempt to spend, or otherwise to place, or attempt to place, in circulation.

To act with "intent to defraud" means to act with intent to cheat or deceive. It does not matter, however, whether anyone was in fact cheated or deceived.

2.27

FORGERY OF ENDORSEMENT ON UNITED STATES TREASURY CHECK, BOND, OR SECURITY 18 U.S.C. § 510(a)(1)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 510(a)(1).

This law makes it a crime to, with intent to defraud, falsely make or forge any endorsement or signature on a Treasury check or bond or security of the United States.

[A [name item if other than a Treasury check] is a bond or security of the United States within the meaning of that law.]

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant wrote the signature of [name payee] on a [United States Treasury check] [name other bond or security] without his permission; and

Second: the defendant did so with intent to defraud.

To act with "intent to defraud" means to act with intent to cheat or deceive. It does not matter, however, whether anyone was in fact cheated or deceived.

[If a felony violation is charged, add:

Third: [the face value of the United States [Treasury check] [name other bond or security] is $1,000 or more] [the aggregate face value of the United States [Treasury checks] [name other bonds or securities] is $1,000 or more.]

The "payee" of a check is the true owner or person to whom the check is payable.

2.28

PASSING A FORGED UNITED STATES TREASURY CHECK, BOND OR SECURITY
18 U.S.C. § 510(a)(2)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 510(a)(2).

This law makes it a crime to, with intent to defraud, pass any Treasury check or bond or security of the United States bearing a falsely made or forged endorsement or signature.

[A [name item if other than a Treasury check] is a bond or security of the United States within the meaning of that law.]

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant passed a United States [Treasury check][name bond or security];

Second: the defendant knew at the time that [the check] [name bond or security] was forged; and

Third: the defendant did so with intent to defraud.

[If a felony violation is charged, add:

Fourth: that [the face value of the United States [Treasury check] [name bond or security] is $1,000 or more] [the aggregate face value of the United States [Treasury checks] [name bonds or securities] is $1,000 or more.]]

"Forge" means to write the payee's endorsement or signature on a check without the payee's permission or authority.

The "payee" of a check is the true owner or person to whom the check is payable.

To act with "intent to defraud" means to act with intent to cheat or deceive. It does not matter, however, whether anyone was in fact cheated or deceived or whether money was actually obtained.

2.29

SMUGGLING
18 U.S.C. § 545 (First Paragraph)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 545.

This law makes it a crime for anyone knowingly and willfully to [smuggle] [attempt to smuggle] with intent to defraud merchandise into the United States in violation of the customs laws and regulations of the United States.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant [brought] [attempted to bring] [describe merchandise] into the United States;

Second: the defendant knew that the [describe merchandise] should have been declared or reported to customs authorities as required by law;

Third: the defendant acted knowingly and willfully with intent to defraud the United States. [It is not necessary, however, to prove that any tax or duty was owed on the merchandise.]

[*Fourth:* the defendant did something which was a substantial step toward committing [crime charged], with all of you agreeing as to what constituted the substantial step. Mere preparation is not a substantial step toward committing [crime charged], rather the government must prove that the defendant, with the intent of committing [crime charged], did some overt act adapted to, approximating, and which in the ordinary and likely course of things would result in, the commission of [crime charged].

To act with "intent to defraud" means to act with intent to deceive or cheat someone.

Comment

This instruction is based on the first paragraph of 18 U.S.C. §545. The first two paragraphs of section 545 set forth two separate offenses. *See* Instruction 2.30. The statute also provides that "[p]roof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall

be deemed evidence sufficient to authorize conviction for violation of this section." 18 U.S.C. §545.

The Committee has chosen not to suggest an instruction be given on section 545's statutory presumption of knowledge and intent to defraud from the mere fact of unexplained possession of undeclared goods.

The phrase "intent to defraud the United States" means intent to avoid and defeat the United States custom laws. *United States v. Boggus*, 411 F.2d 110, 113 (9th Cir. 1969).

The majority of circuits have concluded that 18 U.S.C. §545 does not require as an element that the defendant specifically intended to deprive the government of revenue. *See United States v. Ahmad*, 213 F.3d 805, 811 (4th Cir. 2000); *United States v. Robinson*, 147 F.3d 851, 854 (9th Cir. 1998); *United States v. Borello*, 766 F.2d 46, 51-52 (2d Cir. 1985); *United States v. Kurfess*, 426 F.2d 1017, 1019 (7th Cir. 1970). *But see United States v. Menon*, 24 F.3d 550, 554-55 (3d Cir. 1994) (holding that intent to deprive government of revenue is an essential element).

Use Note

The Committee believes this general instruction is acceptable in the absence of an objection. If requested, however, the defendant would be entitled to an instruction as to unanimity, which should be reflected on the verdict form.

This instruction may be used when the defendant is charged with the crime of smuggling goods or attempting to smuggle goods. The bracketed fourth element should be used when the defendant is charged with an attempt to smuggle goods.

2.30

UNLAWFUL IMPORTATION
18 U.S.C. § 545 (Second Paragraph)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 545.

This law makes it a crime for anyone [knowingly] [fraudulently] to import merchandise (that is, to bring merchandise or to cause it to be brought) into the United States contrary to law.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant imported [describe merchandise] into the United States;

Second: the defendant's importation was contrary to law [describe law(s) in detail]; and

Third: the defendant knew the importation was contrary to law.

Comment

See comment under Instruction 2.29. The term "merchandise" includes marijuana. *United States v. Garcia-Paz*, 282 F.3d 1212, 1214 (9th Cir. 2002). The term "law" includes not only statutes, but substantive agency regulations having the force and effect of law. *United States v. Mitchell*, 39 F.3d 465, 468-70 (4th Cir. 1994). In instructing the jury on the "contrary to law" element, the court should specify which law or laws defendant's act of importation violated. *See, e.g.*, *Babb v. United States*, 218 F.2d 538, 540-41 (5th Cir. 1955) (addressing necessity of including essential elements in indictment).

Note that under the second paragraph of 18 U.S.C. §545, the government is not required to prove specific intent to defraud the government, *United States v. Davis*, 597 F.2d 1237, 1239 (9th Cir. 1979), or knowledge of specific law violated, *Babb v. United States*, 252 F.2d 702, 708 (5th Cir. 1958).

Despite its inclusion in the statute, the Committee chose to eliminate the alternative phrase "clandestinely introduce" from the suggested instruction.

Use Note

When the offense is receiving, concealing, buying or selling unlawfully

imported property pursuant to the second paragraph of 18 U.S.C. section 545, the following instruction may be given:

> The defendant is charged in count ____ with a violation of 18 U.S.C. section 545.
>
> This law makes it a crime for anyone to [receive] [conceal] [buy] [sell] unlawfully imported merchandise knowing that merchandise to have been imported or brought into the United States contrary to law.
>
> To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:
>
> *First*: merchandise had been imported or brought into the United States contrary to law [describe law(s) in detail]; and
>
> *Second*: the defendant [received] [concealed] [bought] [sold] the merchandise knowing that it had been imported or brought into the United States contrary to law.

The second element of this suggested instruction is in the disjunctive and the instruction should be tailored to the mental state alleged in the indictment.

2.31

THEFT OF GOVERNMENT PROPERTY
18 U.S.C. § 641

The defendant is charged in count ____ with a violation of 18 U.S.C. section 641.

This law makes it a crime to [steal] [embezzle] [convert] government property. The defendant is accused of [stealing] [embezzling] [converting] [name property].

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the [name property] belonged to the United States government [if lack of knowledge is asserted, add: It does not matter whether the defendant knew that the [name property] belonged to the United States government, only that he knew it did not belong to him.];

Second: the defendant [stole] [embezzled] [converted] the [name property] intending to put it [to his own use or gain] [to the use or gain of another] or the defendant took the [name property] knowing it was not his and intending to deprive the owner of the use or benefit of the [name property]; and

Third: the value of the [name property] was more than $1000.

"Value" means the face, or market value, or cost price, either wholesale or retail, whichever is greater.

Comment

It is not necessary that the defendant knew the property belonged to the government. *United States v. Speir*, 564 F.2d 934, 937-38 (10th Cir. 1977).

Knowledge that the property is stolen and intent to convert it to one's own (or another's) use or gain are essential elements of the offense. *United States v. Butler*, 494 F.2d 1246, 1249 (10th Cir. 1974).

When instructing on embezzlement, existence of a fiduciary relationship is not an essential element. *United States v. Davila*, 693 F.2d 1006, 1007-08 (10th Cir. 1982).

Use Note

If there is a dispute about whether the property has a value of more or less than $1000, the court should consider giving a lesser included offense instruction. It is suggested that the verdict form might contain a line requiring the jury to specify a value.

The Committee suggests that the trial court include the term "par value" only if the term is an issue in the case. No Tenth Circuit case defines this term.

2.32

EMBEZZLEMENT AND MISAPPLICATION OF BANK FUNDS
18 U.S.C. § 656

The defendant is charged in count ____ with a violation of 18 U.S.C. section 656.

This law makes it a crime for certain people to embezzle or misapply the money, funds, or credits of a federally insured bank.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant was [an officer of] [an agent of] [an employee of] [connected in any capacity with—describe relationship] the [name bank];

Second: the [name bank] was a [describe federal status, i.e., "federally insured institution"];

Third: the defendant [knowingly embezzled] [willfully misapplied] [funds] [credits] [belonging to] [entrusted to the care of] the bank;

Fourth: the defendant acted with the intent to injure or defraud the bank; and

Fifth: the amount of money taken was more than $1,000.

To act with intent to defraud means to act with intent to deceive or cheat someone.

To 'embezzle' means the wrongful, intentional taking of money or property of another after the money or property has lawfully come within the possession or control of the person taking it. No particular type of moving or carrying away is required.

Comment

Sections 656 and 657 are parallel statutes that require the same proof. When instructing under 657, the designation of institution should be changed in the appropriate places.

The statute's "connected in any capacity with" language "should be

given a 'broad interpretation' in accordance with congressional intent of protection of federally insured institutions against fraud." *United States v. Davis*, 953 F.2d 1482, 1489 (10th Cir. 1992) (noting that either a stockholder who exerts control or a financial advisor of a federally protected institution may be within the reach of statutes because both persons occupy "positions of trust").

Use Note

Good faith is a legitimate theory of defense to violation of §§656 and 657. *See United States v. Haddock*, 956 F.2d 1534, 1547-48 (10th Cir. 1992) (applying §656). If the evidence supports the defense theory, it is error to refuse a good faith instruction—general instructions defining willfulness and intent will not suffice. *Id.*

If the charge involved is embezzlement, the relevant inquiry is not one of timing. Rather, the question is whether the defendant has been "given all the means for effective access to and control of the money by virtue of a special trust placed in her by her employer." *United States v. Weller*, 238 F.3d 1215, 1219 (10th Cir. 2001) (discounting defendant's argument that she had no authority to be in the bank at the time she possessed the funds) (quotation omitted).

If the charge involved is misapplication of funds, as opposed to embezzlement or theft, some causal connection is required between the defendant's actions as an officer, agent, employee, or person connected with the institution and the misapplication, such as a loan. For example, the defendant, in his special capacity, must misapply the funds by either making the loan or influencing the loan in a significant way. *United States v. Mitchell*, 15 F.3d 953, 955 (10th Cir. 1994). For a discussion of "misapplication," *see United States v. Davis*, 953 F.2d 1482, 1492-93 (10th Cir. 1992) (also noting that §§656 and 657 are parallel statutes). The possibility of future benefit to the bank is not a defense to misapplication of funds. *United States v. Acree*, 466 F.2d 1114, 1118 (10th Cir. 1972). "Misapplication covers acts not covered by embezzlement . . . [and] does not require previous lawful possession." *United States v. Holmes*, 611 F.2d 329, 331 (10th Cir. 1979). The fact that a bank suffers no loss, or that the defendant offers to repay a loss does not negate an earlier intent to defraud. *United States v. McKinney*, 822 F.2d 946, 949-50 (10th Cir. 1987).

The Tenth Circuit has held that evidence of intent to deceive satisfies the scienter requirement of §656. *United States v. Harenberg*, 732 F.2d 1507, 1511-12 (10th Cir. 1984).

2.33

THEFT FROM INTERSTATE OR FOREIGN SHIPMENT
18 U.S.C. § 659 (Paragraph One)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 659.

This law makes it a crime to commit a theft from an interstate or foreign shipment in certain circumstances.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant [embezzled] [stole] [unlawfully took, carried away or concealed] [by fraud or deception obtained] the property described in the indictment from [here describe the location, e.g., any pipeline system, railroad car, wagon, motortruck or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility];

Second: the defendant did so with the intent to deprive the owner of the use or benefit of the property or goods;

Third: such property or goods were a part of an interstate or foreign shipment at the time; and

Fourth: the value of the property was more than $1,000.

Comment

The word "steal" is defined by its well known meaning of taking the property of another for one's own use without benefit of law. *United States v. Scott*, 592 F.2d 1139, 1143 (10th Cir. 1979). Intent to permanently deprive the owner of the property is not a required element. *United States v. Cook*, 967 F.2d 431 (10th Cir. 1992). A fur coat stolen from a railroad passenger qualifies as an "interstate shipment." *Cathcart v. United States*, 244 F.2d 74, 74 (10th Cir. 1957). No single event can be used to determine when goods lose their interstate character and become intrastate or inventory. *United States v. Luman*, 622 F.2d 490, 492 (10th Cir. 1980).

This crime contains a separate element (thefts of interstate shipment) not present in the charge of theft of government property, 18 U.S.C. §641, so an acquittal on that charge does not bar a second prosecution arising from the same theft if it also occurred in interstate commerce. *United States v.*

Huffman, 595 F.2d 551, 555 (10th Cir. 1979). On the other hand, a defendant may not be convicted of both theft and possession of the same interstate property and it is "obvious and substantial error" for the trial court to fail to so instruct the jury. *United States v. Brown*, 996 F.2d 1049, 1053 (10th Cir. 1993).

Use Note

Section 653 describes six distinct offenses, and further provides that if the goods or chattels in question do not exceed the value $1,000, the offense is a misdemeanor. If the value of the goods or chattels (*see* 18 U.S.C. §641 defining value) is in issue, the court should consider giving a lesser included offense instruction.

The Committee suggests that the trial court include the term "par value" only if the term is an issue in the case. No Tenth Circuit case defines this term.

2.34

BUYING, RECEIVING, POSSESSING GOODS STOLEN FROM INTERSTATE SHIPMENT 18 U.S.C. § 659 (Paragraph Two)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 659.

This law makes it a crime to [buy] [receive] [possess] goods stolen from interstate commerce.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the goods described in the indictment were in defendant's possession;

Second: the goods described in the indictment [were part of] [were moving in] interstate or foreign commerce at the time the goods were stolen;

Third: the defendant knew those goods were stolen; and

Fourth: such property had a value in excess of $1,000.00.

Comment

A defendant may not be convicted of both *theft* of goods in interstate commerce (*see* previous instruction) and *possession* of the same goods. *United States v. Brown*, 996 F.2d 1049 (10th Cir. 1993). Paragraph two of 18 U.S.C. §659 does, however, provide several alternatives, *see* brackets. In *United States v. Koran*, 453 F.2d 144 (10th Cir. 1972), for example, the Court of Appeals recognized there may not have been sufficient evidence to prove defendant knew the goods were stolen when he "received" them, however, the record did show knowledge over the period he continued to "possess" them. And a defendant may be guilty of this offense as well as to being an accessory before the fact when he both plans the theft and receives the stolen goods. *United States v. Pauldino*, 487 F.2d 127 (10th Cir. 1973).

The goods must be part of an interstate shipment only when stolen; it is not necessary that they be so when the "receiving" or "possession" occurs. *United States v. Tyers*, 487 F.2d 828, 830 (2d Cir. 1973); *Winer v. United States*, 228 F.2d 944, 947 (6th Cir. 1956); *United States v. Gollin*, 166 F.2d 123, 125 (3d Cir. 1948). The defendant must know that the goods were stolen, but need not know they were stolen from an interstate shipment. *United*

States v. Polesti, 489 F.2d 822, 824 (7th Cir. 1973). Even though a defendant charged with possession of stolen goods must be shown to have guilty knowledge, long continued possession in the proper circumstances may be sufficient circumstantial evidence of such knowledge. *United States v. Koran*, 453 F.2d 144 (10th Cir. 1972).

If there is a dispute over whether the value is greater or less than $1,000.00, a lesser included offense instruction may be given. This may also raise sentencing issues under *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

2.35

ESCAPE
18 U.S.C. § 751(a)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 751(a).

This law makes it a crime to [escape] [attempt to escape] from a lawfully imposed custodial situation.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant was in federal custody pursuant to a lawful arrest on a felony [misdemeanor] charge at an institution or facility where the defendant was confined by direction of the Attorney General for conviction of an offense;

Second: the defendant departed without permission; and

Third: the defendant knew he did not have permission to leave federal custody.

Comment

The elements of the offense are set out in *United States v. McCray*, 468 F.2d 446 (10th Cir. 1972). "Custody" means the detention of an individual by virtue of lawful process or authority. A person may be "in federal custody" even though not under constant supervision by guards as long as some restraint remains on his or her freedom. *Read v. United States*, 361 F.2d 830, 831 (10th Cir. 1966). A defendant may also be in federal custody following arraignment. *United States v. Allen*, 432 F.2d 939, 940 (10th Cir. 1970). The failure to return to custody is sufficient to sustain a conviction for escape. *United States v. Woodring*, 464 F.2d 1248, 1250 (10th Cir. 1972); *see also United States v. Bailey*, 444 U.S. 394, 413 (1980). But the government must prove defendant is confined by virtue of a judgment resulting in delivery of defendant to the prison from which he escapes. *Strickland v. United States*, 339 F.2d 866, 868 (10th Cir. 1965).

The nature of the custody must be proven specifically since the statute provides dual penalties; escape is a felony if custody was by reason of a felony arrest, but only a misdemeanor if custody was by reason of a misdemeanor, exclusion or expulsion arrest. *United States v. Green*, 797 F.2d 855, 858 n.4 (10th Cir. 1986).

Necessity or duress is a common defense to this charge. For the requirements of such a defense, *see Bailey*, 444 U.S. at 409-13; *United States v. Boomer*, 571 F.2d 543, 545 (10th Cir. 1978). *But see United States v. Haney*, 318 F.3d 1161, 1163 (10th Cir. 2003), where the en banc court, finding the defendant either failed to raise the defense or limited the reach of the defense, noted that "[a] criminal defendant is entitled to an instruction on his theory of defense provided that theory is supported by some evidence and the law" (citing *United States v. Scafe*, 822 F.2d 928, 932 (10th Cir. 1987)).

Use Note

Refer to Instruction 1.36 on coercion and duress defenses.

2.36

THREATS AGAINST THE PRESIDENT
18 U.S.C. § 871

The defendant is charged in count ____ with a violation of 18 U.S.C. section 871.

This law makes it a crime to knowingly and willfully threaten to injure, kill, or kidnap [the President of the United States] [the President-elect] [the Vice President] [an other officer next in the order of succession to the office of President of the United States] [the Vice President-elect].

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant [mailed] [wrote] [said or uttered] the words alleged to be the threat against the [President] [successor to the Presidency] as charged in the indictment;

Second: the defendant understood and meant the words [mailed] [written] [said or uttered] as a threat; and

Third: the defendant [mailed] [wrote] [said or uttered] the words knowingly and willfully.

A "threat" is a serious statement expressing an intention to kill, kidnap, or injure [the President] [successor to the Presidency], which under the circumstances would cause apprehension in a reasonable person, as distinguished from words used as mere political argument, idle talk, exaggeration, or something said in a joking manner.

Comments

This instruction is based on *United States v. Dysart*, 705 F.2d 1247, 1256 (10th Cir. 1983). *See also Watts v. United States*, 394 U.S. 705, 706-08 (1969); *United States v. Crews*, 781 F.2d 826, 834-35 (10th Cir. 1986).

The Tenth Circuit cited favorably the following instructional language with respect to the knowing and willful requirement under 18 U.S.C. §871:

> "A threat is knowingly made, if the maker of it comprehends the meaning of the words uttered by him . . . . And a threat is willfully made, if in addition to comprehending the meaning of

> his words, the maker voluntarily and intentionally utters them as the declaration of an apparent determination to carry them into execution."

Michaud v. United States, 350 F.2d 131, 133 (10th Cir. 1965) (quoting *Ragansky v. United States*, 253 F 643, 645 (7th Cir. 1918)). *See also United States v. Hart*, 457 F.2d 1087, 1090-91 (10th Cir. 1972) (approving a similar instruction). *See United States v. Pinson*, 542 F.3d 822 (10th Cir. 2008), as to the instruction should focus on the apprehension of the listener rather than the intent of the speaker.

18 U.S.C. §871 is constitutional on its face, but threats subject to prosecution must be distinguished from constitutionally protected free speech. *Watts*, 394 U.S. at 707.

Use Note

If the defendant has raised the issue, the court should instruct the jury that it is not necessary to show the defendant intended to carry out the threat, nor is it necessary to prove the defendant actually had the apparent ability to carry out the threat. The question is whether those who hear or read the threat reasonably could consider that an actual threat has been made. The making of the threat, not the intention to carry it out, violates the law.

2.37

INTERSTATE TRANSMISSION OF EXTORTIONATE COMMUNICATION
18 U.S.C. § 875(b)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 875(b).

This law makes it a crime to [send] [transmit] an extortionate communication in interstate or foreign commerce.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant knowingly [sent] [transmitted] a communication containing a threat to [injure] [kidnap] the person of another;

Second: the defendant [sent] [transmitted] that communication with intent to extort [money] [something of value]; and

Third: the communication was sent in interstate commerce.

A "threat" is a serious statement expressing intent to [injure] [kidnap] any person, which under the circumstances would cause apprehension in a reasonable person, as distinguished from mere idle or careless talk, exaggeration, or something said in a joking manner.

To "extort" means to wrongfully induce someone else to pay money or something of value by threatening a kidnapping or injury if such payment is not made.

The term "thing of value" is used in the everyday, ordinary meaning and is not limited to money or tangible things with an identifiable price tag.

Use Note

In appropriate cases, it may be wise to instruct the jury that it is not necessary to prove that the defendant actually succeeded in obtaining the money or other thing of value, or that the defendant actually intended to carry out the threat made.

2.38

MAILING THREATENING COMMUNICATIONS
18 U.S.C. § 876 (Second Paragraph)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 876.

This law makes it a crime to use the mails to transmit an extortionate communication.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant knowingly [deposited] [caused to be deposited] in the mail, for delivery by the Postal Service, a communication containing a threat, as charged;

Second: the nature of the threat was to [kidnap] [injure] any person, and

Third: the defendant made the threat with the intent to extort [money] [something of value].

A "threat" is a serious statement expressing an intention to [injure] [kidnap] any person, which under the circumstances would cause apprehension in a reasonable person, as distinguished from idle or careless talk, exaggeration, or something said in a joking manner.

To "extort" means to wrongfully induce someone else to pay money or something of value by threatening a kidnapping or injury if such payment is not made.

The term "thing of value" is used in the everyday, ordinary meaning and is not limited to money or tangible things with an identifiable price tag.

Use Note

It is not necessary to prove that any money or other thing of value was actually paid or that the defendant actually intended to carry out the threat made.

It is not necessary to prove that the defendant actually wrote the communication. What the government must prove beyond a reasonable doubt

is that the defendant mailed or caused to be mailed a communication containing a "threat" as defined in these instructions.

2.39

MISREPRESENTATION OF CITIZENSHIP
18 U.S.C. § 911

The defendant is charged in count ____ with a violation of 18 U.S.C. section 911.

This law makes it a crime for anyone falsely and willfully to represent oneself to be a citizen of the United States.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant stated he was a citizen of the United States;

Second: the defendant was not a citizen of the United States at that time; and

Third: the defendant knew he was not a citizen and deliberately made this false statement with intent to disobey or disregard the law.

Use Note

The definition of citizen is contained in the Fourteenth Amendment and in 8 U.S.C. §1401. If the defense is that the defendant is a natural-born or naturalized citizen of the United States, a more detailed definition of "citizen" may be appropriate.

2.40

FALSE IMPERSONATION OF FEDERAL OFFICER OR EMPLOYEE—DEMANDING OR OBTAINING ANYTHING OF BALUE 18 U.S.C. § 912

The defendant is charged in count ____ with a violation of 18 U.S.C. section 912.

This law makes it a crime to demand [money] [something of value] while falsely [assuming] [pretending] to be an officer or employee acting under the authority of the United States or any department, agency, or officer thereof.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant falsely [assumed] [pretended] to be an [officer] [employee] acting under the authority of the United States;

Second: the defendant knew that such assumption or pretension was false; and

Third: while acting in such [assumed] [pretended] character, the defendant [demanded] [obtained] [money] [something of value].

[The [name of agency] is a department or agency of the United States within the meaning of that law.]

Comment

The Tenth Circuit has not decided whether "intent to defraud" must be pleaded and proved. Since Congress revised the statute, eight of nine circuits that have addressed the issue have held that the government does not need to plead or prove an "intent to defraud under §912." *See Wilkes*, 732 F.2d at 1159; *United States v. Gayle*, 967 F.2d 483, 486-87 (11th Cir. 1992); *United States v. Cord*, 654 F.2d 490, 491-92 (7th Cir. 1981); *United States v. Robbins*, 613 F.2d 688 (8th Cir. 1979); *United States v. Rosser*, 528 F.2d 652 (D.D.C. 1976); *United States v. Rose*, 500 F.2d 12 (2d Cir. 1974); *United States v. Mitman*, 459 F.2d 451, 453 (9th Cir. 1972); *United States v. Guthrie*, 387 F.2d 569, 571 (4th Cir. 1967). Only the Fifth Circuit has reached a contrary conclusion. *Honea v. United States*, 344 F.2d 798, 801-03 (5th Cir. 1965) (holding that because Congress did not intend to change the substantive offense by deleting the words "intent to defraud," an "intent to defraud" remains an essential element under the second clause of §912 that must be pleaded and proved);

United States v. Randolph, 460 F.2d 367, 370 (5th Cir. 1972) (extending the same reasoning to first clause of §912).

The prior wording of the statute stated that "[w]hoever, *with intent to defraud* either the United States or any person" impersonates a federal officer, and either "acts as such" or demands or obtains a "valuable thing," shall be guilty of a felony. 18 U.S.C. §76 (1940) (emphasis added). The words "with intent to defraud" were thereafter omitted from the statute as meaningless in light of *United States v. Lepowitch*, 318 U.S. 702 (1943). *Dickson v. United States*, 182 F.2d 131 (10th Cir. 1950), is a post-*Lepowitch* decision stating there must be a false representation, *with intent to defraud*, and some overt act in keeping with the false pretense in order to satisfy even the first prong of the statute. *Dickson*, however, does not discuss *Lepowitch* or its effect upon the "intent to defraud" element.

Use Note

It is appropriate to instruct, as a matter of law, on the official status of the department or governmental agency. Official status is not, however, an element of the offense. The statute is violated even if the defendant pretends to be an employee of a department or agency that does not actually exist. *Elliott v. Hudspeth*, 110 F.2d 389, 390 (10th Cir. 1940).

2.41

DEALING IN FIREARMS WITHOUT LICENSE
18 U.S.C. § 922(a)(1)(A)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 922(a)(1)(A).

This law makes it a crime to be in the business of dealing in firearms without a federal license.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant was a dealer in firearms on [date], engaged in the business of selling firearms at wholesale or retail;

Second: the defendant engaged in such business without a license issued under federal law; and

Third: the defendant did so willfully, that is, that the defendant was dealing in firearms with knowledge that his conduct was unlawful.

The term "firearm" means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosive. The term "firearm" also includes the frame or receiver of any such weapon, or any firearm muffler or firearm silencer, or destructive device.

Comment

Willfulness is an element of this offense. 18 U.S.C. §924(a)(1)(D). *Bryan v. United States*, 524 U.S. 184, 189 (1998).

Use Note

"Dealer" is defined at 18 U.S.C. §921(a)(11). "Engaged in the business" is defined at 18 U.S.C. §921(a)(21), "with the principal objective of livelihood and profit" is defined at 18 U.S.C. §921(a)(22), and, if appropriate, these definitions should be included if consistent with the evidence.

2.42

FALSE STATEMENT TO FIREARMS DEALER
18 U.S.C. § 922(a)(6)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 922(a)(6).

This law makes it a crime to make a false statement to a licensed firearms dealer in order to obtain a firearm.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant made a false statement while obtaining a firearm from a licensed dealer;

Second: the defendant knew the statement was false; and

Third: the statement was intended to or was likely to deceive about a material fact, i.e., one which would affect the legality of the transfer of the firearm from the dealer to the defendant.

The term "firearm" means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosive. The term "firearm" also includes the frame or receiver of any such weapon, or any firearm muffler or firearm silencer, or destructive device.

The term "licensed dealer" means any firearms dealer who is licensed under federal law.

A statement is "false or fictitious" if it was untrue when made and was then known to be untrue by the person making it.

A false statement is "likely to deceive" if the nature of the statement, considering all of the surrounding circumstances at the time it is made, is such that a reasonable person of ordinary prudence would have been actually deceived or misled.

Comment

18 U.S.C. §922(a)(6) uses the word "acquisition," which is not defined in section 921 and which, without definition, may imply a sale. In *United States v. Beebe*, 467 F.2d 222, 224 (10th Cir. 1972), the court stated that section

922(a)(6) "contemplates any transfer of property." *See also Huddleston v. United States*, 415 U.S. 814, 823 (1974) (noting the word "acquisition" includes any person who comes into possession, control or power of disposal of a firearm). Therefore, the instruction uses the word "obtain" in lieu of "acquire."

Section 922(a)(6) states a single offense. Attempted acquisition and actual acquisition of a firearm are not separate offenses.

2.43

UNLAWFUL SALE OR DISPOSITION OF FIREARM
18 U.S.C. § 922(d)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 922(d).

This law makes it a crime for a person knowingly to sell or otherwise dispose of a firearm to [a person in a prohibited category, e.g., a convicted felon] when the seller knows or has reasonable cause to believe that such a person is [a member of a prohibited category, e.g., a convicted felon].

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant knowingly sold a firearm to [name of person].

Second: at the time of the sale, [name of person] was [a person in a prohibited category, e.g., a convicted felon]; and

Third: at the time of sale, the defendant knew or had reasonable cause to believe that [name of person] was [a person in a prohibited category, e.g., a convicted felon].

The term "firearm" means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosive. The term "firearm" also includes the frame or receiver of any such weapon, or any firearm muffler or firearm silencer, or destructive device.

Comment

The *mens rea* requirement is set forth at 18 U.S.C. §924(a)(2).

Use Note

Courts are advised to consult the statute for an inclusive list of "prohibited categories" of persons.

2.44

POSSESSION OF A FIREARM BY A CONVICTED FELON
18 U.S.C. § 922(g)(1)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 922(g)(1).

This law makes it a crime for any person who has been previously convicted in any court of a felony to knowingly possess any firearm [or ammunition], in or affecting interstate [or foreign] commerce.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant knowingly possessed a firearm [or ammunition];

Second: the defendant was convicted of a felony, that is, a crime punishable by imprisonment for a term exceeding one year, before he possessed the firearm [or ammunition]; and

Third: before the defendant possessed the firearm [or ammunition], the firearm [or ammunition] had moved at some time from one state to another [or from a foreign country to the United States].

[The term "firearm" means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosive. The term "firearm" also includes the frame or receiver of any such weapon, or any firearm muffler or firearm silencer, or destructive device.]

Comment

The elements are set forth in *United States v. Taylor*, 113 F.3d 1136, 1144-46 (10th Cir. 1997). *See also United States v. Michel*, 446 F.3d 1122, 1128-29 (10th Cir. 2006), *United States v. Bowen*, 437 F.3d 1009, 1016-18 (10th Cir. 2006), which discuss the government's burden of proof and appropriate instructions in cases involving constructive possession and joint occupancy.

The nature or substance of the felony conviction is irrelevant and prejudicial and should be excluded if possible by use of a redacted record, affidavit, stipulation or similar technique, so that the jury is informed only of

the fact of the felony conviction. *United States v. Wacker*, 72 F.3d 1453, 1472-73 (10th Cir. 1995). *See also Old Chief v. United States*, 519 U.S. 172 (1997).

The defendant's knowledge that he could not possess a firearm as a convicted felon is not an element of a §922(g)(1) violation. *United States v. Griffin*, 389 F.3d 1100 (10th Cir. 2004). It is not necessary for the government to prove that the defendant owned the weapon; mere possession is enough. *United States v. Colonna*, 360 F.3d 1169, 1179 (10th Cir. 2004). Depending on the evidence, the court should also instruct that the government is not required to prove that the defendant himself moved the firearm or ammunition in interstate or foreign commerce.

The Court has "discussed but never applied a fleeting possession defense. This is largely because it is redundant to the necessity defense." *United States v. Al-Rekabi*, 454 F.3d 1113, 1126 (10th Cir. 2006). The necessity defense requires the defendant to show: "(1) there is no legal alternative to violating the law; (2) the harm to be prevented is imminent, and (3) a direct causal relationship is reasonably anticipated to exist between the defendant's action and the avoidance of the harm." *Al-Rekabi*, 454 F.3d at 1121.

In *United States v. Baker*, 508 F.3d 1321 (10th Cir. 2007), *rehearing denied*, 523 F.3d 1141 (10th Cir. 2008), *cert. denied*, 129 S.Ct. 349 (2008), the Court reaffirmed it has never explicitly recognized a fleeting possession defense, but examined the possible elements of such a defense. *See* 508 F.3d at 1326 n.2 (quoting *Al-Rekabi*, 454 F.3d at 1127 n.16). Further, in *Baker*, the Court opined on the distinction between knowing and willful possession, stating that "the government need not establish that the defendant possessed the contraband for any illicit purpose; the defendant's motive for possessing ammunition is irrelevant to the crime." 508 F. 3d at 1324. *See United States v. DeSoto*, 950 F.2d 626, 632 (10th Cir. 1991).

Regarding the third element of the offense, the interstate or foreign commerce nexus, refer to Instructions 1.39 and 1.39.1. *See United States v. Urbano*, 563 F.3d 1150 (10th Cir. 2009).

2.45

USING/CARRYING A FIREARM DURING COMMISSION OF A DRUG TRAFFICKING CRIME OR CRIME OF VIOLENCE 18 U.S.C. § 924(c)(1)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 924(c)(1).

This law makes it a crime to [use] [carry] a firearm during and in relation to any [drug trafficking crime] [crime of violence] for which a person may be prosecuted in a court of the United States.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant committed the crime of [name of crime], [as charged in count ____ of the indictment.] You are instructed that [name of crime] is a [drug trafficking crime] [crime of violence];

Second: the defendant used or carried a firearm;

Third: during and in relation to [name of crime].

The phrase "during and in relation to" means that the firearm played an integral part in the underlying crime, that it had a role in, facilitated (i.e., made easier), or had the potential of facilitating the underlying crime.

A defendant knowingly "uses" a firearm when it (1) is readily accessible and (2) is actively employed during and in relation to the underlying crime.

A defendant knowingly "carries" a firearm when he (1) possesses the firearm through the exercise of ownership or control and (2) transports or moves the firearm from one place to another.

In determining whether the defendant knowingly [used] [carried] a firearm during and in relation to the underlying crime, you may consider all of the facts received in evidence including the nature of the crime, the usefulness of a firearm to the crime, the extent to which a firearm actually was observed before, during and after the time of the crime, and any other facts that bear on the issue.

