

Summary of Changes to the Pattern Instructions uploaded in March, 2021

The Committee made four overall changes in the text of the instructions.

1. **Inst. 8.02 Experiments, Research, Investigation and Outside Communications**

The Judicial Conference Committee on Court Administration and Case Management updated its proposed instruction on electronic technology in June, 2020, and these updates have been inserted into Inst. 8.02. The Judicial Conference's proposed instructions for before and during trial are reprinted in the commentary.

2. **Inst. 10.01 Mail Fraud (18 U.S.C. § 1341)**

and

Inst. 10.02 Wire Fraud (18 U.S.C. § 1343)

The Committee reviewed and revised the mail and wire fraud elements instructions. Three changes were made to each instruction.

First, in paragraph (1), the Committee changed the elements from “a scheme to defraud to *obtain* money or property” to “a scheme to defraud to *deprive another of* money or property.” This change responds to recent case law that is described in the Commentary. The Committee made parallel changes in paragraph (2) to the definition of intent to defraud. That definition now requires an “intent to deceive or cheat for the purpose of *depriving another of* money or property”; the Committee deleted references to “*bringing about financial gain*” to oneself or another.

Second, the Committee changed the definition of “knowingly” in paragraph (2)(C) of both instructions. The change was to delete the word “intentionally” from the definition. The same change was made previously in the Bank Fraud instruction on scheme to defraud, Inst. 10.03A. The rationale is provided in the commentary to 10.01 Mail Fraud and 10.02 Wire Fraud.

Third, the definition of materiality was expanded to provide that if the prosecution's theory of fraud is based on concealment of required reports, the court should consider instructing that a failure to file required reports may be a material omission. This change appears in the Use Note and the authority for it is described in the Commentary.

3. **Inst. 14.02B Distribution of a Controlled Substance when Death or Serious Bodily Injury Results (21 U.S.C. §§ 841(a)(1); (b)(1)(A) - (C) and (b)(1)(E)(i) & (ii))**

and

Inst. 14.03B Manufacture of a Controlled Substance when Death or Serious Bodily Injury Results (21 U.S.C. §§ 841(a)(1); (b)(1)(A) - (C) and (b)(1)(E)(i) & (ii))

The Committee amended these instructions on the death-or-injury sentence enhancement for distribution and manufacture of a controlled substance to reflect two new cases. In March of 2020, the court held in *United States v. Hamm*, 952 F.3d 728 (6th Cir. 2020) that while conspiracy liability based on *Pinkerton* could be used to impose the substantive distribution conviction, *Pinkerton* liability could not be used to impose the death-or-injury sentence

enhancement. In August of 2020, the court held in *United States v. Davis*, 970 F.3d 650 (6th Cir. 2020) that the limit announced in *Hamm* did not apply if the underlying controlled substances offense was based on the defendant's own actions and not his status as a conspirator under *Pinkerton*. The changes based on these cases appear in a new bracketed paragraph (1)(D) of both instructions and are described in the commentary.

4. Inst. 18.01 Transmission of a Threat to Kidnap or Injure (18 U.S.C. § 875(c))

United States v. Howard, 947 F.3d 936 (6th Cir. 2020), has been integrated into Inst. 18.01 in two ways. First, citations to the case have been added to the commentary as authority for the elements in paragraph (1). Second, the *Howard* court quoted and approved two instructions stating what the government need not prove, so these were added in a new bracketed paragraph (3).

These amended instructions are current through March 1, 2021.