PATTERN CRIMINAL
JURY INSTRUCTIONS

Chapter 1.00

GENERAL PRINCIPLES

Table of Instructions

1.01 INTRODUCTION

(1) Members of the jury, now it is time for me to instruct you about the law that you must follow in deciding this case.

(2) I will start by explaining your duties and the general rules that apply in every criminal case.

(3) Then I will explain the elements, or parts, of the crime that the defendant is accused of committing.

[(4) Then I will explain the defendant's position.]

(5) Then I will explain some rules that you must use in evaluating particular testimony and evidence.

(6) And last, I will explain the rules that you must follow during your deliberations in the jury room, and the possible verdicts that you may return.

(7) Please listen very carefully to everything I say.

Use Note

Bracketed paragraph (4) should be included only when the defendant has raised a defense that requires some explanation, like alibi, entrapment, insanity, duress or self-defense, or when a defense theory instruction will be given.

Committee Commentary 1.01
(current through December 20, 2017)

This instruction is designed to give the jurors an outline of the instructions that follow. The Committee believes that the jurors will follow the instructions better if they are provided with explanatory introductions and transitions.

The general organization of the jury instructions is a matter within the trial court's discretion. United States v. Dunn, 805 F.2d 1275, 1283 (6th Cir. 1986). The Committee suggests that instructions about case specific evidentiary matters such as impeachment by prior convictions, expert testimony and the like should be given after the instructions defining the elements of the crime, not before as other circuits have suggested. The Committee's rationale is that the jurors should be told what the government must prove before they are told how special evidentiary rules may affect their determination. This is the approach suggested by Devitt and Blackmar, Federal Jury Practice and Instructions (3d ed). By suggesting this approach, the Committee does not intend to foreclose other approaches, or to suggest that the choice of one approach over the other should give rise to an appellate issue.

Paragraph (4) of this instruction is bracketed to indicate that it should not be used in every case. It should be included only when the defendant has raised a defense that requires some explanation, like alibi, entrapment, insanity, duress or self-defense, or when a defense theory instruction will be given.

1.02 JURORS' DUTIES

(1) You have two main duties as jurors. The first one is to decide what the facts are from the evidence that you saw and heard here in court. Deciding what the facts are is your job, not mine, and nothing that I have said or done during this trial was meant to influence your decision about the facts in any way.

(2) Your second duty is to take the law that I give you, apply it to the facts, and decide if the government has proved the defendant guilty beyond a reasonable doubt. It is my job to instruct you about the law, and you are bound by the oath that you took at the beginning of the trial to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions that I gave you before and during the trial, and these instructions. All the instructions are important, and you should consider them together as a whole.

[(3) The lawyers have talked about the law during their arguments. But if what they said is different from what I say, you must follow what I say. What I say about the law controls.]

(4) Perform these duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way.

Use Note

Bracketed paragraph (3) should be included only when the lawyers have talked about the law during their arguments. If the instructions are given before closing arguments, the language of this paragraph should be modified accordingly.

Committee Commentary 1.02
(current through December 20, 2017)

A panel of the Sixth Circuit quoted paragraph (4) of this instruction and stated that it cured any confusing statements made by the district court during voir dire. United States v. Okeezie, 1993 WL 20997 at 4, 1993 U.S. App. LEXIS 1968 at 4 (6th Cir. 1993) (unpublished).

The jurors have two main duties. First, they must determine from the evidence what the facts are. Second, they must take the law stated in the court's instructions, apply it to the facts and decide whether the facts prove the charge beyond a reasonable doubt. See Sparf v. United States, 156 U.S. 51, 102-07 (1895); Starr v. United States, 153 U.S. 614, 625 (1894).

The jurors have the power to ignore the court's instructions and bring in a not guilty verdict contrary to the law and the facts. Horning v. District of Columbia, 254 U.S. 135, 138 (1920). But they should not be told by the court that they have this power. United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir. 1988); United States v. Avery, 717 F.2d 1020, 1027 (6th Cir. 1983); United States v. Burkhart, 501 F.2d 993, 996-97 (6th Cir. 1974). They should instead be told that it is their duty to accept and apply the law as given to them by the court. United

States v. Avery, *supra* at 1027.

The language in paragraph (3) regarding what the lawyers may have said about the law is bracketed to indicate that it should not be used in every case. It should be included only when the lawyers have talked about the law during the trial. When the instructions are given before closing arguments, the language of this paragraph should be modified accordingly.

In United States v. Lawson, 780 F.2d 535, 545 (6th Cir.1985), the Sixth Circuit reviewed an instruction which provided that the jurors' duty was to ascertain the truth, and rejected the defendant's argument that it required reversal of his conviction. However, other circuits have condemned instructions telling jurors that their basic job is to determine which witnesses are telling the truth. See for example United States v. Pine, 609 F.2d 106, 107-08 (3d Cir. 1979), and cases collected therein. Such instructions improperly invite the jury to simply choose between competing versions of the facts, rather than to decide whether the government has carried its burden of proving guilt beyond a reasonable doubt.