A firearm plays an integral part in the underlying crime when it furthers the purpose or effect of the crime and its presence or involvement is not the result of coincidence. The government must prove a direct connection between the defendant's [use] [carrying] of the firearm and the underlying crime but the crime need not be the sole reason the defendant [used] [carried] the firearm.

The term "firearm" means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosive. The term "firearm" also includes the frame or receiver of any such weapon, or any firearm muffler or firearm silencer, or destructive device.

Use Note

This instruction applies when the indictment charges using or carrying a firearm "during and in relation to" a drug trafficking crime or a crime of violence. It must *not* be used when the indictment charges "possession" of a firearm "in furtherance of" a drug trafficking crime or crime of violence. *United States v. Avery*, 295 F.3d 1158, 1172-77 (10th Cir. 2002). Instead, use Instruction 2.45.1.

When the government has charged a defendant with aiding and abetting a violation of 18 U.S.C. § 924(c), the government must prove "that the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission." *Rosemond v. United States*, 134 S. Ct. 1240, 1243 (2014). The defendant's knowledge of a confederate's using or carrying a firearm must be in advance of the criminal enterprise or in advance of a reasonable opportunity to withdraw from the criminal enterprise. *See id.* at 1249-52. *See* Instruction 2.06, Comment.

2.45.1

POSSESSION OF A FIREARM IN FURTHERANCE OF A DRUG TRAFFICKING CRIME OR CRIME OF VIOLENCE
18 U.S.C. § 924(c)(1)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 924(c)(1).

This law makes it a crime to possess a firearm in furtherance of a [drug trafficking crime] [crime of violence].

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant committed the crime of ____ [as charged in count ____ of the indictment], which is a [drug trafficking crime] [crime of violence];

Second: the defendant possessed a firearm in furtherance of this crime.

[The term "firearm" means any weapon which will, or is designed to, or may readily be converted to expel a projectile by the action of an explosive. The term "firearm" also includes the frame or receiver of any such weapon, or any firearm muffler or firearm silencer, or destructive device.]

Possession "in furtherance of" means for the purpose of assisting in, promoting, accomplishing, advancing, or achieving the goal or objective of the underlying offense.

Mere presence of a firearm at the scene is not enough to find possession in furtherance of a [drug trafficking crime] [crime of violence], because the firearm's presence may be coincidental or entirely unrelated to the underlying crime. Some factors that may help in determining whether possession of a firearm furthers, advances, or helps advance a [drug trafficking crime] [crime of violence] include, but are not limited to:

1. the type of criminal activity that is being conducted;

2. accessibility of the firearm;

3. the type of firearm;

4. whether the firearm is stolen;

5. the status of the possession (legitimate or illegal);

6. whether the firearm is loaded;

7. the time and circumstances under which the firearm is found; and

8. proximity to drugs or drug profits.

Use Note

This instruction applies when the indictment charges "possession" of a firearm "in furtherance of" a drug trafficking crime or crime of violence. It must *not* be used when the indictment charges using or carrying a firearm "during and in relation to" a drug trafficking crime or a crime of violence. *United States v. Avery*, 295 F.3d 1158, 1172-77 (10th Cir. 2002). Instead, use Instruction 2.45.

The definition of possession "in furtherance of" is taken from *United States v. Basham*, 268 F.3d 1199, 1206-08 (10th Cir. 2001). The "in furtherance factors" are discussed in *United States v. Trotter*, 483 F.3d 694, 701 (10th Cir. 2007). Trading firearms for drugs satisfies the "in furtherance" requirement. *United States v. Luke-Sanchez*, 483 F.3d 703, 705-06 (10th Cir. 2007).

The paragraph beginning "[The term "firearm" means . . .] is bracketed to indicate that the alternatives should be used as appropriate to the case.

When the government has charged a defendant with aiding and abetting a violation of 18 U.S.C. § 924(c), the government must prove "that the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission." *Rosemond v. United States*, 134 S. Ct. 1240, 1243 (2014). The defendant's knowledge of a confederate's using or carrying a firearm must be in advance of the criminal enterprise or in advance of a reasonable opportunity to withdraw from the criminal enterprise. *See id.* at 1249-52. *See* Instruction 2.06, Comment.

2.46

CONCEALMENT OF A MATERIAL FACT
18 U.S.C. § 1001(a)(1)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1001(a)(1).

This law makes it a crime to knowingly and willfully falsify, conceal, or cover up by any trick, scheme, or device a material fact within the jurisdiction of the [executive], [legislative] [judicial] branch of the United States Government.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant knowingly and willfully [falsified] [concealed] [covered up] a fact; specifically, that he [as described in indictment].

Second: the defendant did so by a trick, scheme, or device, that is, by acting in a way intended to deceive others.

Third: the subject matter involved was within the jurisdiction of the [executive] [legislative] [judicial] branch of the United States;

Fourth: the fact was material to [government entity named in indictment], and

Fifth: the defendant had a legal duty to disclose the fact.

A fact is "material" if it has a natural tendency to influence or is capable of influencing a decision of [name of government entity].

It is not necessary that [entity] was in fact influenced in any way.

Comment

Section 1001 In General

There are three distinct ways to violate the false statements statute: (1) by concealing a material fact, (2) by making a false statement, and (3) by making or using a false writing or document, in a matter within the jurisdiction of a branch of the United States.

The statute was amended by the False Statements Accountability Act of 1996 to explicitly apply to all three branches of government, although applicability to the legislative and judicial branch is limited in scope. Materiality was explicitly made an element of each of the three clauses.

Each of the three clauses requires the prohibited conduct to be done "knowingly and willfully." *See United States v. Meuli*, 8 F.3d 1481, 1484 (10th Cir. 1993). "To prove a violation of 18 U.S.C. §1001, the government must show that the defendant knowingly and willfully made a false statement regarding a material fact that is within the jurisdiction of a federal agency or department." *Id.* (citing *United States v. Brittain*, 931 F.2d 1413, 1415 (10th Cir. 1991)).

It is not necessary, however, to prove that the defendant had actual knowledge of federal jurisdiction, *United States v. Yermian*, 468 U.S. 63, 73-75 (1984); nor is it necessary that the false information be submitted directly to the federal entity. *Meuli*, 8 F.3d at 1484 (citing *United States v. Wolf*, 645 F.2d 23, 25 (10th Cir. 1981)).

The question of materiality is constitutionally required to be submitted to the jury as an element; failure to do so is reversible error. *United States v. Gaudin*, 515 U.S. 506, 511, 522-23 (1995). A material statement is one that has a natural tendency to influence or was capable of influencing the decision of the tribunal in making a required determination. *See, e.g.*, *United States v. Harrod*, 981 F.2d 1171, 1176 (10th Cir. 1992).

It is not necessary, however, to prove the agency was in fact deceived or misled. *Gonzales v. United States*, 286 F.2d 118, 122 (10th Cir. 1960) (holding that it is not necessary that false representation or statement actually influence the action of agency having jurisdiction) (subsequent history omitted). *See United States v. Parsons*, 967 F.2d 452, 455 (10th Cir. 1992) (finding false Forms 1099 were material despite the defendant's argument that the amounts claimed "were so ludicrous that no IRS agent would believe them.").

Concealment Of A Material Fact: 1001(a)(1)

Section 1001(a)(1) anticipates the concealment of an existing fact. *See United States v. Kingston*, 971 F.2d 481, 489 (10th Cir. 1992).

Establishing a concealment offense under the first clause of Section 1001 requires proof that:

> 1) the defendant knowingly concealed a fact by any trick, scheme, or device; 2) the defendant acted willfully; 3) the fact concealed was material; 4) the subject matter involved was within the jurisdiction of a department or agency of the United States; and 5) the defendant had a legal duty to disclose the fact concealed.

Id.

The language "trick, scheme, or device" applies to each of the verbs "falsifies," "conceals" and "covers up," *United States v. Fitzgibbon*, 619 F.2d 874, 880 (10th Cir. 1980), *overruled on other grounds by Brogan v. United States*, 522 U.S. 398, 408 (1998), and implies the requirement of an affirmative act by which material information is concealed, *United States v. Woodward*, 469 U.S. 105, 108 and nn. 4-5 (1985); *see also Kingston*, 971 F.2d at 489.

In addition to proving a "trick, scheme, or device," in a concealment prosecution under 1001(a)(1), the Tenth Circuit requires the government to prove that the defendant had a duty to disclose the information he allegedly concealed. *United States v. Irwin*, 654 F.2d 671, 679 (10th Cir. 1981) (subsequent history omitted); *Kingston*, 971 F.2d at 489.

2.46.1

FALSE STATEMENT
18 U.S.C. § 1001(a)(2)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1001(a)(2).

This law makes it a crime to knowingly and willfully make a [false] [fictitious] [fraudulent] statement or representation concerning a material fact within the jurisdiction of the [executive] [legislative] [judicial] branch of the United States.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant made a [false] [fictitious] [fraudulent] statement or representation to the government; specifically [as described in indictment];

Second: the defendant made the statement knowing it was false;

Third: the defendant made the statement willfully, that is deliberately, voluntarily and intentionally;

Fourth: the statement was made in a matter within the jurisdiction of the [executive] [legislative] [judicial] branch of the United States, and

Fifth: the statement was material to [name government entity].

A fact is "material" if it has a natural tendency to influence or is capable of influencing a decision of [name of government entity].

It is not necessary that [government entity] was in fact influenced in any way.

Comment

See Comment to Instruction 2.46 for general comment on section 1001.

False Statement, section 1001(a)(2):

> The second clause of section 1001 prohibits the making of a statement or misrepresentation that is materially "false,

> fictitious or fraudulent." To support a conviction under this clause, the government must prove "that (1) the defendant made a statement; (2) the statement was false, fictitious, or fraudulent as the defendant knew; (3) the statement was made knowingly and willfully; (4) the statement was within the jurisdiction of the federal agency; and (5) the statement was material." *United States v. Harrod*, 981 F.2d 1171, 1175 (10th Cir. 1992) (quotation omitted).

In addressing the phrase "false, fictitious, or fraudulent" under the False Claims Act, 31 U.S.C.A. §231 et seq., the Tenth Circuit said:

> The first portion of the Act, that which the United States claims Fleming violated, provides for liability in the event of a "false, fictitious *or* fraudulent" claim. By the use of the disjunctive "or" Congress made it clear that any one of the three wrongful types of claims would subject the claimant to liability and that the claim need not be "fraudulent" so long as it is "false."

Fleming v. United States, 336 F.2d 475, 479 (10th Cir. 1964).

2.46.2

USING A FALSE WRITING
18 U.S.C. §1001(a)(3)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1001(a)(3).

This law makes it a crime to knowingly and willfully make or use a false writing or document that contains any material false, fictitious or fraudulent statement or entry within the jurisdiction of the [executive] [legislative] [judicial] branch of the United States.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant [made] [used] a false writing or document; specifically, he [as described in indictment];

Second: the defendant knew the [writing] [document] contained a [false] [fictitious] [fraudulent] statement or entry at the time he [made] [used] it;

Third: the defendant acted willfully, that is deliberately, voluntarily and intentionally;

Fourth: the matter involved was within the jurisdiction of the [executive] [legislative] [judicial] branch of the United States, and

Fifth: the false writing was material to [name government entity].

A fact is "material" if it has a natural tendency to influence or is capable of influencing a decision of [name government entity].

It is not necessary that [entity] was in fact influenced in any way.

2.47

FALSE STATEMENTS IN BANK RECORDS
18 U.S.C. § 1005 (Third Paragraph)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1005.

This law makes it a crime to make a false entry in any [book] [record] [statement] of a federally insured bank, knowing the entry is false, and with intent to injure or defraud the bank or to deceive an officer of that bank.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: [name bank] was a federally insured bank;

Second: the defendant made a false entry in a [book] [record] [statement] of [name bank];

Third: the defendant knew the entry was false when he made it; and

Fourth: the defendant made the false entry with the intent to [injure] [defraud] [name bank] [to deceive an officer of that bank].

Comment

No Tenth Circuit case has decided the issue of whether materiality as an essential element should be read into Section 1005. *See United States v. Wells*, 519 U.S. 482, 489-99 (1997) (holding materiality is not an element of 18 U.S.C. §1014).

Use Note

Section 1005 is far broader than this pattern instruction indicates. Therefore it is necessary to carefully tailor this instruction to fit the specifics of the indictment and the facts of the case. *See United States v. Weidner*, 437 F.3d 1023 (10th Cir. 2006).

2.48

FALSE STATEMENT TO A BANK
18 U.S.C. § 1014

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1014.

This law makes it a crime to knowingly make a false statement to a federally insured bank for the purpose of influencing the bank to make a loan.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: [name bank] was federally insured;

Second: the defendant made a false statement to [name bank];

Third: the defendant knew the statement was false when he made it; and

Fourth: the defendant intended to influence the bank to [describe purpose as stated in indictment].

It is not necessary, however, to prove that the institution involved was in fact influenced or misled.

To make a false statement to a federally insured bank, the defendant need not directly submit the false statement to the institution. It is sufficient that defendant submit the statement to a third party, knowing that the third party will submit the false statement to the federally insured bank.

A statement may be spoken, written, or made by other conduct that communicates a fact to another person.

Comment

United States v. Wells, 519 U.S. 482, 484 (1997), held that materiality is not an element of a Section 1014 offense, abrogating the contrary holding of *United States v. Haddock*, 956 F.2d 1534, 1550 (10th Cir. 1992). *See United States v. Copus*, 110 F.3d 1529, 1534 (10th Cir. 1997). The statute requires only that the defendant intended to influence the bank.

The elements of a 1014 offense are: that the defendant "made a false statement to a federally insured bank knowing the statement was false and intending to influence the bank." *Copus*, 110 F.3d at 1534-35 (citing *Wells*, 519 U.S. at 498-99).

The statement need not be spoken or written but may consist of conduct that communicates the false information. *Copus*, at 1535 (citing *United States v. Bonnett*, 877 F.2d 1450, 1456 (10th Cir. 1989)).

It is not necessary to prove the defendant intended to harm the bank or to profit personally, *United States v. Grissom*, 44 F.3d 1507, 1511 (10th Cir. 1995); nor is it necessary to show that the bank suffered a loss, or was actually misled by defendant's false statements, *id.*

Use Note

This instruction must be tailored to meet the specifics of the indictment regarding the type of institution involved and the purpose for which the false statement was made. The instructions concerning direct submission to a bank and the manner of communication should be used where required by the facts.

2.49

FALSE IDENTIFICATION DOCUMENTS
18 U.S.C. § 1028(a)(3)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1028(a)(3).

This law makes it a crime for anyone to knowingly possess, with intent to transfer unlawfully, five or more false identification documents. Possession must be in or affect interstate or foreign commerce.

To find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant possessed five or more false identification documents;

Second: the defendant did so knowingly and willfully, with the intent to unlawfully transfer the false identification documents; and

Third: the defendant's possession of the false identification documents was in or affected interstate or foreign commerce.

The intent to transfer false identification documents unlawfully is the intent to sell, pledge, distribute, give, loan, or otherwise transfer false identification documents in a manner that would violate one or more federal, state, or local laws.

A "false identification document" means a document of a type that is commonly accepted to identify individuals, that is *not* issued by or under the authority of a governmental entity. It also includes a document that was issued under the authority of a governmental entity but was subsequently altered for purposes of deceit, but *appears* to be issued by or under the authority of [the United States] [a State or a political subdivision of a State].

Use Note

Because of the complexity of the statute and the breadth of offenses covered by 18 U.S.C. §1028, the appropriate instruction in each individual case will be affected by the circumstances of the particular violation. Attention should be paid to the indictment and the instruction should be modified to ensure that the appropriate elements are submitted to the jury. *See Apprendi*

v. New Jersey, 530 U.S. 466 (2000).

This instruction should be given with an appropriate instruction on what constitutes "interstate or foreign commerce." *See* Instruction 1.39.

2.50.1

FRAUD IN CONNECTION WITH COUNTERFEIT CREDIT CARDS OR OTHER ACCESS DEVICES 18 U.S.C. § 1029(a)(1)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1029(a)(1).

This law makes it a crime to [produce] [use] [traffic in] counterfeit credit cards or other access devices.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant knowingly [produced] [used] [trafficked in] one or more counterfeit access devices;

Second: the defendant acted with intent to defraud; and

Third: the defendant's conduct affected interstate or foreign commerce.

The term "access device" means any credit card, plate, code, account number, electronic serial number, mobile identification number, personal identification number, or other telecommunications service, equipment, or instrument identifier, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument).

The term "counterfeit access device" means any access device that is counterfeit, fictitious, altered, or forged, or an identifiable component of an access device or a counterfeit access device.

[The term "produced" includes the design, alteration, authentication, duplication, or assembly of a counterfeit access device.]

[The term "used" includes any effort to obtain money, goods, services, or any other thing of value, or to initiate a transfer of funds with a counterfeit access device.]

[The term "trafficked in" means the transfer, or other disposal of,

a counterfeit access device to another, or the possession or control of a counterfeit device with the intent to transfer or dispose of it to another.]

To act "with intent to defraud" means to act willfully with intent to deceive or cheat, ordinarily for the purpose of causing financial loss to another or bringing about financial gain to one's self.

The essence of the offense is the willful use of a counterfeit access device with intent to defraud, and it is not necessary to prove that anyone was in fact deceived or defrauded.

While it is not necessary to prove that the defendant specifically intended to interfere with or affect interstate commerce, the government must prove that the natural consequences of the acts alleged in the indictment would be to affect "interstate commerce," which means the flow of commerce or business activities between two or more states.

Use Note

Because of the complexity of the statute and the breadth of offenses covered by 18 U.S.C. §1029(a), the Committee has elected to provide instructions for only two of the most common, sections 1029(a)(1) and (2). These may be used as a reference in drafting appropriate instructions for other sections. Note that counterfeit access devices may include legitimate access devices procured by fraud.

2.50.2

USE OF UNAUTHORIZED ACCESS DEVICE
18 U.S.C. § 1029(a)(2)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1029(a)(2).

This law makes it a crime to use, with intent to defraud, one or more unauthorized access devices during any one-year period, and by such conduct obtain anything of value aggregating $1,000 or more during that period.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant knowingly [used] [trafficked in] one or more unauthorized access devices;

Second: as a result of such [use][trafficking], the defendant obtained during a period of one year, some thing or things of value, the total value of which was $1000 or more;

Third: the defendant acted with intent to defraud; and

Fourth: the defendant's conduct affected interstate or foreign commerce.

The term "access device" means any credit card, plate, code, account number, electronic serial number, mobile identification number, personal identification number, or other telecommunications service, equipment, or instrument identifier, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument).

The term "unauthorized access device" means any access device that is lost, stolen, expired, revoked, canceled, or obtained with intent to defraud.

[The term "used" includes any effort to obtain money, goods, services, or any other thing of value, or to initiate a transfer of funds with an unauthorized access device.]

[The term "trafficked in" means the transfer, or other disposal of, an unauthorized access device to another, or the possession or control of an unauthorized access device with the intent to transfer or dispose of it to another.]

To act "with intent to defraud" means to act willfully with intent to deceive or cheat, ordinarily for the purpose of causing financial loss to another or bringing about financial gain to one's self.

The essence of the offense is the willful use of an unauthorized access device with intent to defraud, and it is not necessary to prove that anyone was in fact deceived or defrauded.

Use Note

The elements of 18 U.S.C. §1029(a)(2) were discussed in *United States v. Ryan*, 894 F.2d 355, 357 (10th Cir. 1990). In *United States v. Powell*, 973 F.2d 885, 890 (10th Cir. 1992), the court held that obtaining something of value aggregating $1,000 does not require an actual loss to the victim(s) of $1,000.

Refer to Instruction 1.39 for definition of interstate and foreign commerce.

2.51

TRANSMISSION OF WAGERING INFORMATION
18 U.S.C. § 1084

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1084.

This law makes it a crime for anyone engaged in the business of betting or wagering to transmit bets or wagers in interstate or foreign commerce.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant regularly devoted time, attention and labor to betting or wagering for profit;

Second: the defendant used a wire communication facility:

a) to place bets or wagers on any sporting event or contest; or

b) to provide information to assist with the placing of bets or wagers; or

c) to inform someone that he or she had won a bet or wager and was entitled to payment or credit; and

Third: the transmission was made from one state to another state or foreign country.

Comment

There appears to be a split in the circuits as to whether the government must prove that the defendant knew of the interstate nature of the wire facility transmission. Although there is no Tenth Circuit case directly on point, the committee has excluded the element of knowledge of the interstate nature of the transmission based on *United States v. Kammersell*, 196 F.3d 1137 (10th Cir. 1999), which interprets an analogous statute.

A telephone is a wire communication facility for purposes of this statute. *United States v. Tomeo*, 459 F.2d 445 (10th Cir. 1972).

Definitions of "interstate commerce," "foreign commerce," and "commerce" may be warranted.

It is suggested that all non-applicable subsections be deleted before instructing the jury.

2.52

FIRST DEGREE MURDER
18 U.S.C. § 1111

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1111.

This law makes it a crime to unlawfully kill a human being with malice aforethought. Every murder committed by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing, is murder in the first degree.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant caused the death of the victim named in the indictment;

Second: the defendant killed the victim with malice aforethought;

Third: the killing was premeditated; and

Fourth: the killing took place within the [territorial] [special maritime] jurisdiction of the United States.

To kill "with malice aforethought" means either to kill another person deliberately and intentionally, or to act with callous and wanton disregard for human life. To find malice aforethought, you need not be convinced that the defendant hated the person killed, or felt ill will toward the victim at the time.

In determining whether the killing was with malice aforethought, you may consider the use of a weapon or instrument, and the manner in which death was caused.

A killing is "premeditated" when it is the result of planning or deliberation. The amount of time needed for premeditation of a killing depends on the person and the circumstances. It must be long enough for the killer, after forming the intent to kill, to be fully conscious of that intent.

You should consider all the facts and circumstances preceding, surrounding, and following the killing, which tend to shed light upon

the condition of the defendant's mind, before and at the time of the killing.

You are instructed that the alleged murder occurred within the [territorial] [special maritime] jurisdiction of the United States, if you find beyond a reasonable doubt that such offense occurred in the location described in the indictment.

Comment

First-degree murder requires both malice aforethought and the specific intent to commit an unlawful killing. *United States v. Wood*, 207 F.3d 1222, 1228 (10th Cir. 2000). "A killing is committed with the requisite specific intent if it is 'willful, deliberate, malicious, and premeditated.'" *Id.* (quoting 18 U.S.C. §1111(a)).

Malice aforethought "may be established by evidence of conduct which is reckless and wanton, and a gross deviation from a reasonable standard of care, of such a nature that a jury is warranted in inferring that defendant was aware of a serious risk of death or serious bodily harm." *Id.* (quotation omitted).

Concerning the fourth element, jurisdiction, murder is a crime triable in state courts when the crime is not committed on federal government property and when there are no other circumstances that would give the federal courts jurisdiction.

A conviction for causing the death of a person through use of a firearm during and in relation to a crime of violence, pursuant to 18 U.S.C. §924(j)(1), does not require proof that the defendant murdered the victim within the special maritime and territorial jurisdiction of United States, inasmuch as the jurisdictional element of section 924(j)(1) is satisfied through the predicate crime of violence. For example, *see United States v. Chanthadara*, 230 F.3d 1237, 1244 (10th Cir. 2000) (charging defendant with a Hobbs Act robbery, 18 U.S.C. §1951, and causing the death of a person resulting from use of a firearm during a crime of violence, 18 U.S.C. §924(j)(1)). (Note that 18 U.S.C. section 924(j)(1) was previously numbered as section 924(i)(1). *United States v. Nguyen*, 155 F.3d 1219, 1225 n.1 (10th Cir. 1998).)

Section 924(j)(1) incorporates only the definition of murder contained in section 1111(a). *Young*, 248 F.3d at 274-75. In contrast, section 1111(b) "is not a definitional section at all. Instead, it sets forth penalties for murder under 18 U.S.C. §1111 and creates a jurisdictional requirement for such count." *Id.* at 275. Because section 924(j)(1) refers only to the definition of murder in section 1111, section 924(j)(1) incorporates only subsection (a) of section 1111. *See also United States v. Tuck Chong*, 123 F. Supp. 2d 563, 566 (D. Haw. 1999)(same). In *Nguyen*, 155 F.3d at 1225, this court explained that a section 924(j) violation requires proof of "a felony murder under 18 U.S.C. §1111(a)." *Young*, 248 F.3d at 275.

Compare 18 U.S.C. §2111, "Special maritime and territorial jurisdiction" ("Whoever, within the special maritime and territorial jurisdiction of the United States, by force and violence, or by intimidation, takes or attempts to take from the person or presence of another anything of value, shall be imprisoned not more than fifteen years."); with 18 U.S.C. §2113(e), homicide in the course of bank robbery ("Whoever, in committing any offense defined in this section, . . . kills any person . . . shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment.").

18 U.S.C. §7, defines "Special maritime and territorial jurisdiction of the United States." Its multiple definitions include the high seas, certain vessels, aircraft, vehicles, and even any "key containing deposits of guano" in section 7(4). Subsection 7(3) includes "[a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building."

Use Note

Every murder committed with a premeditated design, unlawfully and maliciously, to cause the death of any human being other than the one who was actually killed, is also murder in the first degree.

If there is evidence that the defendant acted upon a sudden quarrel or heat of passion, a fifth element, as well as some additional defining language, should be added. The Supreme Court has held that the government must "prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975). *See also United States v. Lofton*, 776 F.2d 918, 920 (10th Cir. 1985)(holding that defendant who sufficiently raises a heat of passion defense is entitled to instructions informing the jury of the theory of defense and the government's burden of proving the absence of heat of passion in order to convict).

If there is evidence that the defendant acted lawfully, as in self defense, by accident, or in defense of property, a fifth element should be added and explained; for example, "The defendant did not act in self-defense."

2.52.1

FIRST DEGREE MURDER (FELONY MURDER)
18 U.S.C. § 1111

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1111.

This law makes it a crime to unlawfully kill a human being in the course of committing [name of crime].

To find the defendant guilty of this crime, you must be convinced that the government has proved beyond a reasonable doubt:

First: the defendant caused the death of the victim named in the indictment;

Second: the death of the victim occurred as a consequence of, and while the defendant was [state-of-mind element] engaged in committing or attempting to commit [the specified felony];

Third: the killing took place within the [territorial] [special maritime] jurisdiction of the United States.

The crime charged here is known as first degree felony murder. This means a killing that occurs during the knowing and willful commission of some other specified felony offense. It is not necessary, therefore, for the government to prove that the defendant had any premeditated design or intent to kill the victim. It is sufficient if the government proves beyond a reasonable doubt that the defendant knowingly and willfully committed or attempted to commit the crime as charged in the indictment, and that the killing of the victim occurred during, and as a consequence of, the defendant's commission of or attempt to commit that crime.

You are instructed that the alleged murder occurred within the [territorial] [special maritime] jurisdiction of the United States, if you find beyond a reasonable doubt that such offense occurred in the location described in the indictment.

Comment

The government need not establish some proof of a state of mind other than the intent to commit the underlying felony, and the fact that the killing occurred during the commission of that felony. *United States v. Nguyen*, 155

F.3d 1219, 1225 (10th Cir. 1998). In a first degree felony murder case, "to prove the 'malice aforethought' element . . ., the prosecution only need show commission of the specified felony." *United States v. Pearson*, 159 F.3d 480, 485 (10th Cir. 1998). "Because malice aforethought is proved by commission of the felony, there is no actual intent requirement with respect to the homicide." *United States v. Chanthadara*, 230 F.3d 1237, 1258 (10th Cir. 2000).

In capital cases, there is a limit as to which felony murder defendant may be subject to the death penalty. In *Torres v. Mullin*, 317 F.3d 1145, 1161 (10th Cir. 2003), this circuit held, in the context of a capital habeas corpus case, "The Eighth Amendment does not permit imposition of a death sentence upon a defendant who did not 'himself kill, attempt to kill, or intend that a killing take place or that lethal force be employed,'" (quoting *Enmund v. Florida*, 458 U.S. 782, 797 (1982)), or "unless that defendant was a major participant in the underlying felony and acted with a 'reckless indifference to human life'" (citing *Tison v. Arizona*, 481 U.S. 137, 158 (1987)).

The death does not have to be reasonably foreseeable to others involved in the commission of the underlying felony in order for those defendants to be found guilty of felony murder, as well as the underlying felony. In other words, a defendant, other than the shooter himself, can be convicted of felony murder without a showing of reasonable foreseeability.

In *Chanthadara*, the death resulted from a shooting in the course of a Hobbs Act robbery of a restaurant. In addition to Chanthadara, co-defendants Nguyen, Soukamneuth, and Kayarath participated in the robbery. All were charged with Hobbs Act robbery in count one. Count 2 charged using and carrying a firearm in relation to a violent crime (the Hobbs Act robbery), in violation of 18 U.S.C. §924(c), resulting in a death that constitutes murder under 18 U.S.C. §1111(a), in violation of 18 U.S.C. §924(j). The government presented evidence that Chanthadara was the one who actually fired the weapon, and sought the death penalty against only him. (Note that 18 U.S.C. section 924(j)(1) was previously numbered as section 924(i)(1). *United States v. Nguyen*, 155 F.3d 1219, 1225 n.1 (10th Cir. 1998).)

In *Nguyen*, 155 F.3d at 1221, the Tenth Circuit addressed the appeal of a codefendant. Nguyen was charged in counts one and two, as an aider and abettor under 18 U.S.C. §2. The court interpreted section 1111(a) and the felony murder doctrine to mean that a person who commits a dangerous felony, such as a robbery, is guilty of murder if a death occurs during the commission of the felony. *Id.* at 1225 (stating that the felony murder doctrine "'allow[s] conviction for a death that was unintended and unforeseen'") (quoting *Montoya v. United States Parole Comm'n*, 908 F.2d 635, 638 (10th Cir. 1990)). "[O]nce the government has shown that Defendant intended to commit the robbery and that a killing occurred in the course of that robbery, no additional proof of state of mind is necessary." *Nguyen*, 155 F.3d at 1225. However, in *Nguyen*, the government also presented sufficient evidence that the defendant aided and abetted the killing.

The *Nguyen* decision also, however, stresses the aider and abettor theory, under which a defendant can be convicted of aiding and abetting a

murder, even if it is not charged in the indictment, because 18 U.S.C. §2 "does not create an independent or separate crime, but rather simply 'abolishes the common-law distinction between principal and accessory.'" *United States v. Dunne*, 324 F.3d 1158, 1162 (10th Cir. 2003) (quoting *United States v. Cook*, 745 F.2d 1311, 1315 (10th Cir. 1984)).

In *Pearson*, 159 F.3d at 484-85, the Tenth Circuit may have resolved any ambiguity on this matter. There, the court considered another restaurant robbery and resulting death. The court held that in the felony murder context, malice aforethought includes proof of the commission of the specified felony.

"In the typical case of felony murder, there is no malice in 'fact' with respect to the homicide; the malice is supplied by the 'law.' There is an intended felony and an unintended homicide." *Id.* at 485 (quotation omitted).

2.53

MURDER IN THE SECOND DEGREE
18 U.S.C. § 1111

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1111.

This law makes it a crime to unlawfully kill a human being with malice aforethought.

To find the defendant guilty of this crime, you must be convinced that the government has proved beyond a reasonable doubt:

First: the defendant caused the death of the victim named in the indictment;

Second: the defendant killed the victim with malice aforethought; and

Third: the killing took place within the [territorial] [special maritime] jurisdiction of the United States.

To kill "with malice aforethought" means either to kill another person deliberately and intentionally, or to act with callous and wanton disregard for human life. To find malice aforethought, you need not be convinced that the defendant hated the person killed, or felt ill will toward the victim at the time.

In determining whether the killing was with malice aforethought, you may consider the use of a weapon or instrument, and the manner in which death was caused.

It is not necessary for the government to prove that the defendant acted with premeditated intent to kill. Premeditation is typically associated with killing in cold blood, and requires a period of time in which the accused deliberates or thinks the matter over before acting.

You are instructed that the alleged murder occurred within the [territorial] [special maritime] jurisdiction of the United States, if you find beyond a reasonable doubt that such offense occurred in the location described in the indictment.

Comment

The intent required for second-degree murder is malice aforethought. It is distinguished from first-degree murder by the absence of premeditation.

"[S]econd-degree murder's malice aforethought element is satisfied by: (1) intent-to-kill without the added ingredients of premeditation and deliberation; (2) intent to do serious bodily injury; (3) a depraved-heart; or (4) commission of a felony when the crime does not fall under the first-degree murder paragraph of §1111(a)." *United States v. Pearson*, 203 F.3d 1243, 1271 (10th Cir. 2000). Second degree murder is considered to be "a general intent crime" that requires only malice aforethought. *United States v. Wood*, 207 F.3d 1222, 1228 (10th Cir. 2000).

Second degree murder is not a lesser included offense of first degree felony murder because of the different malice aforethought that is required. *United States v. Chanthadara*, 230 F.3d 1237, 1258-59 (10th Cir. 2000).

The difference between second degree murder and involuntary manslaughter is the requisite *mens rea*. Second degree murder is a general intent crime requiring malice aforethought, an element that may be established by evidence of conduct which is reckless and wanton and a gross deviation from a reasonable standard of care, or of such a nature that a jury is warranted in inferring that the defendant was aware of a serious risk of death or serious bodily harm. To constitute involuntary manslaughter, the defendant's acts must amount to gross negligence, defined as wanton or reckless disregard for human life. The distinction is in the severity of the reckless and wanton behavior. Second degree murder involves reckless and wanton disregard for human life that is extreme in nature. *United States v. Brown*, 287 F.3d 965, 975 (10th Cir. 2002).

Use Note

With this instruction, as with the murder in the first degree instruction, if there is evidence that the defendant acted upon a sudden quarrel or heat of passion, or acted in self-defense, a fourth element, as well as some additional defining language, should be added.

2.54

VOLUNTARY MANSLAUGHTER
18 U.S.C. § 1112

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1112.

This law makes it a crime to unlawfully kill a human being without malice, upon sudden quarrel or heat of passion.

To find the defendant guilty of this crime, you must be convinced the government has proved beyond a reasonable doubt:

First: the defendant killed [the victim named in the indictment];

Second: the defendant acted unlawfully;

Third: while in [sudden quarrel] [heat of passion], and therefore without malice, the defendant:

(a) intentionally killed [the victim named in the indictment]; or

(b) intended to cause [the victim named in the indictment] serious bodily injury; or

(c) acted recklessly with extreme disregard for human life;

Fourth: the killing took place within the [territorial] [special maritime] jurisdiction of the United States.

The term "intentionally killed" as used in this instruction means either

1. a specific purpose to take the life of another human being, or

2. a willingness to act knowing that the death of another human being is practically certain to follow from that conduct.

The term "heat of passion" means a passion, fear or rage in which the defendant loses his normal self-control, as a result of circumstances that provoke such a passion in an ordinary person, but which did not justify the use of deadly force.

You are instructed that the alleged voluntary manslaughter occurred within the [special maritime] [territorial] jurisdiction of the United States, if you find beyond a reasonable doubt that such offense occurred at the location described in the indictment.

