

## Chapter 2.00

### DEFINING THE CRIME AND RELATED MATTERS

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## **2.01 INTRODUCTION**

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

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

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

### **Use Note**

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

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

### **Committee Commentary 2.01** (current through August 1, 2016)

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 LEXIS 30164 (6th Cir. 1999) (unpublished), a panel of the Sixth Circuit held that it was not error to give Pattern Instruction 2.01(3) without modification even though the defendant argued someone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

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

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

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

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

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

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

### **Use Note**

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

### **Committee Commentary 2.01A** (current through August 1, 2016)

This instruction is modeled after Federal Judicial Center Instruction 46A.

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

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

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

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

### **Committee Commentary 2.01B** (current through August 1, 2016)

In *United States v. Mayes*, 512 F.2d 637, 641 (6th Cir. 1975), the Sixth Circuit quoted with approval Justice Rutledge's admonition in *Kotteakos v. United States*, 328 U.S. 750, 772 (1946):

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

The proposed instruction is based on these principles, and on the instructions given by the district court in *United States v. United States Gypsum Co.*, 550 F.2d 115, 127-128 n.12 (3d Cir. 1977), which were affirmed by the Supreme Court in *United States v. United States Gypsum Co.*, 438 U.S. 422, 462-63 (1978).

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

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

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

### **Use Note**

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

### **Committee Commentary 2.01C** (current through August 1, 2016)

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

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

Paragraph (2) should be modified when guilt of one charge is a prerequisite for conviction of another charge. See for example 18 U.S.C. § 1961 (RICO conviction requires proof of two predicate offenses).

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

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

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

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

### **Use Note**

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

### **Committee Commentary 2.01D** (current through August 1, 2016)

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

Paragraph (3) should be modified when guilt of one charge is a prerequisite for conviction of another charge. See for example 18 U.S.C. § 1961 (RICO conviction requires proof of two predicate offenses).

## **2.02 DEFINITION OF THE CRIME**

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

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

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

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

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

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

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

### **Use Note**

Definitions of the precise mental state required for various federal offenses are provided in the elements instructions in Chapters 10 *et seq.*

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

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

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

### **Committee Commentary 2.02** (current through August 1, 2016)

This instruction recommends a format for defining the elements of crimes not covered by elements instructions in Chapters 10 *et seq.* The format here breaks the definition down into two basic parts -- the prohibited acts and/or results required to convict; and the required mental state. It is impossible to break every federal crime down into two neatly separate elements, and this instruction should not be viewed as a rigid formula that can or should be followed in every case. A bracketed catch-all paragraph (1)(C) is included to illustrate that other elements may be required to convict.

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

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

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

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

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

In *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), the Court held that under the Sixth Amendment, any fact (other than a prior conviction) that increases the maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt. In *Alleyne v. United States*, 133 S. Ct. 2151 (2013), the Court reached the same conclusion for any fact that triggers a mandatory minimum penalty. *Alleyne*, *citing* *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and overruling *Harris v. United States*, 536 U.S. 545 (2002). Thus, under *Apprendi* and *Alleyne*, any fact that increases the maximum penalty or triggers a mandatory minimum penalty must be submitted to the jury and found beyond a reasonable doubt.

When the indictment alleges facts that increase the statutory maximum penalty or trigger a mandatory minimum penalty, these facts should not be included in bracketed paragraph (1)(C) of the instruction because these additional facts are not “required to convict.” Rather, in this situation, an additional instruction and special verdict forms may be necessary for the jury to make findings. The Committee recommends that the court give an instruction like Instruction 14.07A or 14.07B Unanimity Required: Determining Amount of Controlled Substance and use a special verdict form like those following Instructions 14.07A and 14.07B.