1.03 PRESUMPTION OF INNOCENCE, BURDEN OF PROOF, REASONABLE DOUBT

(1) As you know, the defendant has pleaded not guilty to the crime charged in the indictment. The indictment is not any evidence at all of guilt. It is just the formal way that the government tells the defendant what crime he is accused of committing. It does not even raise any suspicion of guilt.

(2) Instead, the defendant starts the trial with a clean slate, with no evidence at all against him, and the law presumes that he is innocent. This presumption of innocence stays with him unless the government presents evidence here in court that overcomes the presumption, and convinces you beyond a reasonable doubt that he is guilty.

(3) This means that the defendant has no obligation to present any evidence at all, or to prove to you in any way that he is innocent. It is up to the government to prove that he is guilty, and this burden stays on the government from start to finish. You must find the defendant not guilty unless the government convinces you beyond a reasonable doubt that he is guilty.

(4) The government must prove every element of the crime charged beyond a reasonable doubt. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt. Possible doubts or doubts based purely on speculation are not reasonable doubts. A reasonable doubt is a doubt based on reason and common sense. It may arise from the evidence, the lack of evidence, or the nature of the evidence.

(5) Proof beyond a reasonable doubt means proof which is so convincing that you would not hesitate to rely and act on it in making the most important decisions in your own lives. If you are convinced that the government has proved the defendant guilty beyond a reasonable doubt, say so by returning a guilty verdict. If you are not convinced, say so by returning a not guilty verdict.

Use Note

Paragraph (3) should be modified when an affirmative defense is raised which the defendant has the burden of proving, for example, insanity and justification. In these circumstances, paragraph (3) should be changed to explain that while the government has the burden of proving the elements of the crime, the defendant has the burden of proving the defense.

Committee Commentary 1.03

(current through December 20, 2017)

The Sixth Circuit has approved the entire 1.03 instruction as "correct." United States v. Hynes, 467 F.3d 951, 957 (6th Cir. 2006).

As to paragraph (1), 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). 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). *See also* United States v. Lawson, 535 F.3d 434, 441 (6th Cir. 2008) (reading indictment to prospective jurors was not an abuse of discretion because appropriate limiting instructions to the effect that the indictment was not evidence of guilt were given).

Paragraph (5) of the instruction has been quoted and approved by the Sixth Circuit. United States v. Stewart, 306 F.3d 295, 306-07 (6th Cir. 2002); United States v. Goodlett, 3 F.3d 976, 979 (6th Cir. 1993). *Accord*, United States v. Bond, 22 F.3d 662, 669 n.1 (6th Cir. 1994). In United States v. Rios, 2016 WL 3923881 (6th Cir. July 21, 2016), the court stated, "[W]e stress that departures from pattern instructions regarding the reasonable-doubt standard tend only to muddy the waters further. 'At worst such variations may be prejudicial to a defendant; at best they add needlessly to the work of appellate courts while being of no real benefit to the jury.'" *Id*. at 18 (citations omitted).

Although the Due Process Clause does not necessarily require an instruction on the presumption in state criminal trials, Kentucky v. Whorton, 441 U.S. 786, 789 (1979), in federal trials the Supreme Court appears to have exercised its supervisory authority to require an instruction, at least upon request.

In Coffin v. United States, 156 U.S. 432 (1895), the defendant appealed his federal conviction on the ground that the trial court had refused to give any instruction on the presumption of innocence. The government countered that no instruction was necessary because the trial court gave a complete instruction on the necessity of proof beyond a reasonable doubt. *Id.* at 452-53. The Supreme Court reversed, holding that "the protection of so vital and fundamental a principle as the presumption of innocence be not denied, when requested, to any one accused of crime." *Id.* at 460. *Accord*, Cochran v. United States, 157 U.S. 286, 298-300 (1895) ("[C]ounsel asked for a specific instruction upon the defendant's presumption of innocence, and we think it should have been given . . . . The Coffin case is conclusive . . . and [requires] that the judgment . . . be [r]eversed.").

More recently, in Taylor v. Kentucky, 436 U.S. 478 (1978), Justice Stevens, joined by Justice Rehnquist, dissented from the Court's holding that the failure of a state court to instruct on the presumption violated due process. In doing so, however, Justice Stevens carefully distinguished between state and federal trials, and unequivocally stated: "In a federal court it is reversible error to refuse a request for a proper instruction on the presumption of innocence." *Id.* at 491.

The Sixth Circuit has not directly addressed this question. But in strong dictum the court has said: "Jury instructions concerning the presumption of innocence and proof beyond a reasonable doubt are fundamental rights possessed by every citizen charged with a crime in these United States." United States v. Hill, 738 F.2d 152, 153 (6th Cir. 1984).

The Supreme Court has provided some general guidance about what an instruction on the presumption of innocence should say, but without mandating any particular language. The Court has said that the presumption of innocence is not evidence. Nor is it a true presumption in the sense of an inference drawn from other facts in evidence. Instead, it is "an 'assumption' that is indulged in the absence of contrary evidence." Taylor v. Kentucky, *supra*, 436 U.S. at 483-84 n. 12. It is a "shorthand description of the right of the accused to remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion." *Id.* Its main purpose is to "purge" any suspicions the jurors may have arising from "official suspicion, indictment (or) continued custody," and to emphasize to the jurors that their decision must be based "solely on the . . . evidence introduced at trial." *Id.* at 484-86.