Comment

Section 1112(a) defines manslaughter as the "unlawful killing of a human being without malice." There are two types of manslaughter. Voluntary manslaughter is the unlawful killing without malice "[u]pon a sudden quarrel or heat of passion." §1112(a) ¶ 2. Involuntary manslaughter is the unlawful killing without malice "[i]n the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death." §1112(a) ¶ 3.

Voluntary manslaughter requires an intentional or reckless mental state; it is without malice because heat of passion upon adequate provocation negates malice. *United States v. Scafe*, 822 F.2d 928, 932 (10th Cir. 1987); *United States v. Soundingsides*, 820 F.2d 1232, 1242 (10th Cir. 1987). The jury should be instructed on the requisite mental state for voluntary manslaughter. *United States v. Serawop*, 410 F.3d 656, 658 (10th Cir. 2005).

Subsection (b) of section 1112, like section 1111(b), sets forth the jurisdictional element and the penalties.

Voluntary intoxication is not a defense to voluntary manslaughter. *United States v. Brown*, 287 F.3d 965, 977 (10th Cir. 2002).

2.54.1

INVOLUNTARY MANSLAUGHTER
18 U.S.C. § 1112

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1112.

This law makes it a crime to unlawfully kill a human being 1) while committing an unlawful act not amounting to a felony, or 2) while committing a lawful act in an unlawful manner, or without due caution and circumspection, which act might produce death.

To find the defendant guilty of this crime, you must be convinced that the government has proved beyond a reasonable doubt:

First: the defendant caused the death of the victim named in the indictment;

Second: [the victim was killed while the defendant was committing an unlawful act not amounting to a felony, that is [indicate unlawful act] as charged in the indictment] or [the victim was killed while the defendant was committing a lawful act in an unlawful manner, or without due caution and circumspection, which act might produce death];

Third: the killing took place within the [territorial] [special maritime] jurisdiction of the United States.

In order to prove this offense, the government need not prove that the defendant specifically intended to cause the death of the victim. But it must prove more than that the defendant was merely negligent or that he failed to use reasonable care. The government must prove gross negligence amounting to wanton and reckless disregard for human life.

You are instructed that the alleged involuntary manslaughter occurred within the [territorial][special maritime] jurisdiction of the United States, if you find beyond a reasonable doubt that such offense occurred in the location described in the indictment.

Comment

The defendant's acts must amount to gross negligence, defined as wanton or reckless disregard for human life. *United States v. Wood*, 207 F.3d 1222, 1228 (10th Cir. 2000). Unlike second degree murder, involuntary

manslaughter does not require malice aforethought. *Id.* at 1229.

Second degree murder involves reckless and wanton disregard for human life that is extreme in nature, while involuntary manslaughter involves reckless and wanton disregard that is not extreme in nature. *Id.*

A defendant may commit involuntary manslaughter if he acts in self-defense, but is criminally negligent in doing so. *United States v. Brown*, 287 F.3d 965, 975 (10th Cir. 2002).

2.55

KIDNAPPING
18 U.S.C. § 1201(a)(1)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1201(a)(1).

This law makes it a crime to unlawfully kidnap another person and then transport that person in interstate commerce.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant, knowingly acting contrary to law, kidnapped the person described in the indictment by [seizing] [confining] [inveigling] him, as charged;

Second: the defendant kidnapped the person for some purpose or benefit;

Third: the defendant willfully transported the person kidnapped; and

Fourth: the transportation was in interstate [foreign] commerce.

To "kidnap" a person means to unlawfully hold, keep, detain, and confine the person against that person's will. Involuntariness or coercion in connection with the victim's detention is an essential part of the offense.

[To "inveigle" a person means to lure, or entice, or lead the person astray by false representations or promises, or other deceitful means.]

In the third element, the term "willfully" means that the defendant acted voluntarily and with the intent to violate the law.

Comment

"[T]he elements [of kidnapping] include (1) transportation in interstate commerce (2) of an unconsenting person who is (3) held for ransom, reward, or otherwise, (4) with such acts being done knowingly and willfully." *United States v. Walker*, 137 F.3d 1217, 1220 (10th Cir. 1998).

Definitions of "interstate commerce," "foreign commerce," and "commerce" are in the general instructions at Instruction 1.39.

In *United States v. Sarracino*, 131 F.3d 943, 947 (10th Cir. 1997) (quoting 18 U.S.C. §1201(a)), the court held that in order to meet the requirement that the victim was abducted "'for ransom or reward or otherwise,'" "[i]t is only necessary . . . that the kidnappers had some reason for the kidnapping which, to them, would be of some benefit." *See also De Herrera v. United States*, 339 F.2d 587, 588 (10th Cir. 1964) ("The use in the statute of the words 'or otherwise' shows an intent of Congress to include within the offense any holding of a kidnapped person for a purpose desired by the captor and negatives the need for a ransom or reward.").

An additional element, prompted by the *Apprendi v. New Jersey*, 530 U.S. 466 (2000) doctrine, is required when the indictment alleges that the kidnapping resulted in the death of a person and the prosecution is seeking the death penalty. If a disputed issue is whether a death resulted, a court should consider giving a lesser included offense instruction.

Section 1201(b) provides that failure to release the victim within twenty-four hours after the unlawful seizure creates a rebuttable presumption that the victim has been transported in interstate or foreign commerce.

Use Note

The jury need not unanimously agree on why the defendant kidnapped the person in question, so long as each juror finds that the defendant had some purpose or derived some benefit from the kidnapping.

The government need not prove that the defendant knew that he was crossing a state line with the victim. So long as the defendant crossed a state line while intentionally transporting the victim, the third element has been satisfied.

2.56

MAIL FRAUD
18 U.S.C. § 1341

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1341.

This law makes it a crime to use the mails in carrying out a scheme to defraud [or obtain money or property by means of false or fraudulent pretenses, representations or promises].

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant devised or intended to devise a scheme to [defraud] [obtain money or property by means of false or fraudulent pretenses, representations or promises,] that is [describe scheme as stated in the indictment];

Second: the defendant acted with specific intent to [defraud] [obtain money or property by false or fraudulent pretenses, representations or promises];

Third: the defendant mailed something [caused another person to mail something] through the United States Postal Service [a private or commercial interstate carrier] for the purpose of carrying out the scheme.

Fourth: the scheme employed false or fraudulent pretenses, representations, or promises that were material.

[*Fifth*: the scheme was in connection with the conduct of telemarketing.]

or

[*Fifth*: the scheme was in connection with the conduct of telemarketing and

(a) victimized ten or more persons over the age of 55, or

(b) targeted persons over the age of 55.]

or

[*Fifth*: the scheme was related to a presidentially declared major disaster or emergency.]

or

[*Fifth*: the scheme affected a financial institution.]

A "scheme to [defraud] [obtain money or property by means of false or fraudulent pretenses, representations or promises]" is conduct intended to or reasonably calculated to deceive persons of ordinary prudence or comprehension.

A "scheme to defraud" includes a scheme to deprive another of money, property, or of the intangible right of honest services.

An "intent to [defraud] [obtain money or property by means of false or fraudulent pretenses, representations, or promises]" means an intent to deceive or cheat someone.

A representation is "false" if it is known to be untrue or is made with reckless indifference as to its truth or falsity. A representation would also be "false" when it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud.

A false statement is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to which it is addressed.

What must be proved beyond a reasonable doubt is that the defendant devised or intended to devise a scheme to defraud that was substantially the same as the one alleged in the indictment, and that the use of the mails was closely related to the scheme, in that the defendant either mailed something or caused it to be mailed in an attempt to execute or carry out the scheme. To "cause" the mails to be used is to do an act with knowledge that the use of the mails will follow in the ordinary course of business or where such use can reasonably be foreseen even though the defendant did not intend or request the mails to be used.

Comment

On the elements of a section 1341 offense, see *generally United States v. Haber*, 251 F.3d 881, 887 (10th Cir. 2001); *United States v. Deters*, 184 F.3d 1253, 1258 (10th Cir. 1999). Because it is difficult to prove intent to defraud from direct evidence, a jury may consider circumstantial evidence of fraudulent intent and draw reasonable inferences therefrom. Thus, "[i]ntent may be inferred from evidence that the defendant attempted to conceal activity. Intent to defraud may be inferred from the defendant's misrepresentations, knowledge of a false statement as well as whether the defendant profited or converted money to his own use." *United States v. Prows*, 118 F.3d 686, 692 (10th Cir. 1997) (quotation omitted). Further, "[e]vidence of the schemer's indifference to the truth of statements can amount to evidence of fraudulent intent." *United States v. Trammell*, 133 F.3d 1343, 1352 (10th Cir. 1998) (quotation omitted).

The Tenth Circuit has recognized that section 1341 identifies two overlapping but separate offenses: (1) engaging in a scheme to defraud, or (2) engaging in a scheme to obtain money or property by false or fraudulent pretenses, representations, or promises. *Haber*, 251 F.3d at 888; *United States v. Cronic*, 900 F.2d 1511, 1513 (10th Cir. 1990). A scheme to defraud focuses on the intended result of the defendant's conduct, whereas a scheme to obtain money by false or fraudulent pretenses focuses on the means employed. *Cronic*, 900 F.2d at 1513-14. At times, the same scheme may be charged as a scheme to defraud and a scheme to obtain money or property by means of false or fraudulent pretenses, representations, or promises. In such cases, an appropriate unanimity instruction may be required. *See Trammell*, 133 F.3d at 1354.

An affirmative misrepresentation need not be shown to establish the first type of section 1341 violation. If a scheme is devised with the intent to defraud, and the mails are used to execute the scheme, the first type of violation is established. *Cronic*, 900 F.2d at 1513-14. For the second type of section 1341 violation, obtaining money or property by false or fraudulent pretenses, a false or fraudulent pretense, representation, or promise must be shown. *Id.* at 1514.

The third element is satisfied upon a showing that the use of the mails is a part of the execution or attempted execution of the fraud. *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989) (citing *Kann v. United States*, 323 U.S. 88, 95 (1944)). The use of the mails, however, need not be essential to the scheme. *Id.* at 710. It is sufficient that the use of the mails is "incident to an essential part of the scheme" or "a step in the plot." *Id.* at 710-11 (internal citations omitted). Further, the defendant need only "reasonably foresee the occurrence of mailings." *United States v. Worley*, 751 F.2d 348, 350 (10th Cir. 1984).

A fourth element, materiality, must be decided by the jury in all mail fraud cases. *Neder v. United States*, 527 U.S. 1, 25 (1999). A false statement is "material" if it has "'a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was

addressed.'" *Id.* at 16 (quoting *United States v. Gaudin*, 515 U.S. 506, 509 (1995)).

To establish a violation of the statute, the government need not prove that the defendant made direct misrepresentations to the victim. *See United States v. Kennedy*, 64 F.3d 1465, 1475-76 (10th Cir. 1995). Furthermore, it is not necessary to prove that a victim suffered a pecuniary loss, *Deters*, 184 F.3d at 1258, or that the scheme to defraud was successful, *United States v. Stewart*, 872 F.2d 957, 960 (10th Cir. 1989).

Each separate use of the mails in furtherance of a scheme to defraud constitutes a separate offense.

Use Note

Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a fifth element is required when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. §1341 (mail fraud committed in connection with presidentially declared major disaster or emergency or mail fraud that affects a financial institution) or 18 U.S.C. §2326 (mail fraud involving telemarketing). For the definition of "presidentially declared major disaster or emergency," *see* 42 U.S.C. §5122.

In some cases, a defendant may be entitled to a good-faith instruction. For a description of such circumstances, *see United States v. Chavis*, 461 F.3d 1201, 1209 (10th Cir. 2006).

2.57

WIRE FRAUD
18 U.S.C. § 1343

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1343.

This law makes it a crime to use interstate wire communication facilities in carrying out a scheme to [defraud] or [obtain money by means of false or fraudulent pretenses, representations or promises].

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant devised or intended to devise a scheme to [defraud] [obtain money or property by means of false or fraudulent pretenses, representations or promises,] that is [describe scheme as stated in the indictment];

Second: the defendant acted with specific intent to [defraud][obtain money or property by means of false or fraudulent pretenses, representations or promises];

Third: the defendant [used interstate or foreign wire communications facilities] [caused another person to use interstate or foreign wire communications facilities] for the purpose of carrying out the scheme.

Fourth: the scheme employed false or fraudulent pretenses, representations, or promises that were material.

[*Fifth*: the scheme was in connection with the conduct of telemarketing.]

or

[*Fifth*: the scheme was in connection with the conduct of telemarketing and

(a) victimized ten or more persons over the age of 55, or

(b) targeted persons over the age of 55.]

or

[*Fifth*: the scheme was related to a presidentially declared major disaster or emergency.]

or

[*Fifth*: the scheme affected a financial institution.]

A "scheme to [defraud] [obtain money or property by means of false or fraudulent pretenses, representations or promises]" is conduct intended to or reasonably calculated to deceive persons of ordinary prudence or comprehension.

A "scheme to defraud" includes a scheme to deprive another of money, property or the intangible right of honest services.

An "intent to [defraud] [obtain money by false or fraudulent pretenses, representations or promises]" means an intent to deceive or cheat someone.

A representation is "false" if it is known to be untrue or is made with reckless indifference as to its truth or falsity. A representation would also be "false" when it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud.

A false statement is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to which it is addressed.

To "cause" interstate wire communications facilities to be used is to do an act with knowledge that the use of the wire facilities will follow in the ordinary course of business or where such use can reasonably be foreseen.

Comment

Cases addressing the elements of wire fraud include: *Bancoklahoma Mortgage Corp. v. Capital Title Co.*, 194 F.3d 1089, 1102 (10th Cir. 1999); *United States v. Smith*, 133 F.3d 737, 742-43 (10th Cir. 1997); *United States v. Galbraith*, 20 F.3d 1054, 1056 (10th Cir. 1994); *United States v. Drake*, 932 F.2d 861, 863 (10th Cir. 1991). Tenth Circuit law differentiates between a scheme to defraud that focuses on the end-result of the conduct (affirmative misrepresentations are not necessary), and a scheme to obtain money or property by false pretenses, representations or promises. *United States v.*

Cochran, 109 F.3d 660, 664 (10th Cir. 1997). In *Neder v. United States*, 527 U.S. 1, 25 (1999), the Court held that "materiality of falsehood" is an essential element of wire fraud. Hence, where false representations are involved in the scheme, they must be material.

Given the similarity in elements, Instruction 2.56 on mail fraud also should be consulted.

Each separate use of the interstate wire communications facilities in furtherance of a scheme to [defraud] [obtain money or property by means of false or fraudulent pretenses, representations or promises] constitutes a separate offense.

Use Note

Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a fifth element is required when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. §1343 (wire fraud committed in connection with presidentially declared major disaster or emergency or wire fraud that affects a financial institution) or 18 U.S.C. §2326 (wire fraud involving telemarketing). For the definition of "presidentially declared major disaster or emergency," *see* 42 U.S.C. §5122.

A "wire communications facility" includes wire, radio or television communication facilities. The use of this term should be tailored to the case before the court.

2.58

BANK FRAUD
18 U.S.C. § 1344

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1344.

This law makes it a crime to execute or attempt to execute a scheme or artifice (1) to defraud a financial institution or (2) to obtain any money or other property of a financial institution by means of false or fraudulent pretenses, representations, or promises.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant knowingly [executed] [attempted to execute] a scheme or artifice [to defraud [insert name of financial institution] [to obtain money or property from [insert name of financial institution] by means of false or fraudulent pretenses, representations, or promises];

Second: the [insert name of financial institution] was a financial institution within the meaning of the law; [in this case that means that the government must prove that [insert name of financial institution] was insured by the Federal Deposit Insurance Corporation];

[Third: the defendant acted with intent to defraud.] [The requirement that a defendant acted with intent to defraud a financial institution only applies to § 1344(1)].

[A defendant acts with the requisite "intent to defraud" if the defendant acted knowingly and with specific intent or purpose to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to the defendant.]

Fourth: the false or fraudulent pretenses, representations, or promises that the defendant made were material, meaning they would naturally tend to influence, or were capable of influencing the decision of, [insert name of financial institution].

[*Fifth*: (to be given as appropriate under part one of the statute) the defendant placed [insert name of financial institution] at risk of civil liability or financial loss.]

A "scheme or artifice to defraud" includes any design, plan, pattern or course of action, including false and fraudulent pretenses and misrepresentations, intended to deceive others in order to obtain something of value, such as money, from the institution to be deceived.

A defendant acts with the requisite "intent to defraud" if the defendant acted knowingly and with the specific intent or purpose to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to the defendant.

A statement or representation is "false" or "fraudulent" if it is known to be untrue or is made with reckless indifference to its truth or falsity.

Comment

The elements of section 1344 derive from *United States v. Rackley*, 986 F.2d 1357, 1360-61 (10th Cir. 1993) and 18 U.S.C. §20. Element four, materiality, is required in every case. *Neder v. United States*, 527 U.S. 1, 25 (1999); *United States v. Young*, 952 F.2d 1252, 1256 (10th Cir. 1991) ("A scheme to defraud need not be executed by means of misrepresentation but it does not exclude misrepresentations."). In *Loughrin v. United States*, 134 S. Ct. 2384 (2014), the Supreme Court held that the element of intent to defraud a financial institution only applies to § 1344(1). Where materiality is an element, the court must submit the materiality question to the jury. *United States v. Gaudin*, 515 U.S. 506, 511, 522-23 (1995).

In the Tenth Circuit, it is clear that proof that the defendant put a bank "at risk" is not required for a successful prosecution under section 1344(2). *United States v. Sapp*, 53 F.3d 1100, 1103 (10th Cir. 1995). Proof of risk of loss is required, however, under 1344(1). *Id.* (citing *United States v. Young*, 952 F.2d 1252, 1256 n.4 (10th Cir. 1991)). Note, though, that at least one Tenth Circuit panel declined to draw this conclusion. *United States v. Hill*, 197 F.3d 436, 444 n.3 (10th Cir. 1999).

Use Note

The proof required for the second element will vary depending on the type of financial institution and the instruction should incorporate the appropriate requirement. *See* 18 U.S.C. §20. It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature of the alleged scheme, or that the alleged scheme actually succeeded in defrauding someone.

2.59

MAILING OBSCENE MATERIAL
18 U.S.C. § 1461

The defendant is charged with mailing obscene material in violation of 18 U.S.C. section 1461. This law makes it a crime to use the United States mail to send obscene material. For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant knowingly [used the mail] [caused the mail to be used] to convey or deliver [specify type of alleged obscene material];

Second: the defendant knew the general nature of the content of the [specify type of alleged obscene material] at the time of mailing;

Third: the [specify type of alleged obscene material] [were] [was] obscene.

To prove that material is "obscene," the government must establish three things:

(1) that the material appeals predominantly to prurient interest;

(2) that it depicts or describes sexual conduct in a patently offensive way; and

(3) that the material, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(1) An appeal to "prurient" interest is an appeal to a morbid, degrading, or unhealthy interest in sex. The first test, therefore, is whether the predominant theme or purpose of the material is an appeal [to the morbid, degrading, or unhealthy sexual interest as considered by an average person in the community as a whole] [to the prurient interest of members of a defined deviant sexual group]. In making this decision, you must view the material as a whole and not part by part, considering the intended and probable recipients of the material.

(2) In deciding whether the material depicts or describes sexual conduct in a patently offensive way, you should not judge by your own

standards. Rather, you must measure whether the material is patently offensive by contemporary community standards; that is, whether it exceeds the generally accepted limits of candor or public tolerance in the entire community to the point where it is clearly offensive.

You should consider and evaluate both the first and second parts of the obscenity test by applying contemporary community standards. This means that the question is *not* how the material impresses you as an individual, but how it would be considered by the average person in the community, a person with an ordinary and normal attitude toward—and interest in—sex and sexual matters. Contemporary community standards are those accepted in this community as a whole; that is to say, by the community at large or people in general, and not by what some groups of people may believe the community ought to accept or refuse to accept. You should also bear in mind that customs and standards may change; the community as a whole may, from time to time, accept something that was previously unacceptable.

[The prurient-appeal requirement may also be assessed in terms of the sexual interest of a clearly defined deviant sexual group if the material was intended to appeal to the prurient interest of that group, as distinguished from the community in general.]

(3) The third question in determining whether material is obscene is whether, taken as a whole, the material lacks serious literary, artistic, political, or scientific value. Material may have serious value in one or more of these areas even though it portrays explicit sexual conduct—it is for you to say whether the material has such value. The ideas represented by the material need not have majority approval to be protected, and the value of the material does not vary from community to community. So, unlike the first two tests, you should *not* apply the contemporary community standards to the third test. Instead, you should make this determination on an objective basis: would a reasonable person considering the material as a whole, find that it has or does not have serious literary, artistic, political, or scientific value.

You must decide that all three parts of the obscenity test are met before you can decide that the material is obscene. If any one of the three is not met, then the material is not obscene within the meaning of the law.

To "cause" the mails to be used is to do an act knowing that use of the mails will follow in the ordinary course or use of the mails can be reasonably foreseen.

Comment

This instruction is based on the Supreme Court's decision in *Miller v. California*, 413 U.S. 15 (1973). *See also Smith v. United States*, 431 U.S. 291 (1977); *Pope v. Illinois*, 481 U.S. 497 (1987). For a discussion of the definition of "prurient interest," *see Roth v. United States*, 354 U.S. 476, 487 n.20 (1957); *Mishkin v. New York*, 383 U.S. 502, 508 (1966).

Where the materials are intended to appeal to the prurient interest of members of a clearly defined deviant sexual group, rather than the average public-at-large, the prurient appeal requirement is met if the materials as a whole in fact appeal to members of that group. *Mishkin*, 383 U.S. at 508-09.

"To satisfy the scienter requirement, the prosecution must establish beyond a reasonable doubt that a 'defendant had knowledge of the contents of the material he distributed, and that he knew the character and nature of the materials,' although it is not necessary to prove that a defendant knew or believed such materials might be classified as legally obscene." *Hunt v. Oklahoma*, 683 F.2d 1305, 1308 (10th Cir. 1982) (quoting *Hamling v. United States*, 418 U.S. 87, 123 (1974)). The defendant's knowledge of the general nature of the content of the materials may be shown by either direct or circumstantial evidence. *Smith v. California*, 361 U.S. 147, 154 (1959); *Mishkin*, 383 U.S. at 511-12 (1966).

Although the first two prongs of the Miller test are to be judged by contemporary community standards, the third prong is to be judged by an objective, "reasonable person" standard. *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987).

Use Note

When evidence shows that the materials are intended to appeal to the prurient interest of members of a clearly defined deviant sexual group, rather than the average public-at-large, the instruction must be modified accordingly. One suggestion for modification appears in the brackets at the end of subsection (2) of the instructions.

2.60

INTERSTATE TRANSPORTATION OF OBSCENE MATERIAL
18 U.S.C. § 1462

The defendant is charged with using a[n] [common carrier] [express service] [interactive computer service] to transport obscene material in interstate or foreign commerce, in violation of 18 U.S.C. section 1462. This law makes it a crime to use [a common carrier] [an interactive computer service] to transport obscene materials between [one state to another] [this country to any other country]. For you to find the defendant guilty of this crime, you must be convinced that the government has proved each these things beyond a reasonable doubt:

First: the defendant knowingly used [a common carrier] [an interactive computer service] or caused [a [__] service] to transport [specify type of alleged obscene material] between [one state to another state] [this country to another country].

Second: the defendant knew the general nature of the content of the [specify type of alleged obscene material] at the time it was transported.

Third: the [specify type of alleged obscene material] [was] [were] obscene.

To prove that material is "obscene," the government must establish three things:

(1) hat the material appeals predominantly to prurient interest;

(2) that it depicts or describes sexual conduct in a patently offensive way; and

(3) that the material, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(1) An appeal to "prurient" interest is an appeal to a morbid, degrading, or unhealthy interest in sex. The first test, therefore, is whether the predominant theme or purpose of the material is an appeal [to the morbid, degrading, or unhealthy sexual interest, as considered by an average person in the community as a whole] [to the prurient interest of members of a defined deviant sexual group]. In making this decision, you must view the material as a whole and not part by part,

considering the intended and probable recipients of the material.

(2) In deciding whether the material depicts or describes sexual conduct in a patently offensive way, you should not judge by your own standards. Rather, you must measure whether the material is patently offensive by contemporary community standards; that is, whether it exceeds the generally accepted limits of candor or public tolerance to the point where it is clearly offensive.

You should consider and evaluate both the first and second parts of the obscenity test by applying contemporary community standards. This means that the question is *not* how the material impresses you as an individual, but how it would be considered by the average person in the community, a person with an ordinary and normal attitude toward—and interest in—sex and sexual matters. Contemporary community standards are those accepted in this community as a whole; that is to say, by the community at large or people in general, and not by what some groups of people may believe the community ought to accept or refuse to accept. You should also bear in mind that customs and standards may change; the community as a whole may, from time to time, accept something that was previously unacceptable.

[The prurient-appeal requirement may also be assessed in terms of the sexual interest of a clearly defined deviant sexual group if the material was intended to appeal to the prurient interest of that group, as distinguished from the community in general.]

(3) The third question in determining whether material is obscene is whether, taken as a whole, the material lacks serious literary, artistic, political, or scientific value. Material may have serious value in one or more of these areas even though it portrays explicit sexual conduct—it is for you to say whether the material has such value. The ideas represented by the material need not have majority approval to be protected, and the value of the material does not vary from community to community. So, unlike the first two tests, you should *not* apply the contemporary community standards to the third test. Instead, you should make this determination on an objective basis: would a reasonable person considering the material as a whole, find that it has or does not have serious literary, artistic, political, or scientific value.

You must decide that all three parts of the obscenity test are met before you can decide that the material is obscene. If any one of the three is not met, then the material is not obscene within the meaning of the law.

To "cause" [a trucking service] [interactive computer service] to be used is to do an act knowing that use of the [service] will follow in the ordinary course of business or where such use can be reasonably foreseen.

Comment

See comment to Instruction 2.59 (18 U.S.C. §1461). For definitions of interstate and foreign commerce, see Instruction 1.39.

2.61

INTERSTATE TRANSPORTATION OF OBSCENE MATERIAL FOR SALE OR DISTRIBUTION 18 U.S.C. § 1465

The defendant has been charged with transporting obscene material in interstate or foreign commerce for the purpose of sale or distribution, in violation of 18 U.S.C. section 1465. That statute makes it a crime to transport obscene materials between [one state to another state] [this country to another country] for sale or distribution. For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant knowingly [transported [specify type of alleged obscene material]] [caused [specify type of alleged obscene material] to be transported] [used an interactive computer service to transport [specify type of alleged obscene material]] [traveled] between [one state to another state] [this country to another country].

Second: the defendant [transported [specify type of alleged obscene material]] [caused [specify type of alleged obscene material] to be transported] [used an interactive computer service to transport [specify type of alleged obscene material]] [traveled] for the purpose of selling or distributing [specify type of alleged obscene material].

Third: the defendant knew the general nature of the content of the [specify type of alleged obscene material] at the time [the material was transported] [of travel].

Fourth: the [specify type of alleged obscene material] [was] [were] obscene.

To prove that material is "obscene," the government must establish three things:

(1) that the material appeals predominantly to prurient interest;

(2) that it depicts or describes sexual conduct in a patently offensive way; and

(3) that the material, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(1) An appeal to "prurient" interest is an appeal to a morbid, degrading, or unhealthy interest in sex. The first test, therefore, is whether the predominant theme or purpose of the material is an appeal [to the morbid, degrading, or unhealthy sexual interest, as considered by an average person in the community as a whole] [to the prurient interest of members of a defined deviant sexual group]. In making this decision, you must view the material as a whole and not part by part, considering the intended and probable recipients of the material.

(2) In deciding whether the material depicts or describes sexual conduct in a patently offensive way, you should not judge by your own standards. Rather, you must measure whether the material is patently offensive by contemporary community standards; that is, whether it exceeds the generally accepted limits of candor or public tolerance to the point where it is clearly offensive.

You should consider and evaluate both the first and second parts of the obscenity test by applying contemporary community standards. This means that the question is *not* how the material impresses you as an individual, but how it would be considered by the average person in the community, a person with an ordinary and normal attitude toward—and interest in—sex and sexual matters. Contemporary community standards are those accepted in this community as a whole; that is to say, by the community at large or people in general, and not by what some groups of people may believe the community ought to accept or refuse to accept. You should also bear in mind that customs and standards may change; the community as a whole may, from time to time, accept something that was previously unacceptable.

[The prurient-appeal requirement may also be assessed in terms of the sexual interest of a clearly defined deviant sexual group if the material was intended to appeal to the prurient interest of that group, as distinguished from the community in general.]

(3) The third question in determining whether material is obscene is whether, taken as a whole, the material lacks serious literary, artistic, political, or scientific value. Material may have serious value in one or more of these areas even though it portrays explicit sexual conduct—it is for you to say whether the material has such value. The ideas represented by the material need not have majority approval to be protected, and the value of the material does not vary from community to community. So, unlike the first two tests, you should *not* apply the contemporary community standards to the third test. Instead, you should make this determination on an objective basis: would a reasonable person considering the material as a whole, find

that it has or does not have serious literary, artistic, political, or scientific value.

You must decide that all three parts of the obscenity test are met before you can decide that the material is obscene. If any one of the three is not met, then the material is not obscene within the meaning of the law.

To transport "for the purpose of sale or distribution" means to transport, not for personal use, but with the intent to ultimately transfer possession of the materials to another person or persons, with or without any financial interest in the transaction.

[If two or more copies of the material (or a combined total of five articles or publications) have been transported, you may presume that the materials were intended for sale or distribution. But that presumption may be rebutted, or overcome, by other evidence.]

Comment

See comment to Instruction 2.59 (18 U.S.C. §1461). For definitions of interstate and foreign commerce, see Instruction 1.39.

2.62

CORRUPTLY OBSTRUCTING ADMINISTRATION OF JUSTICE
18 U.S.C. § 1503(a)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1503(a).

This law makes it a crime for anyone corruptly to [influence] [obstruct] [impede] [endeavor to [influence] [obstruct] [impede]] the due administration of justice in connection with a pending judicial proceeding.

To find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: there was a proceeding pending before a federal [court] [grand jury];

Second: the defendant knew of the pending judicial proceeding and [influenced] [obstructed] [impeded] [endeavored to [influence] [obstruct] [impede]] the due administration of justice in that proceeding; and

Third: the defendant's act was done "corruptly," that is, that the defendant acted knowingly and dishonestly, with the specific intent to subvert or undermine the due administration of justice.

[When an "endeavor" is charged, add the following: It is not necessary to show that the defendant was successful in achieving the forbidden objective, only that the defendant corruptly tried to achieve it in a manner which he knew was likely to [influence] [obstruct] [impede] the due administration of justice as the natural and probable effect of the defendant's actions.]

Comment

With respect to the first element, section 1503 requires a pending judicial proceeding, as opposed to a police or agency investigation. *United States v. Aguilar*, 515 U.S. 593, 600 (1995); *United States v. Wood*, 958 F.2d 963, 975 & n.18 (10th Cir. 1992). This statute protects a "witness" who knows, or is supposed to know, material facts and is expected to be called in a federal proceeding. *United States v. Griffin*, 463 F.2d 177, 179 (10th Cir. 1972). 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?

If the endeavor provision is used, it should be noted the Supreme Court read the statute to require a "nexus" relationship in time, causation or logic with the judicial proceedings so that the proscribed endeavor "must have the 'natural and probable effect' of interfering with the due administration of justice." *Aguilar*, 515 U.S. at 559-600; *United States v. Wood*, 6 F.3d 692, 695-96 (10th Cir. 1993). The term "corruptly," used in the "endeavor" provision, does not require proof of a wicked or evil purpose, only that the defendant acted with the purpose of obstructing justice. *United States v. Ogle*, 613 F.2d 233, 239 (10th Cir. 1979). Any endeavor to influence a witness or impede or obstruct justice falls within the definition of "corruptly." *Broadbent v. United States*, 149 F.2d 580, 581 (10th Cir. 1945).

Use Note

This offense provides for an enhanced sentence in the case of a killing, or attempted killing, of a juror or court officer, or in a case "in which the offense was committed against a petit juror and in which a class A or B felony was charged." 18 U.S.C. §1503(b). Another possible enhancement occurs when there is a use or threat of force in connection with the trial of any criminal case. The maximum sentence becomes the higher of that provided in §1503 or that provided for the criminal offense charged in the trial in which the juror is participating. An additional element, prompted by the *Apprendi* doctrine, might be required in all some cases. Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a fourth element is also needed if the offense was committed against a petit juror in which a class A or B felony was charged.

2.63

OBSTRUCTING ADMINISTRATION OF JUSTICE BY THREATS OR FORCE
18 U.S.C. § 1503(a)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1503(a).

This law makes it a crime for anyone by threats or force to [influence] [obstruct] [impede] [endeavor to [influence] [obstruct] [impede] the due administration of justice in connection with a pending judicial proceeding.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: there was a proceeding pending before a federal [court] [grand jury];

Second: the defendant knew of the pending proceeding;

Third: the defendant [threatened physical force] [used physical force], as charged in the indictment; and

Fourth: the defendant's conduct [influenced] [obstructed] [impeded] [endeavored to [influence] [obstruct] [impede]] the due administration of justice in that proceeding.

[When an "endeavor" is charged, add the following: It is not necessary to show that the defendant was successful in achieving the forbidden objective, only that the defendant corruptly tried to achieve it in a manner which he knew was likely to [influence] [obstruct] [impede] the due administration of justice as to the natural and probable effect of defendant's actions.]

Comment

This statute protects a "witness" who knows, or is supposed to know, material facts and is expected to be called in a federal proceeding. *United States v. Griffin*, 463 F.2d 177, 179 (10th Cir. 1972). 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, 903-04 (7th Cir. 1982).

Use Note

This offense provides for an enhanced sentence in the case of a killing, or attempted killing of a juror or court officer, or in a case "in which the offense was committed against a petit juror and in which a class A or B felony was charged." 18 U.S.C. §1503(b). Another possible enhancement occurs when there is a use or threat of force in connection with the trial of any criminal case. The maximum sentence becomes the higher of that provided in §1503 or that provided for the criminal offense charged in the trial in which the juror is participating. An additional element, prompted by the *Apprendi* doctrine, might be required in some cases. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000).

The term "corruptly," used in the "endeavor" provision, does not require proof of a wicked or evil purpose only that defendant acted with the purpose of obstructing justice. *United States v. Ogle*, 613 F.2d 233, 239 (10th Cir. 1979). Any endeavor to influence a witness or impede or obstruct justice falls within the definition of "corruptly." *Broadbent v. United States*, 149 F.2d 580, 581 (10th Cir. 1945).

2.64

CORRUPTLY INFLUENCING A JUROR
18 U.S.C. § 1503

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1503.

This law makes it a crime for anyone corruptly to endeavor to [influence] [intimidate] [impede] any [petit] [grand] juror in or of any court of the United States.

To find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: [____] was a [petit] [grand] juror in a federal court;

Second: the defendant endeavored to [influence] [intimidate] [impede] the juror in the discharge of his or her duty as a [petit] [grand] juror; and

Third: the defendant acted "corruptly," that is, with the deliberate intent to influence the court proceeding in which the juror served.

It is not necessary for the government to prove that the juror was in fact swayed or influenced or prevented from performing his duty in any way, but only that the defendant corruptly tried to do so.

Comment

In *United States v. Ogle*, 613 F.2d 233, 239 (10th Cir. 1979), the court held that "corruptly" did not require an evil motive or a desire to undermine the moral character of a juror. It requires only that the act be done with the purpose of obstructing justice. *Id.*; *Broadbent v. United States*, 149 F.2d 580, 581 (10th Cir. 1945).