Reading the indictment to the jury is generally within the discretion of the district court. *United States v. Smith*, 419 F.3d 521, 530 (6th Cir. 2005), *citing* *United States v. Maselli*, 534 F.2d 1197, 1202 (6th Cir. 1976). Instructions stating that “the purpose of an indictment is only to cause the person named therein to be brought to trial and to advise him of the nature of the charge or charges against him” have been characterized as “desirable” and “customary.” *United States v. Baker*, 418 F.2d 851, 853 (6th Cir. 1969). Earlier versions of this commentary did not recommend that the trial judge read the indictment to the jury, and also recommended that the trial judge not paraphrase the indictment. The Committee recognizes that district court practices on reading or summarizing the indictment vary widely, and takes no position on the best practice. However, jury confusion can arise, particularly in complex cases, if the indictment is not read,

accurately summarized or sent to the jury room. *See, e.g., United States v. Bustamante*, 1992 WL 126630, 1992 U.S. App LEXIS 13407 (6th Cir. 1992) (unpublished). As the Eighth Circuit states in Note 2 to its Model Criminal Instruction 1.01 (2003 ed.), “Depending on the length and complexity of the indictment and the individual practices of each district judge, the indictment may be read, summarized by the court, summarized by the prosecution or not read or summarized depending on what is necessary to assist the jury in understanding the issues before it.” If the indictment is furnished in writing to the jury, a limiting instruction such as Instruction 1.03(1) must be given. *United States v. Smith*, 419 F.3d 521, 531 (6th Cir. 2005) (omission of limiting instruction was error but not plain error). The Committee takes no position on the practice in some districts of providing the jury with a copy of the indictment.

Reading the indictment to prospective jurors is not an abuse of discretion if appropriate limiting instructions are given to the effect that the indictment is not to be considered as evidence of guilt. *United States v. Lawson*, 535 F.3d 434, 441 (6th Cir. 2008). Such a limiting instruction is found in Instruction 1.03(1).

## 2.03 DEFINITION OF LESSER OFFENSE

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

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

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

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

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

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

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

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

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

### Use Note

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

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

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

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

**Committee Commentary 2.03**  
(current through August 1, 2016)

Federal Rule of Criminal Procedure 31(c) provides:

(c) Lesser Offense or Attempt. A defendant may be found guilty of any of the following:

- (1) an offense necessarily included in the offense charged;
- (2) an attempt to commit the offense charged; or
- (3) an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right.

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

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

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

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

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

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

## 2.04 ON OR ABOUT

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

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

### Use Note

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

### Committee Commentary 2.04 (current through August 1, 2016)

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

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

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

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

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

However, even when an alibi defense is raised, the district court retains the discretion to give an "on or about" instruction. *United States v. Neuroth*, 809 F.2d 339, 341-42 (6th Cir. 1987) (en banc). In exercising this discretion, the district court should look at how specifically the indictment alleges the date on which the offense occurred, and compare that to the proofs at trial regarding the date of the offense. If the indictment or the proofs point exclusively to a particular date, it is preferable for the court not to give an "on or about" instruction. The court should also consider the type of crime charged. An "on or about" instruction may be more appropriate in a case involving a crime like conspiracy, where the proof as to when the crime occurred is more nebulous, than in a case involving a crime like murder, where the proof as to when the crime occurred may be more concrete. These factors are guidelines only, not a rigid formula. *Id.* at 342.

Caution also should be used in giving this instruction when there is a statute of limitations question, *see Ledbetter v. United States*, *supra*, 170 U.S. at 612, or when the date charged is an essential element of the offense and the defendant may have been misled by the date alleged in the indictment. *See United States v. Bourque*, 541 F.2d 290, 293-96 (1st Cir. 1976); *United States v. Goldstein*, 502 F.2d 526, 528-30 (3d Cir. 1974). *See also United States v. Pandilidis*, 524 F.2d 644, 647 (6th Cir. 1975) (while a mere change of date is not normally considered a substantial variation in an indictment, where the date of the alleged offense affects the determination of whether a crime has been committed, the change is considered material).

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

## 2.05 WILLFULLY

(No General Instruction Recommended.)

### **Committee Commentary 2.05** (current through August 1, 2016)

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).

The Committee instead recommends that the district court define the precise mental state required for the particular offense charged as part of the court's instructions defining the elements of the offense. Chapters 10 *et seq.* include elements instructions which identify specific mental states for those crimes. This approach is consistent with the approach taken by the majority of the circuits that have drafted pattern instructions. See the Introduction to the Federal Judicial Center Instructions ("[W]e have abjured the term ... 'willfully' ... (and instead) have tried our best to make it clear what it is that a defendant must intend or know to be guilty of an offense").