Although not necessarily approving the particular language of the defendant's requested instruction in *Taylor*, the Supreme Court did quote language from that instruction which told the jurors that although accused, the defendant began the trial with "a clean slate," and that the jurors could consider "nothing but legal evidence" in support of the charge. The Court then said that this language appeared "well suited to forestalling the jury's consideration of extraneous matters, that is, to perform the purging function described . . . above." *Id.* at 488 n.16.

Subsequent Supreme Court cases have repeated that the purpose of the presumption is to purge jurors' suspicions arising from extraneous matters, and to admonish them to decide the case solely on the evidence produced at trial. Carter v. Kentucky, 450 U.S. 288, 302 n.19 (1981); Bell v. Wolfish, 441 U.S. 520, 533 (1979). Sixth Circuit decisions echo this general view. *See* Whiteside v. Parke, 705 F.2d 869, 871 (6th Cir. 1983) ("the presumption . . . protect(s) a defendant's constitutional right . . . to be judged solely on the evidence presented at trial"). Instruction 1.04 defines what is and is not evidence, and contains a strong admonition that the jurors must base their decision only on the evidence produced at trial.

With regard to the indictment, instructions telling the jury that "the indictment itself is not evidence of guilt" have been characterized by the Sixth Circuit as "a correct principle of criminal law." Garner v. United States, 244 F.2d 575, 576 (6th Cir. 1957). Similarly, 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). And in Hammond v. Brown, 323 F.Supp. 326, 342 (N.D.Ohio 1971), *aff'd*, 450 F.2d 480 (6th Cir. 1971), the district court characterized as "the law" the principle that "an indictment is merely an accusation of crime, and . . . is neither evidence of guilt nor does it permit an inference of guilt."

With regard to the presumption itself, several Sixth Circuit cases dealing with the extent to which a district judge must voir dire prospective jurors shed some further light on what the instructions should say. In United States v. Blount, 479 F.2d 650, 651 (6th Cir. 1973), the court reversed the conviction based on the district court's refusal to ask whether the jurors could accept the legal principle that "a defendant is presumed to be innocent, has no burden to establish his innocence, and is clothed throughout the trial with the presumption." Similarly, in United States v. Hill, 738 F.2d 152, 154 (6th Cir. 1984), the Sixth Circuit said that a challenge for cause would have to be sustained if a juror indicated that he could not accept the proposition that "a defendant

is presumed to be innocent despite the fact that he has been accused in an indictment." And in Hammond v. Brown, *supra*, 323 F.Supp. at 342, the district court characterized as an "essential (voir dire) question" whether the jurors could accept the principle that "a man is presumed innocent unless and until he is proved guilty by evidence beyond a reasonable doubt."

Two decisions have identified language that should not be used. In Williams v. Abshire, 544 F.Supp. 315, 319 (E.D.Mich.1982), *aff'd*, 709 F.2d 1512 (6th Cir.1983), a state court included in its instructions language that the presumption "doesn't mean necessarily that he is innocent, but you are duty bound to give him that presumption," and language that "[n]ow we know that some defendants are not innocent of course." Although the district court denied the defendant's habeas petition, it characterized this language as "open to criticism." In Lurding v. United States, 179 F.2d 419, 422 (6th Cir. 1950), the Sixth Circuit characterized as "inept phrasing" language that a defendant is presumed innocent "until such time as the proof produced by the government establishes . . . guilt." The court expressed the fear that such language might be misinterpreted to mean that guilt is established at the conclusion of the government's proofs, unless the defendant proves otherwise.

The Due Process Clause requires that the government bear the burden of proving every element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970). This means that the prosecution must present evidence sufficient to overcome the presumption of innocence and convince the jurors of the defendant's guilt. Agnew v. United States, 165 U.S. 36, 50-51 (1896); Coffin v. United States, 156 U.S. 432, 458-59. "The defendant is presumed to be innocent . . . until he is proven guilty by the evidence . . . . This presumption remains with the defendant until (the jurors) are satisfied of (his) guilt beyond a reasonable doubt." Agnew v. United States, *supra*, 165 U.S. at 51.

Early Supreme Court cases contained broad statements that the burden of proof rests on the government throughout the trial, and that the burden is never on the accused to prove his innocence. *See, e.g.*, Davis v. United States, 160 U.S. 469, 487 (1895). Later cases have tempered these statements to the extent of recognizing that the Due Process Clause does not forbid placing the burden of proving an affirmative defense on the defendant. Martin v. Ohio, 480 U.S. 228 (1987); Patterson v. New York, 432 U.S. 197 (1977); Rivera v. Delaware, 429 U.S. 877 (1976). See for example 18 U.S.C. § 17(b) ("The defendant has the burden of proving the defense of insanity by clear and convincing evidence.") When a true affirmative defense like insanity is raised, paragraph (3) must be modified to explain that while the prosecution has the burden of proving the elements of the crime, the defendant has the burden of proving the affirmative defense.

