

Chapter 3.00

CONSPIRACY

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3.01A CONSPIRACY TO COMMIT AN OFFENSE (18 U.S.C. § 371) – BASIC ELEMENTS

(1) Count ___ of the indictment accuses the defendants of a conspiracy to commit the crime of _____ in violation of federal law. It is a crime for two or more persons to conspire, or agree, to commit a criminal act, even if they never actually achieve their goal.

(2) A conspiracy is a kind of criminal partnership. For you to find any one of the defendants guilty of the conspiracy charge, the government must prove each and every one of the following elements beyond a reasonable doubt:

(A) First, that two or more persons conspired, or agreed, to commit the crime of _____.

(B) Second, that the defendant knowingly and voluntarily joined the conspiracy.

(C) And third, that a member of the conspiracy did one of the overt acts described in the indictment for the purpose of advancing or helping the conspiracy.

(3) You must be convinced that the government has proved all of these elements beyond a reasonable doubt in order to find any one of these defendants guilty of the conspiracy charge.

Use Note

This instruction should be followed by Instructions 3.02 through 3.04, plus the parts of Instructions 3.05 through 3.14 as are appropriate given the facts of the particular case.

Paragraph (2)(C) should be deleted when the statute under which the defendant is charged does not require proof of an overt act. In such cases, all references to overt acts in other instructions should also be deleted.

If the object offense is not charged and defined elsewhere in the instructions, it must be defined at some point in the conspiracy instructions.

Committee Commentary 3.01A (current through August 1, 2016)

This instruction outlines the basic elements of conspiracy under 18 U.S.C. § 371. It follows the basic format for defining the crime used in Instruction 2.02. It is meant to be followed by Instructions 3.02 through 3.04, plus the parts of Instructions 3.05 through 3.14 that are appropriate given the facts of the particular case.

Some conspiracy statutes do not require an overt act. *See, e.g.,* *Whitfield v. United States*, 543 U.S. 209, 213-14 (2005) (holding that money laundering conspiracy under 18 U.S.C. § 1956(h) does not require an overt act); *Salinas v. United States*, 522 U.S. 52 (1997) (holding that RICO conspiracy under 18 U.S.C. § 1962(d) does not require an overt act); *United States v. Shabani*, 513

U.S. 10 (1994) (holding that controlled substances conspiracy under 21 U.S.C. § 846 does not require an overt act); *United States v. Rogers*, 769 F.3d 372, 382 (6th Cir. 2014) (holding that conspiracy under 18 U.S.C. § 1349 does not require an overt act). In such cases, paragraph (2)(C) should be deleted, along with all references in other instructions to the subject of overt acts.

The Sixth Circuit has cited paragraphs (2)(A) and (2)(B) of this instruction as correct elements instructions for conspiracies under § 1349. *See Rogers, supra* at 377.

The Supreme Court has long recognized that "the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." *See, e.g., Pinkerton v. United States*, 328 U.S. 640, 643 (1946). As stated by the Sixth Circuit in *United States v. Van Hee*, 531 F.2d 352, 357 (6th Cir. 1976), "A conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy." An equally well-settled corollary is that to convict a defendant of conspiracy does not require proof that the object of the conspiracy was achieved. *See, e.g., United States v. Fruehauf Corp.*, 577 F.2d 1038, 1071 (6th Cir. 1978). "The gist of the crime of conspiracy is the agreement to commit an illegal act, not the accomplishment of the illegal act." *Id.*

Generally speaking, the government need not prove any special mens rea beyond the degree of criminal intent required for the object offense in order to convict a defendant of conspiracy. *United States v. Feola*, 420 U.S. 671, 686-96 (1975). *See also* Committee Commentary 3.05 (no instruction on bad purpose or corrupt motive recommended). Instruction 3.03, which requires the government to prove that the defendant knew the conspiracy's main purpose, and voluntarily joined it "intending to help advance or achieve its goals," should suffice in most cases, particularly where the object offense is also charged and defined elsewhere in the instructions.

The jury must unanimously agree on at least one object. *United States v. Tragas*, 727 F.3d 610, 616 (6th Cir. 2013) (citing *United States v. Carver*, 470 F.3d 220, 232 (6th Cir. 2006)). Thus, if the object offense is not charged and defined elsewhere in the instructions, it must be defined at some point in the conspiracy instructions. In order not to interrupt the continuity of the conspiracy instructions, the Committee suggests that in such cases, the object offense be defined either after the first sentence of this instruction, or following Instruction 3.04.

3.01B CONSPIRACY TO DEFRAUD THE UNITED STATES (18 U.S.C. § 371) – BASIC ELEMENTS

(1) Count ___ of the indictment accuses the defendants of a conspiracy to defraud the United States by dishonest means in violation of federal law. It is a crime for two or more persons to conspire, or agree, to defraud the United States, even if they never actually achieve their goal.

(2) A conspiracy is a kind of criminal partnership. For you to find any one of the defendants guilty of the conspiracy charge, the government must prove each and every one of the following elements beyond a reasonable doubt:

(A) First, that two or more persons conspired, or agreed, to defraud the United States, or one of its agencies or departments, by dishonest means. The word "defraud" is not limited to its ordinary meaning of cheating the government out of money or property. "Defraud" also means impairing, obstructing or defeating the lawful function of any government agency or department by dishonest means.

(B) Second, the government must prove that the defendant knowingly and voluntarily joined the conspiracy.

(C) And third, the government must prove that a member of the conspiracy did one of the overt acts described in the indictment for the purpose of advancing or helping the conspiracy.

(3) You must be convinced that the government has proved all of these elements beyond a reasonable doubt in order to find any one of these defendants guilty of the conspiracy charge.

[(4) This crime does not require proof that the defendants intended to directly commit the fraud themselves. Proof that they intended to use a third party as a go-between may be sufficient. But the government must prove that the United States or one of its agencies or departments was the ultimate target of the conspiracy, and that the defendants intended to defraud.]

Use Note

This instruction should be followed by Instructions 3.02 through 3.04, plus the parts of Instructions 3.05 through 3.14 that are appropriate given the facts of the particular case.

Appropriate "to defraud the United States" language should be substituted in Instructions 3.02 through 3.14 in place of the "to commit the crime of" language that appears in those instructions.

Bracketed paragraph (4) should be included when there is evidence that a third party served as an intermediary between the defendants and the United States.

Committee Commentary 3.01B
(current through August 1, 2016)

The general federal conspiracy statute, 18 U.S.C. § 371, prohibits two distinct types of conspiracies. The first is any conspiracy to "commit any offense" against the United States. The second is any conspiracy to "defraud the United States or any agency thereof." *See generally* United States v. Levinson, 405 F.2d 971, 977 (6th Cir. 1968). This instruction is designed for use in connection with indictments charging a conspiracy to defraud the United States. It should be followed by Instructions 3.02 through 3.04, plus the parts of Instructions 3.05 through 3.14 that are appropriate given the facts of the particular case. Appropriate "to defraud the United States" language should be substituted in Instructions 3.02 through 3.14 in place of the "to commit the crime of" language that appears in those instructions.

The Sixth Circuit has approved the language in paragraph (2)(B) requiring the defendant to join the conspiracy "knowingly and voluntarily." United States v. Damra, 621 F.3d 474, 498-500 (6th Cir. 2010). The court explained that this exact formulation has been repeatedly approved in its case law and that those terms are sufficient. *Id.* at 500.

The Sixth Circuit distinguishes between conspiracies under the offense clause and conspiracies under the defraud clause of 18 U.S.C. § 371. *See, e.g.,* United States v. Khalife, 106 F.3d 1300 (6th Cir. 1997); United States v. Kraig, 99 F.3d 1361 (6th Cir. 1996). The court has identified some distinctions between a conspiracy to commit an offense and a conspiracy to defraud the U.S. For example, in *Khalife*, the court explained, "there is no 'substantive' offense underlying a § 371 conspiracy to defraud. Thus, it is unnecessary to refer to any substantive offense when charging a § 371 conspiracy to defraud, and it is also unnecessary to prove the elements of a related substantive offense." *Khalife*, 106 F.3d at 1303.

Despite broad dicta to the contrary in United States v. Minarik, 875 F.2d 1186 (6th Cir. 1989), the government may charge a conspiracy under the defraud clause even if the object of the conspiracy was to commit one or more specific offenses. Cases decided subsequent to *Minarik* have limited the decision to its narrow facts. *See* United States v. Damra, 621 F.3d 474, 507 (6th Cir. 2010); United States v. Khalife, *supra* at 1303-04 (discussing *Minarik* and subsequent cases). For example, in *Kraig*, the court held that a defraud clause charge was appropriate where the conspiracy alleged violation of more than one statute. *Kraig*, 99 F.3d at 1367. In *Khalife*, the court stated the law "does not require, in circumstances such as these, that the conspiracy be charged only under the 'offense' clause of § 371." 106 F.3d at 1306. In *Damra*, the court announced the general rule that the defraud and offense clauses are not mutually exclusive. *Damra, supra* (quoting United States v. Tipton, 269 F. App'x 551, 556 (6th Cir. 2008) (unpublished)). If the government charges a conspiracy under both prongs of § 371, instructions for both prongs should be given.