In *United States v. Pomponio*, 429 U.S. 10, 11-12 (1976), the Supreme Court stated that the term "willfully" does not require proof of any evil motive or bad purpose other than the intention to violate the law.

To determine the precise mental state required for conviction, "each material element of the offense must be examined and the determination made what level of intent Congress intended the Government to prove, taking into account constitutional considerations (citation omitted), as well as the common-law background, if any, of the crime involved." *United States v. Renner*, 496 F.2d 922, 926 (6th Cir. 1974), *quoting* *United States v. Freed*, 401 U.S. 601, 613-14 (1971) (Brennan, J., concurring in the judgment).

## **2.06 KNOWINGLY**

(No General Instruction Recommended.)

### **Committee Commentary 2.06** (current through August 1, 2016)

The Committee recommends that the district court give no general instruction defining the term *knowingly* and that instead, the district court define the mental state required for the particular crime charged as part of the court's instructions defining the elements of the offense. Chapters 10 *et seq.* include elements instructions which identify specific mental states for those crimes.

The meaning of the term "knowingly" varies depending on the particular statute in which it appears. For example, in *Liparota v. United States*, 471 U.S. 419, 433-34 (1985), the Supreme Court held that to convict a defendant of food stamp fraud, the government must prove that the defendant knew that his acquisition or possession of food stamps was unauthorized by statute or regulations. In contrast, in *United States v. Elshenawy*, 801 F.2d 856, 857-59 (6th Cir. 1986), the Sixth Circuit held that to convict a defendant of possessing contraband cigarettes, the government need only prove that the defendant knew the physical nature of what he possessed. The government need not prove that the defendant also knew that the cigarettes in his possession were required to be taxed, or that the required taxes had not been paid.

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

## 2.07 SPECIFIC INTENT

(No General Instruction Recommended.)

### **Committee Commentary 2.07** (current through August 1, 2016)

The Committee recommends that the district court give no general instruction on specific intent and that instead, the district court define the mental state required to convict as part of the instructions defining the elements of the offense. The Supreme Court and Sixth Circuit have both recognized this as the best approach.

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

In *United States v. S & Vee Cartage Co.*, 704 F.2d 914, 918-20 (6th Cir. 1983), the district court refused to give any general instruction on general and specific intent. Instead, the court just instructed the jury on the precise mental state required to convict. The Sixth Circuit rejected the defendants' argument that an instruction on general and specific intent should have been given and affirmed the defendants' convictions. The Sixth Circuit said that "[a] court may properly instruct the jury about the necessary mens rea without resorting to the words 'specific intent' or 'general intent'," and that "[i]t is sufficient to define the precise mental state required by the statute." *Id.* at 919.

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

For some federal crimes, defining the mens rea required to convict will require an instruction that the government must prove that the defendant intentionally violated a known legal duty. *See, e.g.*, *Cheek v. United States*, 498 U.S. 192 (1991). For other federal crimes, proof that the defendant knew an act was unlawful is not required to convict. *See, e.g.*, *United States v. S & Vee Cartage Co.*, *supra* 704 F.2d at 919.

*See also* the elements instructions in Chapters 10 *et seq.*

## **2.08 INFERRING REQUIRED MENTAL STATE**

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

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

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

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

### **Use Note**

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

### **Committee Commentary 2.08** (current through August 1, 2016)

In *United States v. Reeves*, 594 F.2d 536, 541 (6th Cir. 1979), the Sixth Circuit characterized Devitt and Blackmar Instruction 14.13 on proof of intent as a "wholly appropriate charge," and said that in future cases where such a charge is appropriate, "this Circuit will approve language similar to [this instruction]." Subsequent Sixth Circuit cases also have approved this instruction. *See, e.g.*, *United States v. Thomas*, 728 F.2d 313, 320-21 (6th Cir. 1984); *United States v. Guyon*, 717 F.2d 1536, 1539 (6th Cir. 1983); *United States v. Bohlmann*, 625 F.2d 751, 752-53 (6th Cir. 1980).