Some instructions recommended by Sixth Circuit decisions include language that the burden of proof "never shifts" to the defendant. *See, e.g.*, United States v. Hart, 640 F.2d 856, 860 n.3 (6th Cir. 1981). Paragraph (3) articulates this concept by simply stating that the burden is on the prosecution "from start to finish."

Some early United States Supreme Court cases appeared to indicate that the government's burden of proof included the burden of negating every reasonable theory consistent with the

defendant's innocence. For example, in Hopt v. Utah, 120 U.S. 430 (1887), the Court rejected the defendant's argument that the district court's instructions failed to adequately define the term reasonable doubt, in part on the ground that the district court had told the jurors that if they could reconcile the evidence with any reasonable hypothesis consistent with innocence, they should do so and find the defendant not guilty. The Court then added that "[t]he evidence must satisfy the judgment of the jurors as to the guilt of the defendant, so as to exclude any other reasonable conclusion." *Id.* at 441.

Subsequently, however, even in cases based largely on circumstantial evidence, the Supreme Court has specifically rejected the argument that the government's burden includes the affirmative duty to exclude every reasonable hypothesis except that of the defendant's guilt. Holland v. United States, 348 U.S. 121, 139-140 (1954). *Accord*, Jackson v. Virginia, 443 U.S. 307, 326 (1979) ("[T]he Court has rejected [this theory] in the past (citing Holland) [and] [w]e decline to adopt it today.") The "better rule" is that "where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect." *Holland, supra*, at 139-140. "If the jury is convinced beyond a reasonable doubt, we can require no more." *Id.* at 140.

Although some earlier Sixth Circuit cases appeared to require the government to disprove every reasonable hypothesis except that of guilt, *see, e.g.*, United States v. Campion, 560 F.2d 751, 754 (6th Cir. 1977); United States v. Wages, 458 F.2d 1270, 1271 (6th Cir. 1972), a long line of more recent cases has consistently rejected any such requirement. *See, e.g.*, United States v. Reed, 821 F.2d 322, 325 (6th Cir.1987); United States v. Townsend, 796 F.2d 158, 161 (6th Cir. 1986); United States v. Vannerson, 786 F.2d 221, 225 (6th Cir. 1986); Maupin v. Smith, 785 F.2d 135, 140 (6th Cir. 1986); United States v. Stone, 748 F.2d 361, 362-63 (6th Cir. 1984).

In United States v. Cooper, 577 F.2d 1079, 1085 (6th Cir. 1978), the Sixth Circuit reviewed an instruction stating:

> [I]n order to justify a verdict of guilty based upon circumstantial evidence you must find from the circumstantial evidence offered, that it is consistent with guilt and inconsistent with innocence and where the evidence as to the element of a crime is equally consistent with the theory of innocence as with the theory of guilt then that evidence necessarily fails to establish guilt beyond a reasonable doubt and you should find the defendant not guilty.

The court stated that such an instruction "poses a likelihood of needless confusion and . . . closely resembles [the] one expressly rejected by the Supreme Court [in *Holland*]." Based on this case, Instruction 1.03 omits this concept altogether.

One other Sixth Circuit decision has identified some potentially troublesome language. In United States v. Buffa, 527 F.2d 1164 (6th Cir. 1975), the district court instructed, without objection, that although it was necessary for the government to prove every element of the crime charged beyond a reasonable doubt, it was not necessary that each "subsidiary fact" be proved beyond a reasonable doubt. The district court did not define the term "subsidiary fact."

Although affirming on the ground that this was not plain error, the Sixth Circuit characterized this as "opening up the possibility that the jury (would be) misled or confused." *Id.* at 1165.

The reasonable doubt standard represents "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." In re Winship, *supra*, 397 U.S. at 372 (Harlan, J., concurring). *Accord*, Francis v. Franklin, 471 U.S. 307, 313 (1985). The purpose of the reasonable doubt standard is to reduce the risk of an erroneous conviction:

> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value--as a criminal defendant his liberty--this margin of error is reduced as to him by the process of placing on the other party the burden of ... persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.

In re Winship, *supra* at 364.

Despite repeated characterizations of the reasonable doubt standard as "vital," "indispensable," and "fundamental," see *Winship, supra* at 363-64 and Jackson v. Virginia, *supra* 443 U.S. at 317, the Supreme Court has been ambivalent about whether and to what extent the term "reasonable doubt" should be defined. On the one hand, the Court has stated on three occasions that "attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." Holland v. United States, *supra*, 348 U.S. at 140; Dunbar v. United States, 156 U.S. 185, 199 (1894); Miles v. United States, 103 U.S. (13 Otto) 304, 312 (1880). On the other hand, the Court has said that "in many instances, especially where the case is at all complicated, some explanation or illustration of the rule may aid in its full and just comprehension." Hopt v. Utah, *supra*, 120 U.S. at 440. And in several other cases, the Court has quoted some rather lengthy explanations of the term without criticism. *See, e.g.*, Wilson v. United States, 232 U.S. 563, 569-70 (1913); Holt v. United States, 218 U.S. 245, 254 (1910); Agnew v. United States, *supra*, 165 U.S. at 51.