Use Note

An additional element, prompted by the *Apprendi* doctrine, might be required if the offense is committed against a petit juror trying a criminal case involving a class A or B felony, as the punishment is enhanced under 18 U.S.C. section 3559(a). *See Apprendi v. New Jersey*, 530 U.S. 466 (2000). In that event, this issue should be submitted to the jury, and the jury's decision reflected on the verdict form.

2.65

WITNESS TAMPERING
18 U.S.C. § 1512(b)(1)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1512(b)(1).

This law makes it a crime for anyone knowingly to [use] [attempt to use] [intimidation] [physical force] [threats] [corrupt persuasion] [misleading conduct] with the intent to [influence] [delay] [prevent] the testimony of any person in an official proceeding.

To find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant [used] [attempted to use] [intimidation] [physical force] [threats] [corrupt persuasion] [misleading conduct] against [____];

Second: the defendant acted knowingly and with the intent to influence [delay] [prevent] the testimony of [____] with respect to [describe official proceeding], an official proceeding.

An act "with the intent to influence the testimony" of a person means to act for the purpose of getting the person to change, color, or shade his or her testimony in some way, but it is not necessary for the government to prove that the person's testimony was, in fact, changed in any way.

[The term "intimidation" means the use of any words or actions intended or designed to make another person timid or fearful or make that person refrain from doing something the person would otherwise do, or do something that person would otherwise not do.]

[An act is done with "corrupt persuasion" if it is done voluntarily and intentionally to bring about false or misleading testimony or to delay or prevent testimony with the hope or expectation of some benefit to oneself or another person.]

Comment

For purposes of this section, "an official proceeding need not be pending or about to be instituted at the time of the offense." 18 U.S.C. §1512(f)(1).

The phrases "official proceeding," "physical force," and "misleading conduct," are defined in 18 U.S.C. §1515.

Under section 1512(b)(1), a threat or other means of persuasion directed at a person does not have to succeed and cause the person to refrain from providing truthful and complete testimony. *See United States v. Dunning*, 929 F.2d 579, 581 (10th Cir. 1991) (interpreting section 1512(b)(3)).

While section 1512(b)(1) is aimed at one who in one way or another tampers with a witness or potential witness, *cf. United States v. Busch*, 758 F.2d 1394, 1397 (10th Cir. 1985) (addressing in dicta, the apparent aim of section 1512(a)), it is not necessary that the victim be under subpoena or a scheduled witness in an "official proceeding." The statute uses the word "person" rather than "witness."

The possible commission of a federal offense is sufficient to invoke section 1512(b)(1). An individual need not actually be convicted of a federal offense before someone may be charged and convicted under the statute. *United States v. Milton*, 966 F. Supp. 1038, 1042-43 (D. Kan. 1997).

2.66

FALSE DECLARATION (PERJURY) BEFORE A COURT OR GRAND JURY
18 U.S.C. § 1623(a)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1623(a).

This law makes it a crime for anyone under oath to make a false material statement in a [name proceeding] before any United States court or grand jury.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant made the statement while under oath in a [name proceeding] as charged;

Second: such statement was false in one or more of the respects charged;

Third: the defendant knew such statement was false when defendant made it; and

Fourth: the false statement was material to the [name proceeding].

To be material, a false statement must have a natural tendency to influence, or be capable of influencing, the decision required to be made. The statement need not actually have influenced the decision so long as it had the potential or capability of doing so.

In reviewing the statement alleged to be false, you should consider such statement in the context of the sequence of questions asked and answers given. You should give the words used their common and ordinary meaning unless the context clearly shows that a different meaning was mutually understood by the questioner and the declarant.

If you find a particular question was ambiguous and the defendant truthfully answered one reasonable interpretation of the question under the circumstances presented, then such answer would not be false. Similarly, if you find the question was clear but the answer

was ambiguous, and one reasonable interpretation of such answer would be truthful, then such answer would not be false.

Comment

The statute, 18 U.S.C. §1623(a), also makes it a crime for anyone under oath in a court proceeding to use "any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration." In the event that portion of the statute applies, the foregoing instruction must be modified accordingly.

To prove perjury before a federal court under 18 U.S.C. §1623(a), the government must establish beyond a reasonable doubt that "(1) the defendant made a declaration under oath before a federal court, (2) such declaration was false, (3) the defendant knew the declaration was false, and (4) the declaration was material" to the proceeding. *United States v. Durham*, 139 F.3d 1325, 1331 (10th Cir. 1998).

Materiality is an element of perjury under section 1623 which the jury must decide. *Johnson v. United States*, 520 U.S. 461, 465 (1997).

"In general, a false statement is material if it has a 'natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it is addressed.'" *Neder v. United States*, 527 U.S. 1, 16 (1999) (citation omitted). "To be material under section 1623(a), a false statement must have 'a natural tendency to influence, or [be] capable of influencing, the decision . . . required to be made.'" *Durham*, 139 F.3d at 1329 (citation omitted). The statement need not actually have influenced so long as it had the potential or capability of doing so. Materiality is determined based on a statement's purpose at the time the allegedly false statement was made. *United States v. Allen*, 892 F.2d 66, 68 (10th Cir. 1989).

Not *all* affidavits and certifications, however, fall within section 1623(a)'s prohibition. *See Dunn v. United States*, 442 U.S. 100, 107-13 (1979). In *Dunn*, the Court held that an interview in a private attorney's office, in the course of which a sworn statement was given, did not constitute a deposition and thus did not constitute an "ancillary proceeding" within the meaning of section 1623(a).

2.67

MAIL THEFT
18 U.S.C. § 1708

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1708.

This law makes it a crime to steal [or attempt to steal] mail from a United States [mailbox] [post office] [letter box] [mail receptacle] [authorized depository for mail matter] [mail route] [mail carrier].

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the mail described in the indictment was in a United States [mailbox] [post office] [letter box] [mail receptacle] [authorized depository for mail matter] [mail route] [mail carrier], as described in the indictment; and

Second, the defendant stole (or attempted to steal) the letter from the United States [mailbox] [post office] [letter box] [mail receptacle] [authorized depository for mail matter] [mail route] [mail carrier], as described in the indictment.

[A private mail box or mail receptacle is an "authorized depository for mail matter."]

Mail is stolen when it has been wrongfully taken with the intent to deprive the owner, temporarily or permanently, of its use and benefit. That intent must exist at the time the mail is taken from the mailbox [post office] [letter box] [mail receptacle] [authorized depository for mail matter] [mail route] [mail carrier].

Comment

The foregoing instruction focuses on paragraph one of section 1708, which addresses, among other things, mail theft. The second paragraph of section 1708 addresses theft of mail "left for collection upon or adjacent to a collection box or other authorized depository of mail matter." The third paragraph of section 1708 addresses receipt and possession of stolen mail matter. Where crimes other than mail theft as addressed in paragraph one of section 1708 are involved, the instruction must be modified accordingly.

To obtain a conviction under 18 U.S.C. §1708, for possession of stolen mail, the government must establish that (1) the defendant had the contents of stolen mail in his possession, (2) the mail had been stolen from a mail receptacle or mail route; and (3) the defendant had knowledge that mail and its contents were stolen. *United States v. Douglas*, 668 F.2d 459, 461 (10th Cir. 1982).

"Proof that an item was stolen from the 'mail' is an essential element of any 18 U.S.C. §1708 violation." *United States v. Hunt*, 212 F.3d 539, 543-44 (10th Cir. 2000).

Where a defendant possessed recently stolen Treasury checks payable to persons he did not know, and provided no plausible explanation for his possession of such checks, the jury could infer defendant's knowledge that the checks were stolen. *Barnes v. United States*, 412 U.S. 837, 845-46 (1973).

The mail theft statute "should be interpreted broadly to effectuate a 'manifest legislative intent to protect the mails.'" *Douglas*, 668 F.2d at 461 (quoting *United States v. White*, 510 F.2d 448, 450 (10th Cir. 1975)). In *White*, the Court held that section 1708's prohibition against taking a letter from or out of a mail receptacle was not limited to a mail container or holder which had an enclosed interior. Rather, such prohibition included defendant's act of taking a letter clipped to a clothespin fastened to a mailbox lid. *White*, 510 F.2d at 451. Similarly, in *Douglas*, the Court held theft of an envelope clipped to a rod permanently attached to a mail box fell within the statute's purview. *Douglas*, 668 F.2d at 461.

Section 1708 extends to both misdelivered and misaddressed mail because "[a]n item does not cease to be mail within the custody of the postal system until it is delivered to the proper addressee." *Id.* at 461 n.3.

Absent a showing of separate receipt or separate storage of multiple items, simultaneous possession of several pieces of stolen mail constitutes only one offense under section 1708. *United States v. Long*, 787 F.2d 538, 539 (10th Cir. 1986).

Use Note

In the case of attempted mail theft, the trial court may want to refer to Instruction 1.32—Attempt. Even though attempted mail theft is addressed in the substantive statute, 18 U.S.C. §1708, the substantial step requirement must be addressed.

2.68

POSSESSION OF STOLEN MAIL
18 U.S.C. § 1708 (Third Paragraph)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1708. This law makes it a crime to possess stolen United States mail.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant possessed stolen mail;

Second: the mail was stolen from a mail receptacle or mail route; and

Third: the defendant knew the mail was stolen.

Mail is "stolen" when it has been wrongfully taken with the intent to deprive the owner, temporarily or permanently, of its use and benefit. It is not necessary that the defendant knew the matter was stolen from the mail so long as the defendant knew that it was stolen.

Comment

This instruction is adapted from the elements set out in *United States v. Douglas*, 668 F.2d 459, 461 (10th Cir. 1982).

The third paragraph of section 1708 proscribes several types of conduct and describes various kinds of mail matter and, by reference to the first paragraph, receptacles from which mail matter can be stolen. The statute also makes illegal possession of mail which the defendant knows to have been unlawfully taken, embezzled or abstracted. The instruction should be modified to conform to the allegations of the indictment, the language of the statute and the evidence.

Proof of the first element, that the item was stolen from the "mail," is an essential element of any 18 U.S.C. §1708 violation. If the mail matter was no longer under USPS control when it was stolen, the conduct falls under 18 U.S.C. §1702.

Simultaneous possession of several items of stolen mail matter constitutes only one offense unless the indictment charges, and the evidence proves, separate offenses, e.g., thefts on separate days. *United States v. Long*, 787 F.2d 538, 539 (10th Cir. 1986). If the indictment charges only one offense,

acquittal of that offense precludes any later prosecution under the statute for the same conduct, even if based on a different theory of theft. *See United States v. Hunt*, 212 F.3d 539, 547 (10th Cir. 2000).

The defendant may not be convicted under 18 U.S.C. §1708 for both stealing and possessing the same piece of mail. *See United States v. Brown*, 996 F.2d 1049, 1053 (10th Cir. 1993) (stating general rule that a defendant may not be convicted for both stealing and possessing the same property, unless Congress specifically intended to treat each act as a separate offense). Where theories of theft and possession are both charged and presented to the jury, the court should instruct the jury that it may convict of either theft or possession but not both. *See United States v. Gaddis*, 424 U.S. 544, 547 (1976).

"The use of the mails like most other facts may be established by circumstantial evidence." *United States v. Gomez*, 636 F.2d 295, 297 (10th Cir. 1981) (citing *United States v. Baker*, 444 F.2d 1290, 1292 (10th Cir. 1971)). Possession of property recently stolen, if not satisfactorily explained, is a circumstance from which the jury may reasonably infer that the person in possession knew the property had been stolen. Where warranted by the evidence, an instruction to that effect may be appropriate. *See, e.g.*, *Barnes v. United States*, 412 U.S. 837, 843-45 (1973); *United States v. Tisdale*, 647 F.2d 91, 93 (10th Cir. 1981); *Baker*, 444 F.2d at 1292.

Use Note

In appropriate cases, "possession," both actual and constructive, should be defined. *See* Instruction 1.31.

2.69

EMBEZZLEMENT/THEFT OF MAIL MATTER BY POSTAL SERVICE EMPLOYEE
18 U.S.C. § 1709

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1709.

This law makes it a crime for a Postal Service employee to embezzle any mail matter possessed by the employee during employment.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant was a Postal Service employee at the time alleged in the indictment;

Second: as a Postal Service employee, the defendant [had lawfully come into possession of][had been entrusted with] [insert the mail matter described in the indictment], which mail matter was intended to be conveyed by mail; and

Third: the defendant embezzled that [insert the mail matter described in the indictment].

"Mail" is "intended to be conveyed by mail" if a reasonable person who saw the mail matter would think it was intended to be delivered through the mail.

[To "embezzle" means to wrongfully and intentionally take money or property of another after the money or property has lawfully come within the possession or control of the person taking it.]

Comment

Section 1709 contains two crimes: the embezzlement of letters or articles contained therein and theft of the contents of letters, as distinguished from the letter itself. For theft of a letter, use 18 U.S.C. §1708 (first paragraph). Section 1709 does not require the postal employee to intend to convert the material in question to his or her own use. *United States v. Gonzales*, 456 F.3d 1178, 1183 (10th Cir. 2006) ("In sum, to sustain a conviction under §1709 for removing the contents of mail, the government is not required to prove a defendant possessed the specific intent to convert the contents to her own use.").

Use Note

Embezzlement presupposes lawful possession and theft does not. When postal employees unlawfully take the contents of mail matter, they may be charged and convicted under the stealing provisions in the second clause of section 1709. An "embezzlement" instruction would be inappropriate under that scenario because postal employees cannot lawfully come into possession of a letter's contents. Adapt this instruction as appropriate if the defendant is charged with theft of mail.

2.70

[ROBBERY] [EXTORTION] BY FORCE, VIOLENCE OR FEAR
18 U.S.C. § 1951(a) (Hobbs Act)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1951(a), commonly called the Hobbs Act.

This law makes it a crime to obstruct, delay or affect interstate commerce by [robbery] [extortion].

To find the defendant guilty of this crime you must be convinced that the government has proved beyond a reasonable doubt that:

First: the defendant obtained [attempted to obtain] property from another [without][with] that person's consent;

Second: the defendant did so by wrongful use of actual or threatened force, violence, or fear; and

Third: as a result of the defendant's actions, interstate commerce, or an item moving in interstate commerce, was actually or potentially delayed, obstructed, or affected in any way or degree;

[Robbery is the unlawful taking of personal property from another against his or her will. This is done by threatening or actually using force, violence, or fear of injury, immediately or in the future, to person or property. "Property" includes money and other tangible and intangible things of value. "Fear" means an apprehension, concern, or anxiety about physical violence or harm or economic loss or harm that is reasonable under the circumstances.]

[Extortion is the obtaining of or attempting to obtain property from another, with that person's consent, induced by wrongful use of actual or threatened force, violence, or fear. The use of actual or threatened force, violence, or fear is "wrongful" if its purpose is to cause the victim to give property to someone who has no legitimate claim to the property.]

"Obstructs, delays, or affects interstate commerce" means any action which, in any manner or to any degree, interferes with, changes, or alters the movement or transportation or flow of goods, merchandise, money, or other property in interstate commerce.

The defendant need not have intended or anticipated an effect on interstate commerce. You may find the effect is a natural consequence of his actions. If you find that the government has proved beyond a reasonable doubt that the defendant intended to take certain actions—that is, he did the acts charged in the indictment in order to obtain property—and you find those actions actually or potentially caused an effect on interstate commerce, then you may find the requirements of this element have been satisfied.

Comment

The extortion provision of the Hobbs Act requires not only the deprivation, but also the acquisition, of property. 18 U.S.C. §1951(b)(2). Thus, the property, whether tangible or intangible, must actually be "obtained" in order for there to be a violation. *See Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003) (holding that by interfering with, disrupting, and in some instances "shutting down" clinics that performed abortions, individual and corporate organizers of antiabortion protest network did not "obtain or attempt to obtain property from women's rights organization or abortion clinics, and so did not commit "extortion" under the Hobbs Act).

The Tenth Circuit has consistently upheld the Hobbs Act as a permissible exercise of the authority granted to Congress under the Commerce Clause, both in the context of robbery, *United States v. Shinault*, 147 F.3d 1266, 1278 (10th Cir. 1998), and extortion, *United States v. Bruce*, 78 F.3d 1506, 1509 (10th Cir. 1996). It also has made clear that only a *de minimis* effect on commerce is required, *United States v. Wiseman*, 172 F.3d 1196, 1214-15 (10th Cir. 1999), and has upheld a trial court's refusal to instruct that a substantial effect is required, *United States v. Battle*, 289 F.3d 661, 664 (10th Cir. 2002).

The court seems to have struggled with the language that "commerce . . . was actually or potentially . . . affected" and that the government can meet its burden by evidence that the defendant's actions caused or "would probably cause" an effect on interstate commerce. In *United States v. Nguyen*, 155 F.3d 1219 (10th Cir. 1998), the court observed that use of the words probable and potential "while perhaps not the best way to explain to the jury the interstate commerce requirement, did not constitute error." *Id.* at 1229. In *United States v. Wiseman*, *supra*, the court upheld an instruction which stated, in pertinent part, that the government could meet its burden by evidence that money stolen for businesses "*could* have been used to obtain such foods or services" from outside the state, opposed to "would" have been so used. *Id.* at 1215 (emphasis in original). The court, citing *Nguyen*, held that the instruction was not prejudicial because only a potential effect on commerce is required. *Id.* at 1216. The Tenth Circuit continues to approve instructions requiring proof of actual, potential, *de minimis* or even just probable effect on commerce. *See United States v. Curtis*, 344 F.3d 1057, 1068-69 (10th Cir. 2003).

Use Note

When the government's evidence is that the robbery or extortion actually affected commerce, the words "potentially," "probably" and "could" can be eliminated from the instruction.

The instruction should be modified in the case of an "attempt." *See* Instruction 1.32.

2.71

EXTORTION UNDER COLOR OF OFFICIAL RIGHT
18 U.S.C. § 1951(a) (Hobbs Act)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1951(a), commonly called the Hobbs Act.

This law makes it a crime for anyone to obstruct commerce by extortion. Extortion means the wrongful obtaining of or attempting to obtain property from another, with that person's consent, under color of official right.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant wrongfully [obtained] [attempted to obtain] property from another with that person's consent;

Second: the defendant did so under color of official right; and

Third: the defendant's conduct [interfered with] [affected] interstate commerce.

The term "property" includes money and other tangible and intangible things of value.

To "wrongfully obtain property under color of official right" means the taking or attempted taking by a public officer of property not belonging or owed to him or his office, whether or not the public official employed force, threats, or fear. In other words, the wrongful use of otherwise valid official power may convert legitimate official conduct into extortion. If a public official accepts or demands property in return for promised performance or nonperformance of an official act, the official is guilty of extortion. This is true even if the official was already duty bound to take or withhold the action in question, or even if the official did not have the power or authority to take or withhold the action in question, if the victim reasonably believed that the official had the authority or power.

The government must prove beyond a reasonable doubt that the natural and probable consequence of the acts the defendant took would be to [interfere with] [affect] interstate commerce. If you decide that

there would be any effect at all on interstate commerce, then that is enough to satisfy this element, even if the effect is minimal.

Use Note

If a public official is alleged to have extorted a campaign contribution "under color of official right," the jury must be instructed that receipt of such contribution violates section 1951 "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." *McCormick v. United States*, 500 U.S. 257, 273 (1991). "[F]ulfillment of the quid pro quo is not, however, an element of the offense." *Evans v. United States*, 504 U.S. 255, 256 (1992); *id.* at 268.

It is not necessary that the government prove that the defendant himself benefitted from any extortion. Extortion is proven if the payments are made to a third party, or entity, at the direction of the defendant. *United States v. Green*, 350 U.S. 415, 420 (1956).

Nor is it necessary for the government to prove that the defendant knew his conduct would [interfere with] [affect] interstate commerce. In appropriate cases, the court should instruct the jury that the government need not show the defendant actually intended or anticipated an effect on interstate commerce by his actions or that commerce was actually affected.

The instruction should be modified in the case of an "attempt." *See* Instruction 1.32.

2.72

ILLEGAL GAMBLING BUSINESS
18 U.S.C. § 1955

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1955.

This law makes it a crime to conduct an illegal gambling business.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant and four or more other persons knowingly [conducted] [financed] [managed] [supervised] [directed] [owned] all or part of a gambling business;

Second: the gambling business was conducted in, and violated the law of, the state of [insert the name of the state]; and

Third: the gambling business [was in substantially continuous operation for more than 30 days] [had a gross revenue of $2,000 or more on any single day].

A person "conducts" a gambling business if he participates in the operation of the gambling business in some function necessary to the operation of the gambling business. A mere bettor or customer is not involved in the "conduct" of the business.

Conducting a [name type of gambling, e.g., bookmaking] business violates the law of the state of [insert the name of the state].

Comment

For discussion of the elements of a violation of 18 U.S.C. §1955, *see Sanabria v. United States*, 437 U.S. 54, 71 n.26 (1978) (finding that §1955 "proscribes any degree of participation in an illegal gambling business, except participation as a mere bettor"); *United States v. Boyd*, 149 F.3d 1062, 1064-65 (10th Cir. 1998) (finding that the government need not prove that at all times during some 30-day period at least five persons participated in conducting an illegal gambling business; rather, government "need only demonstrate that the operation operated for a continuous period of thirty days and involved five or more persons at some relevant time"); *United States v. O'Brien*, 131 F.3d 1428, 1430-31 (10th Cir. 1997) ((1) government must prove that defendant

knew that his act was one of participation in gambling, but need not prove that defendant knew that gambling business involved five or more people, remained in operation for 30 days, or violated state law; (2) jury need not be given unanimity instruction regarding identity of five persons or of particular 30-day durational element).

For definitions of terms used in the instruction, *see United States v. Boss*, 671 F.2d 396, 399-400 (10th Cir. 1982) (engaging in activity that is merely helpful to gambling business, such as serving drinks to gamblers, does not make actor a "conductor" of the business; activity must instead be related to necessary function of gambling business); *United States v. Smaldone*, 583 F.2d 1129, 1132 (10th Cir. 1978) (upholding instruction defining "conduct" as "including all who participate in the operation of the gambling business, 'regardless of how minor their jobs and whether or not they be labeled as agents, runners, or independent contractors,' excepting the person who simply places a bet").

Use Note

The bracketed language should be given as warranted by the facts charged in the indictment. The violation-of-state-law element is generally not disputed. If it is, further instruction may be warranted. If a definition is particularly important under the facts of the case, it can be pulled from the comment and included in the instruction.

2.73
MONEY LAUNDERING USING ILLEGAL PROCEEDS TO PROMOTE ILLEGAL ACTIVITY
18 U.S.C. §1956(a)(1)(A)(i)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1956(a)(1)(A)(i).

This law makes it a crime knowingly to use the proceeds of specified unlawful activity to promote the carrying on of illegal activity.

To find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant [conducted] [attempted to conduct] a financial transaction;

Second: the defendant knew that the property involved in the [financial transaction] [attempted financial transaction] represented the proceeds of some form of unlawful activity;

Third: the [financial transaction] [attempted financial transaction] involved the proceeds of [specify unlawful activity from 18 U.S.C. §1956(c)(7)]; and

Fourth: the defendant [conducted] [attempted to conduct] the financial transaction with the intent to promote the carrying on of [specify unlawful activity from 18 U.S.C. §1956(c)(7)].

The term "conducts" includes initiating, concluding, or participating in initiating or concluding, a transaction.

The term "financial transaction" means [select from the following as appropriate]:

(A) a transaction that in any way or degree affects interstate commerce, and that involves:

(i) the movement of funds by wire or other means; or

(ii) one or more monetary instruments; or

(iii) the transfer of title to any real property, vehicle, vessel, or aircraft; or

(B) a transaction involving the use of a financial institution that is engaged in, or the activities of which affect, interstate commerce in any way or degree.

The term "proceeds" means any property derived from or obtained or retained, directly or indirectly, through specified unlawful activity, including the gross receipts of such activity.

"Interstate commerce" means commerce or travel between the states, territories or possessions of the United States, including the District of Columbia. It is not necessary that the defendant have intended or anticipated an effect on interstate commerce. All that is necessary is that the natural and probable consequence of the defendant's acts did in fact affect interstate commerce, however minimal that effect is.

Comment

In *United States v. Santos*, 553 U.S. 507, 523-24 (2008), the Court held that "proceeds" refers to profits, not gross receipts, at least where the unlawful activity is an illegal gambling operation. *Santos* has since been explicitly limited to its factual setting: "'[P]roceeds' means 'profits' for the purpose of the money laundering statute *only* where an illegal gambling operation is involved." *United States v. Fishman*, 645 F. 3d 1175, 1193-94 (10th Cir. 2011); *see also United States v. Thornburgh*, 645 F.3d 1197, 1209 (10th Cir. 2011). Further, Congress amended the statute in response to *Santos* to define "proceeds" as including gross receipts. 18 U.S.C. § 1956(c)(9) (effective May 20, 2009).

For further discussion of the elements of a violation of 18 U.S.C. §1956(a)(1)(A)(i), *see United States v. Boyd*, 149 F.3d 1062, 1067-68 (10th Cir. 1998) (discussing requirement that defendant know money was proceeds of unlawful activity); *United States v. Hardwell*, 80 F.3d 1471, 1483 (10th Cir. 1996) (subsequent history omitted) (holding that the requirement that money be proceeds of illegal activity does not require government to trace money to particular illegal transaction); *United States v. Grey*, 56 F.3d 1219, 1223-26 (10th Cir. 1995) (finding that evidence failed to show transaction had even minimal effect on interstate commerce): *United States v. Kunzman*, 54 F.3d 1522, 1527 (10th Cir. 1995) (finding that transaction involving financial institution insured by FDIC meets interstate commerce requirement); *United States v. Torres*, 53 F.3d 1129, 1138-39 (10th Cir. 1995) (holding that evidence failed to show that use of proceeds of unlawful activity was intended to promote further unlawful activity); *see also United States v. Allen*, 129 F.3d 1159, 1163 (10th Cir. 1997) (deciding under 18 U.S.C. §1957, a "sister statute" of 18 U.S.C. §1956, that the "effect on interstate commerce" requirement is an essential element of the offense that must be found by the jury).

Use Note

This instruction applies to 18 U.S.C. §1956(a)(1)(A)(i), a commonly charged subsection of §1956. If another subsection is charged, the instruction should be modified as appropriate.

Most of the definitions come from the statute itself, 18 U.S.C. §1956(c). Portions of a definition that have no application in the case should be deleted. In addition to the definitions included in the instruction above, the statutory definitions of "transaction," "monetary instrument" and "financial institution," see 18 U.S.C. §§1956(c)(3,5, and 6), should be included if relevant.

If an effect on foreign, in addition to or rather than, interstate commerce is involved, a definition of foreign commerce should be given. *See* Instructions 1.39 and 1.39.1.

2.73.1

MONEY LAUNDERING
CONCEALING ILLEGAL PROCEEDS
18 U.S.C. § 1956(a)(1)(B)(i)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1956(a)(1)(B)(i).

This law makes it a crime knowingly to conceal or disguise the nature, location, source, ownership, or control of proceeds of specified unlawful activity.

To find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant [conducted] [attempted to conduct] a financial transaction;

Second: the financial transaction involved the proceeds of [specify unlawful activity from 18 U.S.C. §1956(c)(7)];

Third: the defendant knew that the property involved in the [financial transaction] [attempted financial transaction] represented the proceeds of some form of unlawful activity; and

Fourth: the defendant [conducted] [attempted to conduct] the financial transaction knowing that it was designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of unlawful activity.

The term "conducts" includes initiating, concluding, or participating in initiating or concluding, a transaction.

The term "financial transaction" means [select from the following as appropriate]:

(A) a transaction involving the use of a financial institution that is engaged in, or the activities of which affect, interstate commerce in any way or degree; or

(B) a transaction that in any way or degree affects interstate commerce, and that involves:

(i) the movement of funds by wire or other means; or

(ii) one or more monetary instruments; or

(iii) the transfer of title to any real property, vehicle, vessel, or aircraft.

The term "proceeds" means any property derived from or obtained or retained, directly or indirectly, through specified unlawful activity, including the gross receipts of such activity.

"Interstate commerce" means commerce or travel between the states, territories or possessions of the United States, including the District of Columbia. It is not necessary that the defendant have intended or anticipated an effect on interstate commerce. All that is necessary is that the natural and probable consequence of the acts the defendant took would be to affect interstate commerce.

Comment

For discussion of the elements of a violation of 18 U.S.C. §1956(a)(1)(B)(i), *see United States v. Shepard*, 396 F.3d 1116 (10th Cir. 2005) (discussing concealment element); *United States v. Anderson*, 189 F.3d 1201, 1208-09 (10th Cir. 1999) (evidence failed to show transaction was designed to conceal source of proceeds; §1956(a)(1)(B)(i) is a money laundering statute, not a "money spending" statute); *United States v. Contreras*, 108 F.3d 1255, 1264-65 (10th Cir. 1997) (nonexhaustive list of factors that can assist in distinguishing money laundering from "money spending" under §1956(a)(1)(B)(i) includes statements by defendant probative of intent to conceal, unusual secrecy surrounding transaction, structuring transaction to avoid attention, depositing illegal profits in the bank account of a legitimate business, highly irregular features of the transaction, using third parties to conceal the real owner, a series of unusual financial moves culminating in the transaction, and expert testimony on practices of criminals); *United States v. Pretty*, 98 F.3d 1213, 1220 (10th Cir. 1996) (under §1956(a)(1)(B)(i), underlying crime need not be complete before money laundering can occur); *United States v. Salcido*, 33 F.3d 1244, 1246 (10th Cir. 1994) (mere possession and transportation of illegal proceeds does not constitute money laundering under §1956(a)(1)(B)(i); there must be evidence that defendant's possession or transportation of illegal proceeds was designed to conceal nature, location, source, ownership or control of proceeds); *United States v. Dimeck*, 24 F.3d 1239, 1246 (10th Cir. 1994) (government failed to prove violation of §1956(a)(1)(B)(i) where evidence that defendant acted as courier of drug proceeds failed to prove design to conceal nature, location, source, ownership or control of proceeds); *United States v. Garcia-Emanuel*, 14 F.3d 1469, 1473-76 (10th Cir. 1994) (discussion of "design" element of §1956(a)(l)(B)(i)); *United States v. Lovett*, 964 F.2d 1029, 1034 (10th Cir. 1992) (§1956(a)(1)(B)(i) is not aimed solely at transactions designed to conceal the identity of the participants in a financial transaction; rather the statute is aimed at

transactions designed to conceal in any manner the nature, location, source, ownership or control of illegal proceeds).

In *United States v. Santos*, 553 U.S. 507 (2008), the Court construed the term "proceeds" in the context of a different subsection of the statute, §1956(a)(1)(A)(i). The Court held that "proceeds" means profits, not gross receipts, at least when the specified unlawful activity is running an illegal gambling operation. In legislation that took effect May 20, 2009, however, Congress amended §1956 to define proceeds as including gross receipts. 18 U.S.C. §1956(c)(9).

For discussion of the "concealment" element in the context of a different subsection of the statute, §1956(a)(2)(B)(i), *see Cuellar v. United States*, 553 U.S. 550 (2008).

Use Note

This instruction applies to 18 U.S.C. §1956(a)(1)(B)(i), a commonly charged subsection of §1956. If another subsection is charged, the instruction should be modified as appropriate.

Most of the definitions come from the statute itself. Portions of a definition that have no application in the case should be deleted. In addition to the definitions included in the instruction above, the statutory definitions of "transaction," "monetary instrument" and "financial institution," *see* 18 U.S.C. §1956(c)(3, 5, and 6), should be included if relevant.

If an effect on foreign commerce, in addition to or rather than, interstate commerce is involved, a definition of foreign commerce should be given. *See* Instructions 1.39 and 1.39.1.

2.73.2

MONEY LAUNDERING "STING"
CONCEALING PURPORTED PROCEEDS OF ILLEGAL ACTIVITY
18 U.S.C. § 1956(a)(3)(B)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1956(a)(3)(B).

This law makes it a crime to knowingly use [what is represented to be the proceeds of specified unlawful activity] [what is represented to be property used to conduct or facilitate specified unlawful activity] to conceal or disguise the nature, location, source, ownership or control of the property believed to be the proceeds of specified unlawful activity.

To find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant [conducted] [attempted to conduct] a financial transaction;

Second: the financial transaction involved property that was represented by a [law enforcement officer] [person acting at the direction of, or with the approval of, an agent of the [specify agency from 18 U.S.C. §1956(e)]] to be [the proceeds of specified unlawful activity] [property used to conduct or facilitate specified unlawful activity];

Third: the financial transaction was believed by the defendant to be [the proceeds of [specify unlawful activity from 18 U.S.C. §1956(c)(7)]] [property used to conduct or facilitate [specify unlawful activity from 18 U.S.C. §1956(c)(7)]]; and

Fourth: the defendant conducted the [financial transaction] [attempted financial transaction] with the intent to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of [specify unlawful activity from 18 U.S.C. §1956(c)(7)].

The term "conducts" includes initiating, concluding, or participating in initiating or concluding, a transaction.

The term "financial transaction" means [select from the following as appropriate]:

(A) a transaction involving the use of a financial institution that is engaged in, or the activities of which affect, interstate commerce in any way or degree; or

(B) a transaction that in any way or degree affects interstate commerce, and that involves:

(i) the movement of funds by wire or other means; or

(ii) one or more monetary instruments; or

(iii) the transfer of title to any real property, vehicle, vessel, or aircraft.

The term "proceeds" means any property derived from or obtained or retained, directly or indirectly, through specified unlawful activity, including the gross receipts of such activity.

"Interstate commerce" means commerce or travel between the states, territories or possessions of the United States, including the District of Columbia. It is not necessary that the defendant have intended or anticipated an effect on interstate commerce. All that is necessary is that the natural and probable consequence of the acts the defendant took would be to affect interstate commerce.

Comment

For discussion of the elements of a violation of 18 U.S.C. §1956(a)(3)(B), *see United States v. Wolny*, 133 F.3d 758, 767 (10th Cir. 1998) (district court correctly instructed jury under §1956(a)(3)(B) that defendant must have believed representation that money was the proceeds of illegal activity). *United States v. Arditti*, 955 F.2d 331, 338-41 (5th Cir. 1992) (evidence sufficient to show that undercover agent represented, and defendant understood, funds to be the proceeds of illegal activity; jury was sufficiently instructed on mens rea element of the offense).

In *United States v. Santos*, 553 U.S. 507 (2008), the Court construed the term "proceeds" in the context of a different subsection of the statute, §1956(a)(1)(A)(i). The Court held that "proceeds" means profits, not gross receipts, at least when the specified unlawful activity is running an illegal gambling operation. In legislation that took effect May 20, 2009, however, Congress amended §1956 to define proceeds as including gross receipts. 18 U.S.C. §1956(c)(9).

For discussion of the "concealment" element in the context of a different subsection, §1956(a)(2)(B)(i), *see Cuellar v. United States*, 550 U.S. 550 (2008).

Use Note

This instruction applies to money laundering charges brought as the result of a government "sting" operation. It covers subsection (B) of section 1956(a)(3). The word "sting" is included in the title of the instruction to aid the court and counsel in locating the instruction, but should be removed before submission of the instruction to the jury.

2.74

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT
18 U.S.C. § 1962(a) (Introductory Paragraph)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1962(a).