In *United States v. Gaines*, 594 F.2d 541, 544 (6th Cir. 1979), the court appeared to question whether any such instruction should be given at all, stating, that "[i]f district judges in the Sixth Circuit charge at all on inferred intent, it is suggested that they do so in the language of . . . Devitt and Blackmar 14.13." The Committee believes that some instruction on inferred intent is appropriate, particularly in cases where the requisite intent is disputed, in order to provide the jury with some guidance on this subject.

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

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

in evidence which indicate his state of mind.

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

## 2.09 DELIBERATE IGNORANCE

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

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

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

### Use Note

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

### Committee Commentary 2.09 (current through August 1, 2016)

The Sixth Circuit has approved the language of this instruction. *United States v. Mitchell*, 681 F.3d 867, 876 n.51 (6th Cir. 2012) (“We have repeatedly held that [Instruction 2.09] is an accurate statement of the law.”) (footnote and citations omitted). The first case to approve the instruction was *United States v. Lee*, 991 F.2d 343, 349 (6th Cir. 1993). The district judge gave paragraphs (2) and (3) of the instruction with two variations in paragraph (3). First, the judge omitted the words “beyond a reasonable doubt,” and second, the judge omitted the last sentence to the effect that the questions were all for the jury to decide. The Sixth Circuit approved the instruction overall, citing *United States v. Lawson*, 780 F.2d 535, 542 (6th Cir. 1985) and *United States v. Gullett*, 713 F.2d 1203, 1212 (6th Cir. 1983). As to the omission of the phrase “beyond a reasonable doubt,” the court noted that although another instruction on reasonable doubt was given, and although the defendant did not challenge the omission of the phrase, “Nonetheless, we wish to express our concern that the judges of the district courts may invite error if they depart too significantly from the language in the pattern instructions.” *Lee*, 991 F.2d at 350 n.2.

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

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

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

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

In *Global-Tech Appliances, Inc. v. SEB S. A.*, 131 S.Ct. 2060 (2011), the Supreme Court stated that all the Courts of Appeals agreed on “two basic requirements” for willful blindness that give the doctrine an appropriately limited scope. *Id.* at 2070. Those requirements are that “(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact.” *Id.* (footnote omitted). The Court concluded that the Sixth Circuit standard incorporated these requirements. *Id.* at 2071 n.9 (*citing Holloway, supra*). Instruction 2.09 incorporates these two points by requiring that the defendant be “aware of a high probability” that the fact exists and that he “deliberately ignored” or “deliberately closed his eyes” to what was obvious.

Aside from the content of the instruction, a question often arises on whether a deliberate ignorance instruction should be given at all. The instruction is appropriately given when it addresses an issue reasonably raised by the evidence, *i.e.*, when two predicates are met: “(1) the defendant claims a lack of guilty knowledge; and (2) the facts and evidence support an inference of deliberate ignorance.” *United States v. Mitchell*, 681 F.3d 867, 876 (6th Cir. 2012). Generally, the instruction should not be “given routinely” but should be “approached with significant prudence and caution” and “used sparingly,” *id.* (citations and interior quotation marks omitted).

In *Mari v. United States*, *supra*, the court held that giving the pattern deliberate ignorance instruction was harmless as a matter of law because sufficient evidence of actual knowledge was presented. *Mari*, 47 F.3d at 787. In *United States v. Monus*, 128 F.3d 376 (6th Cir.1997), the Sixth Circuit reaffirmed *Mari*, holding that the deliberate ignorance instruction was “at worst harmless error.” *Monus*, 128 F.3d at 390-91. “[E]ven if there had been insufficient evidence to support a deliberate ignorance instruction, we must assume that the jury followed the jury charge and did not convict on the grounds of deliberate ignorance.” *Id.*, *citing Mari* at 785-87. *See also* *United States v. Williams*, 612 F.3d 500, 508 (6th Cir. 2010) (even when it is unsupported by evidence, giving a deliberate ignorance instruction that properly states the law is harmless error)

(quoting *United States v. Rayborn*, 491 F.3d 513, 520 (6th Cir. 2007)) and *United States v. Geisen*, 612 F.3d 471, 486-87 (6th Cir. 2010) (citing *Mari and Monus*, *supra*).