In prosecutions under the conspiracy to defraud clause of 18 U.S.C. § 371, the United States must be the target of the conspiracy. *Tanner v. United States*, 483 U.S. 107 at 128-32 (1987). *Accord* United States v. Minarik, 875 F.2d 1186, 1191 (6th Cir. 1989). In prosecutions brought under the conspiracy to commit an offense clause of § 371, the United States need not be the target. *United States v. Gibson, supra*, 881 F.2d at 321.

The term "defraud" has a broader meaning than simply cheating the government out of property or money. *United States v. Minarik, supra*, 875 F.2d at 1190. It includes "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government," *Tanner v. United States, supra*, 483 U.S. at 128, by "deceit, craft, or trickery, or at least by means that are dishonest." *Minarik, supra* at 1190-91, quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924). *See also* *United States v. Shermetaro*, 625 F.2d 104, 109 (6th Cir. 1980); *United States v. Levinson, supra*, 405 F.2d at 977.

Bracketed paragraph (4) should be included when there is evidence that the defendants intended to accomplish the fraud by going through or manipulating a third party. In *Tanner v. United States*, 483 U.S. 107, 129-32 (1987), the Supreme Court accepted the government's argument that a conspiracy to defraud the United States under § 371 may be committed indirectly by the use of third parties. "The fact that a false claim passes through the hands of a third party on its way . . . to the United States" does not relieve the defendants of criminal liability. *Id.* at 129. The Supreme Court remanded in *Tanner* for consideration of whether the evidence supported the government's theory that the defendants conspired to manipulate a third party in order to cause that third party to make misrepresentations to a federal agency. *Id.* at 132. *See also* *United States v. Gibson*, 881 F.2d 318, 321 (6th Cir. 1989) ("a conspiracy [to defraud] could be directed at the United States as a target and yet be effected through a third party such as a private business").

3.02 AGREEMENT

(1) With regard to the first element--a criminal agreement--the government must prove that two or more persons conspired, or agreed, to cooperate with each other to commit the crime of _____.

(2) This does not require proof of any formal agreement, written or spoken. Nor does this require proof that everyone involved agreed on all the details. But proof that people simply met together from time to time and talked about common interests, or engaged in similar conduct, is not enough to establish a criminal agreement. These are things that you may consider in deciding whether the government has proved an agreement. But without more they are not enough.

(3) What the government must prove is that there was a mutual understanding, either spoken or unspoken, between two or more people, to cooperate with each other to commit the crime of _____. This is essential.

(4) An agreement can be proved indirectly, by facts and circumstances which lead to a conclusion that an agreement existed. But it is up to the government to convince you that such facts and circumstances existed in this particular case.

[(5) One more point about the agreement. The indictment accuses the defendants of conspiring to commit several federal crimes. The government does not have to prove that the defendants agreed to commit all these crimes. But the government must prove an agreement to commit at least one of them for you to return a guilty verdict on the conspiracy charge.]

Use Note

Bracketed paragraph (5) should be included when the indictment alleges multiple object offenses. It is unclear whether an augmented unanimity instruction specifically requiring unanimous agreement on the same object offense is necessary. See generally Instruction 8.03B and Committee Commentary.

Specific instructions that an agreement between a defendant and a government agent will not support a conspiracy conviction may be required where important given the facts of the particular case.

Committee Commentary 3.02 (current through August 1, 2016)

Title 18 U.S.C. § 371 states that "two or more persons" must conspire in order to establish a conspiracy, and this language has been consistently interpreted to require proof of an agreement between the defendant and at least one other person as "an absolute prerequisite" to a conspiracy conviction. *See, e.g.,* United States v. Bouquett, 820 F.2d 165, 168 (6th Cir. 1987). Sixth Circuit decisions have repeatedly defined the nature of the agreement that the government must prove as

"an agreement between two or more persons to act together in committing an offense." *See, e.g.*, *United States v. Reifsteck*, 841 F.2d 701, 704 (6th Cir. 1988); *see also* *United States v. Bostic*, 480 F.2d 965 at 968 (6th Cir. 1973) ("[a]n agreement or understanding between two or more of the defendants whereby they become definitely committed to cooperate for the accomplishment of the [criminal] object . . .").

The agreement required for conspiracy need not be a formal agreement; rather, a tacit agreement or mutual understanding is sufficient. *United States v. Maliszewski*, 161 F.3d 992, 1006 (6th Cir. 1998), *quoting* *United States v. Lloyd*, 10 F.3d 1197, 1210 (6th Cir. 1993). *See also* *United States v. Ledezma*, 26 F.3d 636, 640 (6th Cir. 1994), *citing* *United States v. Pearce*, 912 F.2d 159, 161 (6th Cir. 1990) (a tacit or material understanding is sufficient); *United States v. Frost*, 914 F.2d 756, 762 (6th Cir. 1990). Nor must the government prove that there was agreement on all the details of how the crime would be carried out. *See, e.g.*, *United States v. Schultz*, 855 F.2d 1217, 1221 (6th Cir. 1988).

It is well-established that the government does not have to present direct evidence of an agreement. *See, e.g.*, *United States v. Thompson*, 533 F.2d 1006, 1009 (6th Cir. 1976). An agreement "may be inferred from circumstantial evidence that can reasonably be interpreted as participation in a common plan," *United States v. Ellzey*, 874 F.2d 324 at 328 (6th Cir. 1989) or "from acts done with a common purpose." *United States v. Frost*, 914 F.2d 756, 762 (6th Cir. 1990).

A defendant cannot be convicted of conspiracy merely because he associated with members of the conspiracy. In *United States v. Watkins*, 1994 WL 464193, 1994 U.S. App. LEXIS 23886 (6th Cir. 1994) (unpublished), a panel of the court quoted the third sentence of paragraph (2) of the instruction with approval. In that case, the district court gave the pattern instruction, and a panel of the Sixth Circuit found no error in the district court's refusal to give a supplemental instruction stating that mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient. The panel described the pattern instruction as "thorough and adequate." *United States v. Watkins*, 1994 WL at 3, 1994 LEXIS at 7, *quoting* the third sentence of paragraph (2). *See also* *United States v. Ledezma*, *supra*, *citing* *United States v. Lee*, 991 F.2d 343, 348 (6th Cir. 1993); *United States v. Davenport*, 808 F.2d 1212, 1218 (6th Cir. 1987) (quoting instructions that "mere association . . . , similarity of conduct . . . , assembl[y] . . . and discuss[i]on [of] common aims" do not necessarily establish the existence of a conspiracy).

Bracketed paragraph (5) applies to cases where a single conspiracy count includes multiple objects. A single conspiracy may involve multiple object offenses. *Braverman v. United States*, 317 U.S. 49, 52-54 (1942). But proof that the defendants conspired to commit only one offense is sufficient to convict. *See* § 371 (prohibiting two or more persons from conspiring to commit "any" offense). Supreme Court cases on unanimity and multiple means of committing a single crime are discussed in the Committee Commentary to Instructions 8.03A and 8.03B.

An issue may arise whether the trial court must give an augmented unanimity instruction specifically telling the jurors that they must unanimously agree on the same object offense in order to convict. The general rule in the Sixth Circuit is that no augmented unanimity instruction is required unless special circumstances are present. *See* Committee Commentary to Instruction 8.03A--Unanimity of Theory. In *United States v. Bouquett*, 820 F.2d 165, 169 (6th Cir. 1987), the

court rejected the defendant's argument that his conspiracy conviction should be reversed because the trial court's instructions permitted the jury to convict based on alternate theories of who in particular the defendant conspired with in the context of a single conspiracy. The Sixth Circuit held that these alternate theories did not create "two conceptual groupings requiring an augmented unanimity instruction, and stated that "this court does not require jurors to agree unanimously as to a theory of guilt where a single generic offense may be committed by a variety of acts."

On the question of whether a general verdict of guilty on a multi-object conspiracy count can stand when one of the objects is disqualified as a basis for the conviction, *see Griffin v. United States*, 502 U.S. 46 (1991). In *Griffin*, the Court held that the validity of the general verdict depends on the reason that one of the objects was disqualified. If the object was disqualified as unconstitutional or not legally sufficient (for example, due to a statute of limitations), the verdict had to be set aside. *Griffin*, 502 U.S. at 52-56, *citing inter alia* *Yates v. United States*, 354 U.S. 298 (1957); *Stromberg v. California*, 283 U.S. 359 (1931); *Williams v. North Carolina*, 317 U.S. 287 (1942); and *Bachellar v. Maryland*, 397 U.S. 564 (1970). On the other hand, if one of the objects in a multi-object conspiracy count was disqualified not because it was held unconstitutional or illegal but merely because it was not supported by sufficient evidence, the verdict can stand (assuming the evidence is sufficient for any one of the objects charged). *Griffin*, 502 U.S. at 56. The Court distinguished between objects disqualified by legal error (a mistake about the law) which require the verdict to be set aside, and objects disqualified by insufficiency of proof (a mistake concerning the weight or factual import of the evidence) which allow the verdict to stand. *Id.* at 56-59.