This law makes it a crime for any person who has received any income derived [from a pattern of racketeering activity] [through collection of an unlawful debt] to use or invest that income in acquiring any interest in or establishing or operating any enterprise engaged in or affecting interstate or foreign commerce.

Specifically, the defendant is accused of [read or summarize the indictment]

Use Note

Portions of this subsection probably will not apply. Only the relevant portions should be read to the jury. What is appropriate will differ from case to case.

Regarding RICO cases generally, *see Boyle v. United States*, 129 S. Ct. 2237 (2009).

2.74.1

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

Prejudice from the Word "Racketeering"

The word "racketeering" has certain implications in our society. Use of that term in this statute and in this courtroom should not be regarded as having anything to do with your determination of whether the guilt of this defendant has been proven. The term is only a term used by Congress to describe the statute.

Comment

Because of the pervasive use of the word "racketeering" in both the statute and in charging a RICO jury, this instruction is recommended in order to minimize the potential prejudice from the sinister implications of the word. It is especially important in contexts where the defendant has no obvious connection with what the public would conceive to be organized crime or organized crime activity.

Use Note

Use in all RICO cases.

2.74.2

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT—"SECTION A"

Elements of the Offense

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: an enterprise existed;

Second: the enterprise engaged in or had some effect upon interstate commerce;

Third: the defendant derived income from a pattern of racketeering activity; and

Fourth: some part of that income was used in acquiring an interest in or in operating the enterprise.

Comment

Under the language of section 1962(a), a defendant could derive income "from a pattern of racketeering activity" without ever having committed a racketeering act, without knowing of the commission of a racketeering act, or without even knowing that the income is derived from racketeering activity. The statute has not been interpreted so broadly, and this is reflected in the elements outlined above.

The elements relating to the enterprise and interstate commerce are separated for purposes of clarity in RICO cases, although they are treated as one element for textual reasons in 18 U.S.C. section 1959 cases.

Use Note

Please refer to Instruction 2.74.

2.74.3

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT—"SECTION A"

First Element—The Enterprise

The first element that the government must prove beyond a reasonable doubt is that an "enterprise" existed as alleged in the indictment.

The government has charged the following in the indictment as constituting the enterprise: [Insert the counts or allegations which relate to the enterprise.]

An enterprise includes any legal entity, such as a partnership, corporation, or association, and some other entities as I shall define them for you.

If you find that this was, in fact, a legal entity such as a partnership, corporation or association, then you may find that an enterprise existed.

An enterprise also includes a group of people who associated together for a common purpose of engaging in a course of conduct over a period of time. This group of people does not have to be a legally recognized entity, such as a partnership or corporation. This group may be organized for a legitimate and lawful purpose, or it may be organized for an unlawful purpose. This group of people must have (1) a common purpose; and (2) an ongoing organization, either formal or informal; and (3) personnel who function as a continuing unit.

If you find these three elements, then you may find that an enterprise existed.

Comment

The existence of the enterprise is an essential element of the offense which must be charged to the jury. Section 1961(4) defines "enterprise" to include two distinct types of enterprise: legal entities and associations-in-fact. This distinction is drawn in the instruction. When only a "legal entity" enterprise is charged in the indictment, only that part of the instruction should be read; when only an association-in-fact enterprise is charged, only that part of the instruction should be read.

Under section 1961(4), the legal entity type of enterprise is

self-explanatory: " 'enterprise' includes any individual, partnership, corporation, association, or other legal entity." "Legal entity" enterprises have included, besides partnerships and corporations, sole proprietorships, unions and their benefit funds, and a variety of governmental entities. It also applies to foreign corporations or other foreign entities.

The courts are agreed that an enterprise may be comprised of two or more legal entities. There is a textual argument to the contrary, based on the language of section 1961(4) that an enterprise includes a "legal entity . . . or group of individuals," thereby excluding a group of entities. The courts have uniformly rejected this argument on the ground that the use of the word "includes" means that the list is not exhaustive.

The association-in-fact enterprise is defined in section 1961(4) as "any union or group of individuals associated in fact although not a legal entity." In *United States v. Turkette*, 452 U.S. 576, 583 (1981), the Supreme Court defined the association-in-fact enterprise as

> an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct . . . . The [enterprise] is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.

One problem that arises from *Turkette* is determining the extent to which the defendant's association with others arising from the joint commission of the predicate acts can be construed as an association-in-fact enterprise. In other words, what is it that distinguishes a simple conspiracy to commit a series of predicate acts from an association-in-fact RICO enterprise? In *Turkette*, the Supreme Court gave a partial answer to this question, suggesting that the enterprise must have an organization with a structure and goals separate from the predicate acts themselves, although proof of the pattern of racketeering and enterprise elements may "coalesce." *Id.*

In *United States v. Sanders*, 928 F.2d 940, 943-44 (10th Cir. 1991), the Tenth Circuit stated that an enterprise requires (1) an ongoing organization with a decision-making framework or mechanism for controlling the group, (2) various associates that function as a continuing unit, and (3) an enterprise separate from the pattern of racketeering activity. "The issues of ongoing organization, continuing membership and an enterprise existing apart from the underlying pattern of racketeering are factual questions for the jury." *Id.* at 943.

The courts of appeals have focused on the structure and organization of the group as the critical defining element of an enterprise. For example, the Seventh Circuit has stated that an enterprise is "an ongoing structure of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making." *United States v. Torres*, 191 F.3d 799, 805 (7th Cir. 1999) (quotation omitted). Thus, "continuity of an informal enterprise and the differentiation among roles can provide the requisite 'structure' to prove the elements of 'enterprise.'" *Id.* at

806 (quotation omitted). Similarly, the Eighth Circuit has stated that the hallmark of an enterprise is "a pattern of roles and a continuing system of authority." *United States v. Davidson*, 122 F.3d 531, 535 (8th Cir. 1997) (quotation omitted).

Most circuits have interpreted *Turkette* to mean that from proof of the defendant's association with others to commit the predicate acts of racketeering, a jury may infer continuity, organization, and common purpose, and so find the existence of an association-in-fact type enterprise. Accordingly, this instruction does not require that the evidence of the pattern of racketeering activity be distinct and independent from the evidence of the enterprise. *See Sanders*, 928 F.2d at 943.

It is not required that the enterprise have a separate purpose apart from the intent to commit the predicate acts as long as it possesses the requisite structure which makes it an enterprise. As the Seventh Circuit has pointed out, illegal associations-in-fact, such as drug trafficking rings, have no separate purpose other than the commission of the underlying criminal acts; if a separate purpose were required, RICO would not apply to the associations-in-fact at which RICO is clearly aimed. *United States v. Rogers*, 89 F.3d 1326, 1336-37 (7th Cir. 1996).

An association-in-fact enterprise may include any collective entity, including purely illegal criminal associations. There is no requirement that the enterprise have any economic purpose, even in cases under sections 1962(a) and (b) where the enterprise is the victim of the criminal activity. In *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 259 (1994), the Supreme Court rejected the economic purpose requirement, stating that while the enterprise "may very well be a 'profit-seeking' entity . . . the statutory language in subsections (a) and (b) does not mandate that the enterprise be a 'profit-seeking' entity; it simply requires that the enterprise be an entity that was acquired through illegal activity or the money generated from illegal activity."

The last paragraph of the above charge is responsive to the Supreme Court's characterization of an enterprise as a "continuing unit." *Turkette*, 452 U.S. at 583. Because the nature of the relationship of the enterprise to the other elements of the crime is different in section 1962(c) than it is in sections 1962(a) and 1962(b), this portion of the charge is required only when charging on a violation of section 1962(c).

In regard to all of these matters, see the United States Supreme Court's explication of *Turkette* in *Boyle v. United States*, 129 S. Ct. 2237 (2009).

2.74.4

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT—"SECTION A"

Second Element—Effect on Interstate Commerce

The second element the government must prove beyond a reasonable doubt is that the enterprise was engaged in or had an effect upon interstate (or foreign) commerce.

Interstate commerce includes the movement of goods, services, money and individuals between states (or between states and the District of Columbia or a U.S. Territory or possession or between the United States and a foreign state or nation).

The government must prove that the enterprise engaged in interstate commerce or that its activities affected interstate commerce in any way, no matter how minimal. It is not necessary to prove that the acts of any particular defendant affected interstate commerce as long as the acts of the enterprise had such effect. Finally, the government is not required to prove that any defendant knew he was affecting interstate commerce.

Comment

There is some difference between the interstate commerce element in section 1962(c) cases as opposed to cases brought under subsections (a) and (b) with respect to proof that the predicate racketeering activity affected interstate commerce. It is clear that proof that the racketeering activity affected interstate commerce is never *required* in any RICO case. In cases involving subsections (a) and (b), it is the enterprise which must have an effect on interstate commerce because it is the enterprise that is the target of the criminal activities. *See National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 258-59 (1994) (discussing difference in function of the term "enterprise" in sections 1962(a) and (b) vs. section 1962(c)). In section 1962(c) cases, however, the enterprise is the vehicle for the commission of the predicate crimes, so proof that any of the racketeering activities affected interstate commerce is sufficient by itself to establish that the enterprise affected interstate commerce. Thus, in section 1962(c) cases, proof that either the enterprise itself or the predicate criminal activity affected interstate commerce satisfies this element. The same act can satisfy the interstate impact requirement and also serve as one of the predicate acts in the pattern of racketeering activity.

As indicated in the instruction, although the government has the burden, even a minimal effect on interstate commerce will do. *See United*

States v. Farmer, 924 F.2d 647, 651 (7th Cir. 1991). Indeed, even a potential or probable effect is sufficient. The courts are agreed that this satisfies constitutional requirements. There is also no requirement that the activity affecting interstate commerce be legal.

Third Element—Derivation of Income Through a Pattern of Racketeering Activity

The third element of the offense the government must prove beyond a reasonable doubt is that the defendant derived income from a pattern of racketeering activity.

To derive income from a pattern of racketeering activity means that the defendant has earned some income through the commission of at least two racketeering acts sufficiently related to constitute a pattern.

[That racketeering activity may consist of state offenses as well as federal offenses.]

The government has charged the defendant with committing the following racketeering acts: [insert charged racketeering acts from the indictment]. You must find that the defendant committed two of these acts within ten years of each other.

In order for the state offense of [insert name of state offense] to be considered as a racketeering act, the government must prove to you beyond a reasonable doubt that the defendant committed that offense as defined by state law. The elements of that offense are as follows:

[List elements of state law offense.]

To prove that the acts constituted a pattern of racketeering activity, the government must prove that the acts of racketeering are related to each other and that they pose a threat of continued criminal activity. It is not sufficient for the government to prove only that the defendant committed two of the racketeering acts I have just described. A series of disconnected acts or crimes does not constitute a pattern of racketeering activity. Neither does it amount to, or pose a threat of, continued racketeering activity.

To prove that the acts of racketeering are related, the government must prove that the acts had the same or similar purposes, results, participants, victims, or methods of commission, or that they

are otherwise interrelated by specific characteristics and are not merely isolated events.

To prove that the racketeering acts pose a threat of continued racketeering activity, the government must establish that (1) the acts are part of a long-term association that exists for criminal purposes; or (2) the acts are a regular way of conducting the defendant's ongoing legitimate business or enterprise.

Comment

Section 1962(a) pertains to derivation of income from a pattern of racketeering activity. *Switzer v. Coan*, 261 F.3d 985, 992 n.15 (10th Cir. 2001). The government must prove that the predicate acts are related and that they pose a threat of continuing activity. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989); *Duran v. Carris*, 238 F.3d 1268, 1271 (10th Cir. 2001); *see also Boone v. Carlsbad Bancorporation, Inc.*, 972 F.2d 1545, 1555-56 (10th Cir. 1992) (discussing continuity element); *Sil-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1516 (10th Cir. 1990) (focus is on long-term criminal activity).

In *United States v. Cauble*, 706 F.2d 1322, 1344 (5th Cir. 1983), the court stated that failure to define the word "income" in charging the jury is not plain error. This is so because "income" is a word of common usage and meaning, and because whether something is income generally is not disputed. Only the source of income, or its receipt, is usually disputed.

In *United States v. Knight*, 659 F.3d 1285, 1292 (10th Cir. 2011), the Circuit noted that although neither it nor the Supreme Court requires a specific test to determine whether predicate RICO acts are related, "the more prudent course for district courts is to continue to adhere to the Tenth Circuit pattern jury instructions when defining RICO elements."

Use Note

The trial courts are encouraged to modify paragraphs three and five to fit the cases involving state offense elements.

2.74.6

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT—"SECTION A"

Third Element—Unanimity on Racketeering Acts

The indictment charges the defendant with commission of [insert number alleged in the indictment] racketeering acts. As I just instructed you, the government must prove beyond a reasonable doubt that at least two of the racketeering acts recited in the indictment were committed by the defendant within the prescribed time.

You may not find the defendant guilty unless you all agree unanimously that at least two particular racketeering acts were committed by the defendant. It is not enough that you all believe that two racketeering acts were committed. That is, you cannot find the defendant guilty if some of you think that only racketeering acts A and B were committed by the defendant and the rest of you think that only acts C and D were committed by the defendant. There must be at least two specific racketeering acts that all of you believe were committed by the defendant in order to convict the defendant.

Comment

See United States v. Stewart, 185 F.3d 112, 127 (3d Cir. 1999) (noting with approval such a unanimity instruction).

In *United States v. Randall*, 661 F.3d 1292, 1299 (10th Cir. 2011), the Circuit held "that for a charge of RICO conspiracy, a jury need only be unanimous as to the types of predicate racketeering acts that the defendant agreed to commit, not to the specific predicate acts themselves."

2.74.7

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT—"SECTION A"

Fourth Element—Interest in the Enterprise

The fourth element which the government must prove beyond a reasonable doubt is that the defendant used, directly or indirectly, any part of the income derived from a pattern of racketeering activity to acquire an interest in, to establish, or to operate the enterprise.

This element is satisfied if you find that the defendant invested income from racketeering activities in the enterprise, or if you find that he used such income to establish or operate the enterprise.

Comment

In *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1149 (10th Cir. 1989), the court observed that "[s]ignificantly, the statute [section 1962(a)] does not state that it is unlawful to *receive* racketeering income; rather, . . . the statute prohibits a person who *has received* such income *from using or investing it* in the proscribed manner." (Emphasis in original).

Section 1962(a) itself recognizes a possible de minimis exception for investments involving securities. In the appropriate case, the relevant portion of section 1962(a) should be read and explained to the jury.

The operative terms in section 1962(a), "use or invest" and "any part of such income" have been characterized as "expansive, not restrictive" and "deliberately broad." *United States v. Vogt*, 910 F.2d 1184, 1194 (4th Cir. 1990). Thus there is no strict tracing requirement applicable to this element. *United States v. Cauble*, 706 F.2d 1322, 1342 (5th Cir. 1983). The commingling of funds derived from racketeering activity with clean or legitimate funds, followed by the investment of these combined funds in an enterprise, is a violation of section 1962(a). *United States v. McNary*, 620 F.2d 621, 628-29 (7th Cir. 1980).

A section 1962(a) offense is only complete when funds derived from predicate racketeering activity are invested in the enterprise, so the statute of limitations runs from the last such investment. This differs from section 1962(c), where the limitations period begins to run with the last act of racketeering.

2.75

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT
18 U.S.C. § 1962(b) (Introductory Paragraph)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1962(b).

This law makes it a crime for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Specifically, the defendant is accused of [insert summary of the indictment]

Comment

Subsection (b) of section 1962 has been used very rarely by prosecutors. In reading this subsection of the statute to the jury only the relevant parts should be read. In cases not involving collection of an unlawful debt, reference to such conduct should be omitted. "Unlawful debt" is defined in 18 U.S.C. section 1961(6).

Refer to Instruction 2.74.

2.75.1
RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT—"SECTION B"

Elements of Offense

To find the defendant guilty of violating section 1962(b), you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: an enterprise existed;

Second: the enterprise engaged in or had some effect upon interstate commerce;

Third: the defendant engaged in a pattern of racketeering activity; and

Fourth: the defendant acquired, controlled or maintained an interest in the enterprise through the pattern of racketeering activity.

Comment

A violation of section 1962(b) requires that a RICO defendant acquire or maintain an interest in, or control of, an enterprise through (or by way of) the pattern of racketeering activity. The elements relating to the enterprise and interstate commerce are separated for purposes of clarity in RICO cases, although they are treated as one element for textual reasons in 18 U.S.C. section 1959 cases.

2.75.2

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT—"SECTION B"

First Element—The Enterprise

Use Note

Use Instruction 2.74.3 to define this element.

2.75.3

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT—"SECTION B"

Second Element—Effect on Interstate Commerce

Use Note

Use Instruction 2.74.4 to define this element.

2.75.4

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT—"SECTION B"

Third Element—Engaging in a Pattern of Racketeering Activity

The third element of the offense that the government must prove beyond a reasonable doubt is that the defendant engaged in a pattern of racketeering activity.

[That racketeering activity may consist of state offenses as well as federal offenses.]

The government has charged the defendant with committing the following racketeering acts: [insert the charged racketeering acts from the indictment]. You must find that the defendant committed two of these acts within ten years of each other.

[In order for the state offense of [insert name of state offense] to be considered racketeering activity, the government must prove to you beyond a reasonable doubt that the defendant committed that offense as defined by state law. The elements of that offense are as follows:

[List elements of state law offense.]

To prove that the acts constituted a pattern of racketeering activity, the government must prove that the acts of racketeering are related to the enterprise and to each other and that they pose a threat of continued criminal activity. It is not sufficient for the government to prove only that the defendant committed two of the racketeering acts I have just described. A series of disconnected acts does not constitute a pattern, and a series of disconnected crimes does not constitute a pattern of racketeering activity, nor do they amount to or pose a threat of continued racketeering activity.

To prove that the acts of racketeering are related, the government must prove that the acts had the same or similar purposes, results, participants, victims, or methods of commission, or that they are otherwise interrelated by distinguishing characteristics and are not isolated events.

To prove that the racketeering acts pose a threat of continued racketeering activity, the government must establish that (1) the acts are part of a long-term association that exists for criminal purposes; or

(2) the acts are a regular way of conducting the defendant's ongoing legitimate business; or (3) the acts are a regular way of conducting or participating in an ongoing and legitimate RICO enterprise.

Comment

In *United States v. Carrillo*, 229 F.3d 177, 183-85 (2d Cir. 2000), the Second Circuit, questioning the validity of prior circuit authority, stated that when a violation of state law is charged as a racketeering act, the jury should be charged on the specific elements of the state law offense. The court pointed out that in a variety of circumstances, the failure to include this charge could result in the jury finding the racketeering act to have been committed even though the defendant was not guilty of the offense under state law. *Id. See also United States v. Marino*, 277 F.3d 11, 29-31 (1st Cir. 2002) (discussing whether elements need be included). Accordingly, the recommended charge requires such an instruction.

18 U.S.C. section 1961(5) defines "pattern of racketeering activity." In accordance with this definition, the jury must find that the defendant committed at least two acts of racketeering. Two of the acts must have occurred within ten years of each other.

Prior to the Supreme Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), the courts paid little attention to the pattern requirement beyond requiring proof of two predicate acts of racketeering, and the prevailing view was that the predicate racketeering acts did not have to be meaningfully related. This view was repudiated by the Court's observation in *Sedima* that "while two acts are necessary, they may not be sufficient," and that "[t]he legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern," clearly indicating that some meaningful relationship between (or among) the predicate racketeering acts is required. 473 U.S. at 497 n.14. *Sedima* indicated that it was "*continuity plus relationship*" between the predicates which combined to produce a pattern of racketeering activity. *Id.*

The definition of relatedness adopted in the recommended instruction is that the acts of racketeering are related, the government must prove that the acts had the same or similar purposes, results, participants, victims, or methods of commission, or that they are otherwise interrelated by distinguishing characteristics and are not isolated events. This definition has been widely approved and accepted by the courts. For Tenth Circuit cases discussing the pattern requirement, *see Condict v. Condict*, 826 F.2d 923, 927-29 (10th Cir. 1987), and *Boone v. Carlsbad Bancorporation, Inc.*, 972 F.2d 1545, 1555-56 (10th Cir. 1992).

Section 1962(c) also applies to the collection of an unlawful debt. In such cases, the pattern requirement does not apply, so proof of one collection is sufficient.

Use Note

When charging the jury on this element, it is not necessary to read the statutory definition of what constitutes a racketeering act, a term that is defined in 18 U.S.C. section 1961(1) with an extensive list of qualifying crimes. Rather, the court should read the specific crimes charged as racketeering acts in the indictment. Whether an alleged racketeering act comes within the definition of 18 U.S.C. section 1961(1) is a question of law for the court. The only question for the jury is the factual one whether the alleged racketeering acts were in fact committed by the defendant.

2.75.5

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT—"SECTION B"

Unanimity on Racketeering Acts

Use Note

Use Instruction 2.74.6.

2.75.6

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT—"SECTION B"

Fourth Element—Acquisition of an Interest in or Control of the Enterprise

The fourth element of the offense that the government must prove beyond a reasonable doubt is that the defendant acquired or maintained an interest in, or control of, the enterprise through the pattern of racketeering activity.

To satisfy this element, the government must prove not only that the defendant had some interest in or control over the enterprise, but also that this interest or control was associated with or connected to the pattern of racketeering activity.

Comment

In *United States v. Mandel*, 415 F. Supp. 997, 1019-20 (D. Md. 1976), *rev'd on other grounds*, 591 F.2d 1347 (4th Cir. 1979), *rev'd en banc*, 602 F.2d 653, 654 (4th Cir. 1979), the court declined to construe the word "through" in section 1962(b) narrowly. The court rejected the contention that "through" meant "directly caused" or "was the proximate cause of." *Id.* at 1020. Instead the court found that Congress intended the term to have a broader meaning. The court did not adopt a specific definition, however. *Id.*

There must be a nexus between control of the enterprise and the pattern of racketeering activity. *Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n*, 176 F.3d 315, 329 (6th Cir. 1999).

2.76

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT
18 U.S.C. § 1962(c) (Introductory Paragraph)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 1962(c).

This law makes it a crime for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to participate in the conduct of such enterprise's affairs through [a pattern of racketeering activity] [collection of unlawful debt].

Specifically, the defendant is accused of [insert summary of indictment].

Use Note

Refer to Instruction 2.74.1.

2.76.1
RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT—"SECTION C"

Elements of the Offense

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: an enterprise existed as alleged in the indictment;

Second: the enterprise affected interstate or foreign commerce;

Third: the defendant was associated with or employed by the enterprise;

Fourth: the defendant engaged in a pattern of racketeering activity (or the collection of an unlawful debt); and

Fifth: the defendant conducted, or participated in the conduct of, the enterprise [through that pattern of racketeering activity] [collection of an unlawful debt].

Comment

In *Salinas v. United States*, 522 U.S. 52, 62 (1997), the Supreme Court stated that "[t]he elements predominant in a [section 1962(c)] violation are: (1) the conduct (2) of an enterprise (3) through a pattern of racketeering activity." Since the Court was clearly not intending to delineate the elements precisely or to create a formulation that should be charged to the jury, that language is not used here.

Under section 1962(c), the person and the enterprise engaged in the racketeering activities must be different entities. *Bd. of County Comm'rs v. Liberty Group*, 965 F.2d 879, 885 (10th Cir. 1992); *see also Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161-62 (2001).

Several formulations of a section 1962(c) offense are in use among the courts. "To state a claim under RICO's section 1962(c), plaintiffs must allege four statutory elements: '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'" *Boone v. Carlsbad Bancorporation, Inc.*, 972 F.2d 1545, 1555 n.7 (10th Cir. 1992) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985)).

2.76.2

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT—"SECTION C"

First Element—The Enterprise

Comment

See Comment to 2.74.3.

Use Note

Use Instruction 2.74.3 and add the following paragraph at the end:

If you find that this enterprise existed, you must also determine whether this enterprise continued in an essentially unchanged form during substantially the entire period charged in the indictment. This does not mean that everyone involved has to be the same, but the core of the enterprise has to be the same throughout.

2.76.3

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT—"SECTION C"

Second Element—Effect on Interstate Commerce

Comment

There is some difference between the interstate commerce element in section 1962(c) cases as opposed to cases brought under subsections (a) and (b) with respect to proof that the predicate racketeering activity affected interstate commerce. It is clear that proof that the "racketeering activity" affected interstate commerce is never required in any RICO case. In cases involving subsections (a) and (b), it is "the enterprise" which must have an effect on interstate commerce because it is "the enterprise" that is the target of the criminal activities. In section 1962(c) cases, however, "the enterprise" is the vehicle for the commission of the predicate crimes, so proof that any of the "racketeering activities" affected interstate commerce is sufficient by itself to establish that "the enterprise" affected interstate commerce. Thus, in section 1962(c) cases, proof that either "the enterprise" itself or the predicate criminal activity affected interstate commerce satisfies this element. The same act can satisfy the interstate impact requirement and also serve as one of the predicate acts in the pattern of racketeering activity.

As indicated in the instruction, even a minimal effect on interstate commerce will do. Indeed, even a potential or probable effect is sufficient. The courts are agreed that this satisfies constitutional requirements. There is also no requirement that the activity affecting interstate commerce be legal.

Use Note

Use 2.74.4 to define this element, but include, as appropriate, after the first sentence of the third paragraph the following: "It does not have to prove that the 'racketeering activity' affected interstate commerce, although proof that it did is sufficient to satisfy the requirement that 'the enterprise' engaged in or affected interstate commerce."

2.76.4

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT—"SECTION C"

Third Element—Association with the Enterprise

The third element that the government must prove beyond a reasonable doubt is that the defendant was associated with or employed by the enterprise.

It is not required that the defendant have been employed by or associated with the enterprise for the entire time that the enterprise existed. It *is* required, however, that the government prove, beyond a reasonable doubt, that at *some* time during the period indicated in the indictment, the defendant in question was employed by or associated with the enterprise.

A person cannot be associated with or employed by an enterprise if he does not know of the enterprise's existence or the nature of its activities. Thus, in order to prove this element, the government must prove beyond a reasonable doubt that the defendant was connected to the enterprise in some meaningful way, and that the defendant knew of the existence of the enterprise and of the general nature of its activities.

Comment

Until recently, the relevant case law was barren of any discussion of this element. It appears that this element is generally not contested, or at least not raised on appeal. This is not surprising in view of the fourth and fifth elements. It is logical to conclude that if a defendant participated in the affairs of the enterprise through a pattern of racketeering activity the defendant was associated with that enterprise. This would be true even if the defendant was not "employed" by the enterprise.

Nevertheless, increased attention to this element may be justified because it presents the most fitting justification for developing a *mens rea* requirement, in a prosecution under section 1962(c), separate and apart from the *mens rea* required to commit the predicate acts. It is difficult to see how a defendant can be found to have been "employed by or associated with" an enterprise the nature and existence of which he was unaware. As one court observed:

> Section 1962(c) expressly applies only to persons "employed by" or "associated with" an enterprise involved in interstate or foreign commerce. These phrases can only be given content in association-in-fact cases by a requirement that the government

> show, at a minimum, that the defendant was aware of the existence of a group of persons, organized into a structure of some sort, and engaged in ongoing activities, which the government can prove falls within the definition of enterprise contained in section 1961(4).

United States v. Castellano, 610 F. Supp. 1359, 1401 (S.D.N.Y. 1985). This element also insures that the enterprise will have some separate existence from the defendant. It is often stated that "the same entity cannot do double duty as both the RICO defendant and the RICO enterprise." *United States v. London*, 66 F.3d 1227, 1244 (1st Cir. 1995) (quotation omitted). This becomes an issue when the defendant is a "one-man operation" because it is impossible for the defendant to be associated with or employed by himself. In those cases, the enterprise must either take some legal form or have other individuals as associates or employees:

> If the one-man band incorporates, it gets some legal protections from the corporate form, such as limited liability; and it is just this sort of legal shield for illegal activity that RICO tries to pierce. A one-man band that does not incorporate, that merely operates as a proprietorship, gains no legal protections from the form in which it has chosen to do business; the man and the proprietorship really are the same entity in law and fact. But if the man has employees or associates, the enterprise is distinct from him, and it then makes no difference . . . what legal form the enterprise takes. The only important thing is that it be either formally (as when there is incorporation) or practically (as when there are other people besides the proprietor working in the organization) separable from the individual.

McCullough v. Suter, 757 F.2d 142, 144 (7th Cir. 1985).

The Seventh Circuit has held in *United States v. Mokol*, 957 F.2d 1410, 1417 (7th Cir. 1992), that the association element does not require the government to prove that a defendant has a "stake or interest in the goals of the enterprise." Instead, a defendant "can associate with the enterprise by conducting business with it, even if in doing so the defendant is *subverting* the enterprise's goals." *United States v. Yonan*, 800 F.2d 164, 167 (7th Cir. 1986). This is clearly correct, for if it were not so, then RICO would not be applicable in any case where a legitimate business or government agency was alleged to be the enterprise.

2.76.5

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT—"SECTION C"

Fourth Element—Engaging in a Pattern of Racketeering Activity

The fourth element that the government must prove beyond a reasonable doubt is that the defendant engaged [in a pattern of racketeering activity] [the collection of an unlawful debt].

[That racketeering activity may consist of state offenses as well as federal offenses.]

The government has charged the defendant with committing the following racketeering acts: [read the charged racketeering acts from the indictment]. You must find that the defendant committed two of these acts within ten years of each other.

In order for the state offense of [insert state offense] to be considered as a racketeering act, the government must prove to you beyond a reasonable doubt that the defendant committed that offense as defined by state law. The elements of that offense are as follows:

[List elements of state law offense.]

To prove that the acts constitute a pattern of racketeering activity, the government must prove that the acts of racketeering are related to each other and that they pose a threat of continued criminal activity. It is not sufficient for the government to prove only that the defendant committed two of the racketeering acts I have just described. A series of disconnected acts does not constitute a pattern, and a series of disconnected crimes does not constitute a pattern of racketeering activity, nor do they amount to or pose a threat of continued racketeering activity.

To prove that the acts of racketeering are related, the government must prove that the acts had the same or similar purposes, results, participants, victims, or methods of commission, or that they are otherwise interrelated by distinguishing characteristics and are not isolated events.

To prove that the racketeering acts pose a threat of continued racketeering activity, the government must establish that (1) the acts are part of a long-term association that exists for criminal purposes; or

(2) the acts are a regular way of conducting the defendant's ongoing legitimate business; or (3) the acts are a regular way of conducting or participating in an ongoing and legitimate RICO enterprise.

Comment

See Comment to Instruction 2.75.4.

2.76.6

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT—"SECTION C"

Unanimity on Racketeering Acts

Use Note

Use Instruction 2.74.6.

2.76.7

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT—"SECTION C"

Fifth Element—Conducting or Participating in the Enterprise Through the Pattern of Racketeering Activity

The fifth and final element that the government must prove beyond a reasonable doubt is that the defendant conducted or participated in the conduct of the enterprise through that [pattern of racketeering activity] [collection of unlawful debt].

To conduct, or participate in the conduct of, the enterprise means that the defendant must have played some part in the operation or management of the enterprise. The government is not required to prove that the defendant was a member of upper management. An enterprise is operated not only by those in upper management, but also by those lower down in the enterprise who act under the direction of upper management.

In addition to proving that the defendant played some part in the operation or management of the enterprise, the government must also prove that there is some meaningful connection between the defendant's illegal acts and the affairs of the enterprise. To satisfy this part of the element, the government must establish either (1) that the defendant's position in the enterprise facilitated his commission of those illegal acts and that the racketeering acts had some impact or effect on the enterprise, or (2) that the acts were in some way related to the affairs of the enterprise, or (3) that the defendant was able to commit the acts by virtue of his position or involvement in the affairs of the enterprise.

Comment

Subsection 1962(c) makes it unlawful to conduct an enterprise through a pattern of racketeering activity. It is thus different from subsections 1962(a) and (b) in that it requires some connection between the pattern of racketeering activity and the enterprise. The extent of the connection required between the defendant and the enterprise and between the racketeering activity and the enterprise has been the subject of considerable discussion in the courts.

In *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993), the Supreme Court settled a conflict among the circuits, holding that the phrase "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs" requires proof that the defendant played some part in the operation or management of the enterprise. In *Reves*, the Court held that an outside

accounting firm did not play any part in the operation or management of a corporation it audited, and so was not liable for RICO civil damages arising from misrepresentations in the corporation's annual audit. *Id.* at 186.

Consistent with other circuits, the Tenth Circuit has indicated that the "operation or management" test should be applied to both insiders and outsiders in determining if a defendant participated in the conduct of the enterprise. *See Bancoklahoma Mortgage Corp. v. Capital Title Co.*, 194 F.3d 1089, 1100-01 (10th Cir. 1999).

With respect to the required relationship between the racketeering acts and the enterprise, the circuits agree that subsection 1962(c) is not satisfied when the commission of the pattern of racketeering activity has no connection or only a fortuitous connection with the enterprise. In *United States v. Dennis*, 458 F. Supp. 197, 198 (E.D. Mo. 1978), for example, the defendant had collected unlawful debts of fellow employees on the premises of his employer, General Motors. The court dismissed the RICO count, holding that the "mere fact" that the unlawful activity took place on the premises of the enterprise, General Motors, did not alone establish that the affairs of the enterprise were conducted through a pattern of racketeering activity. *Id.* at 199.

It should be noted that the courts have rejected a variety of limitations on the required enterprise-pattern-of-racketeering nexus that RICO defendants have urged on them. Consequently, it is now established that the pattern of racketeering activity need not have benefitted the enterprise. Indeed, it may have harmed the enterprise in some way. Similarly, the pattern of racketeering activity need not have affected the "common, everyday affairs of the enterprise." *United States v. Carter*, 721 F.2d 1514, 1527 (11th Cir. 1984), *vacated in part on other grounds by United States v. Lightsey*, 886 F.2d 304 (11th Cir. 1989). The defendant need not have channeled the proceeds from the pattern of racketeering activity back into the enterprise. Nor need the defendant have solidified his position in the enterprise through the commission of the predicate acts.

2.77

BANK ROBBERY
18 U.S.C. § 2113
(Subsections (a) and (d) Alleged in the Same Count)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 2113(a).

This law makes it a crime to [take] [attempt to take] from [a person] [the presence of someone] by [force and violence] [intimidation] any [money] [property] in the possession of a federally insured bank, and in the process of so doing to [assault any person] [put in jeopardy the life of any person] by the use of a dangerous weapon or device.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant intentionally took from [the person] [the presence of the person], [money] [property];

Second: the [money] [property] belonged to or was in the possession of a federally insured bank at the time of the taking;

Third: the defendant took the [money] [property] by means of [force and violence] [intimidation]; and

Fourth: the defendant [assaulted some person] [put some person's life in jeopardy] by the use of a dangerous weapon or device, while engaged in taking the [money] [property].

A "federally insured bank" means any bank with deposits insured by the Federal Deposit Insurance Corporation.

[To take "by means of intimidation" is to say or do something in such a way that a person of ordinary sensibilities would be fearful of bodily harm. It is not necessary to prove that the alleged victim was actually frightened, and neither is it necessary to show that the behavior of the defendant was so violent that it was likely to cause terror, panic, or hysteria. However, a taking would not be by "means of intimidation" if the fear, if any, resulted from the alleged victim's own timidity rather than some intimidating conduct on the part of the defendant. The essence of the offense is the taking of money or property

accompanied by intentional, intimidating behavior on the part of the defendant.]