The Sixth Circuit has discussed giving deliberate ignorance instructions in conspiracy cases. In *United States v. Warshawsky*, 20 F.3d 204 (6th Cir. 1994), the court rejected the argument that it is impermissible to give a deliberate ignorance instruction in a conspiracy trial because a conspiracy conviction requires proof that the co-conspirators intended to break the law together. The Sixth Circuit held the instruction proper since deliberate ignorance is sufficient to prove a conspirator's knowledge of the unlawful aims of a conspiracy, although not to prove the existence of an agreement. *Id.* at 210; *see also* *United States v. Mitchell*, *supra* at 879 (quoting *Williams and Warshawsky*, *supra*).

## **2.10 ACTUAL AND CONSTRUCTIVE POSSESSION**

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

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

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

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

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

### **Use Note**

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

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

**Committee Commentary 2.10**  
(current through August 1, 2016)

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

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

The Sixth Circuit has long approved the concept that a defendant can be convicted of a possessory offense based on constructive possession. *See, e.g.*, *United States v. Craven*, 478 F.2d 1329, 1333 (6th Cir. 1973); *United States v. Wolfenbarger*, 426 F.2d 992, 994-95 (6th Cir. 1970); *United States v. Burch*, 313 F.2d 628, 629 (6th Cir. 1963). In *Craven*, the Sixth Circuit outlined the general principles governing this subject as follows:

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

478 F.2d at 1333.

The Sixth Circuit continues to define constructive possession by reference to *Craven*. *See* *United States v. Bailey*, 553 F.3d 940, 944 (6th Cir. 2009); *United States v. Reed*, 141 F.3d 644, 651 (6th Cir. 1998). Later case law is consistent with this definition of constructive possession. *See* *United States v. Gibbs*, 182 F.3d 408, 424 (6th Cir. 1999) (finding sufficient evidence for the jury to conclude that the defendant had constructive possession and stating that "Constructive possession requires that a person knowingly have power and intention to exercise control over an object."), *quoting* *United States v. Critton*, 43 F.3d 1089, 1096 (6th Cir. 1995) and *citing* *United States v. Kincaide*, 145 F.3d 771 at 782 (6th Cir. 1998).

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

possession, and the area contained male clothing and personal papers with defendant's name and address.

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

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

\* \* \*

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

*Id.* at 1049.

In *United States v. Williams*, 526 F.2d 1000, 1003-04 (6th Cir. 1975), the defendant argued that the district court erred in refusing his requested instruction that the "mere presence of a short-barreled shotgun under the driver's seat of the car, without some evidence that the driver exercised some dominion over it, is not sufficient for you to find that it was in the possession of the driver." The Sixth Circuit rejected this argument on the ground that the defendant's requested instruction would only have permitted conviction based on a finding of actual possession. The Sixth Circuit stressed that in addition to correctly defining actual and constructive possession, the district court had also instructed the jury that the word "knowingly" was added to the definition of constructive possession to ensure "that no one would be convicted . . . because of mistake, or accident, or innocent reason."

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

## **2.10A ACTUAL POSSESSION**

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

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

### **Use Note**

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

### **Committee Commentary 2.10A** (current through August 1, 2016)

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

## 2.11 JOINT POSSESSION

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

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

### Use Note

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

### Committee Commentary 2.11 (current through August 1, 2016)

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

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

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

## **2.12 USE OF THE WORD “AND” IN THE INDICTMENT**

Although the indictment charges that the statute was violated by acts that are connected by the word “and,” it is sufficient if the evidence establishes a violation of the statute by any one of the acts charged. Of course, this must be proved beyond a reasonable doubt.

### **Use Note**

If the court incorporates the indictment into the instructions, the court may consider changing the word “and” in the indictment to “or,” or the court may consider giving this instruction.

### **Committee Commentary 2.12** (current through August 1, 2016)

See *United States v. Budd*, 496 F.3d 517, 528 (6th Cir. 2007), *citing* *United States v. Hathaway*, 798 F.2d 902, 913 (6th Cir. 1986); *see also* *United States v. Jones*, 533 F. App'x 562, 572 (6th Cir. 2013) (unpublished).

*See also* Committee Commentary to Inst. 8.03B Unanimity Not Required – Means.