Some Sixth Circuit decisions have sustained state criminal convictions against constitutional attacks based on the trial court's failure to define the term reasonable doubt. See Whiteside v. Parke, *supra*, 705 F.2d at 870-873. Other Sixth Circuit decisions have noted in dicta the Supreme Court's statement that attempts to define reasonable doubt do not usually make the term more understandable. See United States v. Releford, 352 F.2d 36, 41 (6th Cir. 1965). But no Sixth Circuit decisions reviewing federal criminal convictions have explicitly discouraged or condemned instructions defining reasonable doubt, as some other circuits have done. See United States v. Ricks, 882 F.2d 885, 894 (4th Cir. 1989), United States v. Marquardt, 786 F.2d 771, 784 (7th Cir. 1986). *See also* United States v. Nolasco, 926 F.2d 869 (9th Cir. 1991) (en banc) (the decision whether to define reasonable doubt should be left to the trial court's sound discretion), and United States v. Olmstead, 832 F.2d 642, 646 (1st Cir. 1987) (an instruction that uses the words reasonable doubt without further defining them is adequate).

Instead, Sixth Circuit decisions have rather consistently proceeded on the assumption that some definition should be given, with the only real question being what the definition should say. *See, e.g.*, United States v. Mars, 551 F.2d 711, 716 (6th Cir. 1977); United States v. Christy, 444 F.2d 448, 450 (6th Cir. 1971); Ashe v. United States, 288 F.2d 725, 730 (6th Cir. 1961). And in United States v. Hart, *supra*, 640 F.2d at 860-61 (6th Cir. 1981), the Sixth Circuit recommended two rather lengthy definitions as "much better" than the shorter instruction given by the district court.

Supreme Court decisions provide a substantial amount of guidance on what instructions on reasonable doubt should say, some of it rather detailed. The Court has said that proof beyond a reasonable doubt does not mean proof to an "absolute certainty" or proof beyond all "possible" doubt. Hopt v. Utah, *supra*, 120 U.S. at 439-40. "[S]peculative minds may in almost every . . . case suggest possibilities of the truth being different from that established by the most convincing proof . . . [but] [t]he jurors are not to be led away by speculative notions as to such possibilities." *Id.* at 440.

In dictum, the Supreme Court has described the state of mind the jurors must reach as "a subjective state of near certitude." Jackson v. Virginia, *supra*, 443 U.S. at 315. *Accord* Johnson v. Louisiana, 406 U.S. 356, 360 (1972); In re Winship, *supra*, 397 U.S. at 364.

The Supreme Court has approved the concept that a reasonable doubt is "one based on reason," Jackson v. Virginia, *supra*, 443 U.S. at 317, and has noted with apparent approval that numerous cases have defined a reasonable doubt as one "based on reason which arises from the evidence or lack of evidence." Johnson v. Louisiana, *supra*, 406 U.S. at 360. The Court has also approved the analogy that a reasonable doubt is one that would cause reasonable persons to "hesitate to act" in matters of importance in their personal lives. Holland v. United States, *supra*, 348 U.S. at 140, *citing* Bishop v. United States, 107 F.2d 297, 303 (D.C.Cir. 1939). *Accord* Hopt v. Utah, *supra*, 120 U.S. at 441.

The Supreme Court has also disapproved or cast doubt on several concepts. In Hopt v. Utah, *supra* at 440, the Court said that "the words 'to a reasonable and moral certainty' add nothing to the words 'beyond a reasonable doubt' [and] may require explanation as much as the other." In Victor v. Nebraska, 511 U.S. 1 (1994), the Supreme Court held that use of the term moral certainty did not, of itself, make the reasonable doubt instruction unconstitutional. *Id*. at 14. This instruction does not use and never has used any moral certainty language. In Cage v. Louisiana, 498 U.S. 39 (1990), disapproved of on other grounds, Estelle v. McGuire, 502 U.S. 62, 73 n.4 (1991), the Court held that instructions defining a reasonable doubt as "an actual substantial doubt" and as one that would give rise to a "grave uncertainty" were reversibly erroneous. *See also* Taylor v. Kentucky, *supra*, 436 U.S. at 488, where the Court quoted the trial court's instruction defining a reasonable doubt as "a substantial doubt, a real doubt," and then said "[t]his definition, though perhaps not in itself reversible error, often has been criticized as confusing." In Holland v. United States, *supra*, 348 U.S. at 140 the Court said that the language "hesitate to act" should be used instead of the language "willing to act upon." In Harris v. Rivera, 454 U.S. 339, 347 (1981), the Court indicated that a reasonable doubt may exist even if the factfinder cannot articulate the reasons on which the doubt is based.

Sixth Circuit decisions provide further guidance. Although not necessarily condemning the "willing to act" language as reversible error, Sixth Circuit cases have expressed a preference for the "hesitate to act" language, *see* United States v. Mars, *supra*, 551 F.2d at 716, or for equivalent language combining the two concepts to state that proof beyond a reasonable doubt is "proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs." United States v. Hart, *supra*, 640 F.2d at 860 n. 3.