[An "assault" may be committed without actually striking or injuring another person. An assault occurs whenever one person makes a threat to injure someone else and also has an apparent, present ability to carry out the threat, such as by brandishing or pointing a dangerous weapon or device at the other.]

[A "dangerous weapon or device" includes anything capable of being readily operated or wielded by one person to inflict severe bodily harm or injury upon another person.]

[To "put in jeopardy the life of any person by the use of a dangerous weapon or device" means to expose someone else to a risk of death by the use of a dangerous weapon or device.]

Comment

Richardson v. United States, 526 U.S. 813, 817 (1999), lists the elements of the offense, breaking them down differently than this instruction but including the same information.

Under subsection (d), both the "assault" and the "putting in jeopardy" prongs require the use of a dangerous weapon. *Simpson v. United States*, 435 U.S. 6, 13 n.6 (1978), *superseded by statute on other grounds as recognized in United States v. Gonzales*, 520 U.S. 1, 10 (1997).

The term "dangerous weapon" includes, as a matter of law, an unloaded handgun. *See McLaughlin v. United States*, 476 U.S. 16, 17-18 (1986), and its progeny.

The government must prove the federally insured status of the bank. *United States v. Brunson*, 907 F.2d 117, 118-19 (10th Cir. 1990). A conviction under section 2213(d) requires the government to prove that the defendant (a) "created an apparently dangerous situation, (b) intended to intimidate his victim to a degree greater than the mere use of language, (c) which does, in fact, place his victim in reasonable expectation of death or serious bodily injury." *United States v. Spedalieri*, 910 F.2d 707, 709 (10th Cir. 1990) (quotation omitted). For cases dealing with "intimidation," *see United States v. Valdez*, 158 F.3d 1140, 1141 (10th Cir. 1998), and *United States v. Mitchell*, 113 F.3d 1528, 1530-31 (10th Cir. 1997).

Use Note

The statute creates various methods of committing the offense, i.e., using either force and violence or intimidation, and either assaulting or jeopardizing the life of a person by use of a dangerous weapon. Care must be taken in adapting the instruction to the allegations of the indictment. The

instruction above can be tailored to either element under subsection (a). This instruction also presupposes that the indictment charges a violation of subsections (a) and (d) in the same count. If a subsection (d) violation is not alleged, the fourth element and its corresponding definitions would be deleted. Also, when a violation of subsections (a) and (d) is alleged in one count, the jury should be instructed in an appropriate case that a violation of subsection (a) alone, i.e., the first three elements above, is a lesser included offense of the alleged violation of subsections (a) and (d) combined, i.e., all four elements. *See* Instruction 1.33 on Lesser Included Offense. On the other hand, 18 U.S.C. section 2113(b) is not a lesser included offense of 18 U.S.C. section 2113(a). *Carter v. United States*, 530 U.S. 255, 274 (2000) (distinguishing between the elements of a section 2113(a) offense and a section 2113(b) offense); *United States v. Riggans*, 254 F.3d 1200, 1202 (10th Cir. 2001).

2.78

BANK THEFT
18 U.S.C. § 2113(b)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 2113(b).

This law makes it a crime to take and carry away, with intent to steal, any property or money or any other thing of value exceeding $1,000 belonging to or in the care, custody, control, management, or possession of any federally insured bank.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant took and carried away [money] [property] [a thing of value], [belonging to] [in the care, custody, control, management, or possession of] [insert name of bank];

Second: at that time [insert name of bank] had its deposits insured by the Federal Deposit Insurance Corporation;

Third: the defendant took and carried away such [money] [property] [thing of value] with the intent to steal; and

Fourth: such [money] [property] [thing of value] exceeded $1,000 in value.

Comment

Exclusive possession of a recently stolen check can constitute sufficient evidence of a section 2113(b) violation. *Osborn v. United States*, 391 F.2d 115, 117-18 (10th Cir. 1968).

Carter v. United States, 530 U.S. 255, 262 (2000), held that section 2113(b) requires a specific intent to steal or purloin. Accord *United States v. Riggans*, 254 F.3d 1200, 1202 (10th Cir. 2001).

Bell v. United States, 462 U.S. 356, 360-61 (1983), includes obtaining money or property under false pretenses as a "taking" under section 2113(b) and notes that subsection (b) is not limited to just common law larceny.

Regarding the term "steal," see Instruction 2.31.

18 U.S.C. section 2113(b) is not a lesser included offense of 18 U.S.C. section 2113(a). *Carter*, 530 U.S. at 274 (distinguishing between the elements of a section 2113(a) offense and a section 2113(b) offense). "The primary distinction between bank larceny and bank robbery is that only the latter requires proof that [the defendant] obtained money from the bank 'by force and violence, or by intimidation.'" *United States v. Lajoie*, 942 F.2d 699, 701 (10th Cir. 1991) (quoting section 2113(a)).

If a disputed issue is whether the property stolen has a value of more than $1,000, the court should consider giving a lesser included offense instruction, Instruction 1.33.

2.79

CARJACKING
18 U.S.C. § 2119

The defendant is charged in count ____ with a violation of 18 U.S.C. section 2119.

This law makes it a crime to [take] [attempt to take] from [a person] [the presence of another person] by [force and violence] [intimidation] a motor vehicle that has moved in interstate commerce.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant intentionally [took] [attempted to take] a [describe motor vehicle as in indictment] from [a person] [the presence of another person];

Second: the defendant did so by means of [force and violence] [intimidation];

Third: the motor vehicle had been [transported] [shipped] [received] in [interstate] [foreign] commerce;

[*Fourth:* the defendant intended to cause death or serious bodily injury; and]

[*Fifth:* someone [suffered serious bodily injury] [died] as a result of the crime.]

["Serious bodily injury" means injury that involves a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty].

Comment

This statute contains three separate offenses: carjacking resulting in (1) neither serious bodily injury nor death; (2) serious injury; and (3) death, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict. *See Jones v. United States*, 526 U.S. 227, 251-52 (1999); *United States v. McGuire*, 200 F.3d 668, 673 (10th Cir. 1999) (recognizing the separate elements as identified in *Jones*, but

distinguishing *Jones* because the defendant's sentence was enhanced under the Sentencing Guidelines and not pursuant to the heightened penalties in section 2119).

The Tenth Circuit defines "presence of another" to include situations where the person may be some distance from his vehicle, even inside a building. *United States v. Moore*, 198 F.3d 793, 796-97 (10th Cir. 1999), and holding that vehicle was taken from the presence of another where victim could have prevented the theft of the vehicle had she not been fearful for her life). "A car is stolen from the 'presence' of an individual if the victim [is] sufficiently near to the vehicle for it to be within reach, inspection, or control and, absent threat or intimidation, to be able to maintain control of it . . . . [T]he presence requirement of 18 U.S.C. §2119 does not require that the property be within easy touch so long as the car was close enough for the victim [] to have prevented its taking had fear of violence not caused [him] to hesitate." *United States v. Brown*, 200 F.3d 700, 705 (10th Cir. 1999) (quotations omitted; alterations in original).

The Supreme Court has held that conditional intent is sufficient to satisfy the *mens rea* requirement of intent to cause death or serious bodily injury. *Holloway v. United States*, 526 U.S. 1, 11-12 (1999); *United States v. Malone*, 222 F.3d 1286, 1290-92 (10th Cir. 2000); *United States v. Romero*, 122 F.3d 1334, 1338-39 (10th Cir. 1997) (discussing intent element and holding that "a defendant's conditional 'intent to cause death or serious bodily harm' satisfies the specific intent requirement of section 2119"). In other words,

> [i]n a carjacking case in which the driver surrendered or otherwise lost control over his car without the defendant attempting to inflict, or actually inflicting, serious bodily harm, Congress' inclusion of the intent element requires the to prove beyond a reasonable doubt that the defendant would have at least attempted to seriously harm or kill the driver if that action had been necessary to complete the taking of the car.

Holloway, 526 U.S. at 11-12.

"An intent to permanently deprive a victim of a motor vehicle is not required by the 'taking' element." *United States v. Payne*, 83 F.3d 346, 347 (10th Cir. 1996).

This statute was amended in 1994 to add the specific intent requirement.

Interstate and foreign commerce are defined in Instruction 1.39.

Use Note

The carjacking statute refers to the definition of "serious bodily injury" set forth in 18 U.S.C. section 1365.

If the conduct occurred in the special maritime or territorial jurisdiction of the United States, the definition of "serious bodily injury" should be expanded to include conduct that would constitute sexual abuse or aggravated sexual abuse under 18 U.S.C. sections 2241 and 2242.

Use elements four and five as appropriate, depending on the indictment.

2.80

TRANSPORTATION OF STOLEN VEHICLES
18 U.S.C. § 2312

The defendant is charged in count ____ with violating 18 U.S.C. section 2312.

This law makes it a crime to move [a motor vehicle] [aircraft] that is known to be stolen in [interstate] [foreign] commerce.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the [describe vehicle or aircraft in indictment] was stolen;

Second: the defendant [transported the [vehicle] [aircraft]] [caused the [vehicle] [aircraft] to be transported] in [interstate] [foreign] commerce; and

Third: the defendant knew that the [vehicle] [aircraft] was stolen when it was transported in [interstate] [foreign] commerce.

A [vehicle] [aircraft] is "stolen" if it was taken wrongfully or dishonestly with the intent to deprive the owner, either permanently or temporarily, of the rights and benefits of ownership.

Comment

For discussion of the definition of "stolen," *see United States v. Turley*, 352 U.S. 407 (1957); *United States v. Darrell*, 828 F.2d 644, 649-50 (10th Cir. 1987). Further, the Tenth Circuit has held that the defendant need not intend to permanently deprive the owner of the vehicle for it to be "stolen;" intent to deprive the owner of rights and benefits even temporarily will do. *McCarthy v. United States*, 403 F.2d 935, 938 (10th Cir. 1968) ("[W]e conclude that a vehicle may be 'stolen' within the meaning of the Act, whether the intent was to deprive the owner of his rights and benefits in the vehicle permanently, or only so long as it suited the purposes of the taker.").

Use Note

Where the evidence warrants, the court may consider giving the following instructions on the following matters:

(1) Permissible inference of knowledge that vehicle was stolen and that defendant transported it in interstate

commerce: The Tenth Circuit has approved instructions stating that possession of a vehicle in one state that was recently stolen in another state, if not satisfactorily explained, is ordinarily a circumstance from which a jury may infer that the person knew the vehicle was stolen and also transported it in interstate commerce. *See e.g.*, *United States v. White*, 649 F.2d 779, 782 & n.4 (10th Cir. 1981) (discussing permissible inference of knowledge that vehicle was stolen or sold); *Rogers v. United States*, 416 F.2d 926, 927-929 (10th Cir. 1969); *Williams v. United States*, 371 F.2d 141, 144 & n.4 (10th Cir. 1967).

(2) Possession: "[P]ossession means actual control, dominion or authority." *Rogers*, 416 F.2d at 927-28.

The court may also wish to consider an instruction regarding the defendant's good faith belief that the vehicle was not stolen, if the evidence so warrants. *See United States v. Prazak*, 623 F.2d 152 (10th Cir. 1980).

2.81

RECEIPT OR SALE OF A STOLEN MOTOR VEHICLE OR AIRCRAFT
18 U.S.C. § 2313

The defendant is charged in count ____ with a violation of 18 U.S.C. section 2313.

This law makes it a crime to [receive] [possess] [conceal] [store] [sell] [dispose of] a stolen [motor vehicle] [aircraft].

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the [describe vehicle or aircraft in indictment] was stolen;

Second: after it was stolen, the [vehicle] [aircraft] was moved across a [state line] [United States border];

Third: after the [vehicle] [aircraft] had been stolen and moved across a [state line] [United States border], the defendant [received] [possessed] [concealed] [stored] [sold] [disposed of] it; and

Fourth: at the time the defendant [received] [concealed] [stored] [sold] [disposed of] the [vehicle] [aircraft], he knew it had been stolen.

Comment

Following the 1984 amendment, this statute requires only that the property described in the indictment have been stolen and moved in interstate or foreign commerce. Defendant need not know the property moved in interstate commerce; only that it was stolen. The jury may infer such knowledge from defendant's possession of recently stolen property. *United States v. White*, 649 F.2d 779, 782 (10th Cir. 1981); *United States v. Brown*, 541 F.2d 858, 861 (10th Cir. 1976).

Use Note

This statute provides for multiple avenues of conviction (see brackets). Care should be used if more than one act is charged. For example, concealing requires a specific overt act beyond mere possession. There is also a question as to whether the court needs to poll the jury to determine whether they were unanimous on how the crime was committed.

It is the Committee's view that the word "stolen" should be defined if that issue is raised at trial.

The Committee suggests that, to insure unanimity, the jury should be polled and a specific finding on how the crime was committed should be included in the verdict form.

2.82

INTERSTATE TRANSPORTATION OF STOLEN PROPERTY
18 U.S.C. § 2314 (First Paragraph)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 2314.

This law makes it a crime to transport illegally obtained property in interstate commerce.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant [transported] [caused to be transported] in interstate commerce items of [stolen] [converted] [fraudulently obtained] property as described in the indictment;

Second: at the time of such transportation, the defendant knew that the property had been [stolen] [converted] [taken by fraud]; and

Third: the items had a value of $5,000 or more.

Comment

"Each act of interstate transportation involving goods of the requisite jurisdictional amount is chargeable as a separate offense." *United States v. Calabrese*, 645 F.2d 1379, 1388-89 (10th Cir. 1981). Thus, an acquittal of one act of transporting stolen property is not inconsistent with, and does not raise, double jeopardy concerns. *United States v. Van Cleave*, 599 F.2d 954, 955 (10th Cir. 1979). The government need not show the transported funds were precisely the ones taken from defrauded investors. *United States v. Cardall*, 885 F.2d 656, 674 (10th Cir. 1989). It is sufficient if the item or funds transported is/are directly derived from the property stolen, taken or converted by fraud. *Id.*

Transportation is not limited to the physical movement of tangible property in interstate commerce. *United States v. Wright*, 791 F.2d 133, 136-37 (10th Cir. 1986) (wire transfer of money). It is sufficient if the defendant causes the item described in the indictment to be transported by any means. *United States v. Newson*, 531 F.2d 979, 981 (10th Cir. 1976); *Nowlin v. United States*, 328 F.2d 262, 264-65 (10th Cir. 1964). And it is sufficient if the defendant agrees to transfer the item knowing it will move interstate and follows it across state lines. *United States v. O'Connor*, 635 F.2d 814, 817-18 (10th Cir. 1980).

It is not an essential element that the accused know or intend that interstate instrumentalities or transportation will be used. *Newson*, 531 F.2d at 981.

Separate transactions under $5,000 may be aggregated for the purpose of meeting the $5,000 limit provided they are substantially related and charged as a single offense. *Schaffer v. United States*, 362 U.S. 511, 517 (1960); *cf. United States v. Smith*, 692 F.2d 658, 660 (10th Cir. 1982) (permitting aggregation for receipt of stolen property under 18 U.S.C. section 2315).

Use Note

This statute defines five separate offenses, *United States v. Wright*, 791 F.2d 133, 135 (10th Cir. 1986), but this instruction covers only the first paragraph.

"Securities," "value," and "money" are defined in 18 U.S.C. section 2311 if these issues are disputed and require instruction. *See also United States v. Cummings*, 798 F.2d 413, 416 (10th Cir. 1986) (applying market value).

If separate transactions are aggregated to reach the $5,000 threshold, the Third Element of the instruction should state: "the items had a total value of $5,000 or more."

2.83

SALE OR RECEIPT OF STOLEN PROPERTY
18 U.S.C. § 2315 (First Paragraph)

The defendant is charged in count ____ with a violation of 18 U.S.C. section 2315.

This law makes it a crime for anyone to knowingly [receive] [possess] [conceal] [store] [barter] [dispose of] stolen property which has a value of $5,000 or more and which has crossed a [state] [United States] boundary after being [stolen] [taken] [unlawfully converted].

To find the defendant guilty of this crime you must be convinced the government has proved each of the following beyond a reasonable doubt:

First: the defendant [received] [possessed] [concealed][stored] [bartered] [sold] [disposed of] items of [stolen] [taken] [unlawfully converted] property as described in the indictment;

Second: such items had crossed a [state] [United States] boundary after having been [stolen] [unlawfully converted] [unlawfully taken];

Third: the defendant knew the property had been [stolen] [unlawfully converted] [unlawfully taken]; and

Fourth: such items had a value in excess of $5,000.

Comment

This statute applies only to tangible goods, wares, merchandise, securities or monies and not to intangible intellectual property such as computer codes. *United States v. Brown*, 925 F.2d 1301, 1307-08 (10th Cir. 1991).

Defendant need not know goods moved in interstate commerce. *United States v. Luman*, 624 F.2d 152, 155 (10th Cir. 1980). Unexplained possession of recently stolen property is sufficient to submit the matter to the jury. *Id.* at 154-55.

Separate transactions under $5,000 may be aggregated for the purpose of meeting the $5,000 limit provided they are substantially related and charged as a single offense. *Schaffer v. United States*, 362 U.S. 511, 517 (1960); *United States v. Smith*, 692 F.2d 658, 660 (10th Cir. 1982) (permitting aggregation for receipt of stolen property under 18 U.S.C. section 2315).

Use Note

"Securities," "value," and "money" are defined in 18 U.S.C. section 2311 if these issues are disputed and require instruction. *See also United States v. Cummings*, 798 F.2d 413, 416 (10th Cir. 1986) (applying market value).

If separate transactions are aggregated to reach the $5,000 threshold, the Third Element of the instruction should state: "the items had a total value of $5,000 or more."

2.84

FAILURE TO APPEAR
18 U.S.C. § 3146

The defendant is charged in count ____ with a violation of 18 U.S.C. section 3146.

This law makes it a crime willfully to fail to [appear in court] [surrender for service of sentence] on a required date.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant was [charged with a crime punishable by [state maximum punishment applicable to charged offense]] [convicted of [name of crime]] in this court;

Second: the defendant had been released on [bond] [his own recognizance] by a [specify judicial officer] on condition that the defendant [appear in court] [surrender for service of sentence];

Third: the defendant thereafter willfully failed to [appear in court] [surrender for service of sentence] as required.

Defendant would not have willfully failed to [appear] [surrender] if (a) uncontrollable circumstances prevented defendant from [appearing] [surrendering]; (b) the defendant did not himself contribute to the creation of such circumstances in reckless disregard of the requirement to [appear] [surrender]; and (c) the defendant then [appeared] [surrendered] as soon as such circumstances ceased to exist.

Comment

See United States v. Guerrero, 517 F.2d 528, 529-31 (10th Cir. 1975); *United States v. Bourassa*, 411 F.2d 69, 74 (10th Cir. 1969).

The Tenth Circuit approved an instruction which defined "willfully" under this statute as "committed voluntarily and with the purpose of violating the law, and not by mistake, accident, or in good faith." *Bourassa*, 411 F.2d at 74.

The Committee suggests that issues under Fed. R. Evid. 403 may arise, should the court name the crime for which the defendant was released or convicted. The instruction on these elements should be changed in the event the defendant stipulates to the underlying offense. *See Old Chief v. United States*, 519 U.S. 172 (1997).

2.85

CONTROLLED SUBSTANCES—POSSESSION WITH INTENT TO DISTRIBUTE 21 U.S.C. § 841(a)(1)

The defendant is charged in count ____ with a violation of 21 U.S.C. section 841(a)(1).

This law makes it a crime to possess a controlled substance with the intent to distribute it.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant knowingly or intentionally possessed a controlled substance as charged;

Second: the substance was in fact [name controlled substance];

Third: the defendant possessed the substance with the intent to distribute it; and

[*Fourth*: the amount of the controlled substance possessed by the defendant was at least [name amount].]

[*Fifth*: [serious bodily injury] [death] resulted from use of [name controlled substance].]

[Name controlled substance] is a controlled substance within the meaning of the law.

To "possess with intent to distribute" means to possess with intent to deliver or transfer possession of a controlled substance to another person, with or without any financial interest in the transaction.

Comment

The elements of the offense are from *United States v. Bowen*, 437 F.3d 1009, 1014 (10th Cir. 2006): "To establish a violation of [§841(a)(1)], the government must prove the defendant: (1) possessed the controlled substance; (2) knew he possessed the controlled substance; and (3) intended to distribute or dispense the controlled substance."

The government is not required to prove that the defendant knew the precise nature of the controlled substance. *United States v. Johnson*, 130 F.3d 1420, 1428 (10th Cir. 1997).

Use Note

The fourth element is submitted to the jury under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), where the statute imposes increased maximum penalties based on the quantity of the substance. *See* 21 U.S.C. §841(b). *Apprendi* also requires that the fifth element be submitted to the jury where the indictment alleges serious bodily injury or death that would result in an increased penalty under 21 U.S.C. §841(b). If the parties dispute the quantity of the substance or whether serious bodily injury or death resulted from the use of the substance, the court should consider giving a lesser included offense instruction. *See United States v. Lacey*, 86 F.3d 956, 970 (10th Cir. 1996) (lesser included offense instruction not appropriate where quantities were sufficient for distribution and too great for simple possession); *United States v. Burns*, 624 F.2d 95, 104 (10th Cir. 1980) (lesser included offense instruction should have been given where evidence could have supported conviction for either distribution or possession). Alternatively, where the parties dispute the amount of the substance, the court may substitute for the fourth element a special interrogatory on the verdict form asking the jury to determine the amount of the controlled substance. Where the offense involves two or more controlled substances, and the indictment alleges quantities of each substance sufficient to raise the maximum sentence, the court should submit an additional element to the jury for a finding on each controlled substance, or a specific finding as to each quantity should appear on the verdict form.

Title 21 U.S.C. §841(b) also imposes increased penalties where the defendant has a prior conviction for a felony drug offense. Under current law, the court need not submit the question of a prior conviction to the jury. *See Apprendi*, 530 U.S. at 489-90; *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998); *United States v. Moore*, 401 F.3d 1220, 1223 (10th Cir. 2005).

"[T]he quantity of the drug possessed is a circumstance which may permit the inference that the possessor had an intent to sell, deliver or otherwise distribute." *United States v. King*, 485 F.2d 353, 357 (10th Cir. 1973); *accord United States v. Pulido-Jacobo*, 377 F.3d 1124, 1131 (10th Cir. 2004); *United States v. Gama-Bastides*, 222 F.3d 779, 787 (10th Cir. 2000); *United States v. Delreal-Ordones*, 213 F.3d 1263, 1268 n.4 (10th Cir. 2000); *United States v. Wood*, 57 F.3d 913, 918 (10th Cir. 1995).

Title 21 U.S.C. §846, provides that attempts are subject to the same penalties as the underlying offenses.

2.85.1

DISTRIBUTION OF A CONTROLLED SUBSTANCE
21 U.S.C. § 841(a)(1)

The defendant is charged in count ____ with a violation of 21 U.S.C. section 841(a)(1).

This law makes it a crime to distribute a controlled substance.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant knowingly or intentionally distributed a controlled substance as charged;

Second: the substance was in fact [name controlled substance];

[*Third*: the amount of the controlled substance distributed by the defendant was at least [name amount].]

[*Fourth*: [serious bodily injury] [death] resulted from use of [name controlled substance].]

[Name controlled substance] is a controlled substance within the meaning of the law.

The term "distribute" means to deliver or to transfer possession or control of something from one person to another. The term "distribute" includes the sale of something by one person to another. It is not necessary, however, for the government to prove that any transfer of money or other thing of value occurred at the same time as, or because of, the distribution.

Comment

The elements of the offense, with the addition of the *Apprendi* element, are taken from *United States v. Santistevan*, 39 F.3d 250, 255-56 (10th Cir. 1994). *Santistevan* states that the distribution must be knowing or intentional, which tracks the language of the statute. The committee does not recommend that the terms "knowingly" or "intentionally" be defined. *See* Instruction 1.37. The definition of "distribute" is taken from 21 U.S.C. section 802(11).

The government is not required to prove that the defendant knew the precise nature of the controlled substance. *United States v. Johnson*, 130 F.3d 1420, 1428 (10th Cir. 1997).

Use Note

See Use Note for Instruction 2.85.

2.86

UNLAWFUL USE OF COMMUNICATIONS FACILITY
21 U.S.C. § 843(b)

The defendant is charged in count ____ with a violation of 21 U.S.C. section 843(b).

This law makes it a crime to use a communication facility to [commit] [facilitate the commission of] a felony drug offense.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant knowingly used [name the communication facility]; and

Second: the defendant acted with the intent to commit, cause or facilitate the commission of a drug felony, namely [name the predicate felony]. You are instructed that [name the predicate felony] is a felony.

To "facilitate the commission of a drug felony" means to [make the commission of the drug felony easier] [aid or assist in the commission of the offense].

Comment

The underlying drug felony can be any offense set out in 21 U.S.C., Chapter 13, subchapters I and II, as well as attempt and conspiracy. *United States v. Reed*, 1 F.3d 1105, 1108-09 (10th Cir. 1993). The government must prove the commission of the underlying drug felony but it is not necessary that the defendant be convicted of the underlying drug felony. *United States v. Watson*, 594 F.2d 1330, 1342-43 (10th Cir. 1979). As the court pointed out in *United States v. Milton*, 62 F.3d 1292, 1294 (10th Cir. 1995), a facilitation conviction may stand even where the defendant is acquitted of the underlying felony (citing *United States v. Powell*, 469 U.S. 57, 67-69 (1984)). However, the underlying drug crime must be a felony; a call to obtain drugs for personal use is not a violation of section 843(b) because personal use is not a felony drug crime. *United States v. Baggett*, 890 F.2d 1095, 1098 (10th Cir. 1989).

Note that use of a telephone to arrange a drug buy does not require an actual conversation between the purchaser and the dealer; a busy signal on a call to a known dealer facilitates the drug felony. *United States v. McIntyre*, 836 F.2d 467, 473 (10th Cir. 1987). Further, a defendant does not have to initiate use of communication facility; use is sufficient. *United States v. Davis*, 929 F.2d 554, 559-60 (10th Cir. 1991).

The elements of the offense are adapted from *United States v. Johnson*, 57 F.3d 968, 971 (10th Cir. 1995), and *United States v. Willis*, 890 F.2d 1099, 1103 (10th Cir. 1989).

Use Note

The definition of "communication facility" is taken from the statute. It may be shortened to conform to the evidence. It means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication. An instruction to this effect should be given if the issue is raised at trial.

The Committee does not recommend that the terms "knowingly" or "intentionally" be defined. *See* Instruction 1.37.

As indicated in that portion of the instruction addressing the second element, the Committee believes that the predicate felony should be named and the jury should be instructed that it is, in fact, a felony. If there is some dispute over whether the predicate offense is, in fact, a felony, the Committee believes that the issue would be resolved through a motion for judgment of acquittal.

2.87

CONTROLLED SUBSTANCES—CONSPIRACY
21 U.S.C. § 846

The defendant is charged in count ____ with a violation of 21 U.S.C. section 846.

This law makes it a crime for anyone to conspire with someone else to violate federal laws pertaining to controlled substances. In this case, the defendant is charged with conspiracy to [describe the conspiracy alleged in the indictment].

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: two or more persons agreed to violate the federal drug laws;

Second: the defendant knew the essential objective of the conspiracy;

Third: the defendant knowingly and voluntarily involved himself in the conspiracy; and

Fourth: there was interdependence among the members of the conspiracy.

[*Fifth*: the overall scope of the conspiracy involved at least [name amount] of [name controlled substance].]

A conspiracy is an agreement between two or more persons to accomplish an unlawful purpose. It is a kind of "partnership in criminal purposes" in which each member becomes the agent or partner of every other member. [The evidence may show that some of the persons involved in the alleged conspiracy are not on trial. This does not matter. There is no requirement that all members of a conspiracy be charged or tried together in one proceeding.]

The evidence need not show that the members entered into an express or formal agreement. Nor does the law require proof that the members agreed on all the details. But the evidence must show that the members of the alleged conspiracy came to a mutual understanding to

try to accomplish a common and unlawful plan.

If you are convinced that the charged conspiracy existed, then you must next determine whether the defendant was a member of that conspiracy, that is, whether the defendant knew at least the essential goals of the conspiracy and voluntarily chose to be part of it. The law does not require proof that the defendant knew all the other members of the conspiracy or knew all the details about how activities were to be carried out. A person may belong to a conspiracy for a brief period of time or play a minor role. On the other hand, proof is not sufficient if it merely shows that the defendant knew about the existence of the conspiracy or was associated with members of the conspiracy. Rather, the evidence must show the defendant knowingly joined the conspiracy with the intent to advance its purposes.

You are also required to find that interdependence existed among the members of the conspiracy. This means that the members intended to act for their shared mutual benefit. To satisfy this element, you must conclude that the defendant participated in a shared criminal purpose and that his actions constituted an essential and integral step toward the realization of that purpose.

Comment

Please refer to the Comment following Instruction 2.19 (the general conspiracy instruction, 18 U.S.C. section 371).

The elements are taken from *United States v. Small*, 423 F.3d 1164, 1182-83 (10th Cir. 2005). *See also United States v. Scull*, 321 F.3d 1270, 1282 (10th Cir. 2003); *United States v. Ruiz-Castro*, 92 F.3d 1519, 1530 (10th Cir. 1996).

The definition of "interdependence" is taken largely from *United States v. Heckard*, 238 F.3d 1222, 1231-32 (10th Cir. 2001) (noting interdependence exists where each coconspirator's activities "constituted essential and integral steps toward the realization of a common, illicit goal") (citations omitted). *See also United States v. Evans*, 970 F.2d 663, 670-71 (10th Cir. 1992) (coconspirator's actions must facilitate the endeavors of other members of the charged conspiracy or facilitate the venture as a whole).

Interdependence is related to the concern of whether the evidence shows a single conspiracy or multiple conspiracies. *See United States v. Small*, 423 F.3d at 1182 ("a single conspiracy does not exist solely because many individuals deal with a common central player . . . [w]hat is required is a shared, single criminal objective, not just similar or parallel objectives between similarly situated people") (quoting *United States v. Evans*, 970 F.2d at 670). *See also* Instruction 2.20 and *United States v. Carnagie*, 533 F.3d 1231, 1237-44 (10th Cir. 2008). *Carnagie* concerned a section 371 conspiracy, but contains a detailed discussion of interdependence. *Carnagie* also notes

that the proof necessary to establish interdependence may be different in a section 371 conspiracy than in a section 846 (drug) conspiracy. 533 F.3d at 1239 n.5.

The government need not allege or prove the commission of an overt act in furtherance of a section 846 conspiracy. *United States v. Shabani*, 513 U.S. 10, 15 (1994).

Use Note

Please refer to the Use Note following Instruction 2.19 (the general conspiracy instruction, 18 U.S.C. section 371).

The fifth element is submitted to the jury under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), where the statute imposes increased maximum penalties based on the quantity of the substance. *See* 21 U.S.C. §841(b).

Ordinarily, venue is not an issue. When it is an issue, it will be necessary to instruct that venue lies either in the jurisdiction in which the conspiratorial agreement was formed or in any jurisdiction in which an act in furtherance of the conspiracy was committed. Venue must be proved by a preponderance of the evidence, not beyond a reasonable doubt. *United States v. Record*, 873 F.2d 1363, 1366 (10th Cir. 1989).

The agreement necessary for a conspiracy need not be explicit, but may be inferred from the circumstances. *United States v. Rangel-Arreola*, 991 F.2d 1519, 1522 (10th Cir. 1993). The government may prove a drug conspiracy entirely with circumstantial evidence. *United States v. Mendoza-Salgado*, 964 F.2d 993, 1006 (10th Cir. 1992).

2.88

CONTINUING CRIMINAL ENTERPRISE
21 U.S.C. § 848

The defendant is charged in count ____ with a violation of 21 U.S.C. section 848.

This law makes it a crime to engage in what is called a "continuing criminal enterprise" involving controlled substances.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant violated the Controlled Substances Act as charged in counts [____] of the indictment;

Second: such violations were part of a continuing series of violations of the Controlled Substances Act. These violations must be connected together as a series of related or ongoing activities, as distinguished from isolated and disconnected acts. You must unanimously agree on which of at least three of these underlying violations has been proved;

Third: the defendant committed these violations in concert (or by common design or plan) with five or more other persons. The five other persons need not have acted at the same time or in concert with each other. You need not unanimously agree on the identity of any other persons acting in concert with the defendant, so long as each of you finds that there were five or more such persons;

Fourth: the defendant was an organizer, supervisor, or manager of those five persons; and

Fifth: the defendant obtained substantial income or resources from the series of violations.

The term "substantial income or resources" means income in money or property which is significant in size or amount as distinguished from some relatively insignificant, insubstantial, or trivial amount.

The term "organizer, supervisor, or manager" means that the defendant was more than a fellow worker, and that the defendant either

organized or directed the activities of five or more other persons, exercising some form of managerial authority over them. The defendant need not be the only organizer or supervisor.

Comment

"[A] jury in a federal criminal case brought under §848 must unanimously agree not only that the defendant committed some 'continuing series of violations' but also that the defendant committed each of the individual 'violations' necessary to make up that 'continuing series.'" *Richardson v. United States*, 526 U.S. 813, 815 (1999). "[U]nanimity in respect to each individual violation is necessary." *Id.* at 816. Each violation in the series is an element of the offense. *Id.* at 817-19. "The holding in Richardson is based on the distinction between the elements of an offense and the means by which the government may satisfy an element." *United States v. Almaraz*, 306 F.3d 1031, 1035 (10th Cir. 2002).

Conspiracy is a lesser included offense of continuing criminal enterprise. *Rutledge v. United States*, 517 U.S. 292, 300 (1996); *see also United States v. Stallings*, 810 F.2d 973, 975-76 (10th Cir. 1987).

Neither the statute nor *Richardson* expressly requires that a series of violations be comprised of at least three violations. But recently, this court in *Almaraz* said that "the jury must be instructed to unanimously find the defendant committed at least three underlying predicate violations of the applicable drug statutes when determining whether the defendant committed a 'series of violations' within the rubric of the continuing criminal enterprise statute." 306 F.3d at 1036.

In *Almaraz*, this court said that the *Richardson* Court had assumed, without deciding, that there is no unanimity requirement with regard to the identity of the five people and substantial income. *Id.* at 1039. This court also held that "the jury is not limited to considering only those acts for which it returned a guilty verdict when determining which acts make up the 'continuing series of violations.'" *Id.* But then this court said that did not end its analysis, and left "for another day" the "thorny" issue of whether the jury is limited to violations alleged specifically in the indictment, or whether the indictment need only track the statutory language. *Id.* at 1039-40.

2.89

CONTROLLED SUBSTANCES—MAINTAINING DRUG INVOLVED PREMISES
21 U.S.C. § 856(a)(1)

The defendant is charged in count ____ with a violation of 21 U.S.C. section 856(a)(1).

This law makes it a crime to knowingly [open] [maintain] any place for the purpose of manufacturing, distributing or using any controlled substances.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant [opened] [maintained] a place [list address or property description] for the purpose of [manufacturing] [distributing] [using] [a controlled substance]; and

Second: the defendant knew that the place [was] [would be] used for such purpose.

[Name controlled substance] is a controlled substance within the meaning of the law.

Comment

Title 21, U.S.C. §856(a)(1) makes it unlawful to knowingly "open, lease, rent, use, or maintain" drug-involved premises. For the elements of this offense, *see United States v. Sells*, 477 F.3d 1226, 1237 (10th Cir. 2007) and *United States v. Verners*, 53 F.3d 291, 295 (10th Cir. 1995).