In *United States v. Schultz*, *supra*, 855 F.2d at 1221, the Sixth Circuit approvingly cited *United States v. Anello*, 765 F.2d 253, 262-263 (1st Cir. 1985), for the proposition that a conditional agreement to purchase controlled substances, if the quality is adequate, is sufficient to support a conspiracy conviction. The Sixth Circuit then went on to hold that a failure to complete the substantive object offense as a result of disagreements among the conspirators over the details of performance did not preclude the existence of a conspiratorial agreement.

In *United States v. S & Vee Cartage Company, Inc.*, 704 F.2d 914, 920 (6th Cir. 1983), a corporate defendant and two of its officers were convicted of making and conspiring to make false pension and welfare fund statements, in violation of 18 U.S.C. §§ 1027 and 371. On appeal, the three defendants argued that their conspiracy convictions should be reversed on the theory that a criminal conspiracy cannot exist between a corporation and its officers acting as agents of the corporation. The Sixth Circuit rejected this argument, and held that in criminal cases a corporation may be convicted of conspiring with its officers. In doing so, the Sixth Circuit rejected agency principles that treat the acts of corporate officers as the acts of the corporation as a single legal entity. *Accord*, *United States v. Ames Sintering Co.*, 927 F.2d 232 (6th Cir. 1990); *United States v. Mahar*, 801 F.2d 1477, 1488 (6th Cir. 1986).

It is settled that "proof of an agreement between a defendant and a government agent or informer will not support a conspiracy conviction." *United States v. Pennell*, 737 F.2d 521, 536 (6th Cir. 1984). Where important given the facts of the particular case, specific instructions on this point may be required. *United States v. Nunez*, 889 F.2d 1564, 1568-70 (6th Cir. 1989).

Wharton's Rule, which may require proof that more than two persons conspired together, only applies to federal crimes that by definition require voluntary concerted criminal activity by a plurality of agents. *See Iannelli v. United States*, 420 U.S. 770, 777-86 (1975). And it does not apply at all if there is legislative intent to the contrary. *Id.* *See also United States v. Finazzo*, 704 F.2d 300, 305-06 (6th Cir. 1983).

3.03 DEFENDANT'S CONNECTION TO THE CONSPIRACY

(1) If you are convinced that there was a criminal agreement, then you must decide whether the government has proved that the defendants knowingly and voluntarily joined that agreement. You must consider each defendant separately in this regard. To convict any defendant, the government must prove that he knew the conspiracy's main purpose, and that he voluntarily joined it intending to help advance or achieve its goals.

(2) This does not require proof that a defendant knew everything about the conspiracy, or everyone else involved, or that he was a member of it from the very beginning. Nor does it require proof that a defendant played a major role in the conspiracy, or that his connection to it was substantial. A slight role or connection may be enough.

(3) But proof that a defendant simply knew about a conspiracy, or was present at times, or associated with members of the group, is not enough, even if he approved of what was happening or did not object to it. Similarly, just because a defendant may have done something that happened to help a conspiracy does not necessarily make him a conspirator. These are all things that you may consider in deciding whether the government has proved that a defendant joined a conspiracy. But without more they are not enough.

(4) A defendant's knowledge can be proved indirectly by facts and circumstances which lead to a conclusion that he knew the conspiracy's main purpose. But it is up to the government to convince you that such facts and circumstances existed in this particular case.

Use Note

Additional instructions may be appropriate in cases involving defendants who were merely purchasers of stolen goods or contraband, or who were merely suppliers of goods or other items used to commit a crime.

Committee Commentary 3.03 (current through August 1, 2016)

In order to establish a defendant's connection to a conspiracy, the government must prove that he “knew of the conspiracy, and that he knowingly and voluntarily joined it.” *United States v. Christian*, 786 F.2d 203, 211 (6th Cir. 1986). To convict a defendant of conspiracy, “two different types of intent are generally required--the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy.” *United States v. United States Gypsum Co.*, 438 U.S. 422, 443 n.20 (1978).

Knowledge of the existence of a conspiracy cannot be avoided by closing one's eyes “to what [is] going on about him.” *United States v. Smith*, 561 F.2d 8, 13 (6th Cir. 1977). In such cases, a deliberate ignorance instruction may be appropriate. See Instruction 2.09 and *United States v. Mitchell*, 681 F.3d 867, 879 (6th Cir. 2012).

Occasionally conspiracy instructions have required proof that the defendant “willfully” joined the conspiracy. *See, e.g.*, *United States v. Davenport*, 808 F.2d 1212, 1218 (6th Cir. 1987); *United States v. Piccolo*, 723 F.2d 1234, 1240 (6th Cir. 1983). To the extent that the term “willfully” connotes some extra mental state beyond that required for conviction of the substantive offense that is the object of the conspiracy, it is inconsistent with the Supreme Court’s decision in *United States v. Feola*, 420 U.S. 671, 686-696 (1975) (generally speaking, the government need not prove anything more than the degree of criminal intent necessary for the substantive offense in order to convict a defendant of conspiracy). To avoid confusion, the Committee has substituted the word “voluntarily” for “willfully.”

The Sixth Circuit has stated that paragraph (2) is the correct legal standard. *United States v. Young*, 553 F.3d 1035, 1050 (6th Cir. 2009). *See also* *United States v. Ross*, 190 F.3d 446 (6th Cir. 1999). In *Ross*, the court stated, “The government need not show that a defendant participated in all aspects of the conspiracy; it need only prove that the defendant was a party to the general conspiratorial agreement. Although the connection between the defendant and the conspiracy need only be slight, an agreement must be shown beyond a reasonable doubt.” *Id.* at 450, *citing* *United States v. Avery*, 128 F.3d 966, 971 (6th Cir. 1997). *See also* *United States v. Mahbub*, 818 F.3d 213, 230 (6th Cir. 2016) (characterizing the “slight role or connection” standard as an “accurate legal proposition” as long as there is proof beyond a reasonable doubt and citing *United States v. Price*, 258 F.3d 539, 544 (6th Cir. 2001)); *United States v. Christian*, 786 F.2d 203 (6th Cir. 1986); *United States v. Stephens*, 492 F.2d 1367 (6th Cir. 1974).

A panel of the Sixth Circuit has also endorsed paragraph (3) of this instruction. In *United States v. Chubb*, 1993 WL 131922 (6th Cir. 1993) (unpublished), a defendant asked the trial court to instruct that “mere association” with the conspiracy was not enough to convict under 21 U.S.C. § 846, and the court failed to include this proffered instruction. A panel of the Sixth Circuit stated that the proffered instruction was a correct statement of the law and noted that it was similar to Pattern Instruction 3.03(3). *Chubb*, 1993 WL 131922 at 6 n.5. The panel concluded that failure to give the proffered instruction was not reversible error in this case based on the other instructions given and the defendant’s theory of defense. *See also* *United States v. Christian*, 786 F.2d 203, 211 (6th Cir. 1986) (“Although mere presence alone is insufficient to support a guilty verdict, presence is a material and probative factor which the jury may consider in reaching its decision.”).

Generally, conspiracy law in the Sixth Circuit has not changed significantly in recent years. This conclusion is reflected in the court’s discussion of conspiracy law below:

The judicial iterations in conspiracy cases of the black-letter law concerning the manner in which a conspiracy may be proved are so familiar and have been repeated so often as to have become a virtual mantra. But we hesitate to omit them here, lest some unwritten rule of judicial review be offended. Hence: “. . . Every member of a conspiracy need not be an active participant in every phase of the conspiracy, so long as he is a party to the general conspiratorial agreement. Participation in the conspiracy’s common purpose and plan may be inferred from the defendant’s actions and reactions to the circumstances. However, mere presence at the crime scene is insufficient to show participation. And the connection of the defendant to the conspiracy need only be slight, if there is sufficient evidence to establish

that connection beyond a reasonable doubt.”

United States v. Maliszewski, 161 F.3d 992, 1006 (6th Cir. 1998) (citations and internal quotations omitted) (*citing* United States v. Hernandez, 31 F.3d 354, 358 (6th Cir. 1994)).

3.04 OVERT ACTS (18 U.S.C. § 371)

(1) The third element that the government must prove is that a member of the conspiracy did one of the overt acts described in the indictment for the purpose of advancing or helping the conspiracy.

(2) The indictment lists overt acts. The government does not have to prove that all these acts were committed, or that any of these acts were themselves illegal.

(3) But the government must prove that at least one of these acts was committed by a member of the conspiracy, and that it was committed for the purpose of advancing or helping the conspiracy. This is essential.

[(4) One more thing about overt acts. There is a limit on how much time the government has to obtain an indictment. This is called the statute of limitations. For you to return a guilty verdict on the conspiracy charge, the government must convince you beyond a reasonable doubt that at least one overt act was committed for the purpose of advancing or helping the conspiracy after.]

Use Note

This instruction should be omitted when the statute under which the defendant is charged does not require proof of an overt act.

It is unclear whether an augmented unanimity instruction specifically requiring unanimous agreement on the same overt act is necessary. See generally Instruction 8.03A and Committee Commentary.

Bracketed paragraph (4) should be included when compliance with the statute of limitations is an issue. Appropriate modifications should be made when evidence has been presented that there were two separate and successive conspiracies, one of which does not fall within the five year statute of limitations period for conspiracy.

Committee Commentary 3.04 (current through August 1, 2016)

Paragraph (3) of this instruction was quoted with approval in *United States v. Rashid*, 274 F.3d 407, 415 (6th Cir. 2001).

An overt act is an essential element of the general federal conspiracy statute, 18 U.S.C. § 371. *See, e.g.*, *United States v. Reifsteck*, 841 F.2d 701, 704 (6th Cir. 1988). Other conspiracy statutes contain their own separate conspiracy provisions that do not require an overt act. *See, e.g.*, *Salinas v. United States*, 522 U.S. 52 (1997) (RICO conspiracy under 18 U.S.C. § 1962(d) does not require an overt act); *United States v. Shabani*, 513 U.S. 10 (1994) (controlled substances conspiracy under 21 U.S.C. § 846 does not require an overt act); *United States v. Whitfield*, 543 U.S. 209 (2005) (money laundering conspiracy under 18 U.S.C. § 1956(h) does not require an overt act); *see also* 18 U.S.C. §§ 1349, 1951. In such cases this instruction should be omitted.

The government is only required to prove one overt act committed in furtherance of the conspiracy in order to convict. *See* *United States v. Nowak*, 448 F.2d 134, 140 (6th Cir. 1971) (approving instruction requiring that "at least one overt act as set forth in the indictment was committed"); *Sandroff v. United States*, 174 F.2d 1014 at 1018-19 (6th Cir. 1949) (approving instruction that "there need be but one overt act" established); *Wilkes v. United States*, 291 Fed. 988, 995 (6th Cir.1923) ("[I]t was not necessary to conviction to prove that more than one of the overt acts charged in the indictment had been committed.").

"[I]t [is] not necessary that any overt act charged in a conspiracy indictment constitute in and of itself a separate criminal offense." *United States v. Cooper*, 577 F.2d 1079, 1085 (6th Cir. 1978). *See also Sandroff, supra*, 174 F.2d at 1018 ("An overt act . . . need not necessarily be a criminal act, nor a crime that is the object of the conspiracy, but . . . [it] must be done in furtherance of the object of the agreement."); *Reifsteck, supra*, 841 F.2d at 704 ("[E]ach overt act taken to effect the illegal purpose of the conspiracy need not be illegal in itself."). Acts which, when viewed in isolation, are in themselves legal, "lose that character when they become constituent elements of an unlawful scheme." *United States v. Van Hee*, 531 F.2d 352, 357 (6th Cir. 1976).

An issue may arise whether the trial court must give an augmented unanimity instruction specifically telling the jurors that they must unanimously agree on the same object offense in order to convict. The general rule in the Sixth Circuit is that no augmented unanimity instruction is required unless special circumstances are present. *See* Committee Commentary to Instruction 8.03A--Unanimity of Theory. In *United States v. Bouquett*, 820 F.2d 165, 169 (6th Cir. 1987), the court rejected the defendant's argument that his conspiracy conviction should be reversed because the trial court's instructions permitted the jury to convict based on alternate theories of who in particular the defendant conspired with in the context of a single conspiracy. The Sixth Circuit held that these alternate theories did not create "two conceptual groupings requiring an augmented unanimity instruction, and stated that "this court does not require jurors to agree unanimously as to a theory of guilt where a single generic offense may be committed by a variety of acts."

Bracketed paragraph (4) should be included when compliance with the statute of limitations is an issue. The statute of limitations for prosecutions under 18 U.S.C. § 371 is five years from the date of the commission of the last overt act in furtherance of the conspiracy. *Fiswick v. United States*, 329 U.S. 211, 216 (1946); *United States v. Zalman*, 870 F.2d 1047, 1057 (6th Cir. 1989). Other circuits have held, or indicated, that overt acts not alleged in the indictment can be used to prove that a conspiracy continued into the statute of limitations period, as long as fair notice principles are satisfied. *See, e.g., United States v. Lewis*, 759 F.2d 1316, 1344 (8th Cir. 1985); *United States v. Read*, 658 F.2d 1225, 1239 (7th Cir. 1981); *United States v. Elliott*, 571 F.2d 880, 911 (5th Cir. 1978). The instruction is based on the Seventh Circuit's decision in *United States v. Nowak*, 448 F.2d 134, 140 (7th Cir. 1971) (holding that instruction that "one or more of the overt acts occurred after February 6, 1964" was a sufficient instruction on the statute of limitations defense).

When evidence has been presented that there were two separate and successive conspiracies, one of which does not fall within the five year statute of limitations period for conspiracy, appropriate modifications should be made in bracketed paragraph (4). *See* *United*

States v. Zalman, *supra*, 870 F.2d at 1057. *See also* Instructions 3.08 and 3.09.

3.05 BAD PURPOSE OR CORRUPT MOTIVE

(No Instruction Recommended.)

Committee Commentary 3.05
(current through August 1, 2016)

The Committee recommends that no instruction on bad purpose or corrupt motive be given.

In *United States v. Feola*, 420 U.S. 671, 686-96 (1975), the Supreme Court held that generally speaking, the government need not prove anything more than the degree of criminal intent necessary for the substantive offense in order to convict a defendant of conspiracy. The Court noted in passing that requiring some additional degree of criminal intent beyond that required for the substantive offense would come close to embracing the severely criticized "corrupt motive" doctrine, which in some states requires proof of a motive to do wrong to convict a defendant of conspiracy.

Based on *Feola*, the Committee recommends that no instruction be given regarding any bad purpose or corrupt motive beyond the degree of criminal intent required for the substantive offense. *See generally* *United States v. Prince*, 529 F.2d 1108, 1111-12 (6th Cir. 1976).

3.06 UNINDICTED, UNNAMED OR SEPARATELY TRIED CO-CONSPIRATORS

(1) Now, some of the people who may have been involved in these events are not on trial. This does not matter. There is no requirement that all members of a conspiracy be charged and prosecuted, or tried together in one proceeding.

[(2) Nor is there any requirement that the names of the other conspirators be known. An indictment can charge a defendant with a conspiracy involving people whose names are not known, as long as the government can prove that the defendant conspired with one or more of them. Whether they are named or not does not matter.]

Use Note

This instruction should be used when some of the potential conspirators are not on trial.

Bracketed paragraph (2) should be included when some of the potential conspirators are unnamed.

Instructions 2.01(3) and 8.08(2) further caution the jurors that the possible guilt of others is not a proper matter for their consideration.

Committee Commentary 3.06 (current through August 1, 2016)

It is "immaterial" that all members of a conspiracy are not charged in an indictment. *United States v. Sandy*, 605 F.2d 210, 216 (6th Cir. 1979). "It is not necessary, to sustain a conviction for a conspiracy, that all co-conspirators be charged." *United States v. Sachs*, 801 F.2d 839, 845 (6th Cir.1986).

It is also well-settled that "a valid indictment may charge a defendant with conspiring with persons whose names are unknown." *See, e.g., United States v. Piccolo*, 723 F.2d 1234, 1239 (6th Cir. 1983). *See also United States v. English*, 925 F.2d 154, 159 (6th Cir.1991) (absent a specific showing of surprise or prejudice, there is no requirement that an indictment or a bill of particulars identify the supervisees necessary for a continuing criminal enterprise conviction). A defendant "may be indicted and convicted despite the names of his co-conspirators remaining unknown, as long as the government presents evidence to establish an agreement between two or more persons." *United States v. Rey*, 923 F.2d 1217, 1222 (6th Cir.1991).

In *United States v. Anderson*, 76 F.3d 685 (6th Cir. 1996), the court held that "an individual's conviction for conspiracy may stand, despite acquittal of other alleged coconspirators, when the indictment refers to unknown or unnamed conspirators and there is sufficient evidence to show the existence of a conspiracy between the convicted defendant and these other conspirators." *Id.* at 688-89, *citing United States v. Sandy*, 605 F.2d 210 (6th Cir. 1979).

3.07 VENUE

(1) Now, some of the events that you have heard about happened in other places. There is no requirement that the entire conspiracy take place here in _____. But for you to return a guilty verdict on the conspiracy charge, the government must convince you that either the agreement, or one of the [overt acts] [acts in furtherance] took place here in _____.

(2) Unlike all the other elements that I have described, this is just a fact that the government only has to prove by a preponderance of the evidence. This means the government only has to convince you that it is more likely than not that part of the conspiracy took place here.

(3) Remember that all the other elements I have described must be proved beyond a reasonable doubt.

Use Note

This instruction should be used when venue is an issue.

Brackets indicate options for the court. If the conspiracy charged does not include an overt act element, the court should use the [acts in furtherance] option.

Committee Commentary 3.07 (current through August 1, 2016)

A conspiracy prosecution may be brought in the district where the agreement was made, or in any district where an overt act in furtherance of the conspiracy was committed. *See, e.g.*, *United States v. Miller*, 358 F.2d 696, 697 (6th Cir. 1966); *Sandroff v. United States*, 174 F.2d 1014, 1018-19 (6th Cir. 1949).

In *United States v. Turner*, 936 F.2d 221 (6th Cir. 1991), a drug conspiracy prosecution under 21 U.S.C. § 846, the court stated:

Conspiracy and drug importation are “continuous crimes”; that is, they are not completed until the drugs reach their final destination, and venue is proper “in any district along the way.” *United States v. Lowery*, 675 F.2d 593, 594 (4th Cir. 1982); *see also United States v. Scaife*, 749 F.2d 338, 346 (6th Cir. 1984) (venue is proper in conspiracy prosecutions in any district where an overt act in furtherance of the conspiracy takes place).

Turner, 936 F.2d at 226. In *United States v. Baylis*, 1999 WL 993919, 1999 U.S. App. LEXIS 26646 (6th Cir. 1999) (unpublished), a panel of the court stated, “Conspiracy may be prosecuted in any district in which the agreement was formed, or an act in furtherance of the conspiracy occurred.” 1999 WL 993919 at 3, 1999 LEXIS 26646 at 9, *citing Turner*, 936 F.2d at 226 and Federal Rule of Criminal Procedure 18. *See also* 18 U.S.C. § 3237(a).

Unlike true elements, venue is merely a fact that only needs to be proved by a preponderance of the evidence. *United States v. Charlton*, 372 F.2d 663, 665 (6th Cir. 1967). And any objection to venue may be waived if not raised in the district court. *United States v. English*, 925 F.2d 154, 158 (6th Cir. 1991).

3.08 MULTIPLE CONSPIRACIES--MATERIAL VARIANCE FROM THE INDICTMENT

(1) The indictment charges that the defendants were all members of one single conspiracy to commit the crime of _____.

(2) Some of the defendants have argued that there were really two separate conspiracies--one between _____ to commit the crime of _____; and another one between _____ to commit the crime of _____.

(3) To convict any one of the defendants of the conspiracy charge, the government must convince you beyond a reasonable doubt that the defendant was a member of the conspiracy charged in the indictment. If the government fails to prove this, then you must find that defendant not guilty of the conspiracy charge, even if you find that he was a member of some other conspiracy. Proof that a defendant was a member of some other conspiracy is not enough to convict.

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

Use Note

This instruction should be used when there is some evidence that multiple conspiracies may have existed, and a finding that multiple conspiracies existed would constitute a material variance from the indictment. It should be followed by Instruction 3.09, which explains the factors the jury should consider in determining whether a single or multiple conspiracies existed.

The possible existence of separate conspiracies may require the drafting of special instructions limiting the jury's consideration of statements made by co-conspirators to members of a particular conspiracy.

Committee Commentary 3.08 (current through August 1, 2016)

The Sixth Circuit has cited Instruction 3.08(3)-(4) approvingly in affirming a conviction based on a similar instruction. *See United States v. Blackwell*, 459 F.3d 739, 765 (6th Cir. 2006) (noting that instruction at issue “mirrors in substance” the pattern instructions and differs as to “only one sentence” in concluding that trial court’s instruction was not misleading or erroneous).

The Sixth Circuit has stated that Instruction 3.08 “should [be] given” when “there [is] evidence of multiple conspiracies and a possible variance. . . .” *United States v. Maliszewski*, 161 F.3d 992, 1014 (6th Cir. 1998). *See also United States v. Sanchez*, 928 F.2d 1450, 1456 (6th Cir. 1991). *See generally Berger v. United States*, 295 U.S. 78, 81-82 (1935) (proof that two or more conspiracies may have existed is not fatal unless there is a material variance that results in substantial prejudice); *Kotteakos v. United States*, 328 U.S. 750, 773-74 (1946) (there must be

some leeway for conspiracy cases where the evidence differs from the exact specifications in the indictment).

When no evidence is presented warranting an instruction on multiple conspiracies, none need be given. *United States v. Levinson*, 405 F.2d 971, 989 (6th Cir. 1968). But "when the evidence is such that the jury could within reason find more than one conspiracy, the trial court should give the jury a multiple conspiracy instruction." *United States v. Warner*, 690 F.2d 545, 551 (6th Cir. 1982). *Accord*, *United States v. Davenport*, 808 F.2d 1212, 1217 (6th Cir. 1987).

As long as the evidence supports only a single conspiracy, it is not error to refuse a multiple conspiracy instruction. *United States v. Lash*, 937 F.2d 1077, 1086-87 (6th Cir. 1991), *citing* *United States v. Baker*, 855 F.2d 1353, 1357 (8th Cir. 1988), *United States v. Toro*, 840 F.2d 1221, 1236-37 (5th Cir. 1988), and *United States v. Martino*, 664 F.2d 860, 875 (2d Cir. 1981). *Accord*, *United States v. Ghazaleh*, 58 F.3d 240, 245 (6th Cir. 1995); *United States v. Paulino*, 935 F.2d 739, 748 (6th Cir. 1991). When the evidence supports only a single conspiracy, giving a multiple conspiracy instruction containing an erroneous statement of the law has been deemed an "error of no consequence." *Maliszewski*, 161 F.3d at 1014.

Whether single or multiple conspiracies have been proved is usually a question of fact to be resolved by the jury under proper instructions. *United States v. Segines*, 17 F.3d 847, 856 (6th Cir. 1994); *United States v. Grunsfeld*, 558 F.2d 1231, 1238 (6th Cir. 1977).

This instruction is patterned after instructions quoted by the Sixth Circuit in *United States v. Hughes*, 895 F.2d 1135, 1140 n.6 (6th Cir. 1990). Where one single conspiracy is charged, "proof of different and disconnected ones will not sustain a conviction." *United States v. Bostic*, 480 F.2d 965, 968 (6th Cir. 1973). *See also* *United States v. Borelli*, 336 F.2d 376, 382 (2d Cir. 1964).

This instruction should be followed by Instruction 3.09, which explains the factors the jury should consider in determining whether a single or multiple conspiracies existed.

The possible existence of separate conspiracies may require the drafting of special instructions limiting the jury's consideration of statements made by co-conspirators to members of a particular conspiracy.

3.09 MULTIPLE CONSPIRACIES--FACTORS IN DETERMINING

(1) In deciding whether there was more than one conspiracy, you should concentrate on the nature of the agreement. To prove a single conspiracy, the government must convince you that each of the members agreed to participate in what he knew was a group activity directed toward a common goal. There must be proof of an agreement on an overall objective.

(2) But a single conspiracy may exist even if all the members did not know each other, or never sat down together, or did not know what roles all the other members played. And a single conspiracy may exist even if different members joined at different times, or the membership of the group changed. These are all things that you may consider in deciding whether there was more than one conspiracy, but they are not necessarily controlling.

(3) Similarly, just because there were different sub-groups operating in different places, or many different criminal acts committed over a long period of time, does not necessarily mean that there was more than one conspiracy. Again, you may consider these things, but they are not necessarily controlling.

(4) What is controlling is whether the government has proved that there was an overall agreement on a common goal. That is the key.

Use Note

This instruction should be used with Instruction 3.08. Paragraphs (2) and (3) should be tailored to the facts of the particular case. For example, when there is no evidence that the membership of the group may have changed, that language should be deleted.

Committee Commentary 3.09 (current through August 1, 2016)

The leading Sixth Circuit case on the factors to be considered in determining whether single or multiple conspiracies existed is *United States v. Warner*, 690 F.2d 545 (6th Cir. 1982). *See, e.g.*, *United States v. Wilson*, 168 F.3d 916, 923-24 (6th Cir. 1999); *United States v. Paulino*, 935 F.2d 739, 748 (6th Cir. 1991); and *United States v. Sanchez*, 928 F.2d 1450, 1456 (6th Cir. 1991).

In *Warner*, the Sixth Circuit generally described the principles governing the resolution of whether single or multiple conspiracies existed as follows:

In determining whether the evidence showed single or multiple conspiracies, we must bear in mind that the essence of the crime of conspiracy is agreement. In order to prove a single conspiracy, the government must show that each alleged member agreed to participate in what he knew to be a collective venture directed toward a common goal.

690 F.2d at 548-49 (interior quote marks omitted).

The government need not prove an actual agreement to establish a single conspiracy. *United States v. Segines*, 17 F.3d 847, 856 (6th Cir. 1994), *citing* *United States v. Davenport*, 808 F.2d 1212, 1215-16 (6th Cir.1987); *United States v. Paulino*, *supra* at 748, *citing* *Warner*, 690 F.2d 545 (6th Cir.1982). *Accord*, *United States v. Maliszewski*, 161 F.3d 992, 1015 (6th Cir. 1998), *citing* *Segines*, 17 F.3d at 856. The conspirators need not have direct association to establish a single conspiracy. *United States v. Rugerio*, 20 F.3d 1387, 1391 (6th Cir. 1994), *citing* *Sanchez*, 928 F.2d at 1457 (6th Cir. 1991). A single conspiracy may be proved although the defendants did not know every other member of the conspiracy, *see Paulino*, 935 F.2d 739, 748 (6th Cir. 1991), and although each member did not know of or become involved in all of the activities in furtherance of the conspiracy, *see United States v. Maliszewski*, *supra* at 1014 *citing* *United States v. Moss*, 9 F.3d 543 at 551 (6th Cir. 1993). In other words, to establish a single conspiracy, "It is not necessary for each conspirator to participate in every phase of the criminal venture, provided there is assent to contribute to a common enterprise." *United States v. Ghazaleh*, 58 F.3d 240, 245 (6th Cir. 1995), *quoting* *United States v. Hughes*, 895 F.2d 1135, 1140 (6th Cir. 1990). A single conspiracy can be proved regardless of changes in conspiracy membership. *See Wilson* at 924, *citing* *Warner*, 690 F.2d 545; *United States v. Rugerio*, *supra*, *citing* *United States v. Rios*, 842 F.2d 868, 872 (6th Cir. 1988).

In *United States v. Sanchez*, *supra*, the court stated, "[A] single conspiracy is not transposed into a multiple one simply by lapse of time, change in membership, or a shifting emphasis on its locale of operations." 928 F.2d at 1456, *quoting* *United States v. Heinemann*, 801 F.2d 86, 92 (2d Cir. 1986). This articulation has been repeated with approval several times. *See Segines*, 17 F.3d at 856, *citing* *Sanchez*, 928 F.2d at 1456; *Maliszewski*, 161 F.3d at 1014-15, *citing* *Segines*, 17 F.3d at 856. More recently the court summarized the law in these words: "In short, case law makes plain that evidence of multiple players and multiple locales does not equate with evidence of multiple conspiracies." *Maliszewski*, 161 F.3d at 1015 (6th Cir. 1998).

The existence of distinct sub-groups within a conspiracy does not necessarily mean there are multiple conspiracies. *See, e.g., Wilson*, *supra* at 924, *citing* *Warner*, 690 F.2d at 550 n.8 and *Rugerio*, 20 F.3d at 1392.

The Sixth Circuit also relies on *Warner*, 690 F.2d 545 (6th Cir.1982), in discussing chain conspiracies in drug cases. *See, e.g., United States v. Paulino*, *supra* at 748, *citing* *Warner*, 690 F.2d at 548-49.

In *Kotteakos v. United States*, 328 U.S. 750, 754-55 (1946), the Supreme Court held that the commission of similar crimes by the alleged conspirators and their connection to a common "hub" was not sufficient to establish a single conspiracy. Where none of the alleged conspirators benefit from the others' participation, like "separate spokes meeting in a common center," but "without the rim of the wheel to enclose the spokes," there are multiple, not single conspiracies, even if the "spokes" and the "hub" commit similar criminal acts. The government must show that there was a "single enterprise," not "several, though similar . . . separate adventures of like character." *Id.* at 768-69. *See also* *United States v. Sutherland*, 656 F.2d 1181, 1190 (5th Cir. 1981) (absent evidence that the spokes were dependent on or benefitted from each others' participation, or that

there was some interaction between them, government's proofs were insufficient to establish a single conspiracy).

The Committee believes that the concepts of mutual dependence and "chain" vs. "hub" conspiracies are more appropriate for arguments by counsel than for instructions by the court.

3.10 PINKERTON LIABILITY FOR SUBSTANTIVE OFFENSES COMMITTED BY OTHERS

(1) Count ___ of the indictment accuses the defendants of committing the crime of _____.

(2) There are two ways that the government can prove the defendants guilty of this crime. The first is by convincing you that they personally committed or participated in this crime. The second is based on the legal rule that all members of a conspiracy are responsible for acts committed by the other members, as long as those acts are committed to help advance the conspiracy, and are within the reasonably foreseeable scope of the agreement.

(3) In other words, under certain circumstances, the act of one conspirator may be treated as the act of all. This means that all the conspirators may be convicted of a crime committed by only one of them, even though they did not all personally participate in that crime themselves.

(4) But for you to find any one of the defendants guilty of _____ based on this legal rule, 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 was a member of the conspiracy charged in Count ___ of the indictment.

(B) Second, that after he joined the conspiracy, and while he was still a member of it, one or more of the other members committed the crime of _____.

(C) Third, that this crime was committed to help advance the conspiracy.

(D) And fourth, that this crime was within the reasonably foreseeable scope of the unlawful project. The crime must have been one that the defendant could have reasonably anticipated as a necessary or natural consequence of the agreement.

(5) This does not require proof that each defendant specifically agreed or knew that the crime would be committed. But the government must prove that the crime was within the reasonable contemplation of the persons who participated in the conspiracy. No defendant is responsible for the acts of others that go beyond the fair scope of the agreement as the defendant understood it.

(6) 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 them, then the legal rule that the act of one conspirator is the act of all would not apply.

Use Note

This instruction is designed for use when there is some evidence that would support a conviction based on a co-conspirator liability theory.

The language in paragraph (2) should be modified to delete all references to personal

commission or participation when only one defendant is on trial and there is no evidence that he personally committed or participated in the commission of the substantive offense.

When more than one defendant is on trial, and there is no evidence that one or more defendants personally participated in the substantive offense, paragraph (2) should be modified to identify which defendants could be convicted on a personal participation theory, and which defendants could not.

In the rare case where no conspiracy is charged but one is proved, the instruction should be modified to include language discussing the uncharged conspiracy.

Committee Commentary 3.10
(current through August 1, 2016)

In *Pinkerton v. United States*, 328 U.S. 640, 645-48 (1946), the Supreme Court held that even though there was no evidence that one of two conspirators participated directly in the commission of the substantive offenses charged in the indictment, that conspirator could still be convicted of the substantive offenses based on the principle that the "act of one partner (committed in furtherance of the conspiracy) may be the act of all." *Accord*, *United States v. Odom*, 13 F.3d 949, 959 (6th Cir. 1994) ("Once a conspiracy is shown to exist, the Pinkerton doctrine permits the conviction of one conspirator for the substantive offense of other conspirators committed during and in furtherance of the conspiracy, even if the offense is not an object of the conspiracy.") (*citing* *United States v. Christian*, 942 F.2d 363, 367 (6th Cir. 1991)); *United States v. Martin*, 920 F.2d 345, 348 (6th Cir. 1990) ("The Pinkerton doctrine permits conviction of a conspirator for the substantive offenses of other conspirators committed during and in furtherance of the conspiracy.")

The instruction requires the prosecution to prove that the substantive offense was committed after the defendant joined the conspiracy, and while he was still a member of it. Although there is some authority for the proposition that a person who joins a conspiracy may be held responsible for acts committed before he joined it, *see, e.g.*, *United States v. Cimini*, 427 F.2d 129, 130 (6th Cir. 1970), that authority is questionable in light of the United States Supreme Court's decision in *Levine v. United States*, 383 U.S. 265, 266-67 (1966). In *Levine*, the Supreme Court accepted the Solicitor General's concession that an individual "cannot be held criminally liable for substantive offenses committed by members of the conspiracy before that individual had joined or after he had withdrawn from the conspiracy."

The Supreme Court has indicated that it would not hold co-conspirators liable for a substantive offense committed by other members of the conspiracy if the substantive offense "was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of . . . the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *Pinkerton, supra*, 328 U.S. at 647-48. In *United States v. Etheridge*, 424 F.2d 951, 965 (6th Cir. 1970), the Sixth Circuit treated this statement from *Pinkerton* as creating three separate limitations on the rule that the act of one co-conspirator is the act of all, and Instruction 3.10 does the same. *Cf. United States v. Frost*, 914 F.2d 756, 762 (6th Cir. 1990) ("[A] court need not inquire into the individual culpability of a

particular conspirator, so long as the substantive crime was a reasonably foreseeable consequence of the conspiracy.")

In *Pinkerton*, the Supreme Court stated that the act of one co-conspirator may be the act of all "without any new agreement specifically directed to that act." *Id.*, 328 U.S. at 646-47. And in *Etheridge*, the Sixth Circuit held that even though a defendant had no knowledge of a particular substantive offense, he could still be convicted of that offense if it was "within the reasonable contemplation of those who formulated and participated" in the conspiracy. *Id.*, 424 F.2d at 965.

In *United States v. Borelli*, 336 F.2d 376, 385-386 (2d Cir. 1964), the Second Circuit held that when the evidence is ambiguous as to the scope of the agreement made by a particular defendant and the issue has practical importance to the case, a special instruction should be given focusing the jury's attention on this issue. Quoting from *United States v. Peoni*, 100 F.2d 401, 403 (2d Cir. 1938), the Second Circuit stated that "[n]obody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it." *See also* *United States v. United States Gypsum Co.*, 438 U.S. 422, 463 n.36 (1978) (quoting a similar requested instruction, and stating that the district court's actual instructions differed in only "minor and immaterial" respects).

When only a single defendant is on trial and there is no evidence that he personally committed or participated in the commission of the substantive offense, the language in paragraph (2) should be modified to delete all references to personal commission or participation.

When more than one defendant is on trial, and there is no evidence that one or more defendants personally participated in the substantive offense, paragraph (2) should be modified to identify which defendants could be convicted on a personal participation theory, and which defendants could not.

In the rare case where the indictment includes no conspiracy count but a conspiracy is proved, the instruction should be modified to include language discussing the uncharged conspiracy. In *United States v. Budd*, 496 F.3d 517 (6th Cir. 2007), the court held that "a district court may properly provide a *Pinkerton* instruction regarding a substantive offense, even when the defendant is not charged with the offense of conspiracy." *Id.* at 528. In *Budd*, the defendant had in fact been convicted of conspiracy in a previous trial, and the court emphasized that a conspiracy must be proved before a *Pinkerton* instruction regarding a substantive offense is proper.

In contrast, in *United States v. Henning*, 286 F.3d 914 (6th Cir. 2002), the district court gave Pattern Instruction 3.10, and the defendant was convicted on one § 371 conspiracy count and five counts of substantive bank crimes. *Id.* at 919. The district court granted a post-trial motion to acquit the defendant on the conspiracy charge due to insufficient evidence. The Sixth Circuit held that the district court should automatically have considered the viability of the substantive bank crime convictions because of the close relationship between the substantive and conspiracy crimes created by the *Pinkerton* instruction. *Id.* at 920. The failure to consider the substantive convictions was plain error and the convictions were reversed. *Id.* at 923. The court limited its holding to the unique facts of the case. *Id.* at 922 n.11. In *Budd*, the court distinguished *Henning*

and explained, “It was not the absence of a conspiracy *charge* that led this court to reverse in *Henning*; it was the absence of a conspiracy.” *Budd, supra* at 528.

3.11A WITHDRAWAL AS A DEFENSE TO CONSPIRACY

(1) One of the defendants, _____, has raised the defense that he withdrew from the agreement before any overt act was committed. Withdrawal can be a defense to a conspiracy charge. But _____ has the burden of proving to you that he did in fact withdraw.

(2) To prove this defense, _____ must prove each and every one of the following things:

(A) First, that he completely withdrew from the agreement. A partial or temporary withdrawal is not enough.

(B) Second, that he took some affirmative step to renounce or defeat the purpose of the conspiracy. An affirmative step would include an act that is inconsistent with the purpose of the conspiracy and is communicated in a way that is reasonably likely to reach the other members. But some affirmative step is required. Just doing nothing, or just avoiding the other members of the group, would not be enough.

(C) Third, that he withdrew before any member of the group committed one of the overt acts described in the indictment. Once an overt act is committed, the crime of conspiracy is complete. And any withdrawal after that point is no defense to the conspiracy charge.

(3) If _____ proves these three factors by a preponderance of the evidence, then you must find him not guilty. Preponderance of the evidence is defined as “more likely than not.” In other words, the defendant must convince you that the three factors are more likely true than not true.

(4) The fact that _____ has raised this defense does not relieve the government of its burden of proving that there was an agreement, that he knowingly and voluntarily joined it, and that an overt act was committed. Those are still things that the government must prove in order for you to find _____ guilty of the conspiracy charge.

Use Note

This instruction should be used when there is some evidence that a defendant withdrew before any overt act was committed, and withdrawal has been raised as a defense to the conspiracy charge itself.

This instruction does not appear to be appropriate when the conspiracy charged does not require proof of an overt act.

Committee Commentary 3.11A
(current through August 1, 2016)

This instruction should be used when there is some evidence that a defendant withdrew before any overt act was committed, and withdrawal has been raised as a defense to the conspiracy charge itself. Some conspiracies do not require the commission of an overt act in order for the conspiracy to be complete. *See e.g.*, 21 U.S.C. § 846. In such cases, once a defendant joins the conspiracy, the concept of withdrawal as a defense to the conspiracy charge "would appear to be inapplicable." *See* the Committee Commentary to Federal Judicial Center Instruction 63.

The defendant must prove some affirmative action to withdraw from the conspiracy; mere cessation of activity is not sufficient. *Smith v. United States*, 133 S. Ct. 714 (2013); *United States v. True*, 250 F.3d 410, 425 (6th Cir. 2001); *United States v. Lash*, 937 F.2d 1077 at 1083 (6th Cir. 1991), *citing* *United States v. Battista*, 646 F.2d 237, 246 (6th Cir. 1981); *United States v. United States Gypsum Co.*, 438 U.S. 422, 464-65 (1978) and *Hyde v. United States*, 225 U.S. 347, 369 (1912). If there is evidence that the defendant acquiesced in the conspiracy after the affirmative act to withdraw, it remains a jury question whether there was withdrawal. *Lash*, 937 F.2d at 1084, *citing* *Hyde*, 225 U.S. at 371. In *Lash* the court explained that the defendant's "subsequent acts neutralized his withdrawal and indicated his continued acquiescence. Continued acquiescence negates withdrawal, leaving [the defendant] liable. . . ." *Lash*, 937 F.2d at 1084, *citing* *Hyde*, 225 U.S. at 371-72.

Jury instructions quoted or approved in the decided cases commonly include examples of the kinds of affirmative steps considered sufficient to constitute a withdrawal. *See, e.g.*, *United States v. United States Gypsum Co.*, 438 U.S. 422, 463-64 (1978); *United States v. Battista*, *supra*, 646 F.2d at 246. These examples include such things as notifying the authorities, or effectively communicating the withdrawal to the other members of the conspiracy. *See Battista*, *supra* at 246 (quoted instruction containing these two examples "was in accord with the law of this circuit"). But in *United States Gypsum Co.*, the Supreme Court held that jury instructions which limited the ways in which a defendant could withdraw to either informing the authorities, or notifying the other members of the conspiracy of an intention to withdraw, constituted reversible error. The Court stated that other affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach the other co-conspirators have generally been regarded as sufficient to establish withdrawal. *Id.* at 463-64.

Paragraph (2)(B) continues to provide that withdrawal includes an affirmative act that is inconsistent with the purpose of the conspiracy "and" that is communicated in a way likely to reach the other members. However, the defense is not limited to situations where communication of withdrawal to other members of the conspiracy occurs. For example, withdrawal may be established by notifying the authorities. The instruction should be tailored to fit the facts of the case.

As paragraph (1) states, withdrawal is an affirmative defense which the defendant has the burden of proving. *See* *Smith v. United States*, 133 S. Ct. at 720-21; *Lash*, 937 F.2d at 1083, *citing* *United States v. Battista*, *supra*. Paragraph (3) provides that the defendant must prove the

withdrawal defense by a preponderance of the evidence. *Smith*, 133 S. Ct. at 718. The definition of the preponderance standard as more likely true than not is based on *United States v. Ward*, 68 F.3d 146, 148-49 (6th Cir. 1995) and *United States v. Walton*, 908 F.2d 1289, 1301-02 (6th Cir. 1990).

A partial withdrawal is not sufficient to establish this defense. *See United States v. Battista*, *supra*, 646 F.2d at 246 (quoting instruction that the defendant must "completely" disassociate himself from the conspiracy).

The final paragraph of this instruction reminds the jury that the government retains the burden of proving the basic elements of conspiracy even though the defendant has raised withdrawal as an affirmative defense.

3.11B WITHDRAWAL AS A DEFENSE TO SUBSTANTIVE OFFENSES COMMITTED BY OTHERS

(1) One of the defendants, _____, has raised the defense that he withdrew from the conspiracy before the crime of _____ was committed. Withdrawal can be a defense to a crime committed after the withdrawal. But _____ has the burden of proving to you that he did in fact withdraw.

(2) To prove this defense, _____ must prove each and every one of the following things:

(A) First, that he completely withdrew from the conspiracy. A partial or temporary withdrawal is not sufficient.

(B) Second, that he took some affirmative step to renounce or defeat the purpose of the conspiracy. An affirmative step would include an act that is inconsistent with the purpose of the conspiracy and is communicated in a way that is reasonably likely to reach the other members. But some affirmative step is required. Just doing nothing, or just avoiding the other members, would not be enough.

(C) Third, that he withdrew before the crime of _____ was committed. Once that crime was committed, any withdrawal after that point would not be a defense.

(3) If _____ proves these three factors by a preponderance of the evidence, then you must find him not guilty. Preponderance of the evidence is defined as “more likely than not.” In other words, the defendant must convince you that the three factors are more likely true than not true.

(4) Withdrawal is not a defense to the conspiracy charge itself. But the fact that _____ has raised this defense does not relieve the government of proving that there was an agreement, that he knowingly and voluntarily joined it, that an overt act was committed, that the crime of _____ was committed to help advance the conspiracy and that this crime was within the reasonably foreseeable scope of the unlawful project. Those are still things that the government must prove in order for you to find _____ guilty of _____.

Use Note

This instruction should be used when the evidence shows that any withdrawal came after an overt act was committed, and withdrawal has been raised as a defense to a substantive offense committed by another member of the conspiracy.

Committee Commentary 3.11B

(current through August 1, 2016)

This instruction should be used when the evidence shows that any withdrawal came after the conspiracy was completed by the commission of an overt act, and a defendant is raising withdrawal as a defense to a substantive offense committed by a fellow co-conspirator. See Instruction 3.10

on Pinkerton liability.

As long as a defendant has not taken some affirmative action to withdraw from the conspiracy, the defendant remains liable for all co-conspirators' actions in furtherance of the conspiracy. *See* *Smith v. United States*, 133 S. Ct. 714, 719 (2013); *United States v. Hayter Oil Co., Inc.*, 51 F.3d 1265, 1271 (6th Cir. 1995), *both citing* *Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946).

See the Committee Commentary to Instruction 3.11A for a complete discussion of the law of withdrawal.

3.11C WITHDRAWAL AS A DEFENSE TO CONSPIRACY BASED ON THE STATUTE OF LIMITATIONS

(1) One of the defendants, _____, has raised the defense that he withdrew from the conspiracy before _____, and that the statute of limitations ran out before the government obtained an indictment charging him with the conspiracy.

(2) The statute of limitations is a law that puts a limit on how much time the government has to obtain an indictment. This can be a defense, but _____ has the burden of proving to you that he did in fact withdraw, and that he did so before _____.

(3) To prove this defense, _____ must establish each and every one of the following things:

(A) First, that he completely withdrew from the conspiracy. A partial or temporary withdrawal is not sufficient.

(B) Second, that he took some affirmative step to renounce or defeat the purpose of the conspiracy. An affirmative step would include an act that is inconsistent with the purpose of the conspiracy and is communicated in a way that is reasonably likely to reach the other members. But some affirmative step is required. Just doing nothing, or just avoiding contact with the other members, would not be enough.

(C) Third, that he withdrew before _____.

(4) If _____ proves these three factors by a preponderance of the evidence, then you must find him not guilty. Preponderance of the evidence is defined as “more likely than not.” In other words, the defendant must convince you that the three factors are more likely true than not true.

(5) The fact that _____ has raised this defense does not relieve the government of its burden of proving that there was an agreement, that he knowingly and voluntarily joined it, and that an overt act was committed. Those are still things that the government must prove in order for you to find _____ guilty of the conspiracy charge.

Use Note

This instruction should be used when there is some evidence that a defendant withdrew from a conspiracy before the limiting date.

Committee Commentary 3.11C
(current through August 1, 2016)

In *United States v. Lash*, 937 F.2d 1077, 1083 (6th Cir. 1991), the court noted that withdrawal from a conspiracy prior to the relevant statute of limitations date would be a complete defense.

The statute of limitations for prosecutions under 18 U.S.C. § 371 is five years from the date of the last overt act committed in furtherance of the conspiracy. See *United States v. Zalman*, 870 F.2d 1047, 1057 (6th Cir. 1989) (citing 18 U.S.C. § 3282(a)); cf. *Smith v. United States*, 133 S.Ct. 714, 720 n.4 (2013) (applying five-year statute of limitations in § 3282(a) to conspiracies under 21 U.S.C. § 846 and 18 U.S.C. § 1962(d)). But a defendant's withdrawal from a conspiracy starts the statute of limitations running as to him. See *Smith at 719* (“Withdrawal also starts the clock running on the time within which the defendant may be prosecuted, and provides a complete defense when the withdrawal occurs beyond the applicable statute-of-limitations period.”) (footnote omitted).

See the Committee Commentary to Instruction 3.11A for a complete discussion of the law relating to withdrawal.

3.12 DURATION OF A CONSPIRACY

(1) One of the questions in this case is whether _____. This raises the related question of when a conspiracy comes to an end.

(2) A conspiracy ends when its goals have been achieved. But sometimes a conspiracy may have a continuing purpose, and may be treated as an ongoing, or continuing, conspiracy. This depends on the scope of the agreement.

(3) If the agreement includes an understanding that the conspiracy will continue over time, then the conspiracy may be a continuing one. And if it is, it lasts until there is some affirmative showing that it has ended. On the other hand, if the agreement does not include any understanding that the conspiracy will continue, then it comes to an end when its goals have been achieved. This, of course, is all for you to decide.

Use Note

This instruction should be used when an issue relating to the duration of a conspiracy has been raised.

Committee Commentary 3.12
(current through August 1, 2016)

The language of this instruction is based on *United States v. Hamilton*, 689 F.2d 1262, 1268 (6th Cir. 1982); *United States v. Mayes*, 512 F.2d 637, 642 (6th Cir. 1975); and *United States v. Etheridge*, 424 F.2d 951, 964 (6th Cir. 1970).

The duration of a conspiracy may be relevant to various issues that a jury may have to decide. These include: statute of limitations issues, see Instruction 3.04(4); single vs. multiple conspiracy issues, see Instructions 3.08 and 3.09; and whether co-conspirators are responsible for substantive offenses committed by other members of the conspiracy, see Instruction 3.10(4)(B). Conspiracy is a continuing crime which is not completed at the conclusion of the agreement. *United States v. Edgecomb*, 910 F.2d 1309, 1312 (6th Cir. 1990).

Generally, a separate agreement to conceal a conspiracy will not extend the duration of a conspiracy for purposes of the statute of limitations. *United States v. Lash*, 937 F.2d 1077, 1082 (6th Cir. 1991), *citing* *Grunewald v. United States*, 353 U.S. 391 at 401-05 (1957). However, if the acts of concealment occur as an integral part of the conspiracy before its objectives have been finally attained, such acts may extend the life of the conspiracy. *Lash*, 937 F.2d at 1082, *citing* *United States v. Howard*, 770 F.2d 57, 60-61 (6th Cir. 1985) (en banc).

For conspiracies under § 1 of the Sherman Act, 15 U.S.C. § 1, which do not require an overt act, the government need only show that the agreement existed within the statute of limitations. *United States v. Hayter Oil Co., Inc.*, 51 F.3d 1265, 1270 (6th Cir. 1995), *citing* *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-24 n.59 (1940) and *United States v. Cooperative Theatres of Ohio, Inc.*, 845 F.2d 1367, 1373 (6th Cir. 1988).

3.13 IMPOSSIBILITY OF SUCCESS

(1) One last point about conspiracy. It is no defense to a conspiracy charge that success was impossible because of circumstances that the defendants did not know about. This means that you may find the defendants guilty of conspiracy even if it was impossible for them to successfully complete the crime that they agreed to commit.

Use Note

This instruction should be used when impossibility of success has been raised as an issue.

Committee Commentary 3.13 (current through August 1, 2016)

In *United States v. Hamilton*, 689 F.2d 1262, 1269 (6th Cir. 1982), the Sixth Circuit rejected the defendants' argument that statements made to a co-conspirator who had become a government agent were not made in furtherance of the conspiracy. The court held that such statements are admissible even when the conspirator to whom the statements were made was acting under the direction and surveillance of government agents. The Sixth Circuit then buttressed this holding by reference to "the principle that 'it is no defense that success was impossible because of unknown circumstances'." *But cf.* *United States v. Howard*, 752 F.2d 220, 229 (6th Cir. 1985) ("A conspiracy is deemed to have ended when . . . achievement of the objective has . . . been rendered impossible.").

When conspirators do not know the government has intervened, and the conspiracy is bound to fail, the conspiracy does not automatically terminate simply because the government has defeated its object. *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003).

3.14 STATEMENTS BY CO-CONSPIRATORS

(No Instruction Recommended.)

Committee Commentary 3.14 (current through August 1, 2016)

The Committee recommends that no instruction be given.

The rule in the Sixth Circuit is that the trial judge alone is responsible for deciding whether statements by co-conspirators are admissible, and that the question of admissibility should not be submitted to the jury. *See, e.g.,* *United States v. Mitchell*, 556 F.2d 371, 377 (6th Cir. 1977). Instructions that the jury may only consider a co-conspirator's statement if the jury first finds that a conspiracy existed and that the defendant was a member of it have repeatedly been held to be "altogether unnecessary." *See, e.g.,* *United States v. Enright*, 579 F.2d 980, 986-87 (6th Cir. 1978). *Accord, United States v. Swidan*, 888 F.2d 1076, 1081 (6th Cir. 1989). The judge should not advise the jury of the government's burden of proof on the preliminary question of admissibility, or the judge's determination that the government has met its burden. *United States v. Vinson*, 606 F.2d 149, 153 (6th Cir. 1979). Instead, the judge should admit the statements, subject only to instructions on the government's ultimate burden of proof beyond a reasonable doubt, and on the weight and credibility to be given statements by co-conspirators. *Id.*

In *United States v. Wilson*, 168 F.3d 916 (6th Cir. 1999), the court elaborated on the district judge's responsibility for deciding whether co-conspirators' statements are admissible. "Before a district court may admit statements of a co-conspirator, three factors must be established: (1) that the conspiracy existed; (2) that the defendant was a member of the conspiracy; and (3) that the co-conspirator's statements were made in furtherance of the conspiracy. This three-part test is often referred to as an Enright finding." *Id.* at 920, *citing* *United States v. Monus*, 128 F.3d 376, 392 (6th Cir. 1997) *and* *United States v. Enright*, 579 F.2d 980, 986-87 (6th Cir. 1978). The party offering the statement carries the burden of proof on these factors by a preponderance. *Wilson*, 168 F.3d at 921, *citing* *Bourjaily v. United States*, 483 U.S. 171, 176 (1987). The district court may consider the hearsay statements themselves in deciding whether a conspiracy existed. *Wilson*, 168 F.3d at 921, *citing* *Bourjaily*, 483 U.S. at 181 and Fed. R. Evid. 801 (advisory committee note on 1997 amendment to Rule 801). The district judge's ruling on the statements' admissibility under Fed. R. Evid. 801(d)(2)(E) is generally reviewed for clear error, but if an evidentiary objection is not made at the time of the testimony, the ruling is reviewed for plain error. *Wilson*, 168 F.3d at 920, *citing* *United States v. Gessa*, 971 F.2d 1257, 1261 (6th Cir. 1992) (en banc) *and* *United States v. Cowart*, 90 F.3d 154, 157 (6th Cir. 1996).

Special instructions limiting the consideration of statements made by co-conspirators may be required when the evidence would support a finding that multiple conspiracies existed. See Use Note and Committee Commentary to Instruction 3.08.