In the context of reviewing state court convictions, the Sixth Circuit has upheld against constitutional attacks instructions like those criticized by the Supreme Court in Taylor v. Kentucky, *supra*, 436 U.S. at 488, which define a reasonable doubt as "a substantial doubt, a real doubt." Payne v. Smith, 667 F.2d 541, 547 (6th Cir. 1981); Hudson v. Sowders, 510 F.Supp. 124, 128 (W.D.Ky.1981), *aff'd*, 698 F.2d 1220 (6th Cir. 1982). But in the context of reviewing federal convictions, use of the term "substantial doubt" has been characterized as "unfortunate" and as potentially presenting "an issue of some magnitude." United States v. Christy, *supra*, 444 F.2d at 450.

The Sixth Circuit has also criticized language suggesting that the jurors must be "convinced" that a reasonable doubt exists in order to acquit, Cutshall v. United States, 252 F.2d 677, 679 (6th Cir. 1958) (potentially burden shifting), and language stating that if the jurors believe the government's evidence, then the defendant is guilty, Lurding v. United States, 179 F.2d 419, 422 (6th Cir. 1950) ("unfortunate phrasing").

In United States v. Hawkins, 822 F.2d 1089 (6th Cir. 1987), the district court instructed that proof beyond a reasonable doubt is proof that leaves the jurors "firmly convinced" of the defendant's guilt. The Sixth Circuit held that this was not plain error, and stated that two other circuits had upheld use of this language as "a valid reasonable doubt instruction," *citing* United States v. Hunt, 794 F.2d 1095, 1100-01 (5th Cir. 1986), and United States v. Bustillo, 789 F.2d 1364, 1368 (9th Cir. 1986) in support. But these two cases are much more limited than this statement implies. In *Hunt*, all the Fifth Circuit said was that the "firmly convinced" language seemed little different than "a real doubt," a definition which earlier Fifth Circuit decisions had approved. And in *Bustillo*, all the Ninth Circuit did was to hold that the "firmly convinced" language was not plain error.

With regard to the concept that a reasonable doubt may be based on either the evidence or a lack of evidence, *see* Johnson v. Louisiana, supra, 406 U.S. at 360, the Sixth Circuit has refused to reverse based on the failure to specifically include the words "want of evidence" in a reasonable doubt definition, noting that when read as a whole, the instructions made clear that a reasonable doubt could arise from a lack of evidence. Ashe v. United States, 288 F.2d 725, 730 (6th Cir. 1961).

In United States v. Hart, *supra*, 640 F.2d at 859-61, the Sixth Circuit reviewed the following instruction:

> You have heard a lot about reasonable doubt. Reasonable doubt is a doubt founded in reason, and arising from the evidence. Not a mere hesitation of the mind to pronounce guilt because of the punishment that may follow. The punishment, if any, is for the Court. Not a mere capricious doubt or hesitancy of the mind to say this man did so and so, but it must be a doubt founded in reason and arising from the evidence, and you can't go outside the evidence that you have heard and seen in this case to make any kind of determination.

Id. at 859. Although the Sixth Circuit ultimately decided that this instruction did not require reversal, it said that "we think . . . it would have been much better if the district judge had given the charge offered by either the defense or the government." *Id*. at 860. The Sixth Circuit then went on to say that "[b]oth of those instructions (which are similar) provide a much better definition of reasonable doubt than the instruction actually given and also define more clearly the government's burden of proving absence of reasonable doubt." *Id*. at 860-861. The instruction offered by the defense in *Hart* stated:

> The indictment or formal charge against a defendant is not evidence of guilt. The defendant is at present presumed innocent. The government has the burden of proving him guilty beyond a reasonable doubt, and if it fails to do so you must acquit him. It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is doubt based upon a reason and common sense--the kind of doubt that would make a reasonable person hesitate to act. It exists as a real doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture. The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant; for the law never imposes upon a defendant in a criminal case the burden of calling any witnesses or producing any evidence. So if the jury, after careful and impartial consideration of all the evidence in the case, is left with a reasonable doubt that a defendant is guilty of the charge, it must acquit.

Id. at 860 n. 3. The instruction offered by the government in *Hart* stated:

> The law presumes a defendant to be innocent of crime. Thus, a defendant, although accused, begins trial with a "clean slate"--with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case. It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense--the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs. The jury will remember that a defendant is never to be convicted on mere

> suspicion or conjecture. The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant, for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. So, if the jury, after careful and impartial consideration of all the evidence in the case, has a reasonable doubt that a defendant is guilty of the charge, it must acquit. If the jury views the evidence in the case as reasonably permitting either of two conclusions--one of innocence, the other of guilt--the jury should of course adopt the conclusion of innocence.

Id.

See generally Robert C. Power, *Reasonable and Other Doubts: The Problem of Jury Instructions*, 67 Tenn. L. Rev. 45 (1999).

As previously explained in the Commentary to Instruction 1.02, even though jurors have the power to acquit despite the existence of evidence proving guilt beyond a reasonable doubt, Sixth Circuit decisions clearly hold that the court's instructions should not tell the jurors about this. See United States v. Avery, 717 F.2d 1020, 1027 (6th Cir. 1983); United States v. Burkhart, 501 F.2d 993, 996-997 (6th Cir. 1974). "The law of jury nullification . . . seems not to require or permit a judge to tell the jury that it has the right to ignore the law." *Burkhart, supra* at 997 n.3. Thus Instruction 1.03(5) avoids stating that the jury “should” convict and instead contains the “say so” language.

1.04 EVIDENCE DEFINED

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

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

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

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

(5) Make your decision based only on the evidence, as I have defined it here, and nothing else.

Use Note

In paragraph (2), provisions on stipulations and judicial notice are bracketed and should be used only if relevant. If the court has taken judicial notice of a fact, Instruction 7.19 should be given later in the instructions.

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

Committee Commentary 1.04

(current through December 20, 2017)

The Sixth Circuit cited paragraph (3) of this instruction as a good reminder that attorneys' closing arguments are not evidence. United States v. Wilson, 168 F.3d 916, 924 n.6 (6th Cir. 1999).

In United States v. Griffith, 1993 WL 492299, 1993 U.S. App. LEXIS 31194 (6th Cir.1993) (unpublished), a panel of the Sixth Circuit reversed a conviction due to erroneous jury instructions on stipulations. The trial court instructed the jury to give the stipulation "such weight as you believe it deserves . . . ." 1993 WL at 2, 1993 LEXIS at 4. The panel stated, "The law in the Sixth Circuit on the effect of a stipulation of fact is clear: 'Stipulations voluntarily

entered by the parties are binding, both on the district court and on [the appeals court].'" *Griffith*, 1993 WL at 2, 1993 LEXIS at 4, *quoting* FDIC v. St. Paul Fire and Marine Ins. Co., 942 F.2d 1032, 1038 (6th Cir. 1991). *See also* Instruction 7.21 Stipulations.

The strongly worded admonition in paragraph (4) regarding proffered evidence that was rejected or stricken is based in part on Federal Judicial Center Instructions 1 and 9, and in part on the idea that a strongly worded admonition is necessary to counteract the jurors' natural curiosity and inclination to speculate about these matters. This paragraph should be tailored to fit the particular facts of the case. If, for example, there was no occasion during the course of the trial to order that things the jurors saw or heard be stricken from the record, the language in this paragraph dealing with such matters should be omitted.

1.05 CONSIDERATION OF EVIDENCE

You should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion.

Committee Commentary 1.05

(current through December 20, 2017)

Supreme Court and Sixth Circuit cases indicate that jurors should consider the evidence in light of their own experiences, may give it whatever weight they believe it deserves and may draw inferences from the evidence. See Turner v. United States, 396 U.S. 398, 406-407 (1970) (the jury may consider its own store of knowledge, must assess for itself the probative force and the weight, if any, to be accorded the evidence, and is the sole judge of the facts and the inferences to be drawn therefrom); Holland v. United States, 348 U.S. 121, 140 (1954) (the jury must use its experience with people and events in weighing the probabilities); United States v. Jones, 580 F.2d 219, 222 (6th Cir. 1978) (the jury may properly rely upon its own knowledge and experience in evaluating evidence and drawing inferences).

1.06 DIRECT AND CIRCUMSTANTIAL EVIDENCE

(1) Now, some of you may have heard the terms "direct evidence" and "circumstantial evidence."

(2) Direct evidence is simply evidence like the testimony of an eyewitness which, if you believe it, directly proves a fact. If a witness testified that he saw it raining outside, and you believed him, that would be direct evidence that it was raining.

(3) Circumstantial evidence is simply a chain of circumstances that indirectly proves a fact. If someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining.

(4) It is your job to decide how much weight to give the direct and circumstantial evidence. The law makes no distinction between the weight that you should give to either one, or say that one is any better evidence than the other. You should consider all the evidence, both direct and circumstantial, and give it whatever weight you believe it deserves.

Committee Commentary 1.06

(current through December 20, 2017)

In Holland v. United States, 348 U.S. 121, 139-40 (1954), the Supreme Court held that circumstantial evidence is no different intrinsically than direct evidence. *Accord* United States v. Frost, 914 F.2d 756, 762 (6th Cir. 1990). *See also* Jackson v. Virginia, 443 U.S. 307, 326 (1979) (no special cautionary instruction should be given on the government's burden of proof in circumstantial cases).

The purpose of this instruction is to define direct and circumstantial evidence, to make clear that the jury should consider both kinds of evidence, and to dispel the television notion that circumstantial evidence is inherently unreliable.

Federal Judicial Center Instructions 1 and 9 take the position that there is no need to define direct and circumstantial evidence because there is no difference legally in the weight to be given the two. The Committee rejected this approach on the ground that jurors need to be told that they can rely on circumstantial evidence, and that to intelligently convey this concept, some definition of circumstantial evidence is required.

Some Sixth Circuit decisions indicate that upon request, a defendant is entitled to an instruction that the jury may acquit him on the basis of circumstantial evidence. See United States v. Eddings, 478 F.2d 67, 72-73 (6th Cir.1973).

1.07 CREDIBILITY OF WITNESSES

(1) Another part of your job as jurors is to decide how credible or believable each witness was. This is your job, not mine. It is up to you to decide if a witness's testimony was believable, and how much weight you think it deserves. You are free to believe everything that a witness said, or only part of it, or none of it at all. But you should act reasonably and carefully in making these decisions.

(2) Let me suggest some things for you to consider in evaluating each witness's testimony.

(A) Ask yourself if the witness was able to clearly see or hear the events. Sometimes even an honest witness may not have been able to see or hear what was happening, and may make a mistake.

(B) Ask yourself how good the witness's memory seemed to be. Did the witness seem able to accurately remember what happened?

(C) Ask yourself if there was anything else that may have interfered with the witness's ability to perceive or remember the events.

(D) Ask yourself how the witness acted while testifying. Did the witness appear honest? Or did the witness appear to be lying?

(E) Ask yourself if the witness had any relationship to the government or the defendant, or anything to gain or lose from the case, that might influence the witness's testimony. Ask yourself if the witness had any bias, or prejudice, or reason for testifying that might cause the witness to lie or to slant the testimony in favor of one side or the other.

[(F) Ask yourself if the witness testified inconsistently while on the witness stand, or if the witness said or did something (or failed to say or do something) at any other time that is inconsistent with what the witness said while testifying. If you believe that the witness was inconsistent, ask yourself if this makes the witness's testimony less believable. Sometimes it may; other times it may not. Consider whether the inconsistency was about something important, or about some unimportant detail. Ask yourself if it seemed like an innocent mistake, or if it seemed deliberate.]

(G) And ask yourself how believable the witness's testimony was in light of all the other evidence. Was the witness's testimony supported or contradicted by other evidence that you found believable? If you believe that a witness's testimony was contradicted by other evidence, remember that people sometimes forget things, and that even two honest people who witness the same event may not describe it exactly the same way.

(3) These are only some of the things that you may consider in deciding how believable each witness was. You may also consider other things that you think shed some light on the witness's believability. Use your common sense and your everyday experience in dealing with other

people. And then decide what testimony you believe, and how much weight you think it deserves.

Use Note

Bracketed paragraph (2)(F) should be included when a witness has testified inconsistently, or has said or done something at some other time that is inconsistent with the witness's testimony. It should be tailored to the particular kind of inconsistency (i.e. either inconsistent testimony on the stand, or inconsistent out-of-court statements or conduct, or both). The bracketed failure-to-act language should be included when appropriate.

Committee Commentary 1.07
(current through December 20, 2017)

The Sixth Circuit has described this instruction as "a correct statement of the law." United States v. Chesney, 86 F.3d 564, 573 (6th Cir. 1996). *See also* United States v. Franklin, 415 F.3d 537, 554 (6th Cir. 2005) (approving Instruction 1.07(2)(G) as "properly la[ying] out the considerations relevant to evaluating credibility. . .").

So-called "presumption of truthfulness" instructions, which tell the jurors that each witness is presumed to speak the truth unless the evidence indicates otherwise, are reversibly erroneous. *See, e.g.*, United States v. Maselli, 534 F.2d 1197, 1202-03 (6th Cir. 1976).

The "Anglo-Saxon tradition of criminal justice, embodied in the United States Constitution and in federal statutes, makes jurors the judges of the credibility of testimony offered by witnesses." United States v. Bailey, 444 U.S. 394, 414 (1980). "It is for them, generally, and not for . . . [the] courts, to say [whether] a particular witness spoke the truth." *Id.* at 414-15.

1.08 NUMBER OF WITNESSES

(1) One more point about the witnesses. Sometimes jurors wonder if the number of witnesses who testified makes any difference.

(2) Do not make any decisions based only on the number of witnesses who testified. What is more important is how believable the witnesses were, and how much weight you think their testimony deserves. Concentrate on that, not the numbers.

Use Note

Use caution in giving this instruction when the defense has not presented any testimony. It may draw potentially prejudicial attention to the absence of defense witnesses.

Committee Commentary 1.08

(current through December 20, 2017)

In United States v. Moss, 756 F.2d 329, 334-335 (4th Cir. 1985), the defendant objected to the district court's number of witnesses instruction on the ground that it drew unnecessary and potentially prejudicial attention to the fact that the defense had not presented any witnesses during the trial. On appeal, the Fourth Circuit held that there was no error, but stated that district courts should refrain from giving such an instruction when the defendant has not presented any witnesses. *Cf.* Barnes v. United States, 313 A.2d 106, 110 (D.C.App.1973) (such an instruction is not required, even upon request by the defense, when the defense has elected not to present any witnesses).

1.09 LAWYERS' OBJECTIONS

(1) There is one more general subject that I want to talk to you about before I begin explaining the elements of the crime charged.

(2) The lawyers for both sides objected to some of the things that were said or done during the trial. Do not hold that against either side. The lawyers have a duty to object whenever they think that something is not permitted by the rules of evidence. Those rules are designed to make sure that both sides receive a fair trial.

(3) And do not interpret my rulings on their objections as any indication of how I think the case should be decided. My rulings were based on the rules of evidence, not on how I feel about the case. Remember that your decision must be based only on the evidence that you saw and heard here in court.

Committee Commentary 1.09

(current through December 20, 2017)

This instruction covers several concepts related to lawyers' objections that are commonly included somewhere in the court's instructions.