The instruction must contain a definition of "opened or maintained." There are no published Tenth Circuit cases defining "opened" but there are a number of cases which discuss evidence pertaining to "maintained." In general, when the "place" in question is a residence, the jury must be instructed that the defendant must have a "substantial connection" to the residence and must be more than a "casual visitor" in order to satisfy the "maintained" element. When the defendant lives in the residence, the "maintained" element is normally easily proved.

In cases where the defendant does not live in the "place," a "substantial connection" requires the government to prove that the defendant exercised control over the "place." Depending on the evidence, the jury may be instructed on certain factors including whether the defendant owned or rented the

"place"; the amount of time the defendant was present at the "place"; the defendant's activities at the "place" and defendant's supervision of others at the "place." This is not an exclusive list of factors. The evidence in each case will dictate, to some extent, the wording of the instruction defining "maintained."

The following cases illustrate the types of evidence which demonstrate that the defendant "maintained" the "place" for illegal purposes: *United States v. Williams*, 923 F.2d 1397, 1403-04 (10th Cir. 1990) (defendant helped collect a debt for drugs sold out of apartment); *United States v. Verners*, 53 F.3d 291, 296 (10th Cir. 1995) (discussing evidence necessary to satisfy the "for the purpose of" element); *United States v. Higgins*, 282 F.3d 1261, 1276 (10th Cir. 2002) (defendant's assistance in the methamphetamine manufacturing process and keeping watch for intruders or authorities); *United States v. Williams*, 42 Fed. Appx. 379, 2002 WL 1500051 (10th Cir. 2002) (defendant's activities as crowd control manager, dispersing groups of customers loitering outside the premises and cleaning up even though the "place" was located on another persons's property); *United States v. Gann*, 58 Fed. Appx. 792, 2003 WL 134998 (10th Cir. 2003) (evidence that defendant lived at property where methamphetamine was manufactured and distributed); *United States v. Rhodes*, 62 Fed. Appx. 869, 2003 WL 1565166 (10th Cir. 2003) (defendant's use of methamphetamine in a trailer combined with items necessary for the production and use of methamphetamine); *United States v. Callejas*, 66 Fed. Appx. 826, 2003 WL 21300340 (10th Cir. 2003) (large volume of "in and out" traffic from defendant's residence, presence of equipment for manufacturing drugs, weapons and large amounts of cash); *United States v. Scull*, 321 F.3d 1270, 1284 (10th Cir. 2003) (evidence obtained from trash, drying and packaged crack cocaine found in defendant's home and presence of coconspirators seen going and coming from the home in the course of completing drug sales).

2.90

CONTROLLED SUBSTANCES—UNLAWFUL IMPORTATION 21 U.S.C. § 952(a) AND §960(a)(1)

The defendant is charged in count ____ with a violation of 21 U.S.C. section 952(a) and section 960(a)(1).

This law makes it a crime to knowingly or intentionally import a controlled substance.

[Name controlled substance] is a controlled substance within the meaning of this law.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant brought [name controlled substance] into the United States from a place outside the United States;

Second: the defendant knew the substance he was bringing into the United States was a controlled substance;

Third: the defendant knew that the substance would enter the United States; and

Fourth: the quantity of the substance was at least [name weight].

Comment

Knowledge that the contraband was unlawfully brought into the United States is an essential element. *Davis v. United States*, 347 F.2d 378, 378-79 (10th Cir. 1965) (per curiam). The trial court's instructions were found proper in *United States v. Smaldone*, 484 F.2d 311, 322 (10th Cir. 1973).

Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), would seem to require that the verdict form reflect the quantity proved at trial when the quantity affects the statutory maximum.

2.91

POSSESSION OF AN UNREGISTERED FIREARM
26 U.S.C. § 5861(d)

The defendant is charged in count ____ with a violation of 26 U.S.C. section 5861(d).

This law makes it a crime for anyone to possess certain kinds of firearms that are not registered to him in the National Firearms Registration and Transfer Record.

26 U.S.C. §5845 defines "firearm" as including [describe the firearm alleged in the indictment; e.g., a shotgun having a barrel of less than 18 inches in length.]

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant knowingly possessed a firearm, as that term has been defined in this instruction;

Second: the defendant knew of the specific characteristics or features of the firearm [describe, e.g., that it was a shotgun having a barrel of less than 18 inches in length] that caused it to be registrable under the National Firearms Registration and Transfer Record;

Third: the firearm [was] [could readily have been put] in operating condition; and

Fourth: the firearm was not registered to the defendant in the National Firearms Registration and Transfer Record. The government is not required to prove that the defendant knew that the firearm was not registered or had to be registered.

Comment

Prosecution under 26 U.S.C. section 5861(d) does not violate a defendant's rights under the Second Amendment, *United States v. Rose*, 695 F.2d 1356, 1359 (10th Cir. 1982), or the Fifth Amendment, *United States v. Nelson*, 448 F.2d 1304, 1306 (10th Cir. 1971). The statute's registration requirements do not violate equal protection. *Robbins v. United States*, 476 F.2d 26, 32 (10th Cir. 1973). In *United States v. Gonzales*, 535 F.3d 1174, 1179 (10th Cir. 2008), the court approved a trial court instruction that "the government is not required to prove that [the defendant] knew that the

firearm had to be registered, knew what measurements caused [the firearm] to be registered, or knew that [the firearm] was not registered to him."

Prosecution under section 5861(d) for receipt or possession of an unregistered machine gun violates due process because, since 1986, it is not possible to register a machine gun. *United States v. Dalton*, 960 F.2d 121, 122 (10th Cir. 1992). But prosecution under section 5861(d) for receipt or possession of a pipe bomb does not violate due process because there is no similar prohibition against possession of a pipe bomb. The fact that registration of a pipe bomb probably is a legal impossibility does not raise a due process issue. *United States v. Eaton*, 260 F.3d 1232, 1236 (10th Cir. 2001).

Use Note

The first element's possession requirement may be actual or constructive, sole or joint. *United States v. Mains*, 33 F.3d 1222, 1229 (10th Cir. 1994); *United States v. Sullivan*, 919 F.2d 1403, 1430 (10th Cir. 1990). The government may prove absence of registration with a certified copy of a public record certifying that a diligent search has failed to disclose evidence of registration. *Sullivan*, 919 F.2d at 1430 n.43.

The second element may not be required, depending on what the Supreme Court has termed a "commonsense evaluation of the nature of the particular device or substance Congress has subjected to regulation and the expectations that individuals may legitimately have in dealing with the regulated items." *Staples v. United States*, 511 U.S. 600, 619 (1994). It is clear, however, that even when the second element is appropriate, the government is not required to prove that the defendant knew that the particular firearm or device had to be registered. *Rogers v. United States*, 522 U.S. 252, 254-55 (1998).

Section 5861(d) does not require proof of specific intent, nor does it require that the weapon or device be used in some other criminal activity. *United States v. McCollom*, 12 F.3d 968, 971 (10th Cir. 1993).

2.92

TAX EVASION
26 U.S.C. § 7201

The defendant is charged in count ____ with a violation of 26 U.S.C. section 7201.

This law makes it a crime for anyone willfully to attempt to evade or defeat the payment of federal income tax.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant owed substantial income tax in addition to the tax liability which he reported on his [year] income tax return;

Second: the defendant intended to evade and defeat payment of that additional tax;

Third: the defendant committed an affirmative act in furtherance of this intent, that is he [describe affirmative act as alleged in indictment]; and

Fourth: the defendant acted willfully, that is, with the voluntary intent to violate a known legal duty.

To "evade and defeat" the payment of tax means to escape paying a tax due other than by lawful avoidance.

The indictment alleges a specific amount of tax due for each calendar year charged. The proof, however, need not show the exact amount of the additional tax due. The government is required only to prove, beyond a reasonable doubt, that the additional tax due was substantial.

Comment

Please see the Comment to Instruction 1.38 (Willfully—To Act).

To prove tax evasion in violation of section 7201, the government must prove three elements: (1) the existence of a substantial tax liability, (2) willfulness, and (3) an affirmative act constituting an evasion or attempted evasion of the tax. *United States v. Meek*, 998 F.2d 776, 779 (10th Cir. 1993).

Although it is not necessary to prove the exact amount of the tax due, the tax liability must be substantial. *See United States v. Mounkes*, 204 F.3d 1024, 1028 (10th Cir. 2000) (finding a substantial liability where the defendant deducted from his personal return $10,000 dollars of corporate expenses). Whether the tax evaded was substantial is a jury question and generally not susceptible to a precise definition.

The requirement of an affirmative act distinguishes the felony offense of tax evasion from the misdemeanor offense of willful failure to file a tax return. An affirmative act to evade tax is a positive act of commission designed to mislead or conceal. *Meek*, 998 F.2d 779. Misstating income is an affirmative act. *United States v. Jones*, 816 F.2d 1483, 1488 (10th Cir. 1987).

Willfulness in the context of criminal tax cases is a voluntary, intentional violation of a known legal duty. *Cheek v. United States*, 498 U.S. 192, 201 (1991).

The Committee concluded that the Eleventh Circuit's special instruction nine might be instructive. Judicial Council of the Eleventh Circuit, Eleventh Circuit Pattern Jury Instructions (Criminal Cases) at 51 (2003). The Committee points out, however, that this reference to the Eleventh Circuit's instruction is illustrative only. Neither the instruction nor evolution of the instruction within the Eleventh Circuit is to be construed as binding on the Tenth Circuit. The Eleventh Circuit's instruction follows:

Intentional Violation of a Known Legal Duty (as Proof of Willfulness Under the Internal Revenue Code)

Intent and motive should not be confused. Motive is what prompts a person to act, while intent refers to the state of mind with which the act is done.

So, if you find beyond a reasonable doubt that the acts constituting the crime charged were committed by the Defendant voluntarily as an intentional violation of a known legal duty—that is, with specific intent to do something the law forbids—then the element of "willfulness" as defined in these instructions has been satisfied even though the Defendant may have believed that the conduct was [religiously, politically or morally] required, or that ultimate good would result from such conduct.

On the other hand, if you have a reasonable doubt as to whether the defendant acted in good faith, sincerely believing [himself] [herself] to be exempt by the law [from the withholding of income taxes], then the Defendant did not intentionally violate a known legal duty—that is, the Defendant did not act "willfully"—and that essential part of the offense would not be established.

2.93

FALSE STATEMENTS ON INCOME TAX RETURN
26 U.S.C. § 7206(1)

The defendant is charged in count ____ with a violation of 26 U.S.C. section 7206(1).

This law makes it a crime for anyone willfully to make a false material statement on an income tax return.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant signed an income tax return that contained a written declaration that it was made under the penalties of perjury;

Second: the return contained a false statement that [as alleged in indictment];

Third: the defendant knew that statement was false;

Fourth: the defendant acted willfully, that is, with the voluntary intent to violate a known legal duty; and

Fifth: the statement was material.

The tax return must be false as to [the matter stated in indictment]. The government, however, is not required to prove that the defendant owed any additional tax for the year in question. A monetary loss to the government is not an element of this crime.

The fact that an individual's name is signed to a return means that you may find that the tax return was in fact signed by that individual, until and unless outweighed by evidence presented which leads you to a different conclusion. If you find proof beyond a reasonable doubt that the defendant signed his tax return, you may, but are not required to, find that the defendant knew of the false matter in the return.

A statement is material under this law if it concerned a matter necessary to the correct computation of taxes owed and was capable of influencing the decision of the Internal Revenue Service.

Comment

"To sustain a conviction under section 7206(1), the government must prove (1) that the [defendant] made and subscribed to a tax return containing a written declaration, (2) that it was made under the penalties of perjury, (3) that he did not believe the return to be true and correct as to every material matter and (4) that he acted willfully." *United States v. Owen*, 15 F.3d 1528, 1532 (10th Cir. 1994).

Materiality is an essential element of section 7206(1) which must be presented to the jury. *Neder v. United States*, 527 U.S. 1, 4, 9 (1999).

"In general, a false statement is material if it has a natural tendency to influence or [is] capable of influencing the decision of the decisionmaking body to which it is was addressed." *Id.* at 16 (quotation omitted); *see United States v. Winchell*, 129 F.3d 1093, 1098 (10th Cir. 1997).

Willfully, as it relates to tax cases, is defined as the voluntary and intentional violation of a known legal duty. *Cheek v. United States*, 498 U.S. 192, 201 (1991).

2.94

AIDING OR ASSISTING IN PREPARATION OF FALSE DOCUMENTS UNDER INTERNAL REVENUE SERVICE LAWS 26 U.S.C. § 7206(2)

The defendant is charged in count ____ with a violation of 26 U.S.C. section 7206(2).

This law makes it a crime willfully to aid or assist in the [preparation] [presentation] under the Internal Revenue Service laws of a document knowing it to be false or fraudulent in some material way.

To find the defendant guilty of the crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant [aided or assisted in] [counseled] [advised] the [preparation] [presentation] of [insert name of document alleged in the indictment, e.g., an income tax return];

Second: this [insert name of document alleged in the indictment] falsely stated [read the false statement as alleged in indictment];

Third: the defendant knew the statement in the [insert name of document alleged in the indictment] was false;

Fourth: the defendant acted willfully, that is, with the voluntary intent to violate a known legal duty;

Fifth: the false statement was material.

A statement is material under this law if it concerned a matter necessary to the correct computation of taxes owed and the statement was capable of influencing the decision of the Internal Revenue Service.

It is not necessary that the government prove the falsity or fraud was made with the knowledge of the person required to present the [insert name of document alleged in the indictment].

The [insert name of document alleged in the indictment] must be false as to [the matter stated in indictment]. The government, however, is not required to prove that the defendant owed any additional tax for the year in question. A monetary loss to the government is not an element of this crime.

Comment

See Comment to Instruction 2.93 (section 7206(1)).

It is unlawful under section 7206(2) to aid or assist a taxpayer in the preparation of a false tax return.

Case law is unsettled as to whether filing is an element of this offense. *See, e.g.*, *United States v. Habig*, 390 U.S. 222, 223 (1968) (offense of aiding in the preparation of a false tax return committed at the time the false return is filed).

The Tenth Circuit declined to reach the question of filing as an element of the offense. *United States v. Cutler*, 948 F.2d 691, 694-95 (10th Cir. 1991). "Even assuming that 'filing' of the tax form is required for an offense under §7206(2), when a form relating to a taxpayer is required to be filed by an intermediary rather than the taxpayer, an offense under §7206(2) is committed when the document or information has been presented to the entity required by law to present the information to the IRS." *Id.* at 695. The Tenth Circuit went on to criticize the Ninth Circuit's *Dahlstrom* decision because it ignored the language of the statute that was specifically aimed at the "preparation *or* presentation" of false documents. *Id.* at 694. The Tenth Circuit also noted that the Supreme Court's *Habig* decision, upon which *Dahlstrom* relied, was decided in the context of a case in which a false document had actually been filed and the matter at issue was the start-time for the running of the statute of limitations. *Id.*

2.95

REPORTS ON EXPORTING AND IMPORTING MONETARY INSTRUMENTS 31 U.S.C. § 5316(a)(1)

The defendant is charged in count ____ with a violation of 31 U.S.C. section 5316(a)(1).

This law makes it a crime to intentionally fail to report the [exporting] [importing] of monetary instruments of more than $10,000 at one time.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant knowingly [transported] [was about to transport] more than $10,000 in [describe the alleged monetary instrument; e.g., currency] at one time [from a place in the United States to or through a place outside the United States] [to a place in the United States from or through a place outside the United States];

Second: the defendant knew that he had a legal duty to file a report of the amount of currency transported; and

Third: the defendant failed to file the report knowingly and willfully, that is, with intent to violate the law.

[*Fourth*: the defendant willfully violated this law while violating another law of the United States, specifically [describe the law mentioned in the indictment] as part of a pattern of illegal activity involving more than $100,000 in a 12-month period.]

Comment

The statute requires a showing of actual knowledge of the reporting requirement and voluntarily and intentionally violating that known legal duty. *See Ratzlaf v. United States*, 510 U.S. 135, 138, 141-42 (1994) (discussing willfulness under the penalty provision, 31 U.S.C. §5322); *United States v. Dashney*, 117 F.3d 1197, 1201-02 (10th Cir. 1997) (same).

Use Note

The fourth element, prompted by the *Apprendi* doctrine, is required when the indictment alleges facts which would result in an enhanced penalty

under 31 U.S.C. section 5322.

This offense can be committed through structuring. *See* 31 U.S.C. §5324(b)(3). Instruction 2.96, Structuring Transactions to Evade Reporting Requirements, must then be adjusted accordingly.

Use definitions in 31 U.S.C. section 5312 if needed in a particular case.

2.96

STRUCTURING TRANSACTIONS TO EVADE REPORTING REQUIREMENTS 31 U.S.C. § 5324(a)(3)

The defendant is charged in count ____ with a violation of 31 U.S.C. section 5324(a)(3).

This law makes it a crime to [structure] [attempt to structure] [assist in structuring] any transaction with one or more domestic financial institutions in order to evade the reporting requirements of 31 U.S.C. section 5313(a).

Section 5313(a) and its implementing regulations require the filing of a government form called a Currency Transaction Report (CTR). Those regulations require that every domestic financial institution that engages in a currency transaction of over $10,000 must file a report with the Internal Revenue Service. The institution must furnish, among other things, the identity and address of the person engaging in the transaction, the person or entity, if any, for whom he is acting, and the amount of the currency transaction. The Currency Transaction Report must be filed within 15 days of the transaction.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant knowingly [structured] [attempted to structure] [assisted in structuring] a currency transaction;

Second: the defendant knew of the domestic financial institution's legal obligation to report transactions in excess of $10,000; and

Third: the purpose of the structured transaction was to evade that reporting obligation.

[*Fourth*: the defendant violated this law while violating another law of the United States, specifically [describe the law mentioned in the indictment] as part of a pattern of illegal activity involving more than $100,000 in a 12-month period.]

A person structures a transaction if that person, acting alone or with others, conducts one or more currency transactions in any amount,

at one or more financial institutions, on one or more days, for the purpose of evading the reporting requirements described earlier. Structuring includes breaking down a single sum of currency exceeding $10,000 into smaller sums, or conducting a series of currency transactions, including transactions at or below $10,000. Illegal structuring can exist even if no transaction exceeded $10,000 at any single financial institution on any single day.

It is not necessary for the government to prove that a defendant knew that structuring a transaction to avoid triggering the filing requirements was itself illegal. The government must prove beyond a reasonable doubt only that a defendant [structured] [assisted in structuring] [attempted to structure] currency transactions with knowledge of the reporting requirements and with the specific intent to avoid said reporting requirements.

Comment

In *Ratzlaf v. United States*, 510 U.S. 135 (1994), the Court held that 31 U.S.C. section 5324, by incorporating section 5322's willfulness requirement, meant that a defendant must know the structuring he engaged in was unlawful. *Ratzlaf*, 510 U.S. at 136-37. Congress then eliminated the willfulness requirement by amending section 5322 and adding section 5324(c) which does not contain the requirement.

Use Note

The fourth element, prompted by the *Apprendi* doctrine, is required when the indictment alleges facts which would result in an enhanced penalty under 31 U.S.C. section 5324(d)(2).

This instruction is based on a charge of structuring to avoid the requirements of 31 U.S.C. section 5313(a). The structuring statute can also be used with other reporting statutes, e.g., sections 5325 and 5316, and these instructions would have to be adjusted accordingly.

If the case involves monetary instruments other than currency, substitute appropriate term. *See* definition of "monetary instruments" and other pertinent definitions in 31 U.S.C. section 5312.

If the evidence is that the bank filed the CTR as required, then the judge may want to tell the jury that the defendant may be found guilty of this offense even if the bank properly filed the CTR.

2.97

ASSIMILATIVE CRIMES ACT—ELEMENTS
18 U.S.C. § 13

The defendant is charged in count ____ of the indictment with committing a crime upon, or within, a federal enclave. To find the defendant guilty of this crime you must be convinced the government has proved each of the following beyond a reasonable doubt:

***First*: the crime alleged was committed upon, or within, [name federal enclave in indictment]; and**

***Second*: the defendant [here set out the elements of the State crime].**

Comment

The purpose of the Assimilative Crimes Act, 18 U.S.C. §13, is to conform the law of federal enclaves to that of the surrounding state by applying state criminal statutes to non-federal criminal acts or omissions committed within areas over which the federal government has exclusive jurisdiction. *United States v. Mayberry*, 774 F.2d 1018, 1020 (10th Cir. 1985); *Johnson v. Yellow Cab Transit Co.*, 137 F.2d 274, 276 (10th Cir. 1943), *aff'd*, 321 U.S. 383 (1944). For a general discussion of when the Assimilative Crimes Act is properly invoked, *see Lewis v. United States*, 523 U.S. 155, 162-66 (1998).

When there is no factual dispute as to whether the facility or site is a federal enclave, the court may take judicial notice of that fact or give a mandatory instruction that the facility or site is a federal enclave. *See United States v. Piggie*, 622 F.2d 486, 488 (10th Cir. 1980) (holding that 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 normally by a pretrial motion to dismiss for lack of jurisdiction. *See United States v Keller*, 451 F.Supp. 631, 634 (D.P.R. 1978).

Death Penalty Instructions

Comment

Scope of Instructions

These instructions have been prepared for proceedings under the Federal Death Penalty Act (FDPA), 18 U.S.C. section 3591 et seq, which now governs sentencing procedure in all federal capital cases. *See United States v. Barrett*, 496 F.3d 1079, 1106 (10th Cir. 2007) (noting repeal of separate capital sentencing procedure in 21 U.S.C. §848 "effectively rendered the FDPA applicable to all death-eligible offenses"), *cert. denied* 552 U.S. 1260 (2008). They are framed in terms of common homicide offenses and should be readily applicable in, or easily adapted to, most federal capital prosecutions.

To avoid proliferation of alternative instructions and bracketed language, this set of instructions is drafted for the basic case in which the jury must choose between a sentence of death and a sentence of life without possibility of release. The adjustments necessary to accommodate other sentencing choices, though unwieldy and impractical for pattern instructions, should be a straightforward matter in any particular case.

3.01

SENTENCING CHOICES AND RESPONSIBILITY

Members of the jury, you have unanimously found the defendant, [____], guilty of [____] as charged in count [____] of the indictment. This offense is punishable by death or by imprisonment for life without possibility of release. The choice between these alternatives is left exclusively to you. Your unanimous decision will be binding on the court, and I will impose sentence on the defendant according to your choice. If you cannot unanimously agree on the appropriate punishment, I will sentence the defendant to life imprisonment without possibility of release.

Comment

"Upon a [jury's] recommendation under [the Federal Death Penalty Act, 18 U.S.C. section 3591 et seq.] that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly." 18 U.S.C. section 3594. As explained in *Jones v. United States*, 527 U.S. 373, 380-81 (1999), if the jury is unable to reach a unanimous verdict, the sentencing determination passes to the court (i.e., the court does not discharge the jury and hold a second sentencing hearing). When the sentencing options are limited to death or life without possibility of release (which is the basic case this set of instructions is drafted to cover), there is only one sentence the court may impose. Thus, if the jury does not unanimously agree on a death sentence, it has effectively chosen a sentence of life without possibility of release, regardless of whether the jurors unanimously agreed *on that alternative sentence*, and it makes no sense to ask the jury whether they have done so. Therefore these instructions are most naturally written simply to ask the jury whether they have unanimously agreed on a death sentence and, if not, to direct them to indicate that a sentence of life without release should be imposed. Although a jury need not as a general matter always be told the consequences of their failure to return a unanimous verdict, *Jones*, 527 U.S. at 381-83, in this context it seems to be the most straightforward approach.

3.02

SUMMARY OF DELIBERATIVE PROCESS

Let me summarize the deliberative process you must follow in considering the sentencing decision before you. After this broad summary, I will discuss specific matters in more detail.

Your deliberations will be organized into two separate steps, each with its own distinct focus. First, you must determine whether the defendant is eligible for a sentence of death. Unless and until you find that the defendant is eligible for a death sentence, it is improper for you even to consider whether such a sentence would be justified. Second, if you find the defendant is eligible for a death sentence, you must determine whether such a sentence is justified and, thus, must be imposed.

Eligibility for death sentence: To find the defendant eligible for a death sentence, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant was at least eighteen years old when the capital offense was committed;

Second: the defendant acted with a level of intent sufficient to allow consideration of the death penalty, which may be different than the intent required to convict the defendant of the offense, and

Third: the existence of at least one statutory aggravating factor.

Aggravating factors will be explained in a later instruction, but generally they reflect circumstances that tend to support imposition of the death penalty, just as mitigating factors reflect circumstances that tend to suggest a sentence of death should not be imposed. If you find that any one or more of these three eligibility conditions has not been proved beyond a reasonable doubt by the government, the defendant is not eligible for a sentence of death, and your deliberations are over. If you find that the government has proved beyond a reasonable doubt that all of these conditions are satisfied, the defendant is eligible for a death sentence and you must proceed to the next stage of deliberations, to decide whether such a sentence is justified.

Justification and selection of sentence: The justification stage, which focuses on all relevant aggravating and mitigating factors, is

broken down into two steps. First, you must determine what factors have been proved. As for the aggravating factors, you must unanimously determine that the government has proved beyond a reasonable doubt any additional statutory or non-statutory factors relied upon to support the death sentence. In contrast, the defendant may prove mitigating factors by just a preponderance of the evidence. Moreover, it is up to each juror to decide individually whether any mitigating factor exists—there is no requirement that the defendant establish mitigating factors unanimously.

The second step involves a weighing process. You must decide whether the proved aggravating factors outweigh the proved mitigating factors sufficiently to justify the death sentence. (If you do not find any mitigating factors, you still must decide whether the aggravating factors are sufficient to justify imposition of a death sentence.) If you determine as a result of this weighing process that the factors do not justify a death sentence, such a sentence may not be imposed, and your deliberations are over.

If you determine that the factors do justify a death sentence, that sentence must be imposed. But as I will instruct you, weighing aggravating and mitigating factors is not a mechanical process, and the judgment involved is exclusively yours. Whatever findings you make with respect to aggravating and mitigating factors, the result of the weighing process is never foreordained. For that reason a jury is never required to impose a sentence of death. At this last stage of your deliberations, it is up to you to decide whether, for any proper reason established by the evidence, you choose not to impose such a sentence on the defendant.

Any decision to impose a sentence of death must be unanimous.

Comment

There is the appearance of a debate in the case law as to whether the jury should be instructed that it is "never required to impose a death sentence" in capital cases under 18 U.S.C. §3591. Congress has expressly required the instruction in continuing criminal enterprise cases under 21 U.S.C. §848(k), but has not explicitly required (or prohibited) such an instruction in conjunction with §3593. A provision similar to that in §848(k) was deleted from §3593 in the course of its passage, but the reason is not clear. For a thorough discussion of the relevant legislative history, *see United States v. Haynes*, 265 F. Supp. 2d 914, 917-20 (W.D. Tenn. 2003). Many cases reflect use of the "never required" (or a substantively identical) instruction in connection with §3593. *See, e.g.*, *United States v. Higgs*, 353 F.3d 281, 331-32 (4th Cir. 2003); *United States v. Paul*, 217 F.3d 989, 999 (8th Cir. 2000); *United States v. Jones*, 132 F.3d 232, 244 (5th Cir. 1998), *aff'd,* 527 U.S. 373 (1999); *Haynes*, 265 F. Supp. 2d at 914-15, 922 (holding instruction appropriate, and noting

nine other district court cases using instruction which were not disturbed on appeal). The Eighth Circuit, however, has held that the defendant is not entitled to such an instruction under §3593 because, "[b]ased upon the plain language of the statute, once a jury makes a final unanimous determination that a sentence of death is justified, then the [Federal Death Penalty Act] requires its imposition." *United States v. Allen*, 247 F.3d 741, 780 (8th Cir. 2001), *vacated on other grounds*, 536 U.S. 953 (2002), *reaff'd* in *United States v. Ortiz*, 315 F.3d 873, 900-01 (8th Cir. 2002).

On a close reading of the relevant cases, however, the debate here is really about when, not whether, the jury exercises the discretion reflected in the "never required" instruction. Even in *Allen*, the Eighth Circuit acknowledged that "the jury exercises complete discretion in its determination of whether the aggravating factors outweigh the mitigating factors" and should be so informed. *Allen*, 247 F.3d at 781. The Eighth Circuit's point in connection with the "never required" instruction was that once the jury has made this determination and found that a death sentence is justified, it is then required to impose that sentence (and, thus, it is incorrect to broadly instruct the jury, without specific reference to the weighing process, that it is *never* required to impose a death sentence). *See id.* at 781-82; *Ortiz*, 315 F.3d at 900-01. This nuanced view is strongly supported, if not dictated, by the terms of §3591(a), which states that the defendant *"shall be sentenced to death if*, after a consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, *it is determined that imposition of a sentence of death is justified*." (Emphasis added). *See Allen*, 247 F.3d at 781-82 (discussing interplay between §3591(a) and §3593(e)). Indeed, the *Haynes* decision cited above, which specifically held that a "never required" instruction should be given in §3593 cases, expressly notes its agreement with *Allen* on this point, citing the same interplay between §§3591(a) and 3593(e) and explaining that once the jury has decided that a death sentence is proper based on the weighing process in §3593(e), "the jury is no longer entitled to exercise discretion with respect to that decision." *Haynes*, 265 F.Supp.2d at 916-17, 922-23. In sum, the debate over the "never required" instruction dissolves if the instruction is tied to the weighing process and resultant finding that a death sentence is justified under §3593(e); the jury just should not be instructed in a way that suggests that once they have concluded that their discretionary weighing of aggravating and mitigating circumstances directs a death sentence, they retain some last reservoir of essentially undirected discretion to withhold the penalty that they have unanimously found should be imposed under the §3593(e) scheme. The pattern instruction is drafted in accordance with this understanding.

We note that, though it was never an issue in the appellate proceedings, the jury charge in the trial underlying the Jones case cited above included a "never required" instruction placed immediately after an instruction telling the jury that "if you unanimously conclude that the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist . . . to justify a sentence of death, . . . you may recommend a sentence of death." *Jones*, 132 F.3d at 244, 527 U.S. at 385. This sequence of instructions seems to suggest that the jury need not impose a death sentence even after determining it was justified by the §3593(e)

weighing process. For the reasons stated above, that suggestion appears contrary to the plain language of §3591(a), and the pattern instructions have been drafted so as to avoid such a suggestion.

3.03

EVIDENCE

You will be called upon to make findings on various matters. In doing so you are to consider only the testimony and exhibits admitted into evidence during the trial on the offense[s] charged and the sentencing proceeding that has just concluded. I remind you that the statements, questions, and arguments of counsel are not evidence. And, of course, anything else you may have seen or heard outside the courtroom is not evidence and must be disregarded.

During these proceedings, I have ruled on objections to certain testimony and items of evidence. The admissibility of evidence is a legal matter for the court to resolve, and you must not concern yourselves with the reasons for my rulings. In your deliberations, you may not draw any inferences from my decision to exclude or admit evidence.

3.04

SPECIAL FINDINGS FORM

The process by which you must reach your decision requires that you make and record certain findings in a specific order. To ensure that your findings are stated clearly and in the required sequence, you will be given a Special Findings Form, to which I will refer throughout my instructions. You will also be given a copy of my instructions. In light of the complexity and importance of your task, it is essential that you consider and follow the instructions and Form together as you conduct your deliberations. Moreover, if any statement by counsel about the law guiding your deliberations appears to be different, you must be guided by the instructions and Form that I give you. It would be a violation of your sworn duty as jurors to base your decision upon any view of the law other than that reflected in the instructions and Form.

3.05

AGE AT TIME OF OFFENSE

Before you may consider whether the death penalty is an appropriate sentence in this case, you must unanimously find beyond a reasonable doubt that the government has proved the defendant was at least eighteen (18) years old at the time of the offense. If you do so find, answer "yes" on the appropriate page of the Special Findings Form and continue your deliberations. If you do not so find, answer "no" on the Form, sign Verdict III-B (Life Imprisonment), and certify your decision as described in section IV of the Form, which will conclude your deliberations.

Comment

"[N]o person may be sentenced to death who was less than 18 years of age at the time of the offense." 18 U.S.C. §3591(a).

3.06

INTENT REQUIREMENT

Before you may consider whether the death penalty is an appropriate sentence in this case, you must unanimously find beyond a reasonable doubt that the government proved that, in committing the offense charged in count [__], the defendant committed one of the following acts:

1. intentionally killed the victim;

2. intentionally inflicted serious bodily injury that resulted in the death of the victim;

3. intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a result of the act; or

4. intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act. *(Please refer to note (1) of the Use Note and modify this instruction as appropriate.)*

These alternatives are set out in the Special Findings Form, and you must consider and resolve them separately. For each one, you must decide whether you unanimously agree that it has been proved beyond a reasonable doubt, *(Please refer to note (2) of the Use Note and modify this instruction as appropriate)*, and indicate your answer on the Form, and then continue with the next until you have finished. If you answer "no" to all four alternatives, your deliberations are over. Sign Verdict III-B (Life Imprisonment), and certify your decision as described in section IV of the Form. If you answer "yes" to one or more, proceed to the next step in your deliberations.

Comment

(1) 18 U.S.C. §3591(a)(2)(A) to (D). In this instance, the Committee believes that the best way to comply with section 3591(a)(2) is to actually use the language of the statute in the jury instruction. These intent findings are, in the section 3591 context, conditions of eligibility and not aggravating factors

to be considered in the weighing process—as the intent requirements are in death penalty cases under the continuing criminal enterprise statute, 21 U.S.C. section 848(k). In section 848 cases, there is a concern that allowing multiple intent findings could create a set of duplicative aggravating factors that will accumulate on the aggravation side of the scale and unconstitutionally skew the weighing process in favor of the death penalty. *See*, *e.g.*, *United States v. McCullah*, 87 F.3d 1136, 1137-38 (10th Cir. 1996) (on denial of reh'g). While the *eligibility* factors in section 3591 cases do not present this difficulty, it may be prudent to suggest that the court instruct only on those intent findings that are clearly supported by the evidence, to avoid unnecessarily stacking the deck against the defendant.

(2) The statute is arguably ambiguous as to the nature of the unanimity that is required here: must the jury unanimously agree on a particular one of the listed forms of intent, or is it sufficient if the jury unanimously finds that at least one of the forms of intent applies though they do not necessarily agree on which one? And, given the Supreme Court's splintered decision in *Schad v. Arizona*, 501 U.S. 624 (1991), it is not entirely clear whether, if Congress intended to require only the latter "weak" form of unanimity, the statute would be constitutional. To avoid creating constitutional complications, the pattern instruction and Special Findings Form require the strong form of jury unanimity on this crucial eligibility finding. This is consistent with the approach followed in the Fifth Circuit.

3.07

AGGRAVATING AND MITIGATING FACTORS GENERALLY

Although it is left solely to you to decide whether the death penalty should be imposed, Congress has narrowed and channeled your discretion in specific ways, particularly by directing you to consider and weigh aggravating and mitigating factors presented by the case. These factors guide your deliberations by focusing on certain circumstances surrounding the crime, [characteristics of the victim], and personal traits, character, and background of the defendant.

Aggravating factors are considerations that tend to support imposition of the death penalty. The government is required to specify the factors it relies on, and your deliberations are constrained by its choice. Even if you believe that the evidence reveals other aggravating factors, you may not consider them.

Mitigating factors are considerations that suggest that a sentence of death should not be imposed. They need not justify or excuse the defendant's conduct, but they do suggest that a punishment less than death may be sufficient to do justice in the case.

Aside from the condition that the government prove at least one statutory aggravating factor, your task is not simply to decide whether, which, or how many aggravating and mitigating factors are present in the case. You also must evaluate and weigh such factors and, ultimately, make a unique individualized judgment about the justification for and appropriateness of the death penalty as a punishment for the defendant.

Comment

"[T]he attorney [for the government] shall, a reasonable time before the trial . . . sign and file with the court, and serve on the defendant, a notice . . . setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death." 18 U.S.C. §3593(a)(2). "The government may present any information relevant to an aggravating factor *for which notice has been provided under subsection (a)*." *Id.*, §3593(c) (emphasis added); *see also* 18 U.S.C. §3592(b) (directing that the jury "shall consider each of the . . . aggravating factors for which notice has been given"). The same statutes do not similarly limit the presentation of mitigating factors by the defense. *See id.*, §3592(a) (directing that the jury "shall consider any mitigating factor"); *id.*, §3593(c) ("[t]he defendant may present any information relevant to a mitigating factor."). And the Constitution requires that the defendant be allowed to raise any aspect of his

character or background and circumstance of the offense in mitigation. *See Penry v. Johnson*, 532 U.S. 782, 797 (2001); *Penry v. Lynaugh*, 492 U.S. 302, 319-28 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (Burger, C.J., dissenting).

3.08

STATUTORY AGGRAVATING FACTORS

Before you may consider whether the death penalty is an appropriate sentence for the defendant, you must unanimously find beyond a reasonable doubt that the government has proved at least one of the following aggravating factors prescribed by Congress and alleged by the government in this case:

[Insert the appropriate statutory aggravating factors]

There are specific factual circumstances that must be established by proof beyond a reasonable doubt for each of these statutory aggravating factors. These will be explained in individual instructions to follow.

The statutory aggravating factors are set out in the Special Findings Form and you must consider and resolve them separately. You must decide for each one whether you unanimously agree that it has been proved beyond a reasonable doubt, indicate your answer on the Form, and continue until you have finished with them all. If you answer "no" to all of the statutory aggravating factors, sign Verdict III-B (Life Imprisonment) and certify your decision as described in section IV of the Form, which will conclude your deliberations. If you answer "yes" to one or more of the statutory factors, proceed to the next step in your deliberations, which involves consideration of any non-statutory aggravating factors.

Comment

The statutory aggravating factors are listed in 18 U.S.C. section 3592(c)(1) to (16). "The burden of establishing the existence of any aggravating factor is on the government, and is not satisfied unless the existence of such a factor is established beyond a reasonable doubt." 18 U.S.C. §3593(c). And "[a] finding with respect to any aggravating factor must be unanimous." *Id.* §3593(d).

Use Note

Instructions defining and explaining many of the sixteen statutory aggravating factors appear following this instruction, and are numbered 4.08.1 *et seq.* (Subsidiary instructions are designated, for example, as 4.08.1.1 *et seq.*).

3.08.1

DEATH OCCURRING DURING COMMISSION OF ANOTHER CRIME

You must unanimously find that the government has proved beyond a reasonable doubt that the victim's death, or injury resulting in death, occurred during the commission or attempted commission of, or during the immediate flight from the commission of [insert relevant crime from among those listed in 18 U.S.C. section 3592(c)(1)].

Comment

18 U.S.C. §3592(c)(1).

Use Note

This instruction should also include the elements of the specific crime during which the killing is alleged to have occurred. *See United States v. McVeigh*, 944 F. Supp. 1478, 1490 (D. Colo. 1996).

The government can allege that the killing(s) occurred during more than one of the crimes specified in 18 U.S.C. section 3592(c)(1). *See McVeigh*, 944 F.Supp. at 1489. In such a case, however, the instructions should "clearly advise [jurors] that these [several] offenses are simply multiple means for determining that this single aggravating factor, a killing in the course of another offense, is shown to exist." *Id.* Furthermore, "the jury can be required by a special interrogatory to show unanimity in finding which of the underlying offenses they rely on if an affirmative finding is made with respect to this . . . aggravating factor." *Id.*

3.08.2

PREVIOUS CONVICTION OF VIOLENT FELONY INVOLVING FIREARM

You must unanimously find that the government has proved beyond a reasonable doubt that the defendant was previously convicted of [insert name of felony], a felony involving the [use] [attempted use] or [threatened use] of a firearm against another person. If you are convinced that the government has, in fact, proved beyond a reasonable doubt that the defendant was previously convicted of [insert name of felony], you are instructed that [insert name of felony] is, in fact, a felony.

Comment

18 U.S.C. §3592(c)(2).

Use Note

This aggravating factor applies to capital offenses "other than an offense for which a sentence of death is sought on the basis of [18 U.S.C.] section 924(c)." 18 U.S.C. §3592(c)(2).

3.08.2.1

FIREARM DEFINED

A firearm is (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; or (B) the frame or receiver of any such weapon; or (C) any firearm muffler or firearm silencer; or (D) any destructive device. A firearm, however, does not include an antique firearm.

Comment

18 U.S.C. §921(a)(3).

Use Note

Refer to 18 U.S.C. section 921(a)(16) for definition of "antique firearm."

3.08.2.2

FIREARM SILENCER AND FIREARM MUFFLER DEFINED

The terms "firearm silencer" and "firearm muffler" mean any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in assembly or fabrication.

Comment

18 U.S.C. §921(a)(24).

3.08.2.3

DESTRUCTIVE DEVICE DEFINED

A destructive device is:

(A) any explosive, incendiary, or poison gas— (1) a bomb, or (2) grenade, or (3) rocket having a propellant charge of more than four ounces, or (4) missile having an explosive or incendiary charge of more than one-quarter ounce, or (5) mine, or (6) device similar to any of those devices; or

(B) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; or

(C) any combination of parts either designed or intended for use in converting any device into any destructive device described above and from which a destructive device may be readily assembled.

A destructive device, however, does not include any device (1) that is neither designed nor redesigned for use as a weapon; (2) any device, although originally designed for use as a weapon, that is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; or (3) surplus ordinance sold, loaned, or given by the Secretary of the Army.

Comment

18 U.S.C. §921(a)(4).

Use Note

This definition of a destructive device excludes a shotgun and a shotgun shell that the "Attorney General [of the United States] finds [are] generally recognized as particularly suitable for sporting purposes." 18 U.S.C. §921(a)(4).

This definition also excludes "any other device which the Attorney General [of the United States] finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting, recreational or cultural purposes." *Id.*

3.08.3

PREVIOUS CONVICTION OF OFFENSE FOR WHICH A SENTENCE OF DEATH OR LIFE IMPRISONMENT WAS AUTHORIZED

You must unanimously find that the government has proved beyond a reasonable doubt that the defendant was previously convicted of [insert name of other offense], another offense resulting in the death of a person for which a sentence of life imprisonment or a sentence of death was authorized by statute. If you are convinced that the government has, in fact, proved beyond a reasonable doubt that the defendant was previously convicted of [insert name of other offense], you are instructed that [insert name of other offense] is, in fact, an offense for which a sentence of life imprisonment or a sentence of death was authorized by statute.

Comment

18 U.S.C. §3592(c)(3).

3.08.4

PREVIOUS CONVICTION OF OTHER SERIOUS OFFENSES

You must unanimously find that the government has proved beyond a reasonable doubt that the defendant was previously convicted of two or more felonies committed on different occasions; that is, he was convicted of committing [insert name of felony] on [insert date that felony was committed] and [insert name of felony] on [insert date that felony was committed] each involving infliction of, or attempted infliction of, serious bodily injury or death upon another person. If you are convinced that the government has, in fact, proved beyond a reasonable doubt that the defendant was previously convicted of [insert names of previous felonies and dates], you are instructed that [insert names of previous felonies] are, in fact, felonies involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person.

Comment

18 U.S.C. §3592(c)(4).

3.08.4.1

EXCLUSIONS TO THE TERM "FELONY"

The term "felony" does not include:

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment for two years or less.

Comment

18 U.S.C. §921(a)(20).

Use Note

This instruction is only to be used if the defendant was convicted of one of the previous offenses referred to in Instruction 4.08.4.1.

3.08.5

GRAVE RISK OF DEATH TO ADDITIONAL PERSONS

You must unanimously find that the government has proved beyond a reasonable doubt that the defendant, in committing the offense, or in escaping apprehension for committing the offense, knowingly created a grave risk of death to one or more persons, in addition to the victim(s) of the offense. In this case [insert government specification of grave risk].

Comment

18 U.S.C. §3592(c)(5); *See e.g., United States v. McVeigh*, 944 F. Supp. 1478, 1490 (D. Colo. 1996).

3.08.6

HEINOUS, CRUEL, OR DEPRAVED MANNER OF COMMITTING THE OFFENSE

You must unanimously find that the government has proved beyond a reasonable doubt that the defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved either torture or serious physical abuse to the victim.

Torture includes severe mental as well as physical abuse. For such abuse to amount to torture, the victim must have been conscious of it at the time it was inflicted. Further, the defendant must have specifically intended to inflict severe mental or physical pain upon the victim, apart from killing the victim.

On the other hand, serious physical abuse may be inflicted regardless of whether the victim is conscious of the abuse at the time it was inflicted. The defendant, however, must have specifically intended the abuse, apart from the killing. Serious physical abuse means a significant or considerable amount of injury or damage to the victim's body which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

Pertinent factors which you may consider in determining whether a killing was especially heinous, cruel, or depraved include:

[Insert factors as appropriate].

Comment

18 U.S.C. §3592(c)(6); *United States v. Chanthadara*, 230 F.3d 1237, 1261-62 (10th Cir. 2000).

The phrase "especially heinous, cruel, or depraved," by itself, is unconstitutionally vague. *See*, *e.g.*, *Maynard v. Cartwright*, 486 U.S. 356, 363-64 (1988) (addressing similar aggravating factor applying when murder was especially heinous, atrocious, or cruel). Nonetheless, the statutory language limiting this aggravating factor to situations involving torture or serious physical abuse cures any vagueness problems. *See*, *e.g.*, *Walton v. Arizona*, 497 U.S. 639, 654-55 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584, 588-89 (2002); *see also Cartwright*, 486 U.S. at 364-65.

3.08.7

PROCUREMENT OF THE OFFENSE BY PAYMENT

You must unanimously find that the government has proved beyond a reasonable doubt that the defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value. "Anything of pecuniary value" means anything in the form of money, property, or anything else having some economic value, benefit, or advantage.

Comment

18 U.S.C. §3592(c)(7).

3.08.8

PECUNIARY GAIN

You must unanimously find that the government has proved beyond a reasonable doubt that the defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value. "Anything of pecuniary value" means anything in the form of money, property, or anything else having some economic value, benefit, or advantage. The defendant must have expected to receive this pecuniary gain as a result of the victim's death.

Comment

18 U.S.C. §3592(c)(8); *United States v. Chanthadara*, 230 F.3d 1237, 1263-64 (10th Cir. 2000).

Use Note

Particularly where the capital offense is felony murder, the instruction should make clear that the defendant must have expected the pecuniary gain involved to result from the killing itself, and not an underlying felony, such as robbery. *See Chanthadara*, 230 F.3d at 1263-64.

3.08.9

SUBSTANTIAL PLANNING AND PREMEDITATION

You must unanimously find that the government has proved beyond a reasonable doubt that the defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism. "Planning" means mentally formulating a method for doing something or achieving some result. "Premeditation" means thinking or deliberating about an act before deciding to do it. The planning and premeditation involved in an offense are "substantial" when they were ample or considerable, rather than just minimally sufficient, for commission of the offense.

Comment

18 U.S.C. §3592(c)(9). Generally, this instruction is similar in form and content to the Eighth Circuit's Pattern Jury Instruction 12.07I. But the definition of the critical term "substantial" is taken from *United States v. McCullah*, 76 F.3d 1087, 1110-11 (10th Cir. 1996) (applying similar aggravating factor in 21 U.S.C. §848(n)(8)). The definition of "planning" is derived from the Eighth Circuit's instruction, while the definition of "premeditation" is taken from this Circuit's Pattern Jury Instruction No. 2.52 (addressing premeditation as an element of first degree murder), with minor alteration here to avoid redundancy with the related notion of planning.

3.08.10

CONVICTION FOR TWO FELONY DRUG OFFENSES

You must unanimously find that the government has proved beyond a reasonable doubt that the defendant was previously convicted of two or more felonies committed on different occasions; that is, defendant was convicted of committing [insert name of previous felony] on [date felony was committed] and [name of previous felony] on [date felony was committed], each involving the distribution of a controlled substance. If you are convinced that the government has, in fact, proved beyond a reasonable doubt that the defendant was previously convicted of [insert names of previous felonies and dates], you are instructed that [insert names of previous felonies] are, in fact, felonies involving the distribution of a controlled substance.

Comment

18 U.S.C. §3592(c)(10).

3.08.11

VICTIM'S VULNERABILITY

You must unanimously find that the government has proved beyond a reasonable doubt that the victim was particularly vulnerable due to old age, youth, or infirmity.

Comment

18 U.S.C. §3592(c)(11).

3.08.12

CONVICTION FOR SERIOUS FEDERAL DRUG OFFENSE

You must unanimously find that the government has proved beyond a reasonable doubt that the defendant was previously convicted of [insert name of offense], which is [an offense violating title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 for which a sentence of five or more years may be imposed], or [a continuing criminal enterprise]. If you are convinced that the government has, in fact, proved beyond a reasonable doubt that the defendant was previously convicted of [insert name of offense], you are instructed that [insert name of offense] is [an offense violating title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 for which a sentence of five or more years may be imposed] or [a continuing criminal enterprise].

Comment

18 U.S.C. §3592(c)(12); *see also* 21 U.S.C. §848(c) (regarding continuing criminal enterprise).

3.08.13

CONTINUING CRIMINAL ENTERPRISE INVOLVING DRUG SALES TO MINORS

You must unanimously find that the government has proved beyond a reasonable doubt that the defendant committed the offense in the course of engaging in a continuing criminal enterprise, and that violation involved distributing drugs to persons under the age of twenty-one and defendant is a person over the age of eighteen.

A person engages in a continuing criminal enterprise if (1) he commits [a felony defined in 21 U.S.C. section 848(c)] and (2) that offense was part of a continuing series of offenses [specified in 21 U.S.C. section 848(c)(1)] (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and (2) from which such person obtains substantial income or resources.

Comment

18 U.S.C. §3592(c)(13); 21 U.S.C. §§848(c), 859.

3.08.14

HIGH PUBLIC OFFICIALS

You must unanimously find that the government has proved beyond a reasonable doubt that the defendant committed the offense against:

(A) the President of the United States, the President-elect, the Vice President, the Vice President-elect, the Vice President-designate, or, if there is no Vice President, the officer next in order of succession to the office of the President of the United States, or any other person who is acting as President under the Constitution and laws of the United States; or

(B) a chief of state, head of government, or the political equivalent, of a foreign nation; or

(C) a foreign official, who is a Chief of State or the political equivalent, President, Vice President, Prime Minister, Ambassador, Foreign Minister, or other officer of Cabinet rank or above of a foreign government or the chief executive officer of an international organization, or any person who has previously served in such capacity, and any member of his family, in the United States on official business; or

(D) a Federal public servant who is a judge, a law enforcement officer, or an employee of a United States penal or correctional institution (i) while he or she is engaged in the performance of his or her official duties; or (ii) because of the performance of his or her official duties; or (iii) because of his or her status as a public servant. "Law enforcement officer" means a public servant authorized by law or a agency or Congress to conduct or engage in the prevention, investigation, or prosecution or adjudication of an offense, and includes those engaged in corrections, parole, or probation functions.

Comment

18 U.S.C. §3592(c)(14); 18 U.S.C. §1116(b)(3).

Use Note

This instruction should be tailored to address the specific facts of a given case.

3.08.15

PRIOR CONVICTION OF SEXUAL ASSAULT OR CHILD MOLESTATION

You must unanimously find that the government has proved beyond a reasonable doubt that the defendant was previously convicted of [insert name of previous offense], which is a crime of [sexual assault] [child molestation]. If you are convinced that the government has, in fact, proved beyond a reasonable doubt that the defendant was previously convicted of [insert name of previous offense], you are instructed that [insert name of previous offense] is a crime of [sexual assault] [crime of child molestation].

Comment

18 U.S.C. §3592(c)(15).

Use Note

This aggravating factor is available only when the capital offense involves sexual abuse under chapter 109A, or sexual abuse of children under chapter 110. 18 U.S.C. §3592(c)(15).

3.08.16

MULTIPLE KILLINGS OR ATTEMPTED KILLINGS

You must unanimously find that the government has proved beyond a reasonable doubt that the defendant intentionally killed or attempted to kill more than one person in a single criminal episode.

Comment

18 U.S.C. §3592(c)(16).

3.09

NON-STATUTORY AGGRAVATING FACTORS

The government has also alleged the existence of non-statutory aggravating factors in this case. These factors tend to support imposition of the death penalty, though they have not been specifically listed by Congress. The factors alleged by the government are:

[Insert the appropriate non-statutory aggravating factors]

These non-statutory aggravating factors are set out in the Special Findings Form and, just as with the statutory factors, you must consider them separately. You must decide for each one whether you unanimously agree that it has been proved by the government beyond a reasonable doubt, indicate your answer on the Form, and continue until you have finished with them all. Regardless of your findings on these non-statutory factors, you must proceed to the next step in your deliberations, which involves consideration of mitigating factors.

Comment

In addition to the aggravating factors specified by Congress, "[t]he jury . . . may consider whether any other aggravating factor for which notice has been given exists." 18 U.S.C. §3592(c). The courts have held that "the prosecutor's authority to define non-statutory aggravating factors is a constitutional delegation of Congress' legislative power." *See, e.g., United States v. McCullah*, 76 F.3d 1087, 1106-07 (10th Cir. 1996) (upholding similar delegation of authority to specify non-statutory aggravating factors under 21 U.S.C. §848).

3.10

MITIGATING FACTORS

The law never assumes or presumes that a defendant should be sentenced to death. Accordingly, the defense is under no obligation to establish the existence of any mitigating factors (or to disprove the existence of any aggravating factors). A defendant may, of course, choose to argue specific mitigating factors, and the defendant has offered evidence on the following factors in this case:

[Insert mitigating factors.]

The defendant need only prove these mitigating factors by a preponderance of the evidence; that is, by evidence sufficient to persuade you that the factor is more likely present than not present. *(Please refer to note (1) of the Use Note and modify this instruction as appropriate.)* And the law does not require unanimous agreement with regard to mitigating factors. Any juror may find the existence of a mitigating factor and must then consider that factor in weighing the aggravating and mitigating factors even though other jurors may not agree that the particular mitigating factor has been established. *(Please refer to note (2) of the Use Note and modify this instruction as appropriate.)* Moreover, any juror may consider a mitigating factor found by another juror, even if he or she did not concur in that finding. *(Please refer to note (3) of the Use Note and modify this instruction as appropriate.)*

Your discretion in considering mitigating factors is much broader than your discretion in considering aggravating factors. The law permits you to consider any other relevant mitigating information presented in this proceeding, in addition to the specific factors recited above, so long as its existence was proved by a preponderance of the evidence. "Relevant mitigating information" includes anything in the defendant's background, record, character, or any circumstances of the offense, which suggests to you that a sentence of death should not be imposed. *(Please refer to note (4) of the Use Note and modify this instruction as appropriate.)* Throughout these instructions, references to mitigating factors should be understood to include other relevant mitigating information.

Record your findings as to the mitigating factors as indicated by the Special Findings Form. *(Please refer to note (5) of the Use Note and modify this instruction as appropriate.)* Regardless of your findings as

to these factors, however, you must proceed to the next step in your deliberations, which involves weighing aggravating and mitigating factors.

Comment

(1) "The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the existence of such a factor is established by a preponderance of the information." 18 U.S.C. §3593(c). In contrast to the unanimity required for aggravating factors, "[a] finding with respect to a mitigating factor may be made by 1 or more members of the jury." *Id.*, §3593(d).

(2) The instruction explains how non-unanimous mitigating factors fit into the weighing process. Accommodating the mandatory directive in §3593(e) that the jury "shall consider . . . all the mitigating . . . factors found to exist" with the qualification in §3593(d) that a non-unanimous factor is to be considered by "any member of the jury *who finds the existence of [that] mitigating factor*" (emphasis added), the instruction states that inclusion of non-unanimous mitigating factors in the weighing process is mandatory—as it is with all proven factors—for any juror who finds they exist. *United States v. Jackson*, 327 F.3d 273, 301-02 (4th Cir. 2003) (discussing §3593(d) & (e) and approving instruction directing that "[a]ny juror who is persuaded of the existence of a mitigating factor must consider it"); *see United States v. Paul*, 217 F.3d 989, 999 (8th Cir. 2000) (approving instruction insofar as it directed jurors that "each of you must weigh any mitigating factors that you individually find to exist").

(3) The instruction follows the practice of the Eighth Circuit in permitting (but not requiring) each juror to weigh mitigating factors found by other jurors even if that juror did not find the factors himself. *See* Model Jury Instructions for the District Courts of the Eighth Circuit, FEDCRIM—JI8, 12.09 (Westlaw database); *United States v. Paul*, 217 F.3d 989, 999 (8th Cir. 2000). The Fifth Circuit disagrees with this approach. *See United States v. Webster*, 162 F.3d 308, 327 (5th Cir. 1998).

(4) The defendant may frame and rely on mitigating factors not prescribed by Congress (the counterpart to the prosecution's non-statutory aggravating factors). 18 U.S.C. §3592(a)(8). In addition, the Supreme Court has repeatedly held that substantive or procedural limitations (statutory, evidentiary, instructional) on a jury's meaningful consideration of all relevant mitigating information violate constitutional guarantees. *See*, *e.g.*, *Penry v. Johnson*, 532 U.S. 782, 796-804 (2001); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion, adopted by majority in *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982)). Adhering to the consistent thrust of these decisions, the pattern instruction tells the jury it is free to consider all relevant mitigating evidence, without any preemptive limitation to just the categories of mitigation explicitly framed by Congress or the defendant. The definition of "relevant mitigating evidence" is the standard formulation derived from Lockett. *See*, *e.g.*, *Coleman v. Saffle*, 869 F.2d 1377,

1392 (10th Cir. 1989) (quoting *Lockett*, 438 U.S. at 604).

(5) Regarding the return of special findings on mitigating factors, the statute permits but does not require the jury to return such findings. 18 U.S.C. §3593(d) (requiring special findings only as to aggravating factors); *see United States v. Paul*, 217 F.3d 989, 999 n.6 (8th Cir. 2000); *United States v. Chandler*, 996 F.2d 1073, 1087 (11th Cir. 1993). The instruction (and associated section of the Special Findings Form) is drafted on the assumption that the court will direct the jury to return special findings on mitigation. There are two prudential reasons to encourage doing this. First, such findings facilitate meaningful judicial review of death sentences (including assisting an appellate court with prejudice/harmless error determinations with respect to various other instructions). *See generally Paul*, 217 F.3d at 999 n.6 (questioning whether review of challenge regarding proper effectuation of mitigating evidence was possible absent special findings on the matter). Second, "equal treatment" of mitigating and aggravating factors in this way avoids any implicit suggestion that decisions with respect to mitigating factors are less important and/or subject to less searching scrutiny than those with respect to the aggravating factors.

It should be noted, however, that one circuit has read into the permissive statutory language of 21 U.S.C. §848(k)—which is the same in this respect as §3593(d) —a novel idea about the respective authority of the trial court and jury here that conflicts with the recommended approach. In *Chandler*, the Eleventh Circuit held not that it was up to the trial court to decide whether to instruct the jury to return special findings on mitigation, but that it was up to the jury to decide whether they wished to do so: "we find that Section 848 requires that the jury be instructed that it has the option to return written findings of mitigating factors if it so chooses." *Chandler*, 996 F.2d at 1087. As a general matter, decisions about the content and use of special verdicts—like decisions about the instructions they are analogous to—are reserved to the discretionary judgment of the trial court. *See Webb v. ABF Freight Sys., Inc.*, 155 F.3d 1230, 1249 (10th Cir. 1998) (following *Reed*). There is nothing in the statute to suggest that this decision about trial procedure is to be delegated by the trial court to the jury.

Use Note

Instructions defining and explaining the eight statutory mitigating factors follow this instruction, beginning with Instruction 4.10.1.

3.10.1

IMPAIRED CAPACITY

At least one of you must find that the defendant has proved by a preponderance of the evidence that the defendant's capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law was significantly impaired, even though his capacity was not so impaired as to constitute a defense to the charge.

Comment

18 U.S.C. §3592(a)(1).

3.10.2

DURESS

At least one of you must find that the defendant has proved by a preponderance of the evidence that the defendant was under unusual and substantial duress, even though the duress was not of such a degree as to constitute a defense to the charge.

Comment

18 U.S.C. §3592(a)(2).

3.10.3

MINOR PARTICIPATION

At least one of you must find that the defendant has proved by a preponderance of the evidence that the defendant's participation in the offense was relatively minor, even though the defendant's participation was not so minor as to constitute a defense to the charge.

Comment

18 U.S.C. §3592(a)(3).

3.10.4

EQUALLY CULPABLE DEFENDANTS

At least one of you must find that the defendant has proved by a preponderance of the evidence that another defendant or defendants, equally culpable in the crime, will not be punished by death.

Comment

18 U.S.C. §3592(a)(4).

3.10.5

NO PRIOR CRIMINAL HISTORY

At least one of you must find that the defendant has proved by a preponderance of the evidence that the defendant did not have a significant prior history of other criminal conduct.

Comment

18 U.S.C. §3592(a)(5).

3.10.6

DISTURBANCE

At least one of you must find that the defendant has proved by a preponderance of the evidence that the defendant committed the offense under severe mental or emotional disturbance.

Comment

18 U.S.C. §3592(a)(6).

3.10.7

VICTIM'S CONSENT

At least one of you must find that the defendant has proved by a preponderance of the evidence that the victim consented to the criminal conduct that resulted in the victim's death.

Comment

18 U.S.C. §3592(a)(7).

3.10.8

OTHER MITIGATING FACTORS

At least one of you must find that the defendant has proved by a preponderance of the evidence that [list any other factors in the defendant's background, record, or character or any other circumstances of the offense that mitigate against imposing the death sentence.]

Comment

18 U.S.C. §3592(a)(8).

The defendant may submit a mitigating factor, under the catch-all provision, section 3592(a)(8), based on any aspect of his character, record, or offense, even if that factor is similar to the other, statutorily defined mitigating factors, because "a capital defendant is constitutionally entitled to offer in mitigation any aspect of his character, record, or offense." *United States v. McVeigh*, 153 F.3d 1166, 1212 (10th Cir. 1998) (capital defendant entitled to assert, under the catch-all mitigating factor, that he had had a lesser role in the offense, even though that mitigating factor is similar to the statutory mitigating factor applicable when the capital defendant played a minor role in the offense, 18 U.S.C. §3592(a)(3)), *disapproved of on other grounds by Hooks v. Ward*, 184 F.3d 1206, 1227 (10th Cir. 1999), *and abrogation on other grounds recognized by United States v. Nichols*, 38 Fed. Appx. 534, 537-38 (10th Cir. Apr. 5, 2002).

3.11

WEIGHING AGGRAVATION AND MITIGATION

After completing your findings regarding aggravating and mitigating factors, you must engage in a weighing process to determine whether a sentence of death is justified. In this process, you must consider only those aggravating factors, statutory and non-statutory, that you unanimously found to exist. Each of you must also consider any mitigating factors that you individually found to exist, and you each may consider any mitigating factors found by any of the other jurors. You must determine whether the proven aggravating factor[s] sufficiently outweigh any proven mitigating factor[s] to justify a sentence of death.

The task of weighing aggravating and mitigating factors against each other, or weighing aggravating factors alone if there are no mitigating factors, is not a mechanical process. You should not simply count the number of factors, but consider the particular character of each, which may be given different weight or value by different jurors. What constitutes sufficient justification for a sentence of death in this case is exclusively left to you. Your role is to be the conscience of the community in making a moral judgment about the worth of an individual life balanced against the societal value of what the government contends is deserved punishment for the defendant's offense.[1] Whatever aggravating and mitigating factors are found, a jury is never required to conclude the weighing process in favor of a sentence of death. But your decision must be a reasoned one, free from the influence of passion, prejudice, or arbitrary consideration.

If you do not unanimously find that the aggravating factor[s] sufficiently outweigh the mitigating factor[s] to justify a sentence of death—or in the absence of any mitigating factor, that the aggravating factor[s], considered alone, justify a sentence of death—answer "no" on the Special Findings Form, sign Verdict III-B (Life Imprisonment), and certify your decision as described in section IV of the Form, which will end your deliberations. If you unanimously find that the comparative weight of the aggravating factor[s] is sufficient to justify a sentence of death, answer "yes" on the Special Findings Form, sign Verdict III-A (Sentence of Death), and certify your decision as described in section IV of the Form.

Comment

[1] The basic outline of the weighing process is set out in 18 U.S.C. §3593(e).

3.12

RIGHT TO JUSTICE WITHOUT DISCRIMINATION

In considering whether a sentence of death is justified, you shall not consider the race, color, religious beliefs, national origin, or gender of the defendant or of any victim. You are not to impose a death sentence unless you conclude that you would do so no matter what the race, color, religious beliefs, national origin, or gender of the defendant or the victim(s) may be.

Whatever sentencing decision you reach, each of you is required by law to sign a certification attesting to the fact that you have followed this instruction. The certification is set out in section IV of the Special Findings Form.

Comment

The trial court is statutorily required to instruct the jury in this, or a similar, manner. 18 U.S.C. §3593(f).

Special Findings Form

I. Findings Regarding Defendant's Eligibility for a Death Sentence

A. Defendant's Age at Time of Offense

Do you unanimously find that the government proved beyond a reasonable doubt that the defendant was eighteen (18) years of age at the time he committed the offense[s] for which sentence is to be imposed?

YES ____

NO ____

If you answered yes, proceed to the next section (I-B) of this Form. If you answered no, then stop your deliberations, sign the section of this Form indicating a verdict of life imprisonment (III-B), certify your decision as described in section IV, and notify the court that you have reached a decision.

B. Defendant's Intent in Commission of Offense

For each type of intent specified below, answer "yes" or "no" according to whether you unanimously find that the government proved beyond a reasonable doubt that the defendant acted with the specified intent:

1. The defendant intentionally killed the victim;

YES ____

NO ____

2. The defendant intentionally inflicted serious bodily injury that resulted in the victim's death;

YES ____

NO ____

3. The defendant intentionally participated in an act, contemplating that a person's life would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a result of the act;

YES ____

NO ____

4. The defendant intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act.

YES ____

NO ____

If you answered yes to one or more of these alternatives, proceed to the next section (I-C) of this Form. If you answered no to all of them, then stop your deliberations, sign the section of this Form indicating a verdict of life imprisonment (III-B), certify your decision as described in section IV, and notify the court that you have reached a decision.

C. Statutory Aggravating Factors

The government has alleged that the following statutory aggravating factors are present in this case. For each factor, answer "yes" or "no" according to whether you unanimously find that the government proved the existence of the factor beyond a reasonable doubt:

[1.

Insert alleged statutory aggravating factors here (which must match those specified in the associated instruction), each followed by blanks for "yes" or "no" findings.

X.]

If you answered "yes" to one or more of these statutory aggravating factors, you have found the defendant eligible for a death sentence and you should proceed to the next section (II) of this Form to consider whether such a sentence is justified under the

circumstances of the case. If you answered "no" to all of these factors, then you have found the defendant ineligible for a death sentence and you should stop your deliberations, sign the section of this Form indicating a verdict of life imprisonment (III-B), certify your decision as described in section IV, and notify the court that you have reached a decision.

II. Findings Regarding Justification for a Death Sentence

A. Non-Statutory Aggravating Factors

The government has alleged that the following non-statutory aggravating factors are present in this case. For each factor, answer "yes" or no according to whether you unanimously find that the government proved the existence of the factor beyond a reasonable doubt:

[1.

Insert alleged non-statutory aggravating factors here (which must match those specified in the associated instruction), each followed by blanks for "yes" or "no" findings.

X.]

Regardless of your findings on these non-statutory factors, you must proceed to the next section (II-B) of this Form.

B. Mitigating Factors

The defendant has alleged that the following mitigating factors are present in this case. For each of these factors, answer "yes" or "no" according to whether any juror (or jurors) finds that the defendant has proved the existence of the factor by a preponderance of the evidence:

[1.

Insert alleged mitigating factors (which must match those specified in the associated instruction), each followed by blanks for "yes" or "no" findings. In this instance, the "yes" blank should indicate that *any one or more jurors* finds the factor was proved, while the "no" blank should indicate that no juror finds the factor was proved.

X.]

As explained in the Court's instructions, the law permits you to consider any other relevant mitigating information, in addition to the specific mitigating factors alleged by the defendant listed above, so long as you find that it was proved by a preponderance of the evidence. As with specific mitigating factors, your findings in this regard need not be unanimous.

Did one or more jurors find that other relevant mitigating information was proved?

YES ____

NO ____

If you answered "yes," list the additional mitigation information you found to be present in the space provided immediately below:

When you have completed your findings regarding mitigation, proceed to the next section (II-C) of this Form, where you will weigh the aggravating factor[s] with the mitigating factor[s], if any, that you have found to be present in this case.

C. Weighing Process

The question you must answer at this stage of your deliberations is whether the proven aggravating factor[s] sufficiently outweigh the proven mitigating factors and information to justify a sentence of death or, if you have not found any mitigation present, whether the aggravating factor[s] considered alone justify a death sentence. If you unanimously find that the weight of the aggravating factor[s] is sufficient to justify a sentence of death, answer "yes" below, record your verdict on Verdict—Sentence of Death, certify your decision as described in section IV, and notify the court that you have reached a decision. If you do not unanimously find that a death sentence is justified, answer "no" below, stop your deliberations, sign Verdict—Life Imprisonment, certify your decision as described in section IV, and notify the court that you have reached a decision.

YES ____

NO ____

III. Imposition of Sentence

This is the last step in your deliberations. If you have made all of the findings necessary to make the defendant eligible for a death sentence and have unanimously concluded that such a sentence is justified and therefore must be imposed on the defendant, record your decision by collectively signing the verdict set out in Verdict—Sentence of Death below, sign the certification that follows in section IV, and notify the court that you have reached a decision. If you do not unanimously conclude that a sentence of death is justified and therefore must be imposed, sign the verdict for life imprisonment set out in Verdict—Life Imprisonment below, sign the certification in section IV, and notify the court that you have reached a decision.

VERDICT—SENTENCE OF DEATH

Based upon our consideration of the evidence and in accordance with the court's instructions, we find by unanimous vote that a sentence of death shall be imposed on the defendant.

_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____ _____

Foreperson
Date:

VERDICT—LIFE IMPRISONMENT

Based upon our consideration of the evidence and in accordance with the court's instructions, we find that a sentence of life imprisonment without release shall be imposed on the defendant.

IV. Certification

By signing below, each juror certifies that consideration of the race, color, religious beliefs, national origin, or gender of the defendant or the victim(s) was not involved in reaching his or her individual decision, and that the individual juror would have made the same decision regarding the appropriate sentence for the offense in question regardless of the race, color, religious beliefs, national origin, or gender of the defendant or the victim(s).

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Foreperson
Date: