PATTERN CRIMINAL JURY INSTRUCTIONS

Prepared by
Sixth Circuit Committee
on Pattern Criminal Jury Instructions

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Sixth Circuit
Pattern Criminal Jury Instruction Committee
2025

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Introduction
(current through May 1, 2025)

The Sixth Circuit Pattern Criminal Jury Instruction Committee includes district judges, prosecutors, defense attorneys and academics from around the circuit. The members are listed above.

The instructions are designed for use at the end of trial. However, this should not be interpreted as a recommendation against using preliminary instructions before the trial begins. To the contrary, the Committee believes that preliminary instructions are helpful. With modifications, these instructions can be used as preliminary instructions.

The Committee uses simple language, or plain English, whenever possible.

In the text of the instructions, brackets indicate alternatives or language that is only appropriate in limited circumstances. Brackets with italicized type are notes to the court. Use Notes following the instructions briefly explain when bracketed language should be used and other issues relating to the instructions.

A committee commentary is provided with each instruction. The commentaries cite the authority for the instruction and explain the Committee's rationale.

In the commentaries, the Committee occasionally cites unpublished cases. These are widely available now in the electronic databases, Lexis and Westlaw, and in West's publication, the Federal Appendix. The Committee uses unpublished cases only when there is no published case on point or where the unpublished case is helpful. Sixth Circuit Rule 28(g) governs the citation of unpublished decisions by counsel in briefs and oral arguments in the Sixth Circuit and in the district courts. See also Fed.R.App.P. 32.1. Unpublished decisions are not precedentially binding under the doctrine of stare decisis, but they may be of persuasive value. United States v. Villareal, 491 F.3d 605, 610 (6th Cir. 2007); United States v. Sanford, 476 F.3d 391, 396 (6th Cir. 2007).

The instructions include an appendix, which provides some charts diagraming a money laundering crime.

Approval of the content of the instructions must await a case-by-case review by the Court of Appeals. Each case is different, and no set of pattern instructions can cover all the variables which may arise. These are suggested instructions only, and should be tailored to fit the facts of each individual case. As the Sixth Circuit has cautioned, although pattern instructions "have their place, they should not be used without careful consideration being given to their applicability to the facts and theories of the specific case being tried." United States v. Wolak, 923 F.2d 1193, 1198 (6th Cir. 1991). More recently, the court stated that it "regularly looks to whether jury instructions mirror or track the pattern jury instructions as one factor in determining whether any particular instruction is misleading or erroneous," and that it "has noted the potential problems that can arise when trial courts stray from the Pattern Jury Instructions." United States v. Frei, 995 F.3d 561, 565 (6th Cir. 2021) (cleaned up). The court described the

pattern instructions as "presumptively straightforward." *Id.* at 566.

The instructions continue to use singular pronouns and verbs and to use masculine pronouns only where the use of gender-neutral language was awkward or lacked specificity. The instructions should be modified to fit the case, including using female pronouns where appropriate. Some courts give a preliminary instruction on this issue, for example:

> Any reference to he, his and him within these jury instructions should be construed by you as having equal applicability to any female participant in this trial. The use of the masculine pronouns is only for convenience in reading the instructions and not for the purpose of giving emphasis to, or providing focus upon, any witness or particular aspect of this case.

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The Standard of Appellate Review for Jury Instructions Generally
(current through July 1, 2019)

Generally, jury instructions are reviewed as a whole to determine whether they fairly and adequately submit the issues and applicable law to the jury. United States v. Williams, 952 F.2d 1504, 1512 (6th Cir. 1991). The district court's choice of jury instructions is reviewed according to an abuse of discretion standard. United States v. Beaty, 245 F.3d 617, 621-22 (6th Cir. 2001), *citing* United States v. Prince, 214 F.3d 740, 761 (6th Cir. 2000). If the parties request particular language, "it is not error to fail to use the language requested by the parties if the instruction as given is accurate and sufficient." *Williams*, 952 F.2d at 1512, *quoting* United States v. Horton, 847 F.2d 313, 322 (6th Cir. 1988).

When a district court refuses to give a requested instruction, the Sixth Circuit holds that it is "reversible only if that instruction is (1) a correct statement of the law, (2) not substantially covered by the charge actually delivered to the jury, and (3) concerns a point so important in the trial that the failure to give it substantially impairs the defendant's defense." *Williams*, 952 F.2d at 1512, *citing* United States v. Parrish, 736 F.2d 152, 156 (5th Cir. 1984). *See also* United States v. Sassak, 881 F.2d 276, 279 (6th Cir. 1989), *citing Parrish*, 736 F.2d at 156.

When a defendant fails to object to a jury instruction at trial, the appellate court reviews only for plain error. Federal Rule of Criminal Procedure 52(b); United States v. Olano, 507 U.S. 725, 732 (1993). "[B]efore an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" Johnson v. United States, 520 U.S. 461, 466-67 (1997), *quoting Olano*, 507 U.S. at 732. "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Johnson,* 520 U.S. at 467, *quoting Olano*, 507 U.S. at 732. In *Olano*, the Supreme Court discussed but did not adopt the miscarriage of justice standard, noting that the miscarriage of justice standard in the collateral review jurisprudence of the Supreme Court meant actual innocence and that it had never held that the Rule 52(b) remedy was limited to cases of actual innocence. *Olano,* 507 U.S. at 736; *see also* United States v. Thomas, 11 F.3d 620, 630 (6th Cir. 1993) ("While the Court [in *Olano*] referred to the 'miscarriage of justice standard,' it remarked that it had never held a Rule 52(b) remedy was warranted only in cases of actual innocence."). Although the Court did not adopt the miscarriage of justice standard, the Sixth Circuit has occasionally cited this standard. *See, e.g.*, United States v. King, 169 F.3d 1035, 1040 (6th Cir. 1999)("An instruction is not plainly erroneous unless there was an egregious error, one that directly leads to a miscarriage of justice."); United States v. Wilkinson, 26 F.3d 623, 625 (6th Cir. 1994).

In reviewing the substance of given instructions for plain error, the Sixth Circuit held that, "In determining the adequacy of a jury instruction, 'the instruction must be viewed in its entirety, and a misstatement in one part of the charge does not require reversal if elsewhere in the instruction the correct information is conveyed to the jury in a clear and concise manner....'" United States v. Nelson, 27 F.3d 199, 202 (6th Cir. 1994), *quoting* United States v. Pope, 561 F.2d 663, 670 (6th Cir. 1977).

In reviewing the omission of an instruction for plain error, the court has stated that "'[A]n omitted or incomplete instruction is even less likely to justify reversal, since such an instruction is not as prejudicial as a misstatement of the law.'" United States v. Sanderson, 966 F.3d 184, 187 (6th Cir.1992), *quoting* United States v. Hook, 781 F.2d 1166, 1172-73 (6th Cir. 1986).

The standard for review of jury instructions may be affected if the defendant jointly submitted the instruction or stipulated to it. In United States v. Sharpe, 996 F.2d 125 (6th Cir. 1993), the defendant and the government jointly submitted an instruction that the defendant sought to challenge on appeal. The court declined to review the instruction, citing the fact that the defendant did not object to the instructions and in fact jointly submitted them. *Id.* at 128-29, *citing* United States v. Young, 745 F.2d 733, 752 (2d Cir. 1984) and United States v. Thurman, 417 F.2d 752, 753 (D.C. Cir. 1959). In United States v. Barrow, 118 F.3d 482 (6th Cir. 1997), the defendant stipulated to an instruction that he sought to challenge on appeal. The court recounted the *Sharpe* holding but concluded that the invited error doctrine did not foreclose relief when the interests of justice demand otherwise. *Id.* at 491. The analysis of the interests of justice is left to the appellate court's discretion. Here, the court decided that the interests of justice supported review of the defendant's challenge to the instructions for two reasons: the government was as much at fault as the defendant for the stipulated instruction, and the defendant was claiming not just that the instruction was wrong but that it deprived him of his constitutional rights. *Id.* The court cited this latter factor as the distinction between this case and the *Sharpe* case. After concluding that review was warranted, the court stated that, "This does not mean however, that the fact that the parties stipulated to the instruction will not play a role in our analysis of some of defendant's claims." *Id.* The court decided to treat the stipulated instructions the same as it would treat instructions that were not objected to, by applying the plain-error standard. *Id.*

Finally, in reviewing denial of a collateral attack under 28 U.S.C. § 2255, the Sixth Circuit held that "to obtain post-conviction relief for an erroneous jury instruction to which no objection was made at trial, a defendant must show both cause excusing his procedural default and actual prejudice from the alleged error." United States v. Rattigan, 151 F.3d 551, 554 (6th Cir. 1998).

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 May 1, 2025)

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 and impartially. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way.

(5) Do not allow yourself to be influenced by personal likes or dislikes, sympathy, prejudice, fear, public opinion, or biases. You should not be influenced by stereotypes based on any person's age, race, color, religious beliefs, national ancestry, sexual orientation, gender identity, gender, or economic circumstances.

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.

For paragraph (5), the court may find helpful background in videos on bias prepared by the United States District Court for the Western District of Washington and the United States District Court for the Northern District of California. These are identified in the commentary below.

Committee Commentary 1.02
(current through May 1, 2025)

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.

Paragraph (5) provides detail on the kinds of stereotypes that jurors should be careful to avoid. The language is adapted from Ninth Circuit Pattern Instruction 1.1 Duty of Jury. As the Ninth Circuit comment to that instruction notes, the Supreme Court emphasized the importance of jury instructions to protect against bias in Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 871 (2017):

> Trial courts, often at the outset of the case and again in their final jury instructions, explain the jurors' duty to review the evidence and reach a verdict in a fair and impartial way, free from bias of any kind. Some instructions are framed by trial judges based on their own learning and experience. Model jury instructions likely take into account these continuing developments and are common across jurisdictions.

The Use Note identifies two videos on bias prepared by U.S. District Courts that may be used for background before jury selection. One was developed by the United States District Court for the Western District of Washington, see https://www.wawd.uscourts.gov/jury/unconscious-bias, and a shorter version was developed by the United States District Court for the Northern District of California, see https://www.cand.uscourts.gov/attorneys/unconscious-bias-video-for-potential-jurors.

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 May 1, 2025)

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) (omitting 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). *See also* United States v. Ashrafkhan, 964 F.3d 574, 580 (6th Cir. 2020) (holding that reasonable doubt instruction that omitted phrase in paragraph (5) of the pattern instruction that described reasonable doubt as "proof which is so convincing that you would not hesitate to rely and act on it in making the most important decisions in you own lives" was proper; instruction given did not tend to confuse the jurors or indicate to them that the standard does not place a high burden of proof on the government).

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 May 1, 2025)

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

(1) You are to consider only the evidence in the case. You should use your common sense in weighing the evidence. Consider the evidence 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.

(2) In our lives, we often look at one fact and conclude from it that another fact exists. In law we call this an "inference." A jury is allowed to make reasonable inferences, unless otherwise instructed. Any inferences you make must be reasonable and must be based on the evidence in the case.

(3) The existence of an inference does not change or shift the burden of proof from the government to the defendant.

Committee Commentary 1.05
(current through May 1, 2025)

In paragraph (1), the first sentence (that the jury should consider only the evidence in the case), is drawn from 1A Kevin F. O'Malley, Jay E. Grenig & Hon William C. Lee, Federal Jury Practice and Instructions § 12:03 paragraph 7 (6th ed.) (formerly "Devitt & Blackmar's Federal Jury Practice and Instructions"). The next three sentences in paragraph (1) are based on Supreme Court and Sixth Circuit cases indicating 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); and 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).

Paragraphs (2) and (3) were added in 2018, not to reflect a change in the law but to provide some additional plain-English explanation of permitted inferences. Many pattern instructions include such explanations, *see, e.g.*, Fifth Circuit Pattern Instruction 1.07 Evidence – Inferences – Direct and Circumstantial. The language in paragraph (2) is based on Seventh Circuit Pattern Instruction 2.02 Considering the Evidence. The statement that reasonable inferences are allowed “unless otherwise instructed” refers to the law that inferences are generally allowed except in some situations, *see, e.g.*, Inst. 7.02C Witness Other than the Defendant Invoking the Fifth Amendment; Inst. 7.13 Other Acts of Defendant.

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 May 1, 2025)

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).

1.07A 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 1.07A
(current through May 1, 2025)

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.

1.07B CREDIBILITY OF WITNESSES – LAW ENFORCEMENT OFFICER

[You have heard the testimony of [a] law enforcement officer[s]. The fact that a witness is employed as a law enforcement officer does not mean that his testimony necessarily deserves more or less consideration or greater or lesser weight than that of any other witness. You must decide, after reviewing all the evidence, whether you believe the testimony of the law enforcement witness and how much weight, if any, it deserves.]

Use Note

This instruction is bracketed for use when a law enforcement officer has testified.

Committee Commentary 1.07B
(current through May 1, 2025)

Inst. 1.07B provides more detailed guidance on how to evaluate the testimony of law enforcement officers. The language was adapted from Third Circuit Pattern Instruction 4.18 Credibility of Witnesses – Law Enforcement Officer, and L. Sand et al., Modern Federal Jury Instructions, Instruction 7-16 Law Enforcement Witness. See generally United States v. Bethancourt, 65 F.3d 1074, 1080 n.3 (3d Cir. 1995), cert. denied, 516 U.S. 1153 (1996); United States v. Bush, 375 F.2d 602 (D.C. Cir. 1967); and Golliher v. United States, 362 F.2d 594, 604 (8th Cir. 1966).

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 May 1, 2025)

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 May 1, 2025)

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

Chapter 2.00

DEFINING THE CRIME AND RELATED MATTERS

Table of Instructions

2.01 INTRODUCTION

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

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

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

Use Note

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

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

Committee Commentary 2.01

(current through May 1, 2025)

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

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

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

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

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

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

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

Use Note

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

Committee Commentary 2.01A

(current through May 1, 2025)

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

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

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

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

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

Committee Commentary 2.01B

(current through May 1, 2025)

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

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

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

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

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

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

Use Note

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

Committee Commentary 2.01C
(current through May 1, 2025)

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

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

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

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

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

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

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

Use Note

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

Committee Commentary 2.01D

(current through May 1, 2025)

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

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

2.02 DEFINITION OF THE CRIME

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

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

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

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

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

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

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

Use Note

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

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

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

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

Committee Commentary 2.02
(current through May 1, 2025)

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

A bracketed catch-all paragraph (1)(C) is included to illustrate that other elements may be required to convict.

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

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

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

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

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

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

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

special verdict form like those following Instructions 14.07A and 14.07B.

Reading the indictment to the jury is generally within the discretion of the district court. United States v. Smith, 419 F.3d 521, 530 (6th Cir. 2005), *citing* United States v. Maselli, 534 F.2d 1197, 1202 (6th Cir. 1976). Instructions stating that "the purpose of an indictment is only to cause the person named therein to be brought to trial and to advise him of the nature of the charge or charges against him" have been characterized as "desirable" and "customary." United States v. Baker, 418 F.2d 851, 853 (6th Cir. 1969). Earlier versions of this commentary did not recommend that the trial judge read the indictment to the jury, and also recommended that the trial judge not paraphrase the indictment. The Committee recognizes that district court practices on reading or summarizing the indictment vary widely, and takes no position on the best practice. However, jury confusion can arise, particularly in complex cases, if the indictment is not read, accurately summarized or sent to the jury room. *See, e.g.,* United States v. Bustamante, 1992 WL 126630, 1992 U.S. App LEXIS 13407 (6th Cir. 1992) (unpublished). As the Eighth Circuit states in Note 2 to its Model Criminal Instruction 1.01 (2003 ed.), "Depending on the length and complexity of the indictment and the individual practices of each district judge, the indictment may be read, summarized by the court, summarized by the prosecution or not read or summarized depending on what is necessary to assist the jury in understanding the issues before it." If the indictment is furnished in writing to the jury, a limiting instruction such as Instruction 1.03(1) must be given. United States v. Smith, 419 F.3d 521, 531 (6th Cir. 2005) (omission of limiting instruction was error but not plain error). The Committee takes no position on the practice in some districts of providing the jury with a copy of the indictment.

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

2.03 DEFINITION OF LESSER OFFENSE

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

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

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

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

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

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

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

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

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

Use Note

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

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

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

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

Committee Commentary 2.03
(current through May 1, 2025)

Federal Rule of Criminal Procedure 31(c) provides:

> (c) Lesser Offense or Attempt. A defendant may be found guilty of any of the following:
>
> (1) an offense necessarily included in the offense charged;
>
> (2) an attempt to commit the offense charged; or
>
> (3) an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right.

The Supreme Court identified the test for defining lesser included offenses under Rule 31(c) in Schmuck v. United States, 489 U.S. 705 (1989). The Court adopted the "elements approach." *Id.* at 716. The Court explained: "Under this test, one offense is not 'necessarily included' in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c)." *Id*. This elements approach requires a comparison of the statutory elements of the greater and lesser offenses as opposed to a comparison of the conduct proved at trial. *Id*. at 716-17. For applications of this test, *see* Carter v. United States, 530 U.S. 255 (2000) and U.S. v. Colon, 268 F.3d 367 (6th Cir. 2001) (applying the *Schmuck* test and holding that simple possession is not a lesser-included-offense of (1) conspiracy to distribute and possess with intent to distribute drugs or (2) distribution of drugs).

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

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

Id. at 576, *citing* United States v. Moore, 917 F.2d 215, 228 (6th Cir.1990); *see also* U.S. v. Jaffal, 79 F.4th 582, 604 (6th Cir. 2023) (quoting the same four criteria).

The Sixth Circuit has occasionally concluded that refusing a lesser-included-offense instruction is reversible error. See U.S. v. Jaffal, 79 F.4th 582 (6th Cir. 2023) (holding that in prosecution for possession with intent to distribute, district court erred in refusing to give lesser-included-offense instruction for simple possession; convictions reversed and remanded for new trial); U.S. v. LaPointe, 690 F.3d 434, 440, 443 (6th Cir. 2012) (holding that conspiracy to possess is a lesser-included-offense of conspiracy to possess with intent to distribute; district court erred in refusing to give lesser-included-offense instruction; conviction reversed and

remanded for new trial); U.S. v. Monger, 185 F.3d 574 (6th Cir. 1999) (holding that in prosecution for possession with intent to distribute, district court erred in denying request for lesser-included-offense instruction on simple possession; conviction reversed and remanded for new trial).

A panel of the court has characterized *Monger* as "push[ing] the limits of the right to a lesser-included-offense instruction, particularly given the deferential standard of review that we apply to jury instructions on direct appeal and in view of the large quantities of drugs and cash that were discovered in that case." Talley v. United States, 573 F. App'x 410, 413-414 (6th Cir. 2014) (unpublished). The panel concluded that Talley was not entitled to a lesser-included-offense instruction on simple possession, distinguishing *Monger* on the basis that *Talley* involved more powerful circumstantial evidence of intent to distribute and did not satisfy criteria (3) and (4) of the *Monger* list. Moreover, the court noted that the need for a lesser-included-offense instruction was substantially diminished because the district court included an instruction on the defense's theory of the case, expressly telling the jury that it must acquit the defendant if it found that he possessed the cocaine for personal use. *Talley*, 573 F. App'x at 414. *See also* United States v. Hampton, 769 F. App'x 308, 311-312 (6th Cir. 2019) (unpublished) (concluding that defendant was not entitled to a lesser-included-offense instruction on simple possession because he did not satisfy criterion (4) of the *Monger* test, *citing Talley*). The *Hampton* panel also noted that, "[T]he district court heeded our observation in *Talley* that the need for a lesser-included-offense instruction may be diminished by including the defense theory and expressly instructing the jury that it must acquit if the government failed to prove beyond a reasonable doubt that the defendant intended to distribute" the drugs. *Hampton*, 769 F. App'x at 312.

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

2.04 ON OR ABOUT

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

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

Use Note

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

Committee Commentary 2.04
(current through May 1, 2025)

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

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

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

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

Caution should be used in giving this instruction if the defendant raises an alibi defense.

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

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

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

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

2.05 WILLFULLY

(No General Instruction Recommended.)

Committee Commentary 2.05
(current through May 1, 2025)

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

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

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

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

2.06 KNOWINGLY

(No General Instruction Recommended.)

Committee Commentary 2.06
(current through May 1, 2025)

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

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

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

2.07 SPECIFIC INTENT

(No General Instruction Recommended.)

Committee Commentary 2.07
(current through May 1, 2025)

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

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

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

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

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

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

2.08 INFERRING REQUIRED MENTAL STATE

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

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

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

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

Use Note

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

Committee Commentary 2.08
(current through May 1, 2025)

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

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

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

> Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made

[and done or omitted] by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.

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

2.09 DELIBERATE IGNORANCE

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

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

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

Use Note

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

In conspiracy cases, deliberate ignorance can be used to prove (1) the defendant's knowledge of the aims or purpose of the conspiracy but not (2) the defendant's intent to join the conspiracy.

Committee Commentary 2.09
(current through May 1, 2025)

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

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

622 (6th Cir. 2001) (Pattern Instruction 2.09 "accurately states the law of this Circuit.").

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

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

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

In Global-Tech Appliances, Inc. v. SEB S. A., 131 S.Ct. 2060 (2011), the Supreme Court stated that all the Courts of Appeals agreed on "two basic requirements" for willful blindness that give the doctrine an appropriately limited scope. *Id.* at 2070. Those requirements are that "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *Id.* (footnote omitted). The Court concluded that the Sixth Circuit standard incorporated these requirements. *Id.* at 2071 n.9 (*citing Holloway, supra*). Instruction 2.09 incorporates these two points by requiring that the defendant be "aware of a high probability" that the fact exists and that he "deliberately ignored" or "deliberately closed his eyes" to what was obvious. *See also* United States v. Reichert, 747 F.3d 445, 451 (6th Cir. 2014)) (approving Inst. 2.09 as consistent with *Global-Tech*).

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

In Mari v. United States, *supra*, the court held that giving the pattern deliberate ignorance instruction was harmless as a matter of law because sufficient evidence of actual knowledge was

presented. *Mari*, 47 F.3d at 787. In United States v. Monus, 128 F.3d 376 (6th Cir.1997), the Sixth Circuit reaffirmed *Mari*, holding that the deliberate ignorance instruction was "at worst harmless error." *Monus,* 128 F.3d at 390-91. "[E]ven if there had been insufficient evidence to support a deliberate ignorance instruction, we must assume that the jury followed the jury charge and did not convict on the grounds of deliberate ignorance." *Id., citing Mari* at 785-87. *See also* United States v. Williams, 612 F.3d 500, 508 (6th Cir. 2010) (even when it is unsupported by evidence, giving a deliberate ignorance instruction that properly states the law is harmless error) (*quoting* United States v. Rayborn, 491 F.3d 513, 520 (6th Cir. 2007)) and United States v. Geisen, 612 F.3d 471, 486-87 (6th Cir. 2010) (*citing Mari and Monus, supra*).

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

2.10 ACTUAL AND CONSTRUCTIVE POSSESSION

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

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

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

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

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

Use Note

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

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

Committee Commentary 2.10
(current through May 1, 2025)

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

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

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

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

478 F.2d at 1333.

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

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

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

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

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

Id. at 1049.

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

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

2.10A ACTUAL POSSESSION

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

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

Use Note

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

Committee Commentary 2.10A
(current through May 1, 2025)

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

2.11 JOINT POSSESSION

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

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

Use Note

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

Committee Commentary 2.11
(current through May 1, 2025)

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

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

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

2.12 USE OF THE WORD "AND" IN THE INDICTMENT

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

Use Note

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

Committee Commentary 2.12
(current through May 1, 2025)

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

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

Chapter 3.00

CONSPIRACY

Table of Instructions

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 [*insert substantive crime*] 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 [*insert substantive crime*].

(B) Second, that the defendant knew of the conspiracy and its [objects] [aims] [goals].

(C) Third, that the defendant joined the conspiracy with the intent that at least one of conspirators engage in conduct that satisfies the elements of [*insert substantive crime*].

(D) And fourth, 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.

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)(D) 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 May 1, 2025)

This instruction outlines the basic elements of conspiracy under 18 U.S.C. § 371. 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.

Section 371 provides:

If two or more persons conspire . . . to commit any offense against the United

> States, . . . or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title . . . .

The elements identified in paragraph (2) are based primarily on case law. Paragraph (2)(A), requiring that two or more persons agree to commit a crime, is supported by United States v. Ocasio, 136 S. Ct. 1423, 1428 (2016) (approving instruction for § 371 that required government to prove "that two or more persons entered into an unlawful agreement . . . .") and United States v. Falcone, 61 S. Ct. 204, 207 (1940) ("The gist of the offense of conspiracy as defined by . . . 18 U.S.C. § 88 . . . is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy.") (citations omitted).

In paragraphs (2)(B) and (2)(C), the pattern instruction states the mens rea for conspiracy. It requires two mens reas: "knowledge of the conspiracy and its [objects, aims, or goals]" and that the defendant joined the conspiracy "with the intent that at least one of conspirators engage in conduct that satisfies the elements of the substantive crime."

Paragraph (2)(B), requiring that the defendant know of the conspiracy and its objects, aims or goals, is supported by United States v. Falcone, *supra* ("Those having no knowledge of the conspiracy are not conspirators.") (citations omitted); *see also* United States v. Matthews, 31 F.4th 436, 446 (6th Cir. 2022) (approving instruction for § 846 that required the government to prove defendant had "knowledge of . . . the conspiracy alleged in Count I"); United States v. Gibbs, 182 F.3d 408, 421 (6th Cir. 1999) (for § 846, "the government must prove that [the defendant] was aware of the object of the conspiracy . . . .") (*quoting* United States v. Hodges, 935 F.2d 766, 772 (6th Cir. 1991)); and United States v. Warshawsky, 20 F.3d 204, 211 (6th Cir. 1994) (stating that for § 2314, conspirators must have "knowledge of the aims of the conspiracy").

Paragraph (2)(C), requiring that the defendant joined the conspiracy "with the intent that at least one of conspirators engage in conduct that satisfies the elements of the substantive crime" is supported by United States v. Ocasio, 136 S. Ct. 1423 (2016). In *Ocasio*, the Court explained:

> Conspiracy, in the modern law, is generally defined as a confederacy of two or more persons to accomplish some unlawful purpose.
> . . .
> A defendant must . . . reach an agreement with the specific intent that the underlying crime be committed by some member of the conspiracy. . . . [The] defendant must intend to agree and must intend that the substantive offense be committed.

Ocasio, 136 S. Ct. at 1429 (cleaned up). *See also* U.S. v. Hansen, 143 S. Ct. 1932, 1945 (2023) (stating that conspiracy is a familiar common-law offense that contains a particular *mens rea* of intent and citing *Ocasio*, 578 U.S. at 287-288); Salinas v. United States, 118 S. Ct. 469, 477 (1997) ("A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of

furthering or facilitating the criminal endeavor.") (construing the term "conspire" in RICO, § 1962(d)).

In the Sixth Circuit, the court often defines the elements of conspiracy as including defendant's intent to join the conspiracy to participate in it. *See, e.g.*, United States v. Matthews, 31 F.4th 436, 446 (6th Cir. 2022) ("To prove a drug conspiracy under . . . § 846, the government must prove (1) an agreement to violate the drug laws, and (2) each conspirator's knowledge of, intent to join, and participation in the conspiracy.") (*citing* United States v. Crozier, 259 F.3d 503, 517 (6th Cir. 2001); United States v. Potter, 927 F.3d 446, 453 (6th Cir. 2019) (for § 846, "dozens of our cases have quoted (and requoted) three elements: (1) an agreement to violate drug laws, (2) knowledge and intent to join the conspiracy, and (3) participation in the conspiracy.") (*cleaned up, quoting* United States v. Welch, 97 F.3d 142, 148 (6th Cir. 1996) *and citing* United States v. Hines, 398 F.3d 713, 718 (6th Cir. 2005)); United States v. Crozier, 259 F.3d 503, 517 (6th Cir. 2001) ("The essential elements of a drug conspiracy are 1) an agreement to violate the drug laws, and 2) each conspirator's knowledge of, intent to join, and participation in the conspiracy.") (*citing* United States v. Maliszewski, 161 F.3d 992, 1006 (6th Cir.1998)); United States v. Gibbs, 182 F.3d 408, 420 (6th Cir. 1999) ("In order to show a conspiracy under § 846, the government must prove, beyond a reasonable doubt, (1) an agreement to violate drug laws, (2) knowledge and intent to join the conspiracy, and (3) participation in the conspiracy.") (*quoting* United States v. Welch, 97 F.3d 142, 148 (6th Cir.1996)). In *Potter*, the court explained that the term "participation in the conspiracy" first appeared in United States v. Christian, 786 F.2d 203, 211 (6th Cir. 1986), apparently as a means of distinguishing between joining the conspiracy, which is required for conviction, and mere presence at the crime scene, which is insufficient for conviction. *Potter, supra*, 927 F.3d at 453.

The mens rea for conspiracy does not require the government to prove the defendant knew that his conduct violated federal law. United States v. Feola, 420 U.S. 671, 686-689 (1975). This is discussed further below.

Paragraph (2)(D), requiring that a member of the conspiracy did an overt act, is based on the text of § 371. Most 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)(D) should be deleted, along with all references in other instructions to the subject of overt acts.

For the mens rea, as described above, the instruction requires two: "knowledge of the conspiracy and its [objects] [aims] [goals]" and that the defendant joined the conspiracy "with the intent that at least one of conspirators engage in conduct that satisfies the elements of the substantive crime." The version of the instruction in effect from 1991 to 2024 likewise used two mens reas, one based on knowledge and one based on intent. The main substantive change the new instruction makes in the mens rea is to eliminate the term "voluntarily." The pattern

instructions in effect from 1991 to 2024 provided that the defendant must have "knowingly and voluntarily" joined the conspiracy or the conspiracy agreement. See paragraphs 3.01A(2)(B) ("knowingly and voluntarily joined the conspiracy" and 3.03(1) ("knowingly and voluntarily joined the agreement" and "voluntarily joined [the conspiracy]"). The instruction as revised in 2024 omits the term "voluntarily" for several reasons.

First, the authority supporting the term "voluntarily" as a mens rea for conspiracy is weak. That term does not appear in conspiracy statutes or in Supreme Court cases on §§ 371 or 846. In the Sixth Circuit, the term does appear in conspiracy cases, *see* United States v. Matthews, 31 F.4th 436, 447 (6th Cir. 2022); United States v. Potter, 927 F.3d 446, 453 (6th Cir. 2019); United States v. Rogers, 769 F.3d 372, 377 (6th Cir. 2014) (construing § 1349); and United States v. Gibbs, 182 F.3d 408, 421 (6th Cir. 1999) (*quoting* United States v. Hodges, 935 F.2d 766, 772 (6th Cir. 1991)); and United States v. Christian, 786 F.2d 203, 210-211 (6th Cir. 1986). At the beginning of this line of authority, the *Christian* court cited only out-of -circuit authority, United States v. Dreyfus-de Campos, 698 F.2d 227, 229 (5th Cir.), *cert. denied,* 461 U.S. 937, 947, 103 S.Ct. 2107, 2128, 77 L.Ed.2d 1306 (1983), *disavowed on other grounds in* United States v. Jackson, 825 F.2d 853 (5th Cir. 1987) (en banc).

Although the term "voluntarily" appears in Sixth Circuit conspiracy cases, because the term has been in the pattern instruction since 1991, it is difficult to identify and sort out Sixth Circuit support for the term that is independent and not a byproduct of the pattern instruction. When "voluntarily" was adopted for the pattern instruction in 1991, the Committee Commentary on this instruction did not cite any Sixth Circuit authority for the term but instead stated:

> Occasionally conspiracy instructions have required proof that the defendant "willfully" joined the conspiracy (citations omitted). . . . . 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) . . . . To avoid confusion, the Committee has substituted the word "voluntarily" for "willfully."

Beyond resting on weak authority, the term "voluntarily" may be ambiguous in view of its widespread use on topics of criminal law other than the mens rea. For example, as a constitutional matter, the Supreme Court has suggested that all offenses must be based on voluntary acts to be constitutional under the Cruel and Unusual Punishment Clause. See Robinson v. California, 370 U.S. 660 (1962) and Powell v. Texas, 392 U.S. 514 (1968). For another example, the Model Penal Code uses the term "voluntary act" to define the first requirement of all criminal conduct. See Model Penal Code § 2.01 ("Requirement of Voluntary Act . . . . (1) A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.")

Outside the Sixth Circuit, the term "voluntarily" is not widely used for conspiracy's mens rea. In the other circuits' pattern instructions, the Eighth and Tenth Circuits use the term but the First, Third, Fifth, Seventh, Ninth and Eleventh do not. The Model Penal Code does not use "voluntarily" as a mens rea term at all. Model Penal Code § 2.02; *see also* United States v.

Bailey, 444 U.S. 394, 404-405 (1980) (noting the ambiguity of the common law mens rea terms and the alternative analysis adopted in the Model Penal Code using a hierarchy of four descending levels of culpability: purpose, knowledge, recklessness and negligence).

Occasionally conspiracy instructions have required proof that the defendant "willfully" joined the conspiracy. *See, e.g.*, Ocasio v. U.S., 136 S. Ct. 1423, 1428-1429 (2016) (affirming § 371 conviction based on jury instruction using the term "willfully" without further discussion of that term); United States v. Davenport, 808 F.2d 1212, 1218 (6th Cir. 1987); United States v. Piccolo, 723 F.2d 1234, 1240 (6th Cir. 1983).

The Sixth Circuit pattern conspiracy instructions have never used the term "willfully" and the Committee continued this approach in the 2024 revised conspiracy instructions for several reasons. First, the conspiracy statute does not use the term "willfully." Second, the Supreme Court generally construes the term willfully to require knowledge of illegality, *see, e.g.*, Ratzlaf v. United States, 510 U.S. 135, 136-137 (1994) (superseded by statute, 18 U.S.C. § 5324). Because knowledge of illegality is generally not required to support a conspiracy conviction, United States v. Feola, 420 U.S. 671, 686-689 (1975), the term "willfully" is misleading in the context of conspiracy unless the targeted substantive crime itself requires willfulness. *See, e.g.*, 18 U.S.C. § 1001 Statements or entries generally.

Finally, although the Sixth Circuit occasionally used the term "willfully" in the past, the more recent cases do not use the term. See the cases cited above in the commentary. Instead, the Sixth Circuit has generally settled on a two-part mens rea for conspiracy: knowledge of the conspiracy and its objects, aims or goals, and that the defendant joined the conspiracy with the intent that the substantive crime be committed. In pattern instructions outside the Sixth Circuit, the term "willfully" appears in a minority of circuit pattern conspiracy instructions: it appears in the First, Fifth, and Eleventh Circuits but is not used in the Third, Seventh, Eighth, Ninth, and Tenth Circuits.

Aside from the substantive change of deleting the term "voluntarily," the 2024 revision makes stylistic changes to bring the conspiracy instructions into conformity with the other elements instructions. Specifically, Inst. 3.01A Conspiracy to Commit An Offense (18 U.S.C. § 371) – Basic Elements now lists all the elements of the crime, and does so in a single paragraph. The two-part mens rea is listed in separate subparagraphs, (2)(B) and (2)(C), in part for general clarity and in part to accommodate use of Inst. 2.09 Deliberate Ignorance. In conspiracy cases, deliberate ignorance can be used prove knowledge of the aims of the conspiracy but not to prove the existence of an agreement or defendant's intent to join it. United States v. Matthews, 31 F.4th 436, 449-452 (6th Cir. 2022) (*citing, inter alia*, United States v. Warshawsky, 20 F.3d 204, 211 (6th Cir. 1994) *and* United States v. Evans Landscaping Inc., 850 F. App'x 942, 951-952 (6th Cir. 2021) (unpublished)).

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.

(B) Second, that the defendant knew of the conspiracy and its [objects] [aims] [goals].

(C) Third, that the defendant joined the conspiracy with the intent that at least one of conspirators engage in conduct that satisfies the elements of defrauding the United States.

(D) And fourth, 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) Now I will give you more detailed instructions on some of these terms.

[(A) 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.]

[(4) The government need not prove 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 (3)(A) should be included when the definition of defraud is raised by the facts.

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 May 1, 2025)

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 [*insert substantive crime*]" language that appears in those instructions.

The elements in paragraph (2) are based primarily on the case law described below. The elements were revised in 2024 to be consistent with changes made to other conspiracy instructions, Insts. 3.01A, 3.03, and 14.05. These revisions are described in detail in the commentary to Inst. 3.01A.

Paragraphs (2)(B) and (2)(C) state the mens rea for conspiracy to defraud the United States. It requires two mens reas: "knowledge of the conspiracy and its [objects] [aims] [goals]" and that the defendant joined the conspiracy "with the intent that at least one of conspirators engage in conduct that satisfies the elements of defrauding the United States." The mens rea for conspiracy under the defraud clause does not require the government to prove the defendant knew his conduct violated federal law. United States v. Khalife, 106 F.3d 1300, 1303 (6th Cir. 1997).

The Sixth Circuit distinguishes between conspiracies under the offense clause and conspiracies under the defraud clause of § 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 defraud clause of § 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 offense clause of § 371, the United States need not be the target. United States v. Gibson, 881 F.2d 318, 321 (6th Cir. 1989).

In paragraph (3)(A), the two bracketed sentences defining the term "defraud" are based on United States v. Minarik, 875 F.2d 1186 (6th Cir. 1989). The term "defraud" has a broader meaning than simply cheating the government out of property or money. *Id.* 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 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 May 1, 2025)

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[ion] [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) Proof of conspiracy does not require 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. [You must consider each defendant separately in this regard.]

(2) 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.

(3) A defendant's knowledge can be proved indirectly by facts and circumstances which lead to a conclusion that he knew of the conspiracy and its [objects] [aims] [goals]. 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 May 1, 2025)

In 2024, this instruction was revised to be consistent with the changes made that year to other conspiracy instructions, Insts. 3.01A, 3.01B, and 14.05. These revisions are described in detail in the commentary to Inst. 3.01A Conspiracy – Basic Elements.

The Sixth Circuit has stated that paragraph (1) 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 (2) 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.").

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 May 1, 2025)

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 May 1, 2025)

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 May 1, 2025)

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 May 1, 2025)

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 May 1, 2025)

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 May 1, 2025)

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 May 1, 2025)

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 May 1, 2025)

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 May 1, 2025)

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 May 1, 2025)

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 May 1, 2025)

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-Vaccuum 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 May 1, 2025)

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 May 1, 2025)

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.

Chapter 4.00

AIDING AND ABETTING

Table of Instructions

4.01 AIDING AND ABETTING

(1) For you to find _____ guilty of _____, it is not necessary for you to find that he personally committed the crime. You may also find him guilty if he intentionally helped [or encouraged] someone else to commit the crime. A person who does this is called an aider and abettor.

(2) But for you to find _____ guilty of _____ as an aider and abettor, 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 crime of _____ was committed.

(B) Second, that the defendant helped to commit the crime [or encouraged someone else to commit the crime].

(C) And third, that the defendant intended to help commit [or encourage] the crime.

(3) Proof that the defendant may have known about the crime, even if he was there when it was committed, is not enough for you to find him guilty. You can consider this in deciding whether the government has proved that he was an aider and abettor, but without more it is not enough.

(4) What the government must prove is that the defendant did something to help [or encourage] the crime with the intent that the crime be committed.

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

Use Note

If the underlying crime is based on 18 U.S.C. § 924(c)(1)(A)(i), *i.e.*, Using or Carrying a Firearm During and in Relation to a Crime of Violence or Drug Trafficking Crime (see Instruction 12.02) or Possessing a Firearm in Furtherance of a Crime of Violence or Drug Trafficking Crime (see Instruction 12.03), use the accomplice liability instructions provided for those particular crimes in Instructions 12.04 and 12.05 respectively.

The bracketed language in paragraphs (1), (2)(B), (2)(C) and (4) should be included when there is evidence that the defendant counseled, commanded, induced or procured the commission of the crime.

Committee Commentary 4.01
(current through May 1, 2025)

In United States v. Katuramu, 2006 WL 773038, 2006 U.S. App. LEXIS 7640 (6th Cir. 2006) (unpublished), a panel approved Instruction 4.01(3) and (4).

The standard for accomplice liability is set out in 18 U.S.C. § 2:

> (a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.
> (b) Whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

A defendant need not be specifically charged with aiding and abetting to be convicted under 18 U.S.C. § 2, but can be charged as a principal and convicted as an aider and abettor. Standefer v. United States, 447 U.S. 10 (1980)**.** The district court may give an instruction on aiding and abetting as an alternative theory even if the indictment does not include aiding and abetting language and does not refer to the aiding and abetting statute, 18 U.S.C. § 2. United States v. McGee, 529 F.3d 691, 695-96 (6th Cir. 2008).

In Rosemond v. United States, 134 S. Ct. 1240 (2014), the Court vacated a conviction for using or carrying under § 924(c) based on aiding and abetting because of error in the jury instructions. In the wake of *Rosemond*, the Sixth Circuit reversed a § 924(c) conviction, finding the jury instruction using the first sentence of paragraph 4.01(2)(C) to be plain error. The court explained, "*Rosemond* clarifies that intent must go to the *entire crime* – that [defendant] intended to aid in an *armed* bank robbery." United States v. Henry, 2015 WL 4774558, at *2, (6th Cir. 2015) (italics in original, *citing Rosemond*, 134 S. Ct. at 1248, 1251). *See also* United States v. Richardson, 2015 WL 4174809, at *14-15 (6th Cir. July 13, 2015) (jury instruction was error but harmless). If the crime underlying the aiding and abetting instruction is based on 18 U.S.C. § 924(c)(1)(A)(i), *i.e.*, Using or Carrying a Firearm During and in Relation to a Crime of Violence or Drug Trafficking Crime (see Instruction 12.02) or Possessing a Firearm in Furtherance of a Crime of Violence or Drug Trafficking Crime (see Instruction 12.03), use the accomplice liability instructions provided for those particular crimes in Instructions 12.04 and 12.05 respectively.

In United States v. Brown, 151 F.3d 476 (6th Cir. 1998), the court reversed convictions for aiding and abetting a violation of 18 U.S.C. § 1001 (making false statements to a federal agency) for two reasons. First, the court found the evidence of mens rea insufficient because the defendant lacked the "specific intent" required for aiding and abetting. *Id.* at 487. The government's theory was that the defendant aided and abetted the making of false statements in vouchers for Section 8 housing eligibility because the vouchers were given to persons other than those on the waiting list. Because there was no evidence the defendant knew the function of the waiting list for Section 8 housing, the court held the mens rea evidence did not meet the standard for aiding and abetting. In addition, the court held that the evidence of conduct was insufficient because the defendant failed to engage in the sort of active role necessary to an aiding and abetting conviction. *Id*. There was no evidence the defendant helped in the preparation or submission of the documents to HUD; overall, her participation was too limited to establish that

she did any act to bring about filing false documents with HUD.

Another offense raising unique questions on the application of § 2 is the Illegal Gambling Business Statute, 18 U.S.C. § 1955. In United States v. Hill, 55 F.3d 1197, 1199 (6th Cir.1995), the court held that aiding and abetting liability for § 1955 offenses required particular knowledge of the predicate offense. The court stated that § 1955 offenses required what it called a "refined theory" of accomplice liability under § 2, *id.* at 1201, and explained that § 2 is applicable to § 1955, but only "when the aider and abettor has knowledge of the general nature and scope of the illegal gambling enterprise and takes actions that demonstrate an intent to make the illegal gambling enterprise succeed by assisting the principals in the conduct of the business." *Id.* at 1199. The point of this standard is to insure that the defendant knew he was an accomplice to an illegal gambling business which met the size, scope and duration requirements to be a federal crime under § 1955. *Id.* at 1202.

The court has also resolved specific accomplice liability questions for the offense of felon-in-possession-of-a-firearm under 18 U.S.C. § 922(g)(1). In United States v. Gardner, 488 F.3d 700 (6th Cir. 2007), the court reversed the defendant's conviction for aiding and abetting a felon in possession on the basis that the evidence was insufficient. Accomplice liability requires the government to prove that the defendant intended to aid the commission of the crime. The court held that to meet this element in the context of a felon-in-possession charge, "the government must show that the defendant knew or had cause to know that the principal was a convicted felon." *Id*. at 715, *citing* United States v. Xavier, 2 F.3d 1281, 1286 (3d Cir. 1993). Because the government presented no such evidence, the court reversed the conviction.

In order to aid and abet, one must do more than merely be present at the scene of the crime and have knowledge of its commission. The Supreme Court set out the standard for the offense in Nye & Nissen v. United States, 336 U.S. 613, 619 (1949), when it quoted Judge Learned Hand's statement from United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938):

> In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed'.

Accord, United States v. Martin, 920 F.2d 345, 348 (6th Cir. 1990); United States v. Quinn, 901 F.2d 522, 530 n.6 (6th Cir. 1990).

This requires proof of something more than mere association with a criminal venture. United States v. Morrow, 923 F.2d 427, 436 (6th Cir. 1991). The government must prove "some active participation or encouragement, or some affirmative act by (the defendant) designed to further the (crime)." *Id.*

The defendant must act or fail to act with the intent to help the commission of a crime by another. Simple knowledge that a crime is being committed, even when coupled with presence at the scene, is usually not enough to constitute aiding and abetting. United States v. Luxenberg, 374 F.2d 241, 249-50 (6th Cir. 1967). Because of its importance in determining whether the accused is an accomplice, the jury must be charged fully and accurately as to intent. The failure

to instruct on intent constitutes plain error. United States v. Bryant, 461 F.2d 912 (6th Cir. 1972).

Although the defendant must be a participant rather than merely a knowing spectator before he can be convicted as an aider and abettor, it is not necessary for the governments to prove that he had an interest or stake in the transaction. United States v. Winston, 687 F.2d 832, 834 (6th Cir. 1982).

4.01A CAUSING AN ACT

(1) For you to find _____ guilty of _____, it is not necessary for you to find that he personally committed the act charged in the indictment. You may also find him guilty if he willfully caused an act to be done which would be a federal crime if directly performed by him or another.

(2) But for you to find _____ guilty of _____, 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 caused _____ to commit the act of _____.

(B) Second, if the defendant or another person had committed the act it would have been the crime of _____.

(C) And third, that the defendant willfully caused the act to be done.

(3) Proof that the defendant may have known about the crime, even if he was there when it was committed, is not enough for you to find him guilty. You may consider this in deciding whether the government has proved that he caused the act to be done, but without more it is not enough.

(4) What the government must prove is that the defendant willfully did something to cause the act to be committed.

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

Committee Commentary
(current through May 1, 2025)

This instruction is based on 18 U.S.C. § 2(b). Section 2 provides:

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.
(b) Whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

In United States v. Hourani, 1999 WL 16472, 1999 U.S. App. LEXIS 431 (6th Cir. 1999) (unpublished), a panel of the Sixth Circuit stated that § 2(b) was added "to clarify the implicit meaning of § 2(a)" and then quoted the Historical and Statutory Notes accompanying the statute:

Section 2(b) is added to permit the deletion from many sections throughout the revision of such phrases as "causes or procures." The section as revised makes clear the legislative intent to punish as a principal not only one who directly commits an offense

> and one who "aids, abets, counsels, commands, induces or procures" another to commit an offense, but also anyone who causes the doing of an act which if done by him directly would render him guilty of an offense against the United States. It removes all doubt that one who puts in motion or assists in the illegal enterprise or causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense.

Hourani, 1999 WL at 3-4, 1999 LEXIS at 9-10.

In United States v. Maselli, 534 F.2d 1197, 1200 (6th Cir. 1976), the court stated that § 2(b) deals with a class of activities which do not involve direct violations of the law, but which contribute to the commission of the offense and are punishable in the same manner as direct violations. *Maselli* also noted that subsections 2(a) and 2(b) are not mutually exclusive. "They are . . . two statements of indirect illegal actions which carry the same consequences for the actor as direct violation of criminal statutes." *Id.* The court noted that it is proper to instruct on both subsection 2(a) and 2(b) if the evidence justifies it. *Id.*

"[I]t has long been held that an indictment need not specifically charge 'aiding and abetting' or 'causing' the commission of an offense against the United States, in order to support a jury verdict based upon a finding of either." United States v. Lester, 363 F.2d 68, 72 (6th Cir. 1966).

The difference between "inducing" in § 2(a) and "causing" in 2(b) has been described by the Sixth Circuit as "somewhat unclear." United States v. Brown, 151 F.3d 476, 486 (6th Cir. 1998). However, the Sixth Circuit recognized that § 2 has two parts. *See id.* (describing § 2 as having "two components"). The court also stated that the two subsections are alternatives, explaining that a defendant can be guilty as an accomplice "so long as the evidence shows that she aided, abetted, counseled, induced, or procured the commission of the fraud, or, alternatively, caused the false statements to be made." *Id., citing* United States v. Twitty, 107 F.3d 1482, 1491 n.10 (11th Cir. 1997).

Paragraph (1) of the instruction is based on the language of the statute and United States v. Keefer, 799 F.2d 1115, 1124 (6th Cir. 1986). *Keefer* held that under § 2(b) one can be punished as a principal even though the agent who committed the act lacks criminal intent. *See also* United States v. Norton, 700 F.2d 1072, 1077 (6th Cir. 1983) (defendants treated as principals even though they may not have physically done the criminal act).

Paragraph (2) sets forth the elements that must be proved beyond a reasonable doubt by the government. The elements are based upon the language of the statute and are further supported by United States v. Gandy, 926 F.3d 248, 265 (6th Cir. 2019). In *Gandy*, the trial court gave Inst. 4.01A with minor variations in language. The Sixth Circuit held that the instruction was not plain error because the trial judge had instructed the jury properly on the elements of the underlying offense, aggravated identity theft (see Inst. 15.04). *Gandy, supra*. The Sixth Circuit also concluded under an abuse-of-discretion standard that sufficient evidence supported giving Inst. 4.01A. *Gandy, id. See also* United States v. Murph, 707 F.2d 895, 896 (6th Cir.1983),

which held that the further act done by the agent was foreseen by the defendant and thus the defendant "caused" the act to be done.

The word "willfully" in paragraph 2(C) is taken from the statute, and there is no case law in the Sixth Circuit to guide the Committee further on defining this mens rea in the context of § 2(b). The Committee recommends that the term "willfully" be defined by reference to the particular underlying act involved in the case. *Cf.* Instruction 2.05 Willfully (recommending no general instruction on the meaning of willfully and suggesting in commentary that the term be defined based on the particular offense involved).

Paragraph (3) is based upon United States v. Elkins, 732 F.2d 1280, 1287 (6th Cir. 1984) (knowledge of the criminal conduct is insufficient).

Paragraph (4) of the instruction is based on the instruction quoted with approval in *Hourani*, 1999 WL at 4, 1999 LEXIS at 10-11. The panel approved the instruction on accomplice liability under § 2(b) although the instructions did not specify either §§ 2(a) or 2(b).

4.02 ACCESSORY AFTER THE FACT

(1) _____ is not charged with actually committing the crime of _____. Instead, he is charged with helping someone else try to avoid being arrested, prosecuted or punished for that crime. A person who does this is called an accessory after the fact.

(2) For you to find _____ guilty of being an accessory after the fact, the government must prove each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant knew someone else had already committed the crime of _____.

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

(C) And third, that the defendant did so with the intent to help that person avoid being arrested, prosecuted or punished.

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

Committee Commentary 4.02
(current through May 1, 2025)

Title 18 U.S.C. § 3 provides:

> Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts, or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.
>
> Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by life imprisonment or death, the accessory shall be imprisoned not more than ten years.

A defendant is guilty under Section 3 where he knowingly assists an offender in order to hinder the offender's apprehension, trial or punishment. He is distinguished from an aider and abettor by not being entangled in the commission of the crime itself. For example, the driver of a getaway car in a bank robbery may be treated as a principal, while a defendant who learns about a crime afterwards and then supplies a place of refuge would be an accessory after the fact. It is important that the felony not be in progress when assistance is rendered in order for the person to be treated as an accessory after the fact, rather than as a principal.

> The gist of being an accessory after the fact lies essentially in obstructing justice by rendering assistance to hinder or prevent the arrest of the offender after he has committed the crime . . . . The very definition of the crime also requires that the felony not be in progress when the assistance is rendered because then he who renders assistance would aid in the commission of the offense and be guilty as a principal.

United States v. Barlow, 470 F.2d 1245, 1252-53 (D.C.Cir.1972).

The line between an aider and abettor and an accessory after the fact is sometimes difficult to draw, particularly when dealing with the escape immediately following the crime. The defendant in United States v. Martin, 749 F.2d 1514, 1518 (11th Cir. 1985), was convicted of aiding and abetting in a bank robbery under an instruction in which the jury was told that the robbery was not complete as long as the money was being "asported or transported." The Eleventh Circuit held that the instructions extended the crime too far since "the money could be transported long after the possibility of hot pursuit had ended."

Chapter 5.00

ATTEMPTS

Table of Instructions

5.01 ATTEMPT – BASIC ELEMENTS

(1) Count ___ of the indictment accuses the defendant of attempting to commit the crime of _____ in violation of federal law. For you to find the defendant guilty of this crime, you must be convinced that the government has proved both of the following elements beyond a reasonable doubt:

(A) First, that the defendant intended to commit the crime of _____.

(B) And second, that the defendant did some overt act that was a substantial step towards committing the crime of _____.

(C) Merely preparing to commit a crime is not a substantial step. The defendant's conduct must go beyond mere preparation, and must strongly confirm that he intended to _____. But the government does not have to prove that the defendant did everything except the last act necessary to complete the crime. A substantial step beyond mere preparation is enough.

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

Committee Commentary 5.01
(current through May 1, 2025)

The elements of attempt identified in paragraphs (1)(A) and (1)(B) (intent to commit the substantive crime and a substantial step towards committing that crime) are supported by United States v. Wesley, 417 F.3d 612 (6th Cir. 2005) and United States v. Bilderbeck, 163 F.3d 971 (6th Cir. 1999). "To convict a defendant of attempt, the government must prove (1) the defendant's intent to commit the criminal activity; and (2) that the defendant committed an overt act that constitutes a 'substantial step' toward commission of the crime." *Wesley* at 618, *citing Bilderbeck* at 975. For the substantial step element, paragraph (1)(C) provides the definition. In *Wesley*, the court gave an instruction virtually identical to paragraph 5.01(1)(C); neither party objected to the instruction, and the court affirmed the conviction as supported by sufficient evidence. *Wesley* at 618 note 2, 620, 622. Judge Batchelder dissented, *id.* at 622-23.

The main purpose of the substantial step element is to provide objective evidence to corroborate the defendant's intent to commit the substantive crime. *Wesley* at 620; *see also* United States v. Alebbini, 979 F.3d 537, 546 (6th Cir. 2020). The court has explained:

> Because of the problems of proving intent in attempt cases and the danger of convicting for mere thoughts, desires, or motives, we require that the substantial step consist of objective acts that mark the defendant's conduct as criminal in nature. The defendant's objective conduct, taken as a whole, must unequivocally corroborate the required subjective intent to [commit the substantive crime]. The key word . . . is ཞ*objective*ཟ: the ཞsubstantial stepཟ requirement is an objective

> requirement, not a subjective one. In other words, under the "substantial step" analysis, an appellate court evaluates whether any reasonable person could find that the acts committed would corroborate the firmness of a defendant's criminal intent, assuming that the defendant did, in fact, intend to commit the crime.

Bilderbeck at 975, *citing* United States v. Pennyman, 889 F.2d 104, 106-107 (6th Cir. 1989) (cleaned up).

The court has elaborated generally on the elements of attempt. "A substantial step must be something more than mere preparation." United States v. Alebbini, 979 F.3d 537, 546 (6th Cir. 2020), *quoting* United States v. Bailey, 228 F.3d 637, 640 (6th Cir. 2000) (cleaned up). "Evidence is sufficient to sustain a conviction for criminal attempt, if it shows that the defendant's conduct goes beyond preliminary activities and a fragment of the crime was essentially in progress." *Alebbini* at 546-547, *quoting* United States v. Price, 134 F.3d 340, 351 (6th Cir. 1998) (cleaned up). Attempt "is to be construed in a broad and all inclusive manner." *Bilderbeck*, *supra* at 975, *quoting* United States v. Reeves, 794 F.2d 1101, 1103 (6th Cir. 1986) (cleaned up). The proof of the substantial step need not be sufficient to prove the criminal intent, but only to corroborate it; the act and intent are ultimately separate inquiries. *Bilderbeck, supra* at 975.

The court has provided some guidance on the attempt offense applicable to particular offenses. For attempted possession of controlled substances, "when a defendant engages in active negotiations to purchase drugs, he has committed the 'substantial step' towards the crime of possession required to convict him of attempted possession." *Bilderbeck* at 975, *citing Pennyman, supra* at 107-108; United States v. Williams, 704 F.2d 315 (6th Cir. 1983); and United States v. Dworken, 855 F.2d 12, 19 (1st Cir. 1988). For the offense of attempting to provide material support to a foreign terrorist organization, 18 U.S.C. § 2339B(a)(1), the court identified four elements: "(1) that [defendant] intended to commit the crime of providing material support or resources to [a terrorist organization, ISIS]; (2) that he intended to provide himself to ISIS to work under its direction and control; (3) that he knew ISIS was a designated foreign terrorist organization or had engaged in terrorist activity; and (4) that he did some overt act which was a substantial step toward committing the crime." *Alebbini, supra* at 546. In a trial to the court, the *Alebbini* district judge concluded that defendant met the substantial step element when, having purchased two airline tickets to travel to Turkey, he went to the ticket counter at the Cincinnati airport, waited 30 minutes, obtained boarding passes, and headed toward the security area on his way to the gate. The Sixth Circuit affirmed, *Alebbini, supra* at 547.

No defense of withdrawal, abandonment or renunciation exists after the crime of attempt is complete with proof of intent and acts constituting a substantial step toward the substantive offense. United States v. Alebbini, 979 F.3d 537, 548 (6th Cir. 2020), *citing* United States v. Shelton, 30 F.3d 702, 706 (6th Cir. 1994).

5.02 SHAM CONTROLLED SUBSTANCE CASES

(1) The fact that the substance involved in this case was not real _____ is no defense to the attempt charge. But the government must convince you that the defendant actually thought he was buying [selling] real _____.

(2) The government must show that the defendant's actions uniquely marked his conduct as criminal. In other words, the defendant's conduct, taken as a whole, must clearly confirm beyond a reasonable doubt that he actually thought he was buying [selling] real _____.

Use Note

This instruction should be used when the defendant is charged with an attempted controlled substance offense based on a sale or purchase of sham drugs. This instruction should be given in addition to an instruction outlining the elements of attempt.

If the defendant is charged with buying or selling sham drugs knowing they were sham, the defendant lacks the mens rea for an attempted controlled substances crime and this instruction should not be given.

Committee Commentary 5.02
(current through May 1, 2025)

In United States v. Pennell, 737 F.2d 521, 524-25 (6th Cir. 1984), the Sixth Circuit held that the defendant could be convicted of an attempt to possess a controlled substance even though the substance he purchased from government agents was not real cocaine. The Sixth Circuit agreed with the Third Circuit's analysis in United States v. Everett, 700 F.2d 900, 907-08 (3d Cir. 1983), that "Congress intended to eliminate the impossibility defense in cases prosecuted under 21 U.S.C. §§ 841(a)(1) and 846." *Pennell, supra* at 525. *Accord,* United States v. Reeves, 794 F.2d 1101, 1104 (6th Cir. 1986) ("There can be no question that the Congressional intent in fashioning the attempt provision as part of an all-out effort to reach all acts and activities related to the drug traffic was all inclusive and calculated to eliminate technical obstacles confronting law enforcement officials.").

To convict a defendant in a sham delivery case, the government "must, of course, prove the defendant's subjective intent to purchase (or sell) actual narcotics beyond a reasonable doubt." United States v. Pennell, *supra*, 737 F.2d at 525. And in order to avoid unjust attempt convictions in these types of cases, the Sixth Circuit has held that the following evidentiary standard must be met:

> In order for a defendant to be guilty of a criminal attempt, the objective acts performed, without any reliance on the accompanying mens rea, [must] mark the defendant's conduct as criminal in nature. The acts should be unique rather than so commonplace that they are engaged in by persons not in violation of the law.

Id. *Accord*, United States v. Reeves, *supra*, 794 F.2d at 1104 ("This standard of proof has been

adopted in this circuit.").

What this means is that "the defendant's objective conduct, taken as a whole, must unequivocally corroborate the required subjective intent to purchase or sell actual narcotics." United States v. Pennell, *supra,* 737 F.2d at 525. *Accord* United States v. Pennyman, *supra*, 889 F.2d at 106.

The court continues to rely on *Pennell*. *See, e.g.,* United States v. Allen, 1993 WL 445082 at 4, 1993 U.S. App. LEXIS 28778 at 5 (6th Cir. 1993) (unpublished) (quoting the *Pennell* standard).

In sham drugs cases, this instruction alone is not sufficient but is to be given with the instruction setting out the elements of attempt.

An attempted controlled substances offense is only implicated if the defendant believed that the substance involved was a real controlled substance. Thus, if the defendant knew that the substance involved was not a controlled substance but was sham drugs, this instruction is not appropriate. In this situation, *i.e,* the drug is sham and the defendant knows it, the appropriate instruction should be based on 21 U.S.C. §§ 802(32) and 813 (the Controlled Substance Analogue Enforcement Act of 1986).

5.03 ABANDONMENT OR RENUNCIATION

(No Instruction Recommended)

Committee Commentary 5.03
(current through May 1, 2025)

The Committee recommends that no instruction be given.

A panel of the Sixth Circuit has endorsed the approach of Instruction 5.03. In United States v. Tanks, 1992 WL 317179, 1992 U.S. App. LEXIS 28889 (6th Cir. 1992) (unpublished), the district court refused to give an instruction on abandonment. On appeal, the panel stated that a defendant is entitled to instructions only on recognized defenses, and since the abandonment defense was not recognized in the Sixth Circuit, he was not entitled to an instruction. The panel quoted as follows the commentary on Instruction 5.03 from an earlier edition in support of its conclusion that the defense was not recognized:

> No federal cases have explicitly recognized voluntary abandonment or renunciation as a valid defense to an attempt charge. The closest the federal courts have come are two cases which assumed, without deciding, that even if abandonment or renunciation is a defense, the facts of the particular cases did not support a finding that a voluntary abandonment or renunciation had occurred. See United States v. Bailey, 834 F.2d 218, 226-227 (1st Cir. 1987); and United States v. McDowell, 705 F.2d 426, 428 (11th Cir.1983). See generally Model Penal Code § 5.01(4).

Tanks, supra 1992 U.S.App.LEXIS at 16. The panel then stated that the defendant presented insufficient evidence to raise the defense at any rate. *Id.* at 17.

In United States v. Shelton, 30 F.3d 702, 706 (6th Cir. 1994), the Sixth Circuit made clear that it does not recognize the defense of abandonment or renunciation, holding that "withdrawal, abandonment and renunciation, however characterized, do not provide a defense to an attempt crime." The court stated that the crime of attempt is "complete with proof of intent together with acts constituting a substantial step toward commission of the substantive offense," but noted that if a defendant withdraws prior to forming the required intent or taking the substantial step, then the question arises if he has committed the offense since the elements of the crime cannot be proved. *Id*.

Chapter 6.00

DEFENSES

Table of Instructions

6.01 DEFENSE THEORY

(1) That concludes the part of my instructions explaining the elements of the crime. Next I will explain the defendant's position.

(2) The defense says _____

_____

_____.

Committee Commentary 6.01
(current through May 1, 2025)

The Sixth Circuit has not reviewed this instruction directly.

When a defense theory finds some support in the evidence and the law, the defendant is entitled to some mention of that theory in the district court's instructions. United States v. Duncan, 850 F.2d 1104, 1117 (6th Cir. 1988). The test for determining whether some mention of the defense theory must be included is not whether the evidence presented in support of the theory appears reasonable. *Duncan, supra* at 1117. "It is not for the judge, but rather for the jury, to appraise the reasonableness or the unreasonableness of the evidence relating to the [defense] theory." *Id.* (interior quotations omitted). Instead, the test is whether "there is any foundation in the evidence sufficient to bring the issue into the case, even if that evidence is weak, insufficient, inconsistent, or of doubtful credibility." *Id.* (interior quotations omitted).

In United States v. O'Neal, 1999 WL 777307, 1999 U.S. App. LEXIS 23517 (6th Cir. 1999) (unpublished), the panel explained the law as follows: "Although a jury instruction 'should not be given if it lacks evidentiary support or is based upon mere suspicion or speculation,' if there is even weak supporting evidence, '[a] trial court commits reversible error in a criminal case when it fails to give an adequate presentation of a theory of defense.'" 1999 WL at 1, 1999 LEXIS at 3, *quoting* United States v. James, 819 F.2d 674, 675 (6th Cir. 1987) and United States v. Plummer, 789 F.2d 435, 438 (6th Cir. 1986). In *O'Neal*, the panel concluded that the trial court properly refused a defense instruction because it was not supported by the evidence.

Where the proposed instruction does not state a distinct legal theory, the Sixth Circuit has held that an instruction need not be given and the issue should be left to argument. The court explained, "Although a district court is required to instruct the jury on the theory of defense, it is not error to refuse to give 'instructions which merely represent a defendant's view of the facts of the case,' rather than a distinct legal theory." United States v. Chowdhury, 169 F.3d 402, 407 (6th Cir. 1999) (*quoting* United States v. Frost, 125 F.3d 346, 372 (6th Cir. 1997)). *See also* United States v. Mack, 159 F.3d 208, 218 (6th Cir. 1998) (finding no error when trial court refused defense theory instruction because proposed instruction was not statement of law but rather denial of charges and it contained statements the defendant would have made if he had testified).

As to the content of the defense theory instruction, the district court does not have to accept the exact language of a proffered instruction on the defense theory. United States v. McGuire, 744 F.2d 1197, 1201 (6th Cir.1984); United States v. Blane, 375 F.2d 249, 252 (6th Cir. 1967). It is sufficient if the court's instructions, as a whole, adequately cover the defense theory. *Id.* As stated by the Sixth Circuit in *McGuire*:

> A criminal defendant has no right to select the particular wording of a proposed jury instruction. As long as the instruction actually given is a correct statement of the law, fairly presents the issues to the jury, and is substantially similar to the defendant's proposed instruction, the district court has great latitude in phrasing it.

McGuire, supra.

The defense theory must, however, be stated "clearly and completely." Smith v. United States, 230 F.2d 935, 939 (6th Cir. 1956).

6.02 ALIBI

(1) One of the questions in this case is whether the defendant was present _____ _____.

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

Committee Commentary 6.02
(current through Jan. 1, 2024)

Panels of the Sixth Circuit have endorsed Pattern Instruction 6.02 twice. In United States v. Lennox, 1994 WL 242411, 1994 U.S. App. LEXIS 13489 (6th Cir. 1994) (unpublished), the trial court gave Pattern Instruction 6.02, and the question was whether it was error to refuse defendant's proposed additional statement that there is no negative implication to the word "alibi" and that an alibi is a proper and legitimate claim in a defense of an indictment. The panel held it was not error to refuse this statement because the Pattern Instruction made it "abundantly clear" that the government continuously bore the burden of proof beyond a reasonable doubt. *Lennox*, 1994 WL at 5, 1994 LEXIS at 15. The panel stated, "Because this district court's actual jury instructions, taken as a whole, adequately informed the jury of the relevant considerations, and provided a sound basis in the law to aid the jury in reaching its decision, the district court did not err . . . ." *Id.*

In Moore v. United States, 1998 WL 537589, 1998 U.S. App. LEXIS 18795 (6th Cir. 1998) (unpublished), a panel affirmed the district court's conclusion that the pattern instruction adequately described the alibi defense. The panel stated, "The district court properly rejected [the defendant's inadequacy] claim because the trial court gave the pattern instruction for an alibi defense that is recommended in our circuit." *Moore*, 1998 WL at 3, 1998 LEXIS at 9, *citing* Pattern Instruction 6.02.

In United States v. McCall, 85 F.3d 1193 (6th Cir. 1996), the court did not review the pattern instruction as such but did cite it for authority in describing the "primary function" of an alibi instruction as being "to remind the jury as to the government's burden of demonstrating all elements of the crime beyond a reasonable doubt, including defendant's presence at the crime scene...." *Id.* at 1196, *citing* Pattern Instruction 6.02. The issue in *McCall* was whether failure to give an alibi instruction was plain error. The court noted that Sixth Circuit authority established that such a failure might be plain error. *Id.*, *citing* United States v. Hamilton, 684 F.2d 380, 385 (6th Cir. 1982). However, the court went on to hold that failure to give an alibi instruction is not plain error when two conditions are met. The court stated, "[W]e hold that omission of the [alibi] instruction is not plain error, as long as the jury is otherwise correctly instructed concerning the government's burden of proving every element of the crime charged, and the defendant is given a full opportunity to present his alibi defense in closing argument." *McCall,* 85 F.3d at 1196.

If requested, an alibi instruction is required when the nature of the offense charged requires the defendant's presence at a particular place or time, and the alibi tends to show his presence elsewhere at all such times. United States v. Dye, 508 F.2d 1226, 1231 (6th Cir. 1974).

The instruction must tell the jurors that the government has the burden of proof and must meet the reasonable doubt standard concerning the defendant's presence at the relevant time and place. "The defense can easily backfire, resulting in a conviction because the jury didn't believe the alibi rather than because the government has satisfied the jury of the defendant's guilt beyond a reasonable doubt, and it is the trial judge's responsibility to avoid this possibility." United States v. Robinson, 602 F.2d 760, 762 (6th Cir. 1979).

The use of "on or about" instructions may pose special problems in alibi cases. *See* Committee Commentary 2.04 and, in particular, United States v. Neuroth, 809 F.2d 339, 341-42 (6th Cir. 1987).

6.03 ENTRAPMENT

(1) One of the questions in this case is whether the defendant was entrapped.

(2) Entrapment has two related elements. One is that the defendant was not already willing to commit the crime. The other is that the government, or someone acting for the government, induced or persuaded the defendant to commit it.

(3) If the defendant was not already willing to commit the crime prior to first being approached by government agents or other persons acting for the government, and the government persuaded him to commit it, that would be entrapment. But if the defendant was already willing to commit the crime prior to first being approached by government agents or other persons acting for the government, it would not be entrapment, even if the government provided him with a favorable opportunity to commit the crime, or made the crime easier, or participated in the crime in some way.

(4) It is sometimes necessary during an investigation for a government agent to pretend to be a criminal, and to offer to take part in a crime. This may be done directly, or the agent may have to work through an informant or a decoy. This is permissible, and without more is not entrapment. The crucial question in entrapment cases is whether the government persuaded a defendant who was not already willing to commit a crime to go ahead and commit it.

(5) The government has the burden of proving beyond a reasonable doubt that the defendant was already willing to commit the crime prior to first being approached by government agents or other persons acting for the government. Let me suggest some things that you may consider in deciding whether the government has proved this:

(A) Ask yourself what the evidence shows about the defendant's character and reputation.

(B) Ask yourself if the idea for committing the crime originated with or came from the government.

(C) Ask yourself if the defendant took part in the crime for profit.

(D) Ask yourself if the defendant took part in any similar criminal activity with anyone else before or afterwards.

(E) Ask yourself if the defendant showed any reluctance to commit the crime and, if he did, whether he was overcome by government persuasion.

(F) And ask yourself what kind of persuasion and how much persuasion the government used.

(6) Consider all the evidence, and decide if the government has proved that the defendant was already willing to commit the crime. Unless the government proves this beyond a reasonable doubt, you must find the defendant not guilty.

Committee Commentary 6.03
(current through May 1, 2025)

A valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct. Mathews v. United States, 485 U.S. 58, 62-63 (1988). *See also* United States v. Nelson, 922 F.2d 311, 317 (6th Cir. 1990).

In defining predisposition, the Sixth Circuit relies on the five factors identified in United States v. Nelson, 922 F.2d 311, 317 (6th Cir. 1990). *See, e.g.,* United States v. Harris, 1995 WL 6220, 2-3, 1995 U.S. App. LEXIS 254, 6 (6th Cir. 1995) (unpublished) (*quoting* United States v. McLernon, 746 F.2d 1098, 1112 (6th Cir. 1984)). Those five factors are: (1) the character or reputation of the defendant; (2) whether the suggestion of the criminal activity was originally made by the government; (3) whether the defendant was engaged in criminal activity for profit; (4) whether the defendant evidenced reluctance to commit the offense but was overcome by government persuasion; and (5) the nature of the inducement or persuasion offered by the government. *Nelson, supra* at 317. These five factors appear in plain English terms in parts (A), (B), (C), (E), and (F) of paragraph 5.

The pattern instruction adds a sixth factor, paragraph (D) ("Ask yourself if the defendant took part in any similar criminal activity with anyone else before or afterwards."). This addition has been specifically approved by a panel of the Sixth Circuit. United States v. Stokes, 1993 WL 312009, 3, 1993 U.S. App. LEXIS 21414, 9 (6th Cir. 1993) (unpublished). In *Stokes*, the panel explained that paragraph (D) concerns the evidence that may be considered when answering whether predisposition existed, and that "a jury may look at evidence of the defendant's character both before and after his arrest. Ex post facto evidence is relevant because it may shed light on whether defendant is the type of person who could commit the crime in question." *Id.*

In Jacobson v. United States, 503 U.S. 540 (1992), the Court refined the predisposition element, holding that to be convicted, a defendant must be predisposed to commit the criminal act prior to first being approached by government agents. *Jacobson*, 503 U.S. at 549. The words in paragraphs (3) and (5), "prior to first being approached by government agents or other persons acting for the government," are drawn from the *Jacobson* decision and from the modified instruction approved in United States v. Smith, 1994 WL 162584, 4, 1994 U.S. App. LEXIS 9914, 11 (6th Cir. 1994) (unpublished).

In paragraphs (2), (3) and (5), the instruction refers to the question of whether the defendant was "already willing" to commit the crime before being approached by government agents. In *Jacobson*, the Court used the term "predisposed" as opposed to "already willing." 503 U.S. at 549. The Committee decided to use the term "already willing" rather than "predisposed" because the Sixth Circuit has approved the use of "already willing," *see* United States v. Sherrod, 33 F.3d 723, 726 (6th Cir. 1994), and because it is consistent with a plain English approach.

In Mathews v. United States, 485 U.S. 58 (1988), the Supreme Court held that even if a

defendant denies one or more elements of the crime for which he is charged, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find that the government entrapped him.

As long as the defendant shows a predisposition to commit an offense, governmental participation in the commission of an offense by itself cannot be the basis of an entrapment defense. United States v. Tucker, 28 F.3d 1420 (6th Cir. 1994); United States v. Leja, 563 F.2d 244 (6th Cir. 1977).

No instruction on entrapment need be given unless there is some evidence of both government inducement and lack of predisposition. United States v. *Nelson*, supra, 922 F.2d at 317. It is the duty of the trial judge to determine whether there is sufficient evidence of entrapment to allow the issue to go before the jury. If there is, then the burden shifts to the government to prove predisposition. United States v. Meyer, 803 F.2d 246, 249 (6th Cir. 1986). The government must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime. *See, e.g.*, United States v. Jones, 575 F.2d 81, 83-84 (6th Cir. 1978).

The entrapment defense should not be confused with the defense of entrapment by estoppel. *See* United States v. Blood, 435 F.3d 612 (6th Cir. 2006) (noting distinction between the theories of the two defenses of entrapment and entrapment by estoppel). Entrapment by estoppel is covered in Instruction 6.09.

6.04 INSANITY

(1) One of the questions in this case is whether the defendant was legally insane when the crime was committed. Here, unlike the other matters I have discussed with you, the defendant has the burden of proving this defense, and he must prove it by clear and convincing evidence. This does not require proof beyond a reasonable doubt; what the defendant must prove is that it is highly probable that he was insane.

(2) A mental disease or defect by itself is not a defense. For you to return a verdict of not guilty because of insanity, the defendant must prove both of the following by clear and convincing evidence:

(A) First, that he had a severe mental disease or defect when he committed the crime; and

(B) Second, that as a result of this mental disease or defect, he was not able to understand what he was doing, or that it was wrong.

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

(4) In making your decision, you are not bound by what any of the witnesses testified. You should consider all the evidence, not just the opinions of the experts.

(5) So, you have three possible verdicts--guilty; not guilty; or not guilty only by reason of insanity. Keep in mind that even though the defendant has raised this defense, the government still has the burden of proving all the elements of the crime charged beyond a reasonable doubt.

Committee Commentary 6.04
(current through May 1, 2025)

The Sixth Circuit has not discussed this instruction specifically.

The Insanity Defense Reform Act of 1984, 18 U.S.C. § 17, (IDRA) states:

(a) Affirmative defense.--It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.
(b) Burden of proof.--The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

As the statute indicates, insanity is an affirmative defense and imposes on the defendant the burden of proving the defense by clear and convincing evidence. 18 U.S.C. § 17(b). The

statute also clarifies that the defendant's inability to appreciate the nature and quality or the wrongfulness of his acts must have been the result of a "severe" mental disease or defect. 18 U.S.C. § 17(a). This was intended to ensure that nonpsychotic behavior disorders such as "immature personality" or a pattern of "antisocial tendencies" cannot be used to raise the defense, and that the voluntary use of alcohol or drugs, even if they render the defendant unable to appreciate the nature and quality of his acts, do not constitute insanity. *See* S.R.Rep. No. 225, 98th Cong., 1st Sess. reprinted in 1984 U.S.Code Cong. & Adm.News 3182, 3407-3412.

Another statute, 18 U.S.C. § 4242, provides for a jury verdict of "not guilty only by reason of insanity."

The defendant has the burden of proving the insanity defense by a standard of "clear and convincing" evidence. 18 U.S.C. § 17(b). The Sixth Circuit has not defined this standard in a criminal case. In a civil case, United States v. Michigan, 653 F.2d 277, 279 (6th Cir. 1981), the Sixth Circuit discussed the clear and convincing standard of proof by using the terms "highly probable" to describe it. The definition of clear and convincing evidence as "highly probable" is in paragraph (1) of the instruction. In addition, language in paragraph (1) indicates that clear and convincing evidence is a lower standard of proof than beyond a reasonable doubt. The rationale is that this relationship between the two standards of proof might not be clear to jurors just from the names of the standards.

In Shannon v. United States, 512 U.S. 573 (1994), the Court concluded that the IDRA generally does not require that juries be instructed on the consequences of a verdict of not guilty by reason of insanity (NGI). The Court's concern was that the result of giving such an instruction would be "to draw the jury's attention toward the very thing – the possible consequences of its verdict – it should ignore." *Shannon*, 512 U.S. at 586. The Court ruled that an instruction on the consequences of an NGI verdict should not be given as a matter of general practice but may be given when necessary under certain limited circumstances. *Id*. at 587. The Court described those limited circumstances:

> If, for example, a witness or prosecutor states in the presence of the jury that a particular defendant would 'go free' if found NGI, it may be necessary for the district court to intervene with an instruction to counter such a misstatement. The appropriate response . . . will vary . . . . We note this possibility merely so that our decision will not be misunderstood as an absolute prohibition on instructing the jury with regard to the consequences of an NGI verdict.

Id. at 587-88.

In United States v. Kimes, 246 F.3d 800 (6th Cir. 2001), the court stated:

> It is important . . . to distinguish between two different types of mental defect defense. The first, sometimes called the "diminished responsibility" defense, applies where the defendant's mental condition "completely absolves him of criminal responsibility regardless of whether or not guilt can be proven." (*citing* United States v. Fazzini, 871 F.2d 635, 641 (7th Cir. 1989)). The second, often

> referred to as the "diminished capacity" defense, applies "where the defendant claims only that his mental condition is such that he or she cannot attain the culpable state of mind required by the definition of the crime." (*citing Fazzini*, 871 F.2d at 641).

Kimes, 246 F.3d at 805-06.

In United States v. Gonyea, 140 F.3d 649 (6th Cir. 1998), the court described the difference between the insanity defense and diminished capacity. "The insanity defense . . . 'is not concerned with the mens rea element of the crime; rather, it operates to completely excuse the defendant whether or not guilt can be proven.'" *Id.* at 651, *quoting* United States v. Twine, 853 F.2d 676, 678 (9th Cir. 1988). Therefore,

> [I]nsanity is a defense to all crimes, regardless of whether they require general or specific intent. By contrast, the diminished capacity defense . . . is not an excuse. Rather, it "is directly concerned with whether the defendant possessed the ability to attain the culpable state of mind which defines the crime." (citation omitted). [Thus] diminished capacity is a defense only to specific intent crimes . . . ."

Gonyea, 140 F.3d at 651, *quoting* United States v. Twine, *supra*.

The *Gonyea* court concluded that defendant's right to pursue a diminished capacity approach survived enactment of the IDRA, *Gonyea, supra* at 650 n.3, *citing* United States v. Newman, 889 F.2d 88, 91 (6th Cir. 1989), but the diminished capacity approach can be used only for specific intent crimes. *Gonyea*, 140 F.2d at 651.

One concern raised when the defendant can use a diminished capacity approach is explained well by the First Circuit in the Committee Commentary to Instruction 5.07, Insanity. The Committee states:

> If evidence tends to show that a defendant failed to understand the "nature and quality" of his/her conduct, that evidence will not only tend to help prove an insanity defense but it will also typically tend to raise reasonable doubt about the requisite culpable state of mind.

The Committee noted that the "overlap problem" could be solved by adequate instructions given by the trial judge. This conclusion was based upon the Supreme Court's opinion in Martin v. Ohio, 480 U.S. 228, 234 (1987), which provides that the trial judge must adequately convey to the jury that evidence supporting an affirmative defense may also be considered, where relevant, to raise reasonable doubt as to the requisite state of mind. The Sixth Circuit has not discussed this aspect of *Martin* in any greater detail, but a panel of the court has indicated some concern with the diminished capacity defense. *See* United States v. Willis, 1999 WL 591440, 6, 1999 U.S. App. LEXIS 18298, 17-18 (6th Cir. 1999) (unpublished) ("[Diminished capacity defense] is a potentially misleading use of the term 'defense.' We think it is important to distinguish between the use of psychological testimony to negate an element of the crime and the use of such testimony as an affirmative defense to the crime.").

In United States v. Medved, 905 F.2d 935, 940-41 (6th Cir. 1990), the Sixth Circuit upheld instructions telling the jury to consider all the evidence, not just the expert testimony, in determining if the defense had been established.

6.05 COERCION/DURESS

(1) One of the questions in this case is whether the defendant was coerced, or forced, to commit the crime. Here, unlike the other matters I have discussed with you, the defendant has the burden of proof.

(2) Coercion can excuse a crime, but only if the following five factors are met:

> (A) First, that the defendant reasonably believed there was a present, imminent, and impending threat of death or serious bodily injury [to himself] [to another];
>
> (B) Second, that the defendant had not recklessly or negligently placed himself [another] in a situation in which it was probable that he would be forced to choose the criminal conduct;
>
> (C) Third, that the defendant had no reasonable, legal alternative to violating the law;
>
> (D) Fourth, that the defendant reasonably believed his criminal conduct would avoid the threatened harm; and
>
> (E) Fifth, that the defendant did not maintain the illegal conduct any longer than absolutely necessary.

(3) If the defendant proves by a preponderance of the evidence the five elements listed above, then you must find the defendant not guilty.

(4) Preponderance of the evidence is defined as "more likely than not." In other words, the defendant must convince you that the five factors are more likely true than not true.

Use Note

In paragraph (2)(A), use the bracketed option that fits the facts.

Committee Commentary 6.05
(current through May 1, 2025)

The court identified the elements of this defense in United States v. Riffe, 28 F.3d 565, 569 (6th Cir. 1994) as follows:

> (1) that defendant was under an unlawful and present, imminent and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury;
> (2) that the defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct;

(3) that the defendant had no reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm;
(4) that a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm;
(5) that defendant did not maintain the illegal conduct any longer than absolutely necessary.

United States v. Riffe, *supra* at 569, *quoting* United States v. Newcomb, 6 F.3d 1129, 1134-35 (6th Cir. 1993) and *citing* United States v. Singleton, 902 F.2d 471, 472-73 (6th Cir. 1990). These elements are stated in the text of the instruction with some plain English drafting.

The court continues to hold that the duress defense requires a threat of physical harm. *See* United States v. Huff, 1998 WL 385555, 5, 1998 U.S. App. LEXIS 14988, 10 (6th Cir. 1998) (unpublished) (affirming refusal to give duress instruction because no evidence of a threat of physical harm).

As the bracketed language in paragraph (2)(A) indicates, the threat of death or serious bodily harm may be a threat against another. In United States v. Garner, 529 F.2d 962, 969-70 (6th Cir. 1976), a coercion instruction was required when a defendant alleged that she committed the illegal acts because of anonymous threats against her daughter.

In order to raise the defense and warrant an instruction, the defendant need only present some evidence, even weak evidence, of all five elements of the defense. United States v. Riffe, *supra* at 570, *citing Newcomb*, 6 F.3d at 1132. *See also* United States v. Garner, 529 F.2d 962, 970 (6th Cir. 1976).

As to the standard of proof, once an instruction is warranted, paragraph (3) places the burden on the defendant based on Dixon v. United States, 126 S. Ct. 2437, 2447-48 (2006). In *Dixon*, the Court held that in a prosecution of firearms offenses under 18 U.S.C. §§ 922(n) and 922(a)(6), the defendant has the burden of proving the defense of duress by a preponderance of the evidence. The Court indicated that the burden of proof for duress would be on the defendant for most offenses. The Court explained, "In the context of the firearms offenses at issue – as will usually be the case, given the long-established common-law rule – we presume that Congress intended the petitioner to bear the burden of proving the defense of duress by a preponderance of the evidence." *Dixon, supra*. The definition of the preponderance standard in paragraph (4) 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).

In cases involving any justification-type defense to a charge of possession of a firearm by a felon, significant modifications must be made in this instruction. *See* United States v. Singleton, 902 F.2d 471, 472-73 (6th Cir. 1990). *See also* United States v. Wolak, 923 F.2d 1193, 1198 (6th Cir. 1991) (proffered defense of temporary innocent possession).

6.06 SELF-DEFENSE

(1) One of the questions in this case is whether the defendant acted in self-defense.

(2) A person is entitled to defend himself against the immediate use of unlawful force. But the right to use force in self-defense is limited to using only as much force as reasonably appears to be necessary under the circumstances.

(3) The government has the burden of proving that the defendant did not act in self-defense. For you to find the defendant guilty, the government must prove that it was not reasonable for him to think that the force he used was necessary to defend himself against an immediate threat. Unless the government proves this beyond a reasonable doubt, you must find him not guilty.

Committee Commentary 6.06
(current through May 1, 2025)

As with most affirmative defenses, once the defendant raises the defense the government must establish beyond a reasonable doubt that the defendant's action was not in self-defense. Including a specific statement of the burden of proof in a self-defense instruction is preferable to relying on a general burden of proof instruction. DeGroot v. United States, 78 F.2d 244 (9th Cir. 1935); United States v. Corrigan, 548 F.2d 879 (10th Cir. 1977); United States v. Jackson, 569 F.2d 1003 (7th Cir. 1978).

Sixth Circuit decisions indicate that a defendant is limited in using force in self-defense to those situations where there are reasonable grounds for believing that such force is necessary under the circumstances. *See* United States v. Guyon, 717 F.2d 1536, 1541 (6th Cir. 1983).

6.07 JUSTIFICATION

(1) One of the questions in this case is whether the defendant was justified in committing the crime. Here, unlike the other matters I have discussed with you, the defendant has the burden of proof.

(2) For you to return a verdict of not guilty because of a justification defense, the defendant must prove the following five factors by a preponderance of the evidence:

(A) First, that the defendant reasonably believed there was a present, imminent, and impending threat of death or serious bodily injury [to himself] [to another];

(B) Second, that the defendant had not recklessly or negligently placed himself [another] in a situation in which it was probable that he would be forced to choose the criminal conduct;

(C) Third, that the defendant had no reasonable, legal alternative to violating the law;

(D) Fourth, that the defendant reasonably believed his criminal conduct would avoid the threatened harm; and

(E) Fifth, that the defendant did not maintain the illegal conduct any longer than absolutely necessary.

(3) If the defendant proves by a preponderance of the evidence the five elements listed above, then you must find the defendant not guilty.

(4) Preponderance of the evidence is defined as "more likely than not." In other words, the defendant must convince you that the five factors are more likely true than not true.

Use Note

In paragraphs (2)(A) and (B), use the bracketed option that fits the facts.

Committee Commentary 6.07
(current through May 1, 2025)

This instruction is based on United States v. Newcomb, 6 F.3d 1129 (6th Cir. 1993) and United States v. Singleton, 902 F.2d 471 (6th Cir. 1990). *See also* United States v. Ridner, 512 F.3d 846 (6th Cir. 2008); United States v. DeJohn, 368 F.3d 533 (6th Cir. 2004).

The court first recognized the defense of justification in *Singleton* in a prosecution of a felon in possession of a firearm under 18 U.S.C. § 922. The court stated, "The Sixth Circuit has not yet ruled on whether a felon can ever be justified in possession of a firearm. We hold that a defense of justification may arise in rare situations." *Singleton*, 902 F.2d at 472, *citing* United

States v. Gant, 691 F.2d 1159 (5th Cir. 1982) and United States v. Agard, 605 F.2d 665 (2d Cir. 1979). The court stated that the defense should be construed narrowly and then adopted the four factor test from *Gant*. *Singleton*, 902 F.2d at 472-73, *citing Gant*, 691 F.2d at 1162-63. The court concluded it was not error to refuse an instruction on the justification defense in this case because the defendant failed to show that he did not maintain possession of the firearm any longer than was absolutely necessary. *Singleton,* 902 F.2d at 473.

In *Newcomb*, the court elaborated on the justification defense established in *Singleton*. The court defined it as having five factors: the original four from *Gant* and the fifth added in *Singleton* that the defendant did not maintain the illegal conduct any longer than absolutely necessary. *Newcomb,* 6 F.3d at 1134-35 and 1134 n.4 ("This circuit . . . has clearly identified five distinct factors."). The court listed the elements of the defense:

> (1) that defendant was under an unlawful and present, imminent and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury;
> (2) that defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct;
> (3) that defendant had no reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm; . . .
> (4) that a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm; [and
> (5)] that the defendant . . . did not maintain the illegal conduct any longer than absolutely necessary.

Newcomb, 6 F.3d at 1134-35 (internal quotations and punctuation omitted), *quoting* United States v. Singleton, *supra* at 472-73. The court held that the justification defense applies not only when the defendant acts to avoid harm to himself but also when he acts to avoid harm to third parties, and concluded it was error to omit an instruction on the justification defense. *Newcomb*, 6 F.3d at 1135-36.

In paragraphs (2)(A) through (E), the five elements of the defense are taken from *Newcomb*, 6 F.3d at 1134-35. Some of the language was simplified consistent with a plain English approach.

Paragraph 2(A) has been drafted to reflect the *Newcomb* court's holding that the justification defense applies not only when the defendant acts to avoid harm to himself but also when he acts to avoid harm to third parties. *Newcomb,* 6 F.3d at 1135-36. On this issue, the *Newcomb* court explained that the language of United States v. Bailey, 585 F.2d 1087, 1110-11 (D.C. Cir. 1978) (Wilkey, J., dissenting) was broad enough to allow the defense to include fear on behalf of a third party, *Newcomb*, 6 F.3d at 1135 n.5, and further stated that most other circuits would treat this issue the same way. *Id.* at 1136. See also United States v. Ridner, 512 F.3d 846, 850 (6th Cir. 2008) ("[T]his Circuit also applies the necessity defense when a defendant is acting out of a desire to prevent harm to a third party.") (interior quotations and citation omitted).

"Instructions on the defense are proper if the defendant has produced evidence upon

which a reasonable jury could conclude by a preponderance of the evidence that each of the . . . five circumstances exist . . . ." United States v. Hargrove, 416 F.3d 486, 490 (6th Cir. 2005). *Accord,* United States v. Wiseman, 932 F.3d 411, 418 (6th Cir. 2019) and United States v. Ridner, 512 F.3d 846, 849-50 (6th Cir. 2008) (trial judge's duty is to require *prima facie* showing by defendant on each element of the defense) (*quoting* United States v. Johnson, 416 F.3d 464, 467-68 (6th Cir. 2005)). ***See also*** United States v. Clark, 2012 U.S. App. Lexis 13181 (6th Cir. June 26, 2012) (unpublished) (conviction vacated because refusing defendant's request to give Instruction 6.07 was error where defendant produced some evidence on each of the five elements). Paragraphs (1) and (2) place the burden on the defendant of proving the defense of justification by a preponderance of the evidence. United States v. Brown, 367 F.3d 549, 556 (6th Cir. 2004), *citing Singleton*, 902 F.2d at 472. The definition of the preponderance standard in paragraph (4) 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).

In *Newcomb*, the court described the difference between the defenses of justification and necessity. Justification and necessity are not interchangeable; rather, necessity is a type of justification. The court explained:

> "Justification," and its counterpart, "excuse," are terms for general categories of defenses. "Justification" pertains to the category of action that is exactly the action that society thinks the actor should have taken, under the circumstances; "excuse," on the other hand, denotes a more grudging acceptance of an action, where society wishes the actor had not done what he did, but will not hold him blameworthy. . . . "[N]ecessity" is . . . a particular example of a defense that, when proved, will justify the defendant's action. . . . "[T]he defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils. . . .". The precise content of the necessity defense has altered substantially over recent years. We will use the broader term of justification in discussing [the] proffered defense in an attempt to avoid confusion.

6 F.3d at 1133 (citations omitted). In view of this explanation, the Committee also used the broader term of justification. *But compare* United States v. Ridner, 512 F.3d 846 (6th Cir. 2008) (referring to the defense as necessity).

Singleton, *Newcomb*, *DeJohn*, and *Ridner* are all firearms possession cases, so the question arises whether the justification defense exists outside this context. Although the Sixth Circuit has not ruled explicitly, United States v. Milligan, 17 F.3d 177 (6th Cir. 1994) implies that the justification defense is not limited to firearms possession crimes. In *Milligan*, the district court gave a necessity defense instruction on mail and wire fraud, the jury convicted the defendant, and the Sixth Circuit held there was enough evidence to support the jury's rejection of the necessity defense. *Id.* at 181. On the conspiracy count, the district court refused to give a necessity instruction, and the Sixth Circuit affirmed this ruling on two grounds: the defendants failed to produce sufficient evidence that they ceased the criminal activity as soon as a safe opportunity arose, and conspiracy is a continuing offense. *Id.* at 182. *Milligan* indicates that district courts should be wary of giving necessity defense instructions for conspiracy charges, but it also indicates that the justification defense is not limited to firearms possession crimes.

6.08 FRAUD – GOOD FAITH DEFENSE

(See Instruction 10.04.)

Committee Commentary 6.08
(current through May 1, 2025)

Instruction 10.04 states a good faith defense to be used in conjunction with the elements instructions for mail, wire and bank fraud only; it does not articulate a general good faith defense. Instruction 10.04 is cross-listed here in Chapter 6 because it covers a defense, but its applicability is limited to those fraud crimes in Chapter 10.

6.09 ENTRAPMENT BY ESTOPPEL

(1) One of the questions in this case is whether the defendant reasonably relied on a government announcement that the criminal act was legal. This defense is called entrapment by estoppel. Here, unlike the other matters I have discussed with you, the defendant has the burden of proof.

(2) For you to return a verdict of not guilty based on the defense of entrapment by estoppel, the defendant must prove the following four factors by a preponderance of the evidence:

(A) First, that an agent of the United States government announced that the charged criminal act was legal.

(B) Second, that the defendant relied on that announcement.

(C) Third, that the defendant's reliance on the announcement was reasonable.

(D) Fourth, that given the defendant's reliance, conviction would be unfair.

(3) If the defendant proves by a preponderance of the evidence the four elements listed above, then you must find the defendant not guilty.

(4) Preponderance of the evidence is defined as "more likely than not." In other words, the defendant must convince you that the four factors are more likely true than not.

Committee Commentary 6.09
(current through May 1, 2025)

This instruction is based on United States v. Levin, 973 F.2d 463 (6th Cir. 1992) (*citing* United States v. Smith, 940 F.2d 710 (1st Cir. 1991)). *See also* United States v. Triana, 468 F.3d 308 (6th Cir. 2006) and United States v. Blood, 435 F.3d 612 (6th Cir. 2006).

"Entrapment by estoppel applies when an official tells a defendant that certain conduct is legal and the defendant believes that official to his detriment." *Triana*, 468 F.3d at 316 (*citing* Cox v. Louisiana, 379 U.S. 559 (1965)). The defense rests "upon a due process theory . . . focusing on the conduct of the government officials rather than on the defendant's state of mind." *Blood*, 435 F.3d at 626 (*citing* United States v. Batterjee, 361 F.3d 1210, 1218 (9th Cir. 2004)). The "underlying concept is that, under certain circumstances, an individual may be entitled reasonably to rely on the representations of an authorized government official as to the legality of his conduct." *Id*. Since the Due Process Clause requires that citizens have fair warning as to what is illegal, "[o]rdinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach." *Levin*, 973 F.2d at 467.

The Sixth Circuit first recognized the defense of entrapment by estoppel in *Levin*, 973 F.2d 463 (6th Cir. 1992). The court defined the defense as consisting of four factors: "To determine the availability of the defense, the court must conclude that (1) a government must

have announced that the charged criminal act was legal; (2) the defendant relied on the government announcement; (3) the defendant's reliance was reasonable; and, (4) given the defendant's reliance, the prosecution would be unfair." *Id.* at 469 (citations omitted).

In paragraphs 2(A) through (D), the four elements of the defense are based on this holding. Some of the language was simplified consistent with a plain English approach.

Paragraph 2(A) specifies that an agent of the United States government must announce that the charged criminal act was legal. The term "United States government" reflects the case law which specifies that the entrapment-by-estoppel defense will not shield a defendant from federal prosecution when the representations of legality were made by state officers. United States v. Hurst, 951 F.2d 1490, 1499 (6th Cir. 1991); *see also* United States v. Ormsby, 252 F.3d 844, 846 (6th Cir. 2001).

Paragraph (2)(A), and the instruction generally, require that a government agent have explicitly "announced" that the charged criminal act was legal. The terms "announced" and "announcement" are drawn from *Levin,* 973 F.2d at 468; *see also Triana*, 468 F.3d at 316 (quoting this term from *Levin*); *Blood*, 435 F.3d at 626 (same). Case law does not precisely define what constitutes an announcement. The Sixth Circuit has held that an announcement was established by official letters from Health Care Financing Administration "reimbursement specialists" approving the defendants' conduct. *Levin, supra* at 465. However, an announcement was not established by statements an FBI confidential informant made to defendants that a bank was legitimate and that the financing scheme had worked before. *Blood, supra* at 626. The Sixth Circuit has also held that probation officers' failure to prohibit defendant's involvement with federal health care programs was not an announcement because a government official did not "*explicitly* [tell defendant] his actions were legal . . . ." *Triana, supra* at 316 (emphasis in original).

Paragraph 2(B) requires that the defendant actually rely on the government announcement at the time the offense was committed. The defense does not apply to a subsequent grant of authority. United States v. Lowenstein, 108 F.3d 80, 83 (6th Cir. 1997). Similarly, if the defendant was not aware of the representation at the time of the offense, the defense fails. *Id*.

As indicated in paragraph 2(C), the defense will only succeed when, in light of the agent's statement, the defendant's conduct is reasonable. *See Blood*, 435 F.3d at 626 (defendants could not have reasonably relied on statements by a party they did not know to be a government agent at the time of the reliance).

Paragraph 2(D) requires that conviction would be "unfair." Case law does not clearly define unfairness. *See, e.g.,* United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 665 at 674-75 (1973); Cox v. Louisiana, 379 U.S. 559 at 570 (1965); Raley v. Ohio, 360 U.S. 423 at 426 (1959); *Levin*, 973 F.2d at 466. However, the court has emphasized the government's role in actively misleading the defendant. As the court explained in *Levin*, because the defense is grounded "upon fundamental notions of fairness embodied in the Due Process Clause of the Constitution," *id*. at 468, "criminal sanctions are not supportable if they are to be imposed under

'vague and undefined' commands; or if they are 'inexplicably contradictory'; *and certainly not if the Government's conduct constitutes 'active misleading.'*" *Id.* at 467 (citations omitted; emphasis in original).

Generally, the entrapment-by-estoppel defense developed in three Supreme Court cases: Raley v. Ohio, 360 U.S. 423 (1959); *Cox*, 379 U.S. 559; and United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655 (1973). In *Raley*, the defendants were convicted of contempt after they refused to answer the Ohio Un-American Activities Commission's questions about their alleged Communist party ties. The Court reversed the convictions, holding that the defendants had reasonably relied on the Commission's statements as to the right to refuse to answer. The Court noted that to uphold the convictions "would be to sanction an indefensible sort of entrapment by the State – convicting a citizen for exercising a privilege which the State clearly had told him was available to him." *Id*. at 426. In *Cox, supra*, the Court reversed the defendant's conviction under a Louisiana statute that prohibited picketing "near" a courthouse. The Court cited *Raley* as an analogous case:

> In effect, appellant was advised that a demonstration at the place it was held would not be one "near" the courthouse within the terms of the statute. . . . The Due Process Clause does not permit convictions to be obtained under such circumstances.

Id. at 570 (citations omitted). Finally, in *Pennsylvania Indus. Chem. Corp*., *supra*, the Court reversed the defendant's conviction and remanded the case to allow the defendant corporation to present evidence to satisfy an entrapment-by-estoppel defense when the defendant claimed reliance on erroneous agency regulations that permitted the discharge of pollutants into rivers.

The defendant bears the "threshold evidentiary burden" to prove that he is entitled to an instruction on the defense. *Triana*, 468 F.3d at 315 n.3 and 316. The case law does not clearly identify the amount of evidence that will satisfy this threshold requirement. *See, e.g., Triana*, 468 F.3d at 315 n.3 and 316 ("tenuous" evidence is not enough; defendant must show that an "evidentiary basis exists upon which the instruction can be issued") (citations omitted). "As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Mathews v. United States, 485 U.S. 58, 63 (1988); *see also Triana*, 468 F.3d at 315 ("A district court must grant an instruction on the defendant's theory of the case if the theory has some support in the evidence and the law.") (citation omitted). The Sixth Circuit and panels of the circuit have occasionally concluded that the threshold showing was not made and that the district court properly omitted an instruction on the defense. *See Hurst*, 951 F.2d at 1499; United States v. Haire, 2004 U.S. App. LEXIS 4183 at 17, 2004 WL 406141 at 5 (6th Cir. 2004) (unpublished); United States v. Gross, 1997 U.S. App. LEXIS 25318 at 3, 1997 WL 572938 at 1 (6th Cir. 1997) (unpublished). However, district courts are cautioned that "so long as there is even weak supporting evidence, '[a] trial court commits reversible error in a criminal case when it fails to [give] an adequate presentation of a theory of defense.'" *Triana,* 468 F.3d at 316 (*quoting* United States v. Plummer, 789 F.2d 435, 438 (6th Cir. 1986)).

The defendant bears the burden of proving entrapment by estoppel by a preponderance of the evidence. United States v. Beaty, 245 F.3d 617, 624 (6th Cir. 2001). The definition of the

preponderance standard in paragraph (4) 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).

In contrast to the entrapment defense, the entrapment-by-estoppel defense does not depend on the defendant's pre-disposition to commit the offense. *See Blood*, 435 F.3d at 626 ("defendant's pre-disposition to commit an offense is not at issue in an entrapment by estoppel defense"). For this reason, the Sixth Circuit has been careful to distinguish entrapment from entrapment by estoppel. In *Blood* the district court's instruction, which incorporated both elements of entrapment and entrapment by estoppel, "*could* have [been] 'confusing'" (internal citations omitted) (emphasis added). *Id*. The court held the error was harmless, because the defendant presented no evidence to justify the estoppel defense. *Id*.

Other circuits recognize the defense of entrapment by estoppel under different names, including "reliance on public authority," United States v. Howell, 37 F.3d 1197 (7th Cir. 1994), "official misleading," "unconscionably misleading conduct," or "misleading government conduct defense," United States v. Batterjee, 361 F.3d 1210, 1216-17 (9th Cir. 2004).

Chapter 7.00

SPECIAL EVIDENTIARY MATTERS

Table of Instructions

7.01 INTRODUCTION

That concludes the part of my instructions explaining the elements of the crime [and the defendant's position]. Next I will explain some rules that you must use in considering some of the testimony and evidence.

Use Note

The bracketed language in the first sentence should be used when a defense has been explained or a defense theory instruction has been given.

Committee Commentary 7.01

(current as of May 1, 2025)

This instruction is a transitional one to be used as a lead-in to the instructions explaining the rules for evaluating evidence.

7.02A DEFENDANT'S ELECTION NOT TO TESTIFY OR PRESENT EVIDENCE

(1) A defendant has an absolute right not to testify [or present evidence]. The fact that he did not testify [or present any evidence] cannot be considered by you in any way. Do not even discuss it in your deliberations.

(2) Remember that it is up to the government to prove the defendant guilty beyond a reasonable doubt. It is not up to the defendant to prove that he is innocent.

Use Note

The bracketed language in paragraph (1) should be included when the defense has not presented any evidence.

If there is more than one non-testifying defendant, and some, but not all, the defendants request this instruction, it should be given in general terms without using the defendants' names.

Committee Commentary 7.02A

(current as of May 1, 2025)

The need for such an instruction in federal criminal cases was first noted in Bruno v. United States, 308 U.S. 287 (1939), in which a unanimous court held that 18 U.S.C. § 3481 required such an instruction where the defendant requested it. In Carter v. Kentucky, 450 U.S. 288 (1981), the Court firmly based the right on the Fifth Amendment and extended the requirement to state criminal prosecutions. The instruction is patterned after Federal Judicial Center Instruction 22.

In Lakeside v. Oregon, 435 U.S. 333 (1978), the Supreme Court upheld the practice of a state trial judge giving such an instruction over the defendant's objection that the instruction would call attention to his failure to testify. The *Lakeside* Court reasoned that the Fifth and Fourteenth Amendments bar only adverse comment on a defendant's failure to testify, and that "a judge's instruction that the jury must draw no adverse inferences of any kind from the defendant's exercise of this privilege not to testify is 'comment' of an entirely different order." *Id.* at 339. While it may be permissible to give this instruction over the defendant's objection, the better practice is not to give it unless it is requested by the defendant.

The Committee found no Sixth Circuit opinions where, in a case involving multiple defendants, one defendant requested such an instruction while another objected to it. However, following the reasoning in *Carter* and *Lakeside*, it is clear that any such instruction is not harmful to a co-defendant. The Commentary to Federal Judicial Center Instruction 22 recommends that if there is more than one non-testifying defendant and an instruction is requested by some but not all such defendants, it should be given in general terms without the use of the defendants' names.

7.02B DEFENDANT'S TESTIMONY

(1) You have heard the defendant testify. Earlier, I talked to you about the "credibility" or the "believability" of the witnesses. And I suggested some things for you to consider in evaluating each witness's testimony.

(2) You should consider those same things in evaluating the defendant's testimony.

Use Note

This instruction should be used when the defendant chooses to testify.

Committee Commentary 7.02B
(current as of May 1, 2025)

This instruction refers back to Instruction 1.07A Credibility of Witnesses.

7.02C WITNESS OTHER THAN THE DEFENDANT INVOKING THE FIFTH AMENDMENT

(1) You have heard _____ [*insert witness's name*] exercise his right under the Fifth Amendment to the United States Constitution to refuse to answer questions because the testimony might tend to incriminate him.

(2) You must not infer anything at all, for or against either the government or the defendant, because the witness did not answer.

Use Note

This instruction should be used when a witness other than the defendant declines to answer questions because of the Fifth Amendment.

Committee Commentary 7.02C
(current as of May 1, 2025)

This instruction is a cautionary instruction to help offset any prejudice that may arise when a witness declines to testify based on the Fifth Amendment.

The Sixth Circuit has quoted limiting instructions which helped avoid error when witnesses asserted the Fifth Amendment. *See* United States v. Mack, 159 F.3d 208, 217 (6th Cir. 1998); United States v. Okeezie, 1993 WL 20997, 10, 1993 U.S. App. LEXIS 1968, 4 (6th Cir. 1993) (unpublished). The language of Instruction 7.02C is based on these quoted instructions.

The Fifth Amendment to the United States Constitution states that "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ." This privilege applies to a witness at a trial as well as to the defendant. *See, e.g., Mack, supra*; United States v. Gaitan-Acevedo, 148 F.3d 577, 588 (6th Cir. 1998). Thus, the parties' right to compel witnesses to testify must yield to the witness's assertion of the Fifth Amendment, assuming it is properly invoked. *Mack, supra*; *Gaitan-Acevedo,* 148 F.3d at 588, *citing* United States v. Damiano, 579 F.2d 1001, 1003 (6th Cir. 1978).

To assert the privilege, the witness must have a reasonable fear of danger of prosecution. *Mack*, *supra*; *Gaitan-Acevedo, supra* at 588, *citing Damiano, supra*. *See also* In re Morganroth, 718 F.2d 161, 167 (6th Cir. 1983) ("reasonable cause to apprehend a real danger of incrimination"), *citing* Hoffman v. United States, 341 U.S. 479 (1951). The privilege can be asserted to cover answers which would themselves support a criminal conviction, and also to cover answers which would furnish a link in the chain of evidence needed to prosecute. *In re* Morganroth, *supra* at 164, *citing Hoffman*, 341 U.S. at 486.

Although a witness has a right to assert the Fifth Amendment when called to testify, there is some danger in allowing the witness to assert it in front of a jury. In United States v. Vandetti,

623 F.2d 1144 (6th Cir. 1980), the court explained:

> There are two constitutional problems which may arise when a witness is presented who refuses to testify relying upon the fifth amendment privilege. The first problem is that such a witness permits the party calling the witness to build its case out of inferences arising from the use of the testimonial privilege, a violation of due process. "Neither side has the right to benefit from any inferences the jury may draw from the witness' assertion of the privilege alone or in conjunction with questions that have been put to him." Nevertheless, although guilt is not properly inferable from the exercise of the privilege, it is feared that its assertion in the presence of the jury may have a disproportionate effect on its deliberations.
>
> Second, calling such a witness encroaches upon the right to confrontation. . . . The probative value of this sort of testimony is almost entirely undercut by the impossibility of testing it through cross-examination.

Vandetti, supra (citations omitted). In addition, the American Bar Association Standards for Criminal Justice provide that the prosecution and defense should not call a witness in the presence of the jury who the party knows will claim a valid privilege not to testify. See American Bar Association Standards for Criminal Justice, the Prosecution Function, Standard 3-5.7(c) and *id.*, the Defense Function, Standard 4-7.6(c).

Notwithstanding these dangers, parties may still seek to call a witness, subject to the court's discretion, knowing the witness will refuse to answer under the Fifth Amendment. United States v. Vandetti, *supra* at 1147, *citing* United States v. Kilpatrick, 477 F.2d 357, 360 (6th Cir. 1973) and United States v. Compton, 365 F.2d 1, 5 (6th Cir. 1966). *See, e.g.,* United States v. Mack, *supra* at 217. *See also* Lindsey v. United States, 484 U.S. 934 (1987) (White and Brennan, JJ., dissenting from denial of cert., acknowledging Sixth Circuit law that party may seek to call witness whom party knows will assert the Fifth Amendment and noting circuit split on this issue).

Because of the competing interests involved, *i.e.*, the constitutional concerns versus the factfinders' need to operate with as much relevant information as possible, the judge should "closely scrutinize" requests to call a witness who has indicated he will assert the Fifth Amendment. *Vandetti*, 623 F.2d at 1147, *citing* United States v. Maffei, 450 F.2d 928, 929 (6th Cir. 1971). The judge should "weigh a number of factors in striking a balance between the competing interests." *Vandetti,* 623 F.2d at 1149, *citing* Eichel v. New York Central R. Co, 375 U.S. 253, 255 (1963). "The judge must determine whether the probative value of the proffered evidence is substantially outweighed by the danger of unfair prejudice." *Vandetti,* 623 F.2d at 1149, *citing* F. R. Evid. 403. Factors to balance include: (1) the extent of the questioning following the witness's assertion of the Fifth Amendment, *see Vandetti*, 623 F.2d at 1149; (2) the value of the testimony sought, *id.*; (3) the phrasing of the questions to minimize prejudice, *id.* at 1150; and (4) the effect of a limiting instruction, United States v. Epley, 52 F.3d 571, 577 (6th Cir. 1995) and *Vandetti*, 623 F.2d at 1149.

The Sixth Circuit has elaborated on the role of cautionary instructions, stating:

> Even though a cautionary instruction may be useful, it may not be sufficiently ameliorative in all cases. . . . Some courts have suggested that any prejudice to the government arising from the absence of a witness, who, if called, would assert his fifth amendment privilege, can be dissipated by an instruction that the witness is not available to either side and that no inferences about his testimony may be drawn by the jury.

Vandetti, 623 F.2d at 1148 & 1150 (citations omitted).

7.03 OPINION TESTIMONY

(1) You have heard the testimony of _____, who testified as an opinion witness.

(2) You do not have to accept _____'s opinion. In deciding how much weight to give it, you should consider the witness's qualifications and how he reached his conclusions. Also consider the other factors discussed in these instructions for weighing the credibility of witnesses.

(3) Remember that you alone decide how much of a witness's testimony to believe, and how much weight it deserves.

Use Note

If the witness testifies to both opinions and facts, a cautionary instruction such as Instruction 7.03A on the dual role should be given in addition to Instruction 7.03. This situation usually arises when law enforcement witnesses testify. See the discussion in the commentary below.

Committee Commentary 7.03
(current as of May 1, 2025)

In United States v. Johnson, 488 F.3d 690 (6th Cir. 2007), the court said that district judges should use the term "opinion" rather than "expert" in the presence of the jury. *Id.* at 698. Although the court found no plain error on the facts in *Johnson*, the court explained that, "'Except in ruling on an objection, the court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion . . . .'" *Johnson, supra* at 697, *quoting* ABA Civil Trial Practice Standard 17 (Feb. 1998). Based on *Johnson*, Instruction 7.03 uses the term "opinion" in lieu of the term "expert."

In *Johnson*, the court also counseled district judges not to certify before the jury that a witness is qualified as an expert. The court explained, "Instead, the proponent of the witness should pose qualifying and foundational questions and proceed to elicit opinion testimony. If the opponent objects, the court should rule on the objection, allowing the objector to pose voir dire questions to the witness's qualifications if necessary and requested." *Johnson, supra* at 698.

The *Johnson* court's disapproval of certifying a witness as an expert is consistent with previous cases. In Berry v. City of Detroit, 25 F.3d 1342 (6th Cir. 1994), the court pointed out that the Federal Rules of Evidence do not call for a proffer and stated that in a previous case, United States v. Kozminski, 821 F.2d 1186, 1219 (6th Cir. 1987) (en banc) (dissent), the Sixth Circuit "counseled against putting some general seal of approval on an expert after he has been qualified but before any questions have been posed to him." Berry v. City of Detroit, *supra* at 1351.

In paragraph (2), the final sentence mentioning other instructions on the credibility of witnesses refers to Instruction 1.07 Credibility of Witnesses, which identifies the general bases

for evaluating witness credibility.

The admissibility of expert testimony is governed by Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993) and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). These decisions do not affect the instruction.

"Expert testimony, even if uncontradicted, may be believed in its entirety, in part, or not at all." Dawahare v. Spencer, 210 F.3d 666, 671 (6th Cir. 2000). In holding that the arbitration panel was not compelled to accept the expert's damages evidence, the Sixth Circuit cited authority from other circuits, including Quinones-Pacheco v. American Airlines, Inc., 979 F.2d 1, 5 (1st Cir. 1992) (holding that fact finder is not ordinarily bound by uncontradicted expert opinion testimony, particularly where testimony "lacks great convictive force" in context of evidence as a whole); Gregg v. U.S. Indus., Inc., 887 F.2d 1462, 1469-70 (11th Cir. 1989) (holding that expert testimony is not conclusive and need not be accepted).

Caution is required when a law enforcement officer testifies both as a fact witness and as an opinion witness. See Instruction 7.03A.

Under the Federal Rules of Evidence, an expert may testify in order to assist the trier of fact to understand the evidence or determine a fact in issue. Such testimony may be in the form of an opinion. Fed. R. of Evid. 702. The basic approach to opinion testimony in the Federal Rules of Evidence is to allow it when it is helpful to the trier of fact. This includes opinions as to an ultimate issue to be decided by the trier of fact. Fed. R. of Evid. 704. However, opinion testimony as to ultimate issues with respect to a defendant's mental state or condition may not be introduced. Fed. R. of Evid. 704(b); United States v. Pickett, 604 F.Supp. 407 (S.D. Ohio 1985).

7.03A WITNESS TESTIFYING TO BOTH FACTS AND OPINIONS

(1) You have heard the testimony of _____, who testified to both facts and opinions. Each of these types of testimony should be given the proper weight.

(2) As to the testimony on facts, consider the factors discussed earlier in these instructions for weighing the credibility of witnesses.

(3) As to the testimony on opinions, you do not have to accept _____'s opinion. In deciding how much weight to give it, you should consider the witness's qualifications and how he reached his conclusions along with the other factors discussed in these instructions for weighing the credibility of witnesses.

(4) Remember that you alone decide how much of a witness's testimony to believe, and how much weight it deserves.

Use Note

If this instruction is given at the time the witness testifies, the language in paragraphs (2) and (3) referring to other instructions should be modified.

Committee Commentary 7.03A
(current as of May 1, 2025)

Caution is required when a witness testifies both as a fact witness and as an opinion witness. In this situation, which often arises when law enforcement witnesses testify, the court should consider giving a cautionary instruction so that the jury can give proper weight to each type of testimony and the court can guard against the inherent risks of confusion when a witness testifies in both roles.

The court has identified three risks of confusion in dual testimony. These include: "(1) that the agent who testifies as an expert receives unmerited credibility for lay testimony, (2) that the witnessခ့်s dual role ... confuse[s] the jury, and (3) that the jury may unduly credit the opinion testimony of an investigating officer based on a perception that the expert was privy to facts about the defendant not presented at trial." United States v. Barron, 940 F.3d 903, 920 (6th Cir. 2019), *quoting* United States v. Rios, 830 F.3d 403, 414 (6th Cir. 2016) (internal quotations and citations omitted).

In United States v. Lopez-Medina, 461 F.3d 724 (6th Cir. 2006), the court vacated the conviction, holding it was plain error to allow a government agent to give dual testimony as both a fact witness and an opinion witness when no cautionary instruction was given and there was no clear demarcation between the officer's fact testimony and opinion testimony. *Id.* at 744-45. In such cases, the court " 'should take care to assure that the jury is informed of the dual roles of a law enforcement officer as a fact witness and an expert witness, so that the jury can give proper weight to each type of testimony.' " *Id.* at 743, *quoting* United States v. Thomas, 74 F.3d 676,

683 (6th Cir. 1996), *abrogated on other grounds by* General Elec. Co. v. Joiner, 522 U.S. 136, 143 (1997).

The best practice is always to provide a cautionary instruction like Inst. 7.03A. The court has commented that there are two ways to ensure the jury is informed of the dual roles. *See Barron, supra* at 920 ("We have recognized two primary ways to assure that the jury is properly informed of the dual roles: (1) by providing 'an adequate cautionary jury instruction,' or (2) 'clear demarcation between expert and fact witness roles.'") (cleaned up). For the approach based on (1) providing a cautionary jury instruction, Inst. 7.03A is adequate and proper. *Barron*, *supra* at 920-21.

Paragraph (1) is based on the phrase from *Lopez-Medina* quoted above that the jury should be informed of the dual roles so it can give "proper weight to each type of testimony."

Paragraph (2) refers to the factors mentioned in Instruction 1.07 Credibility of Witnesses.

Paragraphs (3) and (4) are based on Instruction 7.03 Opinion Testimony.

7.04 IMPEACHMENT BY PRIOR INCONSISTENT STATEMENT NOT UNDER OATH

(1) You have heard the testimony of _____. You have also heard that before this trial he made a statement that may be different from his testimony here in court.

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

Use Note

This instruction must be given when a prior inconsistent statement which does not fall within Fed.R.Evid. 801(d)(1)(A) has been admitted.

If several prior inconsistent statements were admitted, some for impeachment purposes and others as substantive evidence, this instruction should identify which statements were offered for impeachment purposes.

Committee Commentary 7.04
(current as of May 1, 2025)

A panel of the Sixth Circuit has stated that this instruction is "clearly a correct statement of the law . . . ." United States v. Johnson, 1995 WL 517229, 3, 1995 U.S. App. LEXIS 32896, 6 (6th Cir. 1995) (unpublished).

Often the question is not the content of the instruction but whether it should be given. In two cases, the Sixth Circuit did not resolve whether omitting the instruction was error because it found the omission harmless. In United States v. Aguwa, 123 F.3d 418, 422 (6th Cir. 1997), the trial court refused to instruct that prior inconsistent statements not under oath are evidence of credibility only and not substantive evidence. The Sixth Circuit affirmed the conviction, stating that the defendant was not prejudiced and might have actually benefitted from the absence of such an instruction. *Id.*

In the second case the Sixth Circuit concluded it was error to give the instruction but found the error harmless. *See* United States v. Toney, 161 F.3d 404 (6th Cir. 1998) (holding it was error for district court to give Instruction 7.04 because no evidence of a prior inconsistent statement was admitted but error harmless).

This instruction deals only with prior inconsistent statements *not* under oath. The Committee considered drafting an instruction on prior statements under oath and discarded the idea. As the First Circuit explains in commentary, the instruction on prior inconsistent statements not under oath is:

> for use where a witness's prior statement is admitted only for impeachment purposes. Where a prior statement is admitted substantively under Fed.R. Evid. 801(d)(1), this instruction is not appropriate. Once a prior statement is admitted substantively as non-

hearsay under Rule 801(d)(1), it is actual evidence and may be used for whatever purpose the jury wishes. No instruction seems necessary in that event, but one may refer to Federal Judicial Center Instructions 33 and 34.

Pattern Jury Instructions: First Circuit, Criminal Cases, Instruction 2.02 Comment.

The traditional view had been that a prior statement of a witness is hearsay if offered to prove the matters asserted therein. This did not preclude the use of the prior statement to impeach the witness if the statement was inconsistent with his testimony. Fed. R. Evid. 801(d)(1)(A) carved out an exception where the prior statement was under oath in a judicial hearing or in a deposition. Where a prior statement does not fall within Fed. R. Evid. 801(d)(1)(A), the jury must be instructed that the statement is offered solely to impeach the credibility of the witness. United States v. Harris, 523 F.2d 172, 175 (6th Cir.1975).

If during the course of the trial, several prior inconsistent statements were admitted, some for impeachment purposes and others as substantive evidence, then this instruction should be given with the court identifying the impeaching statement or statements.

7.05A IMPEACHMENT OF DEFENDANT BY PRIOR CONVICTION

(1) You have heard that before this trial the defendant was convicted of a crime.

(2) This earlier conviction was brought to your attention only as one way of helping you decide how believable his testimony was. You cannot use it for any other purpose. It is not evidence that he is guilty of the crime that he is on trial for now.

Use Note

This instruction should not be given if evidence of other crimes has been admitted for one of the approved purposes under Fed. R. Evid. 404(b). Instead, the jury should be specifically instructed on the purpose for which the evidence was admitted. See Instruction 7.13.

Committee Commentary 7.05A
(current as of May 1, 2025)

Generally, evidence of a defendant's prior conviction is only admissible to attack his credibility as a witness. See Fed. R. Evid. 609; United States v. Sims, 588 F.2d 1145, 1149 (6th Cir.1978). The defendant is entitled, upon request, to an instruction limiting the jury's consideration of the conviction to the purpose for which it was admitted.

The defendant's commission of other crimes may also be admissible for other purposes under Fed. R. Evid. 404(b). In such cases, this instruction should not be given. Instead the jury should be specifically instructed on the purpose for which the evidence may be considered. See Instruction 7.13.

7.05B IMPEACHMENT OF A WITNESS OTHER THAN DEFENDANT BY PRIOR CONVICTION

(1) You have heard the testimony of _____. You have also heard that before this trial he was convicted of a crime.

(2) This earlier conviction was brought to your attention only as one way of helping you decide how believable his testimony was. Do not use it for any other purpose. It is not evidence of anything else.

Committee Commentary 7.05B

(current as of May 1, 2025)

This instruction should be used when a witness other than the defendant is impeached by a prior conviction.

7.06A TESTIMONY OF A PAID INFORMANT

(1) You have heard the testimony of _____. You have also heard that he received money [or _____] from the government in exchange for providing information.

(2) The use of paid informants is common and permissible. But you should consider _____'s testimony with more caution than the testimony of other witnesses. Consider whether his testimony may have been influenced by what the government gave him.

(3) Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

Use Note

The bracketed language in paragraph (1) should be used when some consideration other than money has been given.

This instruction may not be necessary if the informant's testimony has been materially corroborated, or if an accomplice cautionary instruction has been given.

Committee Commentary 7.06A

(current as of May 1, 2025)

In United States v. Wheaton, 517 F.3d 350 (6th Cir. 2008), the court rejected a challenge to an instruction similar to Instruction 7.06A for two reasons. The first reason was that the instruction given provided ample notice that the testimony should be viewed with suspicion; the second reason was that the instruction given was "almost identical to . . . Sixth Circuit Pattern Criminal Jury Instruction 7.06A . . . ." *Id.* at 363.

In On Lee v. United States, 343 U.S. 747, 757 (1952), the Supreme Court said that to the extent an informant's testimony raises serious questions of credibility, the defendant is entitled to have the issue submitted to the jury "with careful instructions."

No cautionary instruction is required when there is no evidence that the witness was an informant. See United States v. Vinson, 606 F.2d 149, 154 (6th Cir. 1979). Less clear is whether an instruction is required if the witness's testimony has been materially corroborated. In United States v. Griffin, 382 F.2d 823, 827-28 (6th Cir. 1967), the Sixth Circuit indicated in dictum that even if corroborated, the better practice would be to give a cautionary instruction. But subsequently, in United States v. Vinson, *supra*, the Sixth Circuit rejected the argument that a cautionary instruction should have been given, in part on the ground that the witness's testimony had been materially corroborated. *Vinson* also indicated that no instruction was required because the district court had instructed the jury to treat the witness's testimony with care because of evidence that he was an accomplice, and that this "had the same cautionary effect" as if the court had given an informant instruction. *Id.*

Instruction 7.06A does not use the term "informer" in order to avoid pejorative labeling. *See* United States v. Turner, 490 F.Supp. 583 (E.D.Mich.1979), *aff'd*, 633 F.2d 219 (6th Cir.1980). It is based on Federal Judicial Center Instruction 24.

7.06B TESTIMONY OF AN ADDICT-INFORMANT UNDER GRANT OF IMMUNITY OR REDUCED CRIMINAL LIABILITY

(1) You have heard the testimony of _____. You have also heard that he was using _____ during the time that he testified about, and that the government has promised him that he will not be prosecuted for _____ [or will _____] in exchange for his testimony.

(2) It is permissible for the government to make such a promise. But you should consider _____'s testimony with more caution than the testimony of other witnesses. An addict may have a constant need for drugs, and for money to buy drugs, and may also have a greater fear of imprisonment because his supply of drugs may be cut off. Think about these things and consider whether his testimony may have been influenced by the government's promise.

(3) Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

Use Note

The bracketed language in paragraph (1) should be used when some consideration other than an agreement not to prosecute has been given by the government.

Whether this instruction must be given may depend on the particular circumstances of the case.

Committee Commentary 7.06B

(current as of May 1, 2025)

In United States v. Anderson, 1998 WL 833701, 1998 U.S. App. LEXIS 30121 (6th Cir. 1998) (unpublished), the defendant requested an "addict-witness instruction" and the district court refused. A panel of the Sixth Circuit noted that Pattern Instruction 7.06B, and the underlying case law, refer to addict-*informants*, and then went on to discuss the propriety of refusing the instruction. The panel stated there was no "per se rule" requiring this instruction whenever an addict-informant testifies; district courts should assess the need for such an instruction based on the circumstances of each case. *Anderson*, 1998 WL at 4, 1998 LEXIS at 12, *quoting* United States v. Brown, 946 F.2d 1191, 1195 (6th Cir. 1991). The panel concluded that, assuming that the addict-informant instruction applied in the case of an addict-witness/codefendant, the district court did not err by refusing the instruction because the jury was aware of the witness's addiction, the witness's testimony was corroborated, and a cautionary instruction was given. *Anderson*, 1998 WL at 4, 1998 LEXIS at 13, *citing* United States v. McGhee, 882 F.2d 1095, 1100 (6th Cir. 1989) (stating there is less need for an addict-informant instruction when the jury is aware of the witness's addiction and there is substantial corroboration for the witness's testimony).

In other cases, panels of the Sixth Circuit have likewise concluded that omission of an addict-informant instruction was not error. In United States v. Rich, 2000 WL 92269, 5, 2000 U.S. App. LEXIS 826, 13 (6th Cir. 2000) (unpublished), the panel reiterated that there was no per

se rule requiring an addict-informant instruction, *citing Brown, supra* at 1195, and concluded it was not error to refuse the instruction because no evidence suggested that the witness was addicted at the relevant time. In United States v. Lopez, 1999 WL 397947, 1999 U.S. App. LEXIS 11827 (6th Cir. 1999) (unpublished), a panel held that it was not error to omit an addict-informant instruction. The trial judge gave a general witness credibility instruction, cautioning the jury to weigh carefully testimony affected by a witness's own interest, and the panel stated that this instruction accomplished the same objective as an addict-informant instruction by warning jurors that the credibility of the witnesses might be suspect.

The instruction is a plain English version of the instruction approved in United States v. Hessling, 845 F.2d 617 (6th Cir.1988). *Hessling* approved the instruction but did not mandate its use.

7.07 TESTIMONY OF A WITNESS UNDER GRANT OF IMMUNITY OR REDUCED CRIMINAL LIABILITY

(1) You have heard the testimony of _____. You have also heard that the government has promised him that [he will not be prosecuted for _____] [he will _____] in exchange for his cooperation.

(2) It is permissible for the government to make such a promise. But you should consider _____'s testimony with more caution than the testimony of other witnesses. Consider whether his testimony may have been influenced by the government's promise.

(3) Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

Use Note

In paragraph (1) , the first bracketed language should be used when the plea agreement is based on a government promise not to prosecute; the second bracketed language should be used when the plea agreement is based on some other consideration, such as a recommendation for a reduced sentence. It should also be used when the government and the defendant have a use immunity agreement.

This instruction may not be necessary when the witness's testimony has been materially corroborated.

Committee Commentary 7.07
(current as of May 1, 2025)

The Sixth Circuit has described this as a "proper jury instruction[]" that "correctly" and "properly" informs the jury about this issue. United States v. Hynes, 467 F.3d 951, 971 (6th Cir. 2006) (instruction given was Pattern Instruction 7.07, see Joint Appendix at 940).

The purpose of this instruction is to alert the jury to potential credibility problems with witnesses who have entered into plea bargains in exchange for their testimony.

The instruction avoids using the terms plea bargain and plea agreement.

Since the rationale for this instruction is similar to that for Instruction 7.06A on the testimony of an informant, the limitations from United States v. Vinson, 606 F.2d 149 (6th Cir.1979) should apply. Where ample corroboration of the testimony exists, the instruction may not be necessary.

7.07A TESTIMONY OF A WITNESS UNDER COMPULSION

(1) You have heard that the court compelled the testimony of _____. You have also heard that his testimony cannot be used against him by the government except in a prosecution for perjury.

(2) You should consider _____'s testimony with more caution than the testimony of other witnesses. Consider whether his testimony may have been influenced by this grant of immunity.

(3) Do not convict any of the defendants based on the unsupported testimony of such a witness, standing alone, unless you believe that testimony beyond a reasonable doubt.

Use Note

This instruction may not be necessary when the witness's testimony has been materially corroborated.

Committee Commentary 7.07A

(current as of May 1, 2025)

The purpose of this instruction is to alert the jury to potential credibility problems with witnesses who testified under compulsion. *See* 18 U.S.C. § 6001 *et seq.*

7.08 TESTIMONY OF AN ACCOMPLICE

(1) You have heard the testimony of _____. You have also heard that he was involved in the same crime that the defendant is charged with committing. You should consider _____'s testimony with more caution than the testimony of other witnesses.

(2) Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

[(3) The fact that _____ has pleaded guilty to a crime is not evidence that the defendant is guilty, and you cannot consider this against the defendant in any way.]

Use Note

This instruction is not necessary if the jury has been instructed to treat the witness's testimony with caution for other reasons.

Bracketed paragraph (3) should be included when the fact that an accomplice has pleaded guilty has been brought to the jury's attention.

Committee Commentary 7.08
(current as of May 1, 2025)

The Sixth Circuit has described this as a "proper jury instruction[]" that "correctly" and "properly" informs the jury about this issue. United States v. Hynes, 467 F.3d 951, 971 (6th Cir. 2006) (instruction given was Pattern Instruction 7.08, see Joint Appendix at 941). In addition, a panel has cited Instruction 7.08(1) and (2) with approval. United States v. Savoca, 2006 WL 126737, 2006 U.S. App. LEXIS 1465 (6th Cir. 2006) (unpublished) (stating that the instruction "was not erroneous. Indeed, the charge is taken from Sixth Circuit Pattern Instruction 7.08.").

In United States v. Wheaton, 517 F.3d 350 (6th Cir. 2008), the court held that omitting Instruction 7.08 was not error because "an accomplice instruction 'is not necessary if the jury has been instructed to treat the witness's testimony with caution for other reasons.' " *Id.* at 363 (*quoting* the Use Note to Instruction 7.08). Because the district court had given an instruction on treating the witness's testimony with caution that was almost identical to Instruction 7.06A, it was not error to omit Instruction 7.08. *Id.* *Accord*, United States v. Carr, 5 F.3d 986, 992 (6th Cir. 1993) (finding no reversible error in omitting an explicit accomplice testimony instruction because the court substantially covered the same considerations in the general witness credibility instructions; those instructions were adequate because they cautioned the jury to consider "any relation that a witness may bear to either side of the case and his or her reasons for testifying" and stated that "the testimony of a witness may be discredited or impeached by showing that the witness has been convicted of a crime.").

In United States v. Ailstock, 546 F.2d 1285, 1288 (6th Cir. 1976), the Sixth Circuit held

that an accomplice instruction alone adequately cautioned the jury about the weight to be given an accomplice's testimony, even though the accomplice had a plea bargain with the government and no plea bargain instruction had been given.

If the court thoroughly instructs the jury about evaluating the witness's credibility, and cautions the jury to use care in considering accomplice testimony, it is not an abuse of discretion to refuse any additional instruction on perjured testimony. United States v. Frost, 914 F.2d 756, 766 (6th Cir. 1990).

7.09 CHARACTER AND REPUTATION OF DEFENDANT

You have heard testimony about the defendant's good character. You should consider this testimony, along with all the other evidence, in deciding if the government has proved beyond a reasonable doubt that he committed the crime charged.

Committee Commentary 7.09
(current as of May 1, 2025)

Some instruction on the defendant's good character is required if supported by the evidence. *See* Edgington v. United States, 164 U.S. 361, 365-67 (1896); *accord* United States v. Huddleston, 811 F.2d 974, 977 (6th Cir. 1987). But there is disagreement about whether the instruction must say that good character evidence "standing alone" may create a reasonable doubt of guilt. *See* Spangler v. United States, 487 U.S. 1224 (1988) (White, J., dissenting from denial of certiorari) (noting disagreement).

Old Supreme Court cases provide some support for the position that "standing alone" language may be appropriate, at least in some circumstances. *See Edgington, supra*, 164 U.S. at 366 ("The circumstances may be such that . . . good character . . . would alone create a reasonable doubt."); Michelson v. United States, 335 U.S. 469, 476 (1948) ("[T]his Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed.").

In Poliafico v. United States, 237 F.2d 97, 114 (6th Cir. 1956), the court, without extensive analysis, rejected the argument that "standing alone" language should have been included in the district court's instructions. The Sixth Circuit characterized the instructions given, which told the jury to consider the good character evidence along with all the other evidence in the case, as "proper," citing *Edgington* in support. In *Huddleston, supra,* the Sixth Circuit, again without extensive analysis, held that the district court adequately met its responsibility to instruct on good character evidence by instructing the jury to consider such evidence along with all the other evidence in determining whether the government had sustained its burden of proving guilt beyond a reasonable doubt. Based on these cases, the Committee has omitted the "standing alone" language. *See also* United States v. Kirkland, 1994 WL 454864 at 9 n.8, 1994 U.S. App. LEXIS 22925 at 27 n.8 (6th Cir. 1994) (unpublished) (describing “standing alone” language as “not warranted under the law”) (*citing* Poliafico v. United States, 237 F.2d 97, 114 (6th Cir. 1956)).

7.10 AGE OF WITNESS

You have heard the testimony of _____, a young witness. No witness is disqualified just because of age. There is no precise age that determines whether a witness may testify. With any witness, young or old, you should consider not only age, but also the witness's intelligence and experience, and whether the witness understands the duty to tell the truth and the difference between truth and falsehood.

Committee Commentary 7.10
(current as of May 1, 2025)

A panel of the Sixth Circuit described this instruction as "a general admonition to the jury to weigh the maturity and experience of a young witness when the jury considers the substance of the testimony presented by that witness." United States v. Bourne, 1994 WL 84742 at 1, 1994 U.S. App. LEXIS 4562 at 2-3 (6th Cir. 1994) (unpublished).

Under Fed. R. Evid. 601 there is no specific age requirement for the competency of witnesses.

In 1990, Congress enacted The Child Victims' and Child Witnesses' Rights Act, 18 U.S.C. § 3509. This Act defines children as persons under eighteen who are or allegedly are victims of physical abuse, sexual abuse or exploitation, or are witnesses to a crime committed against another. *Id.* § 3509(a)(2). The Act provides, "A child is presumed to be competent." *Id.* § 3509(c)(2). In *Bourne*, *supra*, a panel of the Sixth Circuit noted that this provision lends itself to the interpretation that a child witness is presumed competent to testify in the absence of an express determination to the contrary, but the issue was not preserved and the panel did not rule on it. *Bourne*, 1994 WL at 1, 1994 U.S. App. LEXIS at 3.

In United States v. Allen J., 127 F.3d 1292, 1295 (10th Cir. 1997), the court stated: "Upon enactment of § 3509, the rules changed. Now children are presumed competent and the party seeking to prevent a child from testifying has the burden of providing a compelling reason for questioning the child's competence." Similarly, the Seventh Circuit has concluded that § 3509(c)(2) means that "Children are presumed to be competent to testify." United States v. Snyder, 189 F.3d 640, 645 (7th Cir. 1999).

The statutory presumption of competency is a procedural rule to use in determining the competency of a child witness and does not affect the applicability of the instruction after the child witness is found competent.

7.11 IDENTIFICATION TESTIMONY

(1) You have heard the testimony of _____, who has identified the defendant as the person who _____. You should carefully consider whether this identification was accurate and reliable.

(2) In deciding this, you should especially consider if the witness had a good opportunity to see the person at that time. For example, consider the visibility, the distance, whether the witness had known or seen the person before, and how long the witness had to see the person.

[(3) You should also consider the circumstances of the earlier identification that occurred outside of court. For example, consider how that earlier identification was conducted, and how much time passed after the alleged crime before the identification was made.]

[(4) You may take into account any occasion in which the witness failed to make an identification of defendant, or made an identification that was inconsistent with his identification at trial.]

(5) Consider all these things carefully in determining whether the identification was accurate and reliable.

(6) Remember that the government has the burden of proving beyond a reasonable doubt that the defendant was the person who committed the crime charged.

Use Note

This instruction should be given when the identification has become an issue because of lack of corroboration, or limited opportunity for observation, or when the witness's memory has faded by the time of trial.

Bracketed paragraph (3) should be included when evidence of an out-of-court identification has been admitted.

Bracketed paragraph (4) should be included when evidence of an earlier failure to make identification or evidence of an inconsistent identification is admitted.

Committee Commentary 7.11
(current as of May 1, 2025)

The testimony of a single eyewitness is sufficient to take a criminal case to the jury. However, courts have recognized that there is a serious possibility of mistake inherent in uncorroborated identification testimony. United States v. O'Neal, 496 F.2d 368 (6th Cir. 1974). In cases where identification is a key issue, courts have required an instruction that emphasizes the need for finding that the circumstances of the identification are convincing beyond a reasonable doubt.

The leading case is United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972). *Telfaire* set out a model instruction in an appendix which emphasized: (1) the capacity and opportunity of the witness to observe reliably the offender; (2) the question whether the identification was the product of the witness's own recollection; (3) the inconsistent identification made by the same witness; and (4) the credibility of the witness. *Id.* at 558-59. The *Telfaire*-type instruction was adopted by the Sixth Circuit in United States v. Scott, 578 F.2d 1186, 1191 (6th Cir. 1978). The language in the instruction is drawn directly from *Telfaire, supra*.

The instruction should be given when the identification has become an issue because of lack of corroboration or limited opportunity for observation, or where the witness's memory has faded by the time of trial. *Scott, supra.*

This instruction omits any mention of the credibility of the identification witnesses because that topic is adequately covered in the general credibility instruction, Instruction 1.07. If the credibility of identification witnesses is a particularly significant issue in a case, the *Scott* decision gives district courts the leeway to mention the credibility factor in this instruction as well as in the general credibility instruction. *See Scott, supra* (listing as a factor the jury should consider "(4) the credibility of the witness.").

7.12 SUMMARIES AND OTHER MATERIALS NOT ADMITTED IN EVIDENCE

During the trial you have seen counsel use [summaries, charts, drawings, calculations, or similar material] which were offered to assist in the presentation and understanding of the evidence. This material is not itself evidence and must not be considered as proof of any facts.

Use Note

This instruction should be used when pedagogical-device summaries or similar material are not admitted into evidence.

If the summaries or similar material are admitted into evidence as secondary-evidence summaries, see Instruction 7.12A.

If the summaries or similar material are admitted into evidence as primary-evidence summaries, no instruction is necessary.

Committee Commentary 7.12
(current as of May 1, 2025)

This instruction is based on United States v. Bray, 139 F.3d 1104, 1112 (6th Cir. 1998), in which the Sixth Circuit noted some confusion in past cases and provided a comprehensive discussion on the treatment of summary evidence. The court explained:

> To recapitulate, there are three kinds of summaries:
> (1) Primary-evidence summaries, ... which summarize "voluminous writings, recordings, or photographs" that, because they are so voluminous, "cannot conveniently be examined in court." Fed.R.Evid. 1006. In this instance, the summary, and not the underlying documents, is the evidence to be considered by the factfinder.
> (2) Pedagogical-device summaries, or illustrations, such as chalkboard drawings, graphs, calculations, or listings of data taken from the testimony of witnesses or documents in evidence, which are intended to summarize, clarify or simplify testimonial or other evidence that has been admitted in the case, but which are not themselves admitted, instead being used only as an aid to the presentation and understanding of the evidence. For these the jury should be instructed that the summaries are not evidence and were used only as an illustrative aid.
> (3) Secondary-evidence summaries that are a combination of (1) and (2), in that they are not prepared entirely in compliance with Rule 1006 and yet are more than mere pedagogical devices designed to simplify and clarify other evidence in the case. These secondary-evidence summaries are admitted in evidence not in lieu of the evidence they summarize but in addition thereto, because in the judgment of the trial court such summaries so accurately and reliably summarize complex or difficult evidence that is received in the case as to materially assist the jurors in better understanding the evidence. In the unusual instance in which this third form of secondary evidence summary is admitted, the jury should be instructed that the summary is not independent evidence of

its subject matter, and is only as valid and reliable as the underlying evidence it summarizes.

Id. (citations omitted).

As the Sixth Circuit explained, when summaries are used as (2) pedagogical-device summaries or (3) secondary-evidence summaries, the trial court should give a limiting instruction. Pattern Instruction 7.12 is the limiting instruction designed to cover the type of material described in category (2) as pedagogical-device summaries. This instruction should be given only when the material is not admitted into evidence. If the summary or other material falls into category (3) as secondary-evidence summaries and is admitted into evidence, Pattern Instruction 7.12A should be given. Finally, if the summary or other material falls into category (1) as primary-evidence summaries and is admitted into evidence, no limiting instruction is necessary since Rule 1006 authorizes the admission into evidence of the summary itself. *Bray,* 139 F.3d at 1111-12.

In United States v. Paulino, 935 F.2d 739 (6th Cir. 1991), the court stated that summaries other than those directly admissible under Rule 1006 should generally be accompanied by a limiting instruction, but held that omission of a limiting instruction was not reversible error because the defendants did not request a limiting instruction, the trial judge did give a limiting instruction at the close of the proof, the defendants had a full opportunity to cross-examine the witness on the summaries, and the summaries were not substantially inconsistent with the evidence. *Id.* at 753-54. The Sixth Circuit later relied again on the opportunity to cross-examine, explaining "we have not held a court's failure to issue such [limiting] instructions fatal where the defendants had a full opportunity to cross-examine the witness and thereby 'alleviat[e] any danger or inaccuracy or unfair characterization.'" United States v. Gaitan-Acevedo, 148 F.3d 577, 587-88 (6th Cir. 1998), *quoting Paulino*, 935 F.2d at 753.

7.12A SECONDARY- EVIDENCE SUMMARIES ADMITTED IN EVIDENCE

(1) During the trial you have seen or heard summary evidence in the form of [a chart, drawing, calculation, testimony, or similar material]. This summary was admitted in evidence, in addition to the material it summarizes, because it may assist you in understanding the evidence that has been presented.

(2) But the summary itself is not evidence of the material it summarizes, and is only as valid and reliable as the underlying material it summarizes.

Use Note

Giving Instruction 7.03 Opinion Testimony does not obviate the need for this instruction when summary evidence is admitted.

This instruction should be used when summaries or similar material are admitted into evidence as secondary-evidence summaries.

The bracketed items in the first sentence should be tailored to fit the facts of the case.

If the summaries or similar material are admitted as primary-evidence summaries, no instruction is necessary.

If the summaries or other material are not admitted into evidence, see Instruction 7.12.

Committee Commentary 7.12A
(current through May 1, 2025)

This instruction is based on United States v. Bray, 139 F.3d 1104, 1112 (6th Cir. 1998), which is discussed in the Commentary to Instruction 7.12.

In United States v. Smith, 601 F.3d 530, 541-42 (6th Cir. 2010), the court stated it was error to omit a cautionary instruction regarding summary testimony but concluded it was not plain error and so did not warrant reversal of the conviction. In United States v. Vasilakos, 508 F.3d 401, 412 (6th Cir. 2007), the court held that omission of a limiting instruction on the summary testimony of an IRS agent was plain error. This holding is reflected in the words in paragraph (1) that refer to hearing summary evidence in the form of testimony.

7.13 OTHER ACTS OF DEFENDANT

(1) You have heard testimony that the defendant committed [crimes, acts, wrongs] other than the ones charged in the indictment. If you find the defendant did those [crimes, acts, wrongs], you can consider the evidence only as it relates to the government's claim on the defendant's [intent] [motive] [opportunity] [preparation] [plan] [knowledge] [identity] [absence of mistake] [absence of accident]. You must not consider it for any other purpose.

(2) Remember that the defendant is on trial here only for _____, not for the other acts. Do not return a guilty verdict unless the government proves the crime charged in the indictment beyond a reasonable doubt.

Use Note

This instruction should be used when evidence of other acts has been admitted for an appropriate purpose under Fed.R.Evid. 404(b). In identifying the purposes for which the evidence may be used, the instruction should name only the purpose or purposes actually in issue. The instruction facilitates this by bracketing each of the purposes separately.

This instruction should be given when the evidence is introduced and at the end of the case as well.

Committee Commentary 7.13
(current through May 1, 2025)

Once evidence of other crimes, acts or wrongs has been admitted under Rule 404(b), the trial court should give a cautionary instruction identifying the specific, limited purpose for which the evidence was admitted. The district court "must 'clearly, simply, and correctly' instruct the jury as to the specific purpose for which they may consider the evidence." United States v. Merriweather, 78 F.3d 1070, 1077 (6th Cir. 1996) (*quoting* United States v. Johnson, 27 F.3d 1186, 1193 (6th Cir. 1994)). In the limiting instruction, the court should be careful to identify only purposes for using the other acts evidence that are actually in issue. In *Merriweather*, the Sixth Circuit reversed a conviction because the limiting instructions allowed the jury to consider the other acts evidence for seven of the nine purposes listed in Rule 404(b) when only two purposes were arguably presented on the facts. 78 F.3d at 1077. Similarly, in United States v. Ward, 190 F.3d 483 (6th Cir. 1999), the court held the limiting instruction to be error because it recited the list of all the purposes for which other acts evidence was admissible as set out in Rule 404(b). The Sixth Circuit cautioned district courts as follows:

> Rule 404(b) evidence, even when properly admitted, under a properly limiting instruction, asks jurors to engage in mental gymnastics that may well be beyond their ability or even their willingness. Such evidence has great potential for unfair prejudice, and ordinarily it is only the trial court's carefully and clearly articulated limiting instruction as to the specific purpose for which the evidence may be considered by the jurors, that avoids substantial unfairness to the accused. Here, the court's instruction was certainly error, but [not plain error]. We do, however, caution district courts, when

> admitting rule 404(b) evidence, to instruct the jury that the "other act" evidence may be considered only with respect to the specific factor named in the rule–usually only one–which is in issue in the case.

Id. at 489-90. *See also* United States v. Davis, 547 F.3d 520, 526-27 (6th Cir. 2008) (limiting instruction erroneous for listing purposes not in issue; error not harmless); United States v. Bell, 516 F.3d 432, 446-47 (6th Cir. 2008) (limiting instruction erroneous for listing purposes not in issue and for listing prior convictions not probative of intent; error not harmless); United States v. Fraser, 448 F.3d 833, 842 (6th Cir. 2006) (limiting instruction erroneous for listing three purposes not in issue but error did not affect defendant's substantial rights); United States v. Everett, 270 F.3d 986, 992 (6th Cir. 2001) (limiting instructions erroneous but error harmless); United States v. Spikes, 158 F.3d 913, 929-30 (6th Cir. 1998) (same).

The instruction responds to these concerns by listing the appropriate purposes for which the evidence may be admitted under Rule 404(b) rather than just leaving a blank for the district court to fill in. Rule 404(b) states that the evidence may be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." Each purpose is separately bracketed so district courts can readily identify the appropriate purpose or purposes involved and include only those actually raised in the case. Rule 404(b) is reprinted in full below.

District courts are urged to instruct the jury on the specific use or uses for the evidence that are actually implicated in the case even if defense attorneys do not object to an instruction listing purposes not implicated in the case. In United States v. Davis, 547 F.3d 520 (6th Cir. 2008), the defendant objected to the admission of the Rule 404(b) evidence but did not separately object to the limiting instruction. The court held it was not limited to plain error review of the instruction because the defendant had already objected to admission of the evidence for the purposes identified in the limiting instruction. The *Davis* court distinguished United States v. Fraser, 448 F.3d 833 (6th Cir. 2006), in which the court reversed for plain error because no such objection to admission of the evidence had been made. The *Davis* court stated, "It is proper for us to look at the limiting instruction when we review the admission of such evidence." *Davis, supra* at 526. *See also* United States v. Newsom, 452 F.3d 593, 607 (6th Cir. 2006) (*citing* United States v. Johnson, 27 F.3d 1186, 1194 (6th Cir. 1994) and commenting on "the tension between existing Sixth Circuit opinions regarding Rule 404(b) jury instructions"); United States v. Yopp, 577 F.2d 362 (6th Cir. 1978) (stating that if no limiting instruction is requested by the defendant, the failure to give an instruction will not necessarily result in reversible error but noting that it would have been better practice for the court to give the instruction sua sponte).

The Use Note indicates that the instruction should be given when the evidence is admitted as well as at the close of the case. However, a delayed instruction alone has been held not to be reversible error. *See* United States v. Fraser, *supra* at 843 n.4 (6th Cir. 2006) ("A delayed limiting instruction is no basis for reversal.") (*citing* United States v. Miller, 115 F.3d 361, 366 (6th Cir. 1997)); United States v. Cook, 2008 WL 3983925 at 9, 2008 U.S. App. LEXIS 18788 at 25 (6th Cir. 2008) (unpublished) (mentioning with approval that the court gave limiting instructions twice).

Federal Rule of Evidence 404(b) states:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

The threshold inquiry the trial court must make before admitting evidence under Rule 404(b) is whether such evidence is "probative of a material issue other than character." Huddleston v. United States, 485 U.S. 681, 686 (1988). In so doing, the court necessarily assesses whether the evidence is relevant and, if so, whether the probative value is substantially outweighed by its potential for unfair prejudice under Fed. R. Evid. 403.

7.14 FLIGHT, CONCEALMENT OF EVIDENCE, FALSE EXCULPATORY STATEMENTS

(1) You have heard testimony that after the crime was supposed to have been committed, the defendant _____.

(2) If you believe that the defendant _____, then you may consider this conduct, along with all the other evidence, in deciding whether the government has proved beyond a reasonable doubt that he committed the crime charged. This conduct may indicate that he thought he was guilty and was trying to avoid punishment. On the other hand, sometimes an innocent person may _____ for some other reason. The defendant has no obligation to prove that he had an innocent reason for his conduct.

Use Note

The language in paragraphs (1) and (2) should be tailored to the specific kinds of evidence in the particular case.

Committee Commentary 7.14
(current through May 1, 2025)

The Sixth Circuit recognizes defendants' flight, concealment of evidence and implausible stories as evidence which allows an inference of guilty knowledge. *See* United States v. Jackson, 55 F.3d 1219, 1226 (6th Cir. 1995).

Flight has been deemed relevant to show guilt through consciousness of guilt. United States v. Touchstone, 726 F.2d 1116, 1119 (6th Cir. 1984); United States v. Rowan, 518 F.2d 685, 691 (6th Cir. 1975). The relevance of such evidence depends on a series of inferences. For example, the relevance of evidence of flight depends on being able to draw three inferences: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; and (3) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

In United States v. Carter, 236 F.3d 777 (6th Cir. 2001), the trial court gave an instruction on flight substantially similar to Pattern Instruction 7.14. The Sixth Circuit concluded that giving the instruction was not an abuse of discretion and did not unconstitutionally require the defendant to testify or explain prior incidents of flight. The instruction did not appear to suggest guilt on the defendant's part, but rather stated that "evidence of flight *may or may not* indicate a defendant's guilty conscience or intent to avoid punishment." *Id*. at 792 n.11 (italics in original), *citing* Illinois v. Wardlow, 528 U.S. 119, 123-27 (2000). *See also* United States v. Swain, 2007 U.S. App. LEXIS 16825 at 7-9, 2007 WL 2031447 (6th Cir. 2007) (unpublished) (giving Instruction 7.14 on flight was not error because adequate evidence existed; Instruction 7.14 accurately reflects the law, *citing* United States v. Carter, *supra* and United States v. Diakite, 5 Fed. Appx. 365, 370-71 (6th Cir. 2001) (unpublished)). The final sentence in paragraph (2) is based on United States v. Peterson, 569 F. App'x 353, 356 n.4 (6th Cir. 2014) (unpublished).

The Sixth Circuit has held that evidence of flight is admissible even though the flight was

not immediately after the commission of the crime or after the defendant is accused of the crime. *Touchstone, supra* at 1119-20. In that case the court explicitly approved the following instruction:

> The intentional flight or concealment of a defendant is not of course sufficient in itself to establish his guilt; but is a fact which, if proved, may be considered by the jury in the light of all other evidence in the case, in determining guilt or innocence.

Id. at 1118 and 1120 n.6.

In Illinois v. Wardlow, *supra*, the Supreme Court recognized flight as a factor the police could use in determining whether they had reasonable suspicion to justify a stop under the Fourth Amendment. The Court stated, "Headlong flight–wherever it occurs–is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Wardlow, supra* at 124.

The Sixth Circuit has approved implausible stories as evidence allowing an inference of guilt in several cases. *See Jackson, supra, quoting* United States v. Diaz-Carreon, 915 F.2d 951, 955 (5th Cir. 1990) *and citing* United States v. Mari, 47 F.3d 782, 785 & n.2 (6th Cir. 1995) and United States v. Chu, 988 F.2d 981, 984 (9th Cir. 1993).

False exculpatory statements are also recognized as evidence from which the jury may infer consciousness of guilt. Stanley v. United States, 245 F.2d 427 (6th Cir. 1957). *See, e.g.,* United States v. Tedesco, 1996 WL 690152 at 2, 1996 U.S. App. LEXIS 31285 at 7 (6th Cir. 1996) (unpublished). *Cf.* United States v. McDougald, 990 F.2d 259, 262-63 (6th Cir. 1993) (describing defendant's false exculpatory statements as "of little value" in establishing guilty knowledge at relevant time because statements were made eight months after the crime when he was questioned by police; conviction reversed for insufficient evidence).

Spoliation of evidence is admissible to show consciousness of guilt. The fact that a defendant attempts to fabricate or conceal evidence indicates a consciousness that his case is weak and from that the defendant's guilt may be inferred. United States v. Mendez-Ortiz, 810 F.2d 76, 79 (6th Cir. 1986); United States v. Franks, 511 F.2d 25, 36 (6th Cir. 1975). It has been held to be reversible error for the court to instruct that such evidence might be considered evidence of guilt rather than evidence of "consciousness of guilt." As with all consciousness of guilt evidence, there is some dispute as to its admissibility.

The Federal Judicial Center includes a general instruction on "Defendant's Incriminating Actions After the Crime." See Federal Judicial Center Instruction 43. But the Committee Commentary recommends that it should not be given in most cases, and that generally these matters should be left to argument by counsel.

Based on Sixth Circuit authority, the Committee recommends one generic instruction for all consciousness of guilt situations which can be modified as circumstances dictate.

7.15 SILENCE IN THE FACE OF ACCUSATION

(No Instruction Recommended.)

Committee Commentary 7.15
(current through May 1, 2025)

The Committee withdrew this instruction in view of Combs v. Coyle, 205 F.3d 269, 283 (6th Cir. 2000) (use of prearrest silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination). However, evidence of the defendant's prearrest, pre-*Miranda* silence is still admissible to impeach the defendant if he testifies at trial. *See* Fletcher v. Weir, 455 U.S. 603, 607 (1982); Jenkins v. Anderson, 447 U.S. 231, 238-39 (1980); Combs v. Coyle, 205 F.3d at 280.

7.16 POSSESSION OF RECENTLY STOLEN PROPERTY

(1) You have heard testimony that the defendant had possession of some property that was recently stolen.

(2) If you believe that the defendant had possession of this property, you may consider this, along with all the other evidence, in deciding whether the defendant knew that the property was stolen [or stole the property]. But the longer the period of time between the theft and his possession, the less weight you should give this evidence.

(3) You do not have to draw any conclusion from the defendant's possession of the property. You may still have a reasonable doubt based on all the other evidence. Remember that the burden is always on the government to prove beyond a reasonable doubt that the defendant committed the crime charged.

Use Note

The bracketed language in paragraph (2) should be used when the government is attempting to prove in the alternative that the defendant either possessed the property knowing that it was stolen, or stole the property.

Committee Commentary 7.16
(current through May 1, 2025)

In Barnes v. United States, 412 U.S. 837, 843 (1973), the Supreme Court noted that "For centuries courts have instructed juries that an inference of guilty knowledge may be drawn from the fact of unexplained possession of stolen goods."

The bracketed language in paragraph (2) is based on United States v. Jennewein, 590 F.2d 191, 192 (6th Cir. 1978) (citing United States v. Nalley, 455 F.2d 259 (6th Cir. 1972); United States v. Lipscomb, 425 F.2d 226 (6th Cir. 1970); and Prince v. United States, 217 F.2d 838 (6th Cir. 1954)).

7.17 TRANSCRIPTIONS OF RECORDINGS

(1) You have heard some recorded conversations that were received in evidence, and you were given some written transcripts of the recordings.

(2) Keep in mind that the transcripts are not evidence. They were given to you only as a guide to help you follow what was being said. The recordings themselves are the evidence. If you noticed any differences between what you heard on the recordings and what you read in the transcripts, you must rely on what you heard, not what you read. And if you could not hear or understand certain parts of the recordings, you must ignore the transcripts as far as those parts are concerned.

Committee Commentary 7.17
(current through May 1, 2025)

Recordings are generally admissible unless the incomprehensible portions of the recordings are so substantial as to render the recordings as a whole untrustworthy. United States v. Terry, 729 F.2d 1063, 1068 (6th Cir. 1984). The decision to admit recordings into evidence rests with the trial court. United States v. Vinson, 606 F.2d 149 (6th Cir. 1979). Such recordings must be authentic, accurate, trustworthy and sufficiently audible and comprehensible for the jury to consider the contents. *See* United States v. Robinson, 707 F.2d 872, 876 (6th Cir. 1983). *See also* United States v. Elder, 90 F.3d 1110, 1129-30 (6th Cir. 1996); United States v. Scarborough, 43 F.3d 1021, 1024 (6th Cir. 1994); United States v. Segines, 17 F.3d 847, 854 (6th Cir. 1994).

When a recording is admissible, an accurate transcript of the recording may be provided, in the trial court's discretion, for the jury to use while the recording is played, so that the jury may follow the recording more easily. *See Robinson, supra* at 876. But the Sixth Circuit has expressed a clear preference that a transcript not be submitted to the jury unless the parties stipulate to its accuracy. *Id.; see also Vinson, supra* at 155.

In the absence of a stipulation, the transcriber should verify that he or she has listened to the recording and accurately transcribed its content, and the court should make an independent determination of accuracy by comparing the transcript against the recording and directing the deletion of the unreliable portion of the transcript. *Robinson, supra* at 879.

Another option, but the least preferred, is to submit two transcripts to the jury, one from the government and one from the defense. *See* United States v. Martin, 920 F.2d 393, 396 (6th Cir. 1990). But this has been held to be prejudicial error requiring reversal if the recording is significantly inaudible, even if a cautionary instruction is given. *Robinson, supra* at 879.

In *Segines,* the Sixth Circuit elaborated on the procedural alternatives when a transcript is used:

> The preferred method is stipulation to its accuracy by all parties. The next best alternative is for the transcriber to attest to its accuracy and for the court to test that accuracy, outside of the jury's presence, "by reading the transcripts while listening to the

> tapes." (citation omitted.) When tapes are unintelligible, however, a transcript intended as an aid to the jury inevitably becomes, in the minds of the jurors, the evidence itself (citation omitted). As is required whenever a transcript is used and there is no stipulation as to its accuracy, the trial court here gave a cautionary instruction to the jury regarding the limited use to be made of the transcript. Such an instruction does not suffice, however, to erase the prejudice created by "shepherding hearsay to the jury via the transcripts . . . ."

Segines, supra at 854.

One point made clear in *Segines* is that cautionary instructions on the limited role of the transcript alone are not sufficient to justify its use. The *Segines* court concluded that use of transcripts was error, despite repeated use of a cautionary instruction on the limited role of the transcript, because the judge found much of the recording unintelligible. The Sixth Circuit stated that at retrial, a transcript should not be given to the jury. *Id.* at 855.

See also Scarborough, supra at 1024-25 (no error to use government's transcript where district court reviewed it and found it accurate and gave limiting instruction); United States v. Wilkinson, 53 F.3d 757 (6th Cir. 1995) (any potential prejudice from use of government's transcript was remedied, *inter alia*, by a cautionary jury instruction), *citing* United States v. Hughes, 895 F.2d 1135, 1147 (6th Cir. 1990). In United States v. Elder, 90 F.3d 1110, 1129-30 (6th Cir. 1996), the Sixth Circuit held that it was not error to allow transcripts as an aid to the jury when the trial judge followed the *Robinson* guidelines to review the recordings and gave a limiting instruction substantially the same as Pattern Instruction 7.17.

On whether transcripts can be used by the jury during deliberations, the Sixth Circuit has allowed such use. *See Scarborough, supra* at 1024-25 (transcripts can be used in deliberations, even if transcripts not admitted into evidence, as long as court instructs that the recordings and not the transcripts are evidence) (*citing* United States v. Puerta Restrepo, 814 F.2d 1236, 1242 (7th Cir. 1987)). While the Committee takes no position on whether transcripts should go to the jury room, if they do, the court should instruct the jury again that the recordings are the evidence rather than the transcripts.

If the case involves recordings in a foreign language and English transcripts are provided to the jury, see United States v. Garcia, 20 F.3d 670, 672-73 (6th Cir. 1994), *citing* United States v. Moreno, 933 F.2d 362, 375 (6th Cir. 1991) and United States v. Cruz, 765 F.2d 1020, 1023 (11th Cir. 1985).

7.18 SEPARATE CONSIDERATION – EVIDENCE ADMITTED AGAINST CERTAIN DEFENDANTS ONLY

(1) You have heard testimony from _____ that _____.

(2) You can only consider this testimony against _____ in deciding whether the government has proved him guilty. You cannot consider it in any way against any of the other defendants.

Committee Commentary 7.18
(current through May 1, 2025)

This instruction is designed to supplement any mid-trial instructions given when evidence admissible against only one defendant is introduced. See Fed. R. Evid. 105 and United States v. Gallo, 763 F.2d 1504, 1528 (6th Cir. 1985) for when such an instruction must be given.

Recent cases indicate that limiting instructions such as Instruction 7.18 can cure a risk of prejudice when there are multiple defendants. In Zafiro v. United States, 506 U.S. 534 (1993), the Supreme Court held that mutually antagonistic defenses alone do not mandate separate trials; there must be some risk of prejudice. Even when the risk of prejudice is high, the Court explained, severance may not be necessary because "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice." *Id*. at 539. In *Zafiro*, the Court found the risk of prejudice was cured by proper instructions, including an instruction that told the jury to "give separate consideration to each individual defendant and to each separate charge against him. Each defendant is entitled to have his or her case determined from his or her own conduct and from the evidence [that] may be applicable to him or to her." *Id*. at 541.

The Sixth Circuit relied on *Zafiro* in United States v. Pierce, 62 F.3d 818 (6th Cir. 1995) to find no error in a joint trial because the risk of prejudice was cured by several cautionary instructions, including one stating "[y]ou must decide, for each defendant, whether the United States has presented proof beyond a reasonable doubt that the particular defendant is guilty of a particular charge." *Id*. at 830-31.

This issue is also covered by Pattern Instruction 2.01B, Separate Consideration – Multiple Defendants Charged with a Single Crime.

7.19 JUDICIAL NOTICE

I have decided to accept as proved the fact that _____, even though no evidence was presented on this point. You may accept this fact as true, but you are not required to do so.

Committee Commentary 7.19
(current through May 1, 2025)

This instruction is based on Fed. R. Evid. 201(g). It should be given whenever the court has taken judicial notice of a fact.

This instruction applies only to adjudicative facts and must not be used in connection with a court's determination of law. In United States v. Dedman, 527 F.3d 577, 587-88 (6th Cir. 2008), the court held that giving Instruction 7.19 was error when the district court gave it in connection with announcing applicable state law because the last sentence of the instruction empowered the jury to disregard that law. The court quoted the official commentary to Instruction 7.19 to the effect that the instruction should be given only when the court takes judicial notice of facts and further counseled, "Accordingly, judges should take care to limit judicial notice and use of criminal Pattern Jury Instruction 7.19 to matters of fact." *Id.* at 588.

7.20 STATEMENT BY DEFENDANT

(1) You have heard evidence that the defendant, _____ , made a statement in which the government claims he admitted certain facts. It is for you to decide whether the defendant made that statement, and if so, how much weight it deserves. In making these decisions, you should consider all of the evidence about the statement, including the circumstances under which the defendant allegedly made it.

(2) You may not convict the defendant solely upon his own uncorroborated statement or admission.

Committee Commentary 7.20
(current as of May 1, 2025)

Paragraph (1) is based on Jackson v. Denno, 378 U.S. 368 (1964) and 18 U.S.C. § 3501(a), the latter of which states that "the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances." Most circuits include a similar pattern instruction, including the First, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits.

Paragraph (2) is based on United States v. Adams, 583 F.3d 457 (6th Cir. 2009) and United States v. Marshall, 863 F.2d 1285 (6th Cir. 1988). In *Adams*, the court reversed the conviction and remanded for a new trial because the district court erred in refusing to instruct the jury that it could not find defendant guilty solely on the basis of his uncorroborated confession. The court noted that based on *Marshall*, the established law in the circuit is that this instruction is required even though the record includes some evidence that tends to corroborate the statements. *Adams, supra* at 469-70, *quoting Marshall, supra* at 1288. *See also* United States v. Brown, 617 F.3d 857, 862-63 (6th Cir. 2010) (giving several examples of sufficient corroboration) and United States v. Ramirez, 635 F.3d 249 (6th Cir. 2011). The purpose of requiring corroboration is "to ensure the reliability of the confession or admission of the accused." *Brown, supra* at 862, *quoting* United State v. Trombley, 733 F.2d 35, 37 (6th Cir. 1984). *See generally* Smith v. United States, 348 U.S. 147 (1954) and Opper v. United States, 348 U.S. 84 (1954).

7.21 STIPULATIONS

The government and the defendant have agreed, or stipulated, to certain facts. Therefore, you must accept the following stipulated facts as proved: [*insert facts stipulated*].

Use Note

Each stipulation should be read to the jury right after the element it pertains to.

When the stipulated facts establish an element of the crime, the best practice is for the stipulation to be in writing and signed by the defendant and counsel.

Brackets indicate options for the court; bracketed italics are notes to the court.

Committee Commentary 7.21
(current as of May 1, 2025)

The general rule is that a defendant cannot stipulate or admit his way out of the full evidentiary force of the case as the government chooses to present it. Old Chief v. United States, 117 S. Ct. 644, 653 (1997); United States v. Luck, 852 F.3d 615, 624 (6th Cir. 2017). In *Old Chief*, the Court carved out an exception to this rule, holding that the government cannot refuse a defendant's offer to stipulate to felon status in felon-in-possession prosecutions under 18 U.S.C. § 922(g)(1). *Old Chief*, 117 S. Ct. at 654-55. The Supreme Court limited this exception to cases involving proof of felon status, see 117 S. Ct. at 651 note 7, and the Sixth Circuit has rejected attempts to expand the exception. *Luck*, 852 F.3d at 625.

In Witherspoon v. United States, 633 F.2d 1247 (6th Cir. 1980), the defendant entered a plea of not guilty and stipulated that he met all the elements for the offense of being a felon in possession of a firearm; the trial judge found the defendant guilty. When the defendant argued that the trial judge should have complied with the procedures of Rule 11 because the stipulation had the practical effect of a guilty plea, the Sixth Circuit found no reversible error and affirmed the conviction. However, the court expressed concern and suggested to District Courts that "they consider the possible applicability of the terms of Rule 11 in any instance where a stipulation as to most or all of the factual elements necessary to proof of guilt . . . is tendered." *Id.* at 1252. When the parties stipulate to any element of the crime, the Use Note suggests that the best practice is to put the stipulation in writing and have it signed by both parties.

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 492299 at 2, 1993 LEXIS 31194 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 492299 at 2, 1993 LEXIS 31194 at 4, *quoting* FDIC v. St. Paul Fire and Marine Ins. Co., 942 F.2d 1032, 1038 (6th Cir. 1991).

See also Instruction 1.04(2) Evidence Defined.

Chapter 8.00

DELIBERATIONS AND VERDICT

Table of Instructions

8.01 INTRODUCTION

(1) That concludes the part of my instructions explaining the rules for considering some of the testimony and evidence. Now let me finish up by explaining some things about your deliberations in the jury room, and your possible verdicts.

(2) The first thing that you should do in the jury room is choose someone to be your foreperson. This person will help to guide your discussions, and will speak for you here in court.

(3) Once you start deliberating, do not talk to the jury officer, or to me, or to anyone else except each other about the case. If you have any questions or messages, you must write them down on a piece of paper, sign them, and then give them to the jury officer. The officer will give them to me, and I will respond as soon as I can. I may have to talk to the lawyers about what you have asked, so it may take me some time to get back to you. Any questions or messages normally should be sent to me through your foreperson.

[(4) If you want to see any of the exhibits that were admitted in evidence, you may send me a message, and those exhibits will be provided to you.]

(5) One more thing about messages. Do not ever write down or tell anyone, including me, how you stand on your votes. For example, do not write down or tell anyone that you are split 6-6, or 8-4, or whatever your vote happens to be. That should stay secret until you are finished.

Use Note

Bracketed paragraph (4) should be included if the exhibits are not being submitted to the jury except upon request.

An instruction on using electronic technology should be included, see Inst. 8.02.

Committee Commentary 8.01
(current through May 1, 2025)

This instruction covers some miscellaneous concepts such as selection of a foreperson, communications with the court and not disclosing numerical divisions that are commonly included in instructions on the jury's deliberations.

In some districts all exhibits are routinely submitted to the jury when deliberations begin. In other districts exhibits are not provided unless the jury asks for them. Bracketed paragraph (4) should be used when the exhibits are not provided unless the jury makes a request.

8.02 EXPERIMENTS, RESEARCH, INVESTIGATION AND OUTSIDE COMMUNICATIONS

(1) Remember that you must make your decision based only on the evidence that you saw and heard here in court.

(2) During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media or application [unless specifically instructed to do so by this court], such as a telephone, cell phone, smart phone, iPhone, Blackberry, or computer, the Internet, any Internet service, or any text or instant messaging service, any Internet chat room, blog, or website such as Facebook, MySpace, LinkedIn, YouTube, Twitter, Instagram, WhatsApp, Snapchat or other similar electronic service, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations. I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

(3) You may not use these electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom. Information on the Internet or available through social media might be wrong, incomplete, or inaccurate. Even using your smartphones, tablets, and computers -- and the news and social media apps on those devices -- may inadvertently expose you to certain notices, such as pop-ups or advertisements, that could influence your consideration of the matters you've heard about in this courtroom. You are only permitted to discuss the case with your fellow jurors during deliberations because they have seen and heard the same evidence you have. In our judicial system, it is important that you are not influenced by anything or anyone outside of this courtroom. Otherwise, your decision may be based on information known only by you and not your fellow jurors or the parties in the case. This would unfairly and adversely impact the judicial process. A juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result, which would require the entire trial process to start over.

Use Note

The bracketed language in paragraph (2) may be used if the court has authorized the jury to use any electronic device or application.

Proposed model instructions for use before and during trial are reprinted below in the commentary.

Committee Commentary 8.02
(current through May 1, 2025)

The purpose of this instruction is to caution jurors at the close of the case that they must not communicate or attempt to gather any information about the case on their own during their

deliberations. Paragraphs (2) and (3) are drawn from two sources: the Benchbook (6th ed. 2013), Instruction 2.08 General Instructions to Jury at End of Criminal Case; and the Proposed Model Jury Instructions on the Use of Electronic Technology to Learn or Communicate about a Case, Prepared by the Judicial Conference Committee on Court Administration and Case Management, Updated June 2020 (Proposed Model Instruction for the Close of the Case).

Generally, the court needs to caution jurors that they should not communicate about the case, that they should not do any research or investigation about the case, and that their deliberations should be confined to what they hear in the courtroom.

The Judicial Conference Committee has provided the following instruction for the close of the case:

> Throughout your deliberations, you may discuss with each other the evidence and the law that has been presented in this case, but you must not communicate with anyone else by any means about the case. You also cannot learn from outside sources about the case, the matters in the case, the legal issues in the case, or individuals or other entities involved in the case. This means you may not use any electronic device or media (such as a phone, computer, or tablet), the internet, any text or instant messaging service, or any social media apps (such as Twitter, Facebook, Instagram, LinkedIn, YouTube, WhatsApp, and Snapchat) to research or communicate about what you've seen and heard in this courtroom.
>
> These restrictions continue during deliberations because it is essential, under our Constitution, that you decide this case based solely on the evidence and law presented in this courtroom. Information you find on the internet or through social media might be incomplete, misleading, or inaccurate. And, as I noted in my instructions at the start of the trial, even using your smartphones, tablets, and computers - and the news and social media apps on those devices – may inadvertently expose you to certain notices, such as pop-ups or advertisements, that could influence your consideration of the matters you've heard about in this courtroom.
>
> You are permitted to discuss the case with only your fellow jurors during deliberations because they have seen and heard the same evidence and instructions on the law that you have, and it is important that you decide this case solely on the evidence presented during the trial, without undue influence by anything or anyone outside of the courtroom. For this reason, I expect you to inform me at the earliest opportunity, should you learn about or share any information about this case outside of this courtroom or the jury room, or learn that another juror has done so.

Proposed Model Jury Instructions, The Use of Electronic Technology to Learn or Communicate about a Case, Prepared by the Judicial Conference Committee on Court Administration and Case Management, Updated June 2020.

The Judicial Conference Committee also proposed model instructions for use before and during trial. *Id.* They provide as follows:

During Voir Dire of Potential Jurors:

> If you are selected as a juror in this case, you cannot discuss the case with your fellow jurors before you are permitted to do so at the conclusion of the trial, or with anyone else until after a decision has been reached by the jury. Therefore, you cannot talk about the case or otherwise have any communications about the case with anyone, including your fellow jurors, until I tell you that such discussions may take place. Thus, in addition to not having face-to-face discussions with your fellow jurors or anyone else, you cannot communicate with anyone about the case in any way, whether in writing, or through email, text messaging, blogs, or comments, or on social media websites and apps (like Twitter, Facebook, Instagram, LinkedIn, YouTube, WhatsApp, and Snapchat). [OPTIONAL: If you feel that you cannot do this, then you cannot let yourself become a member of the jury in this case. Is there anyone who will not be able to comply with this restriction?]
>
> You also cannot conduct any type of independent or personal research or investigation regarding any matters related to this case. Therefore, you cannot use your cellphones, iPads, computers or any other device to do any research or investigation regarding this case, the matters in the case, the legal issues in the case, or the individuals or other entities involved in the case. And you must ignore any information about the case you might see, even accidentally, while browsing the internet or on your social media feeds. This is because you must base the decisions you will have to make in this case solely on what you hear and see in this courtroom. [OPTIONAL: If you feel that you cannot do this, then you cannot let yourself become a member of the jury in this case. Is there anyone who will not be able to comply with this restriction?]

Before Trial:

> The Sixth Amendment of our Constitution guarantees a trial by an impartial jury. This means that, as jurors, you must decide this case based solely on the evidence and law presented to you here in this courtroom. Until all the evidence and arguments have been presented and you begin to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you start to deliberate, you may discuss the case, the evidence, and the law as it has been presented, but only with your fellow jurors. You cannot discuss it with anyone else until you have returned a verdict and the case has come to an end. I'll now walk through some specific examples of what this means.
>
> First, this means that, during the trial, you must not conduct any independent research about this case, or the matters, legal issues, individuals, or other entities involved in this case. Just as you must not search or review any

traditional sources of information about this case (such as dictionaries, reference materials, or television news or entertainment programs), you also must not search the internet or any other electronic resources for information about this case or the witnesses or parties involved in it. The bottom line for the important work you will be doing is that you must base your verdict only on the evidence presented in this courtroom, along with instructions on the law that I will provide.

Second, this means that you must not communicate about the case with anyone, including your family and friends, until deliberations, when you will discuss the case with only other jurors. During deliberations, you must continue not to communicate about the case with anyone else. Most of us use smartphones, tablets, or computers in our daily lives to access the internet, for information, and to participate in social media platforms. To remain impartial jurors, however, you must not communicate with anyone about this case, whether in person, in writing, or through email, text messaging, blogs, or social media websites and apps (like Twitter, Facebook, Instagram, LinkedIn, YouTube, WhatsApp, and Snapchat).

Please note that these restrictions are about all kinds of communications about this case, even those that are not directed at any particular person or group. Communications like blog posts or tweets can be shared to an ever-expanding circle of people and can have an unexpected impact on this trial. For example, a post you make to your social media account might be viewable by a witness who is not supposed to know what has happened in this courtroom before he or she has testified. For these reasons, you must inform me immediately if you learn about or share any information about the case outside of this courtroom, even if by accident, or if you discover that another juror has done so.

Finally, a word about an even newer challenge for trials such as this one– persons, entities, and even foreign governments may seek to manipulate your opinions, or your impartiality during deliberations, using the communications I've already discussed or using fake social media accounts. But these misinformation efforts might also be undertaken through targeted advertising online or in social media. Many of the tools you use to access email, social media, and the internet display third-party notifications, pop-ups, or ads while you are using them. These communications may be intended to persuade you or your community on an issue, and could influence you in your service as a juror in this case. For example, while accessing your email, social media, or the internet, through no fault of your own, you might see popups containing information about this case or the matters, legal principles, individuals or other entities involved in this case. Please be aware of this possibility, ignore any pop-ups or ads that might be relevant to what we are doing here, and certainly do not click through to learn more if these notifications or ads appear. If this happens, you must let me know.

Because it is so important to the parties' rights that you decide this case based solely on the evidence and my instructions on the law, at the beginning of each day, I may ask you whether you have learned about or shared any

information outside of this courtroom. (I like to let the jury know in advance that I may be doing that, so you are prepared for the question.)

I hope that for all of you this case is interesting and noteworthy.

At the End of Each Day of the Case:

As I indicated before this trial started, you as jurors will decide this case based solely on the evidence presented in this courtroom. This means that, after you leave here for the night, you must not conduct any independent research about this case, the matters in the case, the legal issues in the case, or the individuals or other entities involved in the case. This is important for the same reasons that jurors have long been instructed to limit their exposure to traditional forms of media and information such as television and newspapers. You also must not communicate with anyone, in any way, about this case. And you must ignore any information about the case that you might see while browsing the internet or your social media feeds.

At the Beginning of Each Day of the Case:

As I reminded you last night and continue to emphasize to you today, it is important that you decide this case based solely on the evidence and the law presented here. So you must not learn any additional information about the case from sources outside the courtroom. To ensure fairness to all parties in this trial, I will now ask each of you whether you have learned about or shared any information about this case outside of this courtroom, even if it was accidental.

ALTERNATIVE 1 (in open court): If you think you might have done so, please let me know now by raising your hand. [Wait for a show of hands]. I see no raised hands; however, if you would prefer to talk to a member of the court's staff privately in response to this question, please do so at the next break. Thank you for your careful adherence to my instructions.

ALTERNATIVE 2 (during voir dire with each juror, individually): Have you learned about or shared any information about this case outside of this courtroom? . . . Thank you for your careful adherence to my instructions.

8.03 UNANIMOUS VERDICT

(1) Your verdict, whether it is guilty or not guilty, must be unanimous [as to each count].

(2) To find the defendant guilty [of a particular count], every one of you must agree that the government has overcome the presumption of innocence with evidence that proves his guilt beyond a reasonable doubt.

(3) To find him not guilty [of a particular count], every one of you must agree that the government has failed to convince you beyond a reasonable doubt.

(4) Either way, guilty or not guilty, your verdict must be unanimous [as to each count].

Committee Commentary 8.03
(current through May 1, 2025)

Fed. R. Crim. P. 31(a) mandates that jury verdicts in federal criminal trials "shall be unanimous." This also appears to be constitutionally required. *See* Johnson v. Louisiana, 406 U.S. 356, 366-403 (1972) (five justices indicating in dicta that the Sixth Amendment requires unanimous verdicts in federal criminal trials).

Given the importance of the reasonable doubt requirement, the Committee believes that the jurors should be specifically instructed on the relationship between proof beyond a reasonable doubt and the unanimity requirement. As characterized by the Supreme Court in In re Winship, 397 U.S. 358, 363-64 (1970), the reasonable doubt standard plays a "vital" role in our criminal justice system. It is a "prime instrument" for reducing the risk of an erroneous conviction. And it performs the "indispensable" function of "impress[ing] . . . the trier of fact [with] the necessity of reaching a subjective state of certitude [on] the facts in issue."

On the question of whether a specific unanimity instruction is required, see Commentary to Instruction 8.03B Unanimity Not Required – Means.

8.03A UNANIMITY OF THEORY

(No Instruction Recommended.)

Committee Commentary 8.03A
(current through May 1, 2025)

The Committee withdrew this instruction in view of Richardson v. United States, 526 U.S. 813 (1999) and Schad v. Arizona, 501 U.S. 624 (1991).

Fed.R.Crim.P. 7(c) permits the government to allege in one count of an indictment that "the defendant committed [the offense] by one or more specified means." In Schad v. Arizona, 501 U.S. 624 (1991) (plurality opinion), the Supreme Court rejected the approach of requiring unanimity when the means used to commit an offense simply satisfy an element of a crime and do not themselves constitute a separate offense or an element of an offense. In these circumstances, unanimity is not required. *Id*. at 630-33. On the other hand, if the means used to commit an offense are deemed an element of the crime, unanimity is required.

Schad was followed by Richardson v. United States, in which the Court again distinguished the elements of a crime from the means used to commit the elements of the crime. *Richardson, supra* at 817, *citing Schad, supra* at 631-32. If a fact is an element, "a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved [it]." *Id.* (citations omitted). On the other hand, if the fact is defined as a means of committing the crime, "a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." *Richardson,* 526 U.S. at 817, *citing* Schad v. Arizona, *supra*.

Accordingly, the Committee withdrew Instruction 8.03A Unanimity of Theory. In its place is Instruction 8.03B Unanimity Not Required – Means. This instruction covers cases where unanimity is not required because it is alleged the defendant used several possible means to commit a single element of the crime as described in *Schad* and *Richardson*. Instruction 8.03B is discussed in detail in its commentary.

8.03B UNANIMITY NOT REQUIRED – MEANS

(1) One more point about the requirement that your verdict must be unanimous. Count ___ of the indictment accuses the defendant of committing the crime of _____ in more than one possible way. The first is that he _____. The second is that he _____.

(2) The government does not have to prove all of these for you to return a guilty verdict on this charge. Proof beyond a reasonable doubt of any one of these ways is enough. In order to return a guilty verdict, all twelve of you must agree that at least one of these has been proved; however, all of you need not agree that the same one has been proved.

Use Note

> The existence of "multiple factual bases" in a charge warrants a special unanimity instruction where (1) the nature of the evidence is exceptionally complex or the alternative specifications are contradictory or only marginally related to each other; or (2) there is a variance between indictment and proof at trial; or (3) there is tangible indication of jury confusion, as when the jury has asked questions or the court has given regular or supplementary instructions that create a significant risk of nonunanimity.

United States v. Hendrickson, 822 F.3d 812, 823 (6th Cir. 2016) (citations and quotations omitted).

Committee Commentary 8.03B
(current through May 1, 2025)

In Schad v. Arizona, 501 U.S. 624 (1991) (plurality opinion), the Supreme Court rejected the approach of requiring jury unanimity when the means used to commit an offense simply satisfy an element of a crime and do not themselves constitute a separate offense or an element of an offense. In these circumstances, unanimity is not required. *Id*. at 630-33.

Schad was followed by Richardson v. United States, in which the Court again distinguished the elements of a crime from the means used to commit the elements of the crime. Richardson v. United States, 526 U.S. 813, 817 (1999), *citing* Schad v. Arizona, *supra* at 631-32 (1991) (plurality opinion). If a fact is an element, "a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved [it]." *Richardson*, 526 U.S. at 817, *citing* Johnson v. Louisiana, 406 U.S. 356, 369-71 (1972) (Powell, J., concurring); Andres v. United States, 333 U.S. 740, 748 (1948); and Fed. R. Crim. Pro. 31(a). On the other hand, if the fact is defined as a means of committing the crime, "a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." *Richardson*, 526 U.S. at 817, *citing* Schad v. Arizona, *supra* and Andersen v. United States, 170 U.S. 481, 499-501 (1898). *See also* Mathis v. United States, 136 S.Ct. 2243, 2248-49

(2016) (reiterating this distinction and citing *Schad* and *Richardson*).

This instruction covers situations where the crime charged includes an element that can be committed by multiple means, so jury unanimity on a particular means is not required. The instruction should only be given if the indictment alleges that the defendant committed a single element through more than one means.

The Sixth Circuit has explained:

> The existence of multiple factual bases in a charge warrants a special unanimity instruction where (1) the nature of the evidence is exceptionally complex or the alternative specifications are contradictory or only marginally related to each other; or (2) there is a variance between indictment and proof at trial; or (3) there is tangible indication of jury confusion, as when the jury has asked questions or the court has given regular or supplementary instructions that create a significant risk of nonunanimity.

United States v. Hendrickson, 822 F.3d 812, 823 (6th Cir. 2016) (*quoting* United States v. Miller, 734 F.3d 530, 538-ฺ39 (6th Cir. 2013)).

Statutes the courts have analyzed on this point include:

– 18 U.S.C. § 2 (terms listed in § 2 describe various means by which the elements of the crime can be accomplished, and do not require jury unanimity as to each of these terms, United States v. Davis, 306 F.3d 398, 414 (6th Cir. 2002)).

– 18 U.S.C. § 111 (harming or threatening a federal officer under § 111(a)(1) states a singular crime which can be committed six ways, United States v. Kimes, 246 F.3d 800, 809 (6th Cir. 2001)).

– 18 U.S.C. § 401(3) (where defendant was convicted of criminal contempt for violating a court order, and the indictment contained alternative specifications that defendant violated the order by (1) filing a false return for 2008 and by (2) failing to file amended returns for 2002 and 2003, a specific unanimity instruction was not warranted because the court order was handed down in its entirety all at once and defendant's actions had a single unifying theme based on faulty legal theories and the specifications were sufficiently related to avoid a risk of serious unfairness, United States v. Hendrickson, 822 F.3d 812, 823-24 (6th Cir. 2016)).

– 18 U.S.C. § 666 (theft of government services under § 666 exemplifies an offense which can be committed by a variety of acts, United States v. Sanderson, 966 F.2d 184, 188-89 (6th Cir. 1992)).

– 18 U.S.C. § 922(g)(1) (when the indictment charges a felon possessed more than one firearm, the particular firearm is not an element, but "instead the means used to satisfy the element of 'any firearm'," United States v. DeJohn, 368 F.3d 533, 542 (6th Cir. 2004)).

– 18 U.S.C. § 922(g)(1) (possession under § 922(g) does not require a specific unanimity instruction; proving possession as actual or constructive involves different means, not different elements, so the general unanimity instruction was sufficient, U.S. v. Crump, 65 F.4th 287 (6th Cir. 2023)).

– 18 U.S.C. § 924(c) (offenses of possessing, using, or carrying a firearm generally do not require jury unanimity as to a specific gun; this general rule has exceptions which were handled properly with an instruction requiring the jury to agree on "one instance" of firearm possession in furtherance of a drug trafficking crime, United States v. Steele, 919 F.3d 965, 973 (6th Cir. 2019)).

– 18 U.S.C. § 1001 (duty to disclose and concealment of material information as alternative ways to prove violation of single offense, United States v. Zalman, 870 F.2d 1047, 1055 n.10 (6th Cir. 1989)). *See also* United States v. Hixon, 987 F.2d 1261, 1265 (6th Cir. 1993) (three subsections are separate means of committing single offense).

– 18 U.S.C. § 1512(b)(3) (where defendant pressured a witness to conceal facts and to provide false information, omission of a special unanimity instruction was not plain error because the charge of hindering communication of information to a law enforcement officer involved a single element that could be proved by multiple means, and while the statutory term "information" was broad, it raised no risk of serious unfairness in this case, United States v. Eaton, 784 F.3d 298, 308-09 (6th Cir. 2015)).

– 18 U.S.C. § 1519 (where defendant made multiple false statements and omissions in a prison incident report, the "falsifies clause" of § 1519 provided several possible means or ways of committing the crime and the jury need not agree that the same way was proved, United States v. Schmeltz, 667 F.3d 685 at 687-688 (6th Cir. 2011).

– 18 U.S.C. § 1962(d) (RICO conspiracy does not require unanimity for the particular racketeering acts; court does not resolve whether RICO conspiracy requires unanimity for categories or types of racketeering acts, United States v. Rios, 2016 WL 3923881, 18-19 (6th Cir. July 21, 2016).

– 21 U.S.C. § 848 (the "series of violations" language in the Continuing Criminal Enterprise statute made each individual violation an element, so the jury had to agree unanimously on each violation rather than merely agreeing that there had been a series of violations. Richardson v. United States, 526 U.S. 813, 824 (1999)).

Cf. 18 U.S.C. § 1425 ("Rather than defining two crimes, [subsections (a) and (b)] provide two means by which unlawful naturalization can be obtained." United States v. Damrah, 412 F.3d 618, 622 (6th Cir. 2005) (analyzing the issue in the context of a duplicity claim)) and 18 U.S.C. § 242 ("[T]he Fourteenth Amendment and Eighth Amendment excessive force standards describe two alternative methods by which one crime could be committed, rather than two crimes." U.S. v. Budd, 496 F.3d 517 (6th Cir. 2007) (analyzing the issue in the context of a constructive amendment claim)).

8.03C – UNANIMITY REQUIRED: STATUTORY MAXIMUM PENALTY INCREASED (CONTROLLED SUBSTANCES: 21 U.S.C. § 841)

(This instruction has been withdrawn and replaced with Instruction 14.07A.)

8.04 DUTY TO DELIBERATE

(1) Now that all the evidence is in and the arguments are completed, you are free to talk about the case in the jury room. In fact, it is your duty to talk with each other about the evidence, and to make every reasonable effort you can to reach unanimous agreement. Talk with each other, listen carefully and respectfully to each other's views, and keep an open mind as you listen to what your fellow jurors have to say. Try your best to work out your differences. Do not hesitate to change your mind if you are convinced that other jurors are right and that your original position was wrong.

(2) But do not ever change your mind just because other jurors see things differently, or just to get the case over with. In the end, your vote must be exactly that--your own vote. It is important for you to reach unanimous agreement, but only if you can do so honestly and in good conscience.

(3) No one will be allowed to hear your discussions in the jury room, and no record will be made of what you say. So you should all feel free to speak your minds.

(4) Listen carefully to what the other jurors have to say, and then decide for yourself if the government has proved the defendant guilty beyond a reasonable doubt.

Use Note

This instruction is designed for use before deliberations begin as part of the court's final instructions to the jury.

Committee Commentary 8.04
(current through May 1, 2025)

Case law on a related issue, the *Allen* charge, is discussed in the Commentary to Instruction 9.04.

This instruction is for use before deliberations begin as part of the court's final instructions to the jury. Its content is heavily dependent on cases dealing with post-deliberation *Allen* charges. In United States v. Sawyers, 902 F.2d 1217, 1220-21 (6th Cir.1990), the Sixth Circuit said that an *Allen* charge "probably would have its least coercive effect if given along with the rest of the instructions before the jury ever start(s) deliberating."

In Allen v. United States, 164 U.S. 492, 501-502 (1896), the district court gave some lengthy supplemental instructions which, as paraphrased by the Supreme Court in its opinion, included the following concepts:

1) that in a large proportion of cases absolute certainty could not be expected;

2) that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other;

3) that it was their duty to decide the case if they could conscientiously do so;

4) that they should listen, with a disposition to be convinced, to each other's arguments;

5) that, if the much larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one given that it had made no impression upon the minds of so many equally honest and intelligent persons; and

6) that if, on the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

The Supreme Court analyzed these supplemental instructions as follows:

> While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury-room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury-room with a blind determination that the verdict shall represent his opinion of the case at that moment; or, that he should close his ears to the arguments of men who are equally honest and intelligent as himself. There was no error in these instructions.

The Supreme Court noted that these instructions were "taken literally" from instructions approved by the Massachusetts Supreme Court in Commonwealth v. Tuey, 62 Mass. (8 Cush.) 1, 2-3 (1851). The *Tuey* instructions included the following additional concepts, not noted by the Supreme Court in its *Allen* opinion:

7) that in order to make a decision more practicable, the law imposes the burden of proof on one party or the other;

8) that in a criminal case the burden of proof is on the government to prove every element of the charge beyond a reasonable doubt; and

9) that if the jurors are left in doubt as to any element, then the defendant is entitled to the benefit of that doubt and must be acquitted.

The records in the *Allen* case indicate that the actual instruction given by the district court only included a shortened version of these additional concepts. In the course of giving the supplemental instructions, the district court in *Allen* included the following from *Tuey*:

"In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases. In the present case, the burden of proof is upon the government."

See Records and Briefs, United States Supreme Court, Vol. 829, October Term 1896, Allen v. United States, Docket No. 371, Transcript of Record pp. 137-38. Except for one First Circuit decision, Pugliano v. United States, 348 F.2d 902, 903-04 (1st Cir. 1965), no cases appear to have noticed or discussed this omission from the Supreme Court's opinion in *Allen*.

Despite substantial judicial and scholarly criticism of *Allen* in the years since it was decided, the Supreme Court reaffirmed *Allen*'s constitutional validity in Lowenfield v. Phelps, 484 U.S. 231 (1988). Referring to the *Allen* Court's analysis quoted above, the Court said that "[t]he continuing validity of this Court's observations in Allen are beyond dispute." *Lowenfield,*

supra at 237.

Sixth Circuit decisions have repeatedly emphasized that the instructions approved by the Supreme Court in *Allen* "approach 'the ultimate permissible limits' for a verdict urging instruction." *See, e.g.*, United States v. Harris, 391 F.2d 348, 354 (6th Cir. 1968) (*quoting* Green v. United States, 309 F.2d 852, 855 (5th Cir.1962)). "Our . . . circuit has determined that the wording approved at the turn of the century represents, at best, 'the limits beyond which a trial court should not venture in urging a jury to reach a verdict'." United States v. Scott, 547 F.2d 334, 337 (6th Cir. 1977) (*quoting Harris, supra* at 354). "Any variation upon the precise language approved in Allen imperils the validity of the trial." *Scott, supra* at 337. *Accord* Williams v. Parke, 741 F.2d 847, 850 (6th Cir. 1984); United States v. Giacalone, 588 F.2d 1158, 1166 (6th Cir. 1978); United States v. LaRiche, 549 F.2d 1088, 1092 (6th Cir. 1977).

Among the more important variations that the Sixth Circuit has criticized or disapproved are the following: 1) statements regarding the expense and burden of conducting a trial, United States v. Harris, *supra*, 391 F.2d at 354 ("questionable extension"); 2) statements that the case must be decided at some time by some jury, *id.* at 355 ("coercive . . . [and] misleading"); 3) omitting statements reminding jurors that they should not surrender an honest belief about the outcome of the case simply because other jurors disagree, United States v. Scott, *supra*, 547 F.2d at 337 ("one of the most important parts of the Allen charge"); and 4) statements that juror intransigence would delay the trial of other cases and add to the court's backlog, *Scott, supra* at 337 ("impermissibly coercive").

These and other Sixth Circuit cases provide further guidance regarding the appropriate content of an *Allen* charge. In United States v. Barnhill, 305 F.2d 164, 165 (6th Cir. 1962), the district court's supplemental instructions stressed the importance of reaching a verdict, and the duty of each individual juror to listen to the views expressed by the other jurors and to give those views due weight and consideration in attempting to arrive at a verdict. These statements were balanced with a reminder that each juror had the right to his own beliefs, and that if it developed that they could not agree, a mistrial would be declared and the case would be submitted to another jury. The Sixth Circuit affirmed, stating that these instructions "complied with the standards approved ... in Allen."

In United States v. Markey, 693 F.2d 594, 597 (6th Cir. 1982), the district court concluded its instructions to the jury with the comment that the courthouse would be available the next morning, which was Christmas Eve day, if the jury was not able to reach a consensus that afternoon. The Sixth Circuit affirmed, stating that this comment "was not 'likely to give the jury the impression that it was more important to be quick than to be thoughtful'."

In United States v. Harris, *supra*, 391 F.2d at 355, the Sixth Circuit explained as follows why instructions indicating that the case must be decided at some time by some jury were coercive and misleading:

> The constitutional safeguards of trial by jury (Article III, Section 2, Clause 3, and the Sixth Amendment) have always been held to confer upon every citizen the right ... to remain free from the stigma and penalties of a criminal conviction until he has been

> found guilty by a unanimous verdict of a jury of twelve of his peers. The possibility of disagreement by the jury and the lack of a unanimous verdict is a protection conferred upon a defendant in a criminal case by the Constitution. For the judge to tell a jury that a case must be decided is therefore not only coercive in nature but is misleading in fact. It precludes the right of a defendant to rely on the possibility of disagreement by the jury.

The Sixth Circuit then noted that in Thaggard v. United States, 354 F.2d 735, 739 (5th Cir. 1965), the Fifth Circuit had said that, "[An] *Allen* charge should be approved only so long as it 'avoids creating the impression that there is anything improper, questionable, or contrary to good conscience for a juror to cause a mistrial'."

Harris and subsequent Sixth Circuit cases have said that there is a clear distinction between language stating that the case "must be decided at some time," which is improper, and language stating that the case "must be disposed of at some time," which is not. *Harris, supra* at 356. "The latter phrase merely restates the obvious proposition that all cases must come to an end at some point, whether by verdict or otherwise." United States v. LaRiche, *supra*, 549 F.2d at 1092.

In Williams v. Parke, *supra*, 741 F.2d at 850-52, the Sixth Circuit upheld the defendant's state court conviction against constitutional attack. In rejecting the argument that the state trial court's supplemental instructions violated due process, the Sixth Circuit emphasized that the instructions had not included the criticized language from *Allen* singling out minority jurors. *Id.* at 850. *See also* Lowenfield v. Phelps, *supra*, 484 U.S. at 237-38 (noting same omission in the course of affirming a state court conviction). The Sixth Circuit also emphasized that the trial court's instructions implicitly advised the jurors of their "right to continue disagreeing" by alluding to the possibility that a new jury might be necessary, and by telling them that they should return to court if they could not agree. *Williams, supra* at 850. *See also* Hyde v. United States, 225 U.S. 347, 383 (1912) (district court's instruction that it was not the court's intention to unduly prolong the deliberations, and that if the jurors could not conscientiously agree, they would be discharged, eliminated potential coercive effect of other instructions).

In United States v. LaRiche, *supra*, 549 F.2d at 1092-93, the Sixth Circuit rejected the defendant's argument that the district court's *Allen* charge constituted plain error because it did not remind the jurors of the government's burden of proof. But in doing so the Sixth Circuit did say that "it may be desirable for a judge to restate the beyond a reasonable doubt standard in an Allen charge." *Id.* at 1093. *See also* United States v. Lewis, 651 F.2d 1163, 1165 (6th Cir. 1981) (given the weakness of the evidence against the defendant, and the jury's difficulty in weighing the evidence, it was improper not to reinstruct on the government's burden of proving guilt beyond a reasonable doubt).

In United States v. Giacalone, *supra*, 588 F.2d at 1166-67, the Sixth Circuit noted that in Kawakita v. United States, 343 U.S. 717 (1952), the Supreme Court implicitly approved an *Allen* charge which later became the basis for Devitt and Blackmar Instruction 18.14. That instruction, which is intended for use as a supplemental instruction when the jurors fail to agree, states:

> The Court wishes to suggest a few thoughts which you may desire to consider in your

deliberations, along with the evidence in the case, and all the instructions previously given.

This is an important case. The trial has been expensive in time, and effort, and money, to both the defense and the prosecution. If you should fail to agree on a verdict, the case is left open and undecided. Like all cases, it must be disposed of some time. There appears no reason to believe that another trial would not be costly to both sides. Nor does there appear any reason to believe that the case can be tried again, by either side, better or more exhaustively than it has been tried before you. Any future jury must be selected in the same manner and from the same source as you have been chosen. So, there appears no reason to believe that the case would ever be submitted to twelve men and women more conscientious, more impartial, or more competent to decide it, or that more or clearer evidence could be produced on behalf of either side.

Of course these things suggest themselves, upon brief reflection, to all of us who have sat through this trial. The only reason they are mentioned now is because some of them may have escaped your attention, which must have been fully occupied up to this time in reviewing the evidence in the case. They are matters which, along with other and perhaps more obvious ones, remind us how desirable it is that you unanimously agree upon a verdict.

As stated in the instructions given at the time the case was submitted to you for decision, you should not surrender your honest convictions as to the weight or effect of evidence, solely because of the opinion of other jurors, or for the mere purpose of returning a verdict.

However, it is your duty as jurors to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but you should do so only after a consideration of the evidence in the case with your fellow jurors. And in the course of your deliberations, you should not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous.

In order to bring twelve minds to an unanimous result, you must examine the questions submitted to you with candor and frankness, and with proper deference to and regard for the opinions of each other. That is to say, in conferring together, each of you should pay due attention and respect to the views of the others, and listen to each other's arguments with a disposition to reexamine your own views.

If much the greater number of you are for a conviction, each dissenting juror ought to consider whether a doubt in his or her own mind is a reasonable one, since it makes no effective impression upon the minds of so many equally honest, equally conscientious fellow jurors, who bear the same responsibility, serve under the same oath, and have heard the same evidence with, we may assume, the same attention and an equal desire to arrive at the truth. On the other hand, if a majority or even a lesser number of you are for acquittal, other jurors ought seriously to ask themselves again, and most thoughtfully, whether they do not have reason to doubt the correctness of a judgment, which is not concurred in by many of their fellow jurors, and whether they should not distrust the weight and sufficiency of evidence, which fails to convince the minds of several of their fellows beyond a reasonable doubt.

You are not partisans. You are judges--judges of the facts. Your sole interest here is to seek the truth from the evidence in the case. You are the exclusive judges of the

credibility of all the witnesses, and of the weight and effect of all the evidence. In the performance of this high duty, you are at liberty to disregard all comments of both court and counsel, including of course the remarks I am now making.

Remember, at all times, that no juror is expected to yield a conscientious conviction he or she may have as to the weight or effect of evidence. But remember also that, after full deliberation and consideration of all the evidence in the case, it is your duty to agree upon a verdict, if you can do so without violating your individual judgment and your conscience. Remember too, if the evidence in the case fails to establish guilt beyond a reasonable doubt, the accused should have your unanimous verdict of "NOT GUILTY".

In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases. In the present case, the burden of proof is on the government.

Above all, keep constantly in mind that, unless your final conscientious appraisal of the evidence in the case clearly requires it, the accused should never be exposed to the risk of having to run twice the gauntlet of a criminal prosecution; and to endure a second time the mental, emotional and financial strain of a criminal trial.

You may conduct your deliberations as you choose, but I suggest that you now carefully reexamine and reconsider all the evidence in the case bearing upon the questions before you.

You may be as leisurely in your deliberations as the occasion may require; and you shall take all the time which you may feel is necessary. (The bailiffs have been instructed to take you to your meals at your pleasure, and to take you to your hotel whenever you may be ready to go.)

You may now retire and continue your deliberations, in such manner as shall be determined by your good and conscientious judgment as reasonable men and women.

In United States v. Nickerson, 606 F.2d 156, 158-59 (6th Cir. 1979), the Sixth Circuit concluded that an instruction similar to Devitt and Blackmar Instruction 18.15 was not coercive. *See also* United States v. Lewis, supra, 651 F.2d at 1165 (characterizing Devitt and Blackmar Instruction 18.15 as having been "approved" in *Nickerson*). Instruction 18.15 is a milder and shorter version of the Allen charge. It states:

I am going to ask you that you resume your deliberations in an attempt to return a verdict.

As I have told you, each of you must agree in order to return a verdict. You have the duty to consult with one another and to deliberate with a view to reaching an agreement, if this can be done without violence to individual judgment. Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors. During the course of your deliberations, each of you should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous. No juror, however, should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

The instruction recommended by the Commentary to ABA Standards for Criminal Justice, Trial

by Jury Standard 15-4.4, states:

> The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.
>
> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.
>
> You are not partisans. You are judges--judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

Instruction 8.04 incorporates the best parts of these various instructions in plain English form.

The "every reasonable effort" language in paragraph (1) is essentially a plain English restatement of the language in other instructions that the jurors have a duty to deliberate with a view to reaching an agreement if they can do so without violence to individual judgment.

The "keep an open mind" language in paragraph (1) is patterned after the "open mind" language found in other pattern instructions.

The "try your best" language at the end of paragraph (1) summarizes the "every reasonable effort" theme stated in the first sentence for emphasis.

The "do not ever change your mind" language at the beginning of paragraph (2) is a plain English restatement of the "do not surrender" language found in other instructions. The adverb "ever" was included to provide an appropriate balance to the "do not hesitate" language and the other strong language in the first paragraph encouraging jurors to reach agreement.

The "just because other jurors see things differently" language, and the "just to get it over with language," in paragraph (2) is a plain English restatement of language in other instructions. See Federal Judicial Center Instruction 10.

The "your own vote" language in paragraph (2) is a plain English restatement of the language in other instructions that the verdict must represent the considered judgment of each juror. The "only if you can do so honestly and in good conscience" language is drawn from the 1985 version of Ninth Circuit Instruction 7.01.

Paragraph (3) tells the jurors that no one will be allowed to hear their deliberations and that no record will be made of what they say. It is based on concepts included in Federal Judicial Center Instruction 9.

Paragraph (4) summarizes the deliberation process and relates it to the government's burden of proof. This approach is consistent with the concluding sentences recommended by Federal Judicial Center Instruction 10. It rejects the "seek the truth" language found in other instructions for the reasons more fully explained in the Committee Commentary to Instruction 1.02. Such language incorrectly assumes that the "truth" is somewhere in the evidence presented, overlooks the possibility that the proofs do not satisfactorily establish the truth one way or the other, and thereby shifts attention away from the government's obligation to convince the jury beyond a reasonable doubt. *But see* United States v. LaRiche, *supra*, 549 F.2d at 1093 (rejecting the defendant's argument that such language distorts the jury's function and dilutes the government's burden of proof).

8.05 PUNISHMENT

(1) If you decide that the government has proved the defendant guilty, then it will be my job to decide what the appropriate punishment should be.

(2) Deciding what the punishment should be is my job, not yours. It would violate your oaths as jurors to even consider the possible punishment in deciding your verdict.

(3) Your job is to look at the evidence and decide if the government has proved the defendant guilty beyond a reasonable doubt.

Committee Commentary 8.05

(current through May 1, 2025)

It is standard practice to include an instruction telling the jurors that if they find the defendant guilty, it is the judge's job to determine the appropriate punishment, and that they cannot consider what the possible punishment might be in deciding their verdict.

The Sixth Circuit cited this instruction and quoted paragraph (2) in support of its conclusion on an issue involving cross-examination on penalties in United States v. Bilderbeck, 163 F.3d 971, 978 (6th Cir. 1999).

This instruction remains appropriate in cases involving a verdict of not guilty by reason of insanity in the wake of Shannon v. United States, 512 U.S. 573 (1994). That decision is discussed in detail in the Commentary to Pattern Instruction 6.04 on the insanity defense.

8.06 VERDICT FORM

(1) I have prepared a verdict form that you should use to record your verdict. The form reads as follows: _____.

(2) If you decide that the government has proved the charge against the defendant beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form. If you decide that the government has not proved the charge against him beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form. Your foreperson [Each of you] should then sign the form, put the date on it, and return it to me.

Use Note

The bracketed language in the last sentence of paragraph (2) should be used in place of "Your foreperson" if the court follows the practice of having all jurors sign the verdict form.

Committee Commentary 8.06

(current through March May 1, 2025)

Many pattern instructions include an explanation to the jurors about how to use the verdict form, either as part of a general instruction on deliberations or as a separate instruction.

Some judges prefer to have all jurors sign the verdict form. The bracketed language in the last sentence of paragraph (2) should be used in place of "Your foreperson" when this approach is preferred.

In United States v. Escobar-Garcia, 893 F.2d 124, 126 (6th Cir. 1990), in a prosecution for illegal entry to the United States under 8 U.S.C. § 1326, the Sixth Circuit noted that exigent circumstances may arise to justify using special interrogatories to the jury but cautioned against using them in the interest of judicial economy. Subsequent cases have established that special interrogatories are proper to satisfy the Sixth Amendment right to jury trial. *See, e.g.,* Instructions 14.07A and 14.07B, which recommend the use of special verdict forms to satisfy the requirements of Apprendi v. New Jersey, 530 U.S. 466 (2000).

8.07 LESSER OFFENSE, ORDER OF DELIBERATIONS, VERDICT FORM

(1) As I explained to you earlier, the charge of _____ includes the lesser charge of _____.

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

(3) If you decide that the government has proved this lesser charge beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the verdict form. If you decide that the government has not proved this lesser charge beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form. Your foreperson [Each of you] should then sign the form, put the date on it and return it to me.

Use Note

The bracketed language in paragraph (2) should be added if the court believes that the jurors should be permitted to consider a lesser offense even though they have not unanimously acquitted the defendant of the charged offense.

The bracketed language in the last sentence of paragraph (3) should be used in place of "Your foreperson" if the court follows the practice of having all jurors sign the verdict form.

Committee Commentary 8.07
(current through May 1, 2025)

This instruction explains the order and manner in which greater and lesser offenses should be considered. Lesser included offenses are defined in Pattern Instruction 2.03.

One issue is whether the jury should be allowed to consider a lesser offense only after it agrees unanimously the defendant is not guilty of the greater offense, or whether it may also consider a lesser offense if it is unable to reach agreement on the greater offense. The "every reasonable effort" language in brackets in paragraph (2) is included as an option so the district court may in its discretion use either approach. No Supreme Court or Sixth Circuit authority compels one approach over the other. A panel of the Sixth Circuit has held that it was not error for the district judge to omit the "every reasonable effort" language in the paragraph (2) brackets. In United States v. Amey, 1995 WL 696680, 1995 U.S. App. LEXIS 35527 (6th Cir. 1995) (unpublished), the district court instructed the jury on lesser included offenses using an instruction substantially similar to Pattern Instruction 8.07 but omitting the bracketed language on "every reasonable effort" in paragraph (2). A panel of the Sixth Circuit affirmed the decision, explaining:

> We note, first, that the defendant's requested "reasonable efforts" instruction, if given in this case would not have constituted error. See, e.g., United States v. Tsanas, 572 F.2d at 346 ("we cannot say either form of instruction is wrong as a matter of law"); Sixth Circuit District Judges Association, Pattern Criminal Jury Instructions section 8.07,

> Committee Commentary (1991 ed.) ("the Committee takes no position on which approach should be used"). However, given what even Tsanas recognizes to be the speculative advantages to be gained by a defendant from a "reasonable efforts" instruction, we conclude that the failure to give that instruction also cannot be held to constitute error. We thus decline to reverse the conviction.

Amey, 1995 WL at 5, 1995 U.S. App. LEXIS at 14-15.

Case law in other circuits indicates that neither of the options is legally incorrect, and that the district court may choose between them as the court sees fit, unless the defendant objects, in which case the court should give whichever option the defendant elects. *See* United States v. Jackson, 726 F.2d 1466, 1469-70 (9th Cir.1984).

Giving the defendant the right to elect the option to be given is based on the Second Circuit's decision in United States v. Tsanas, 572 F.2d 340 (2d Cir. 1978). In his opinion for the Court in *Tsanas*, Judge Friendly explained that the two available options had advantages and disadvantages for both the prosecution and the defense. With regard to the option that requires the jury to unanimously find the defendant not guilty of the greater offense before moving on to consider a lesser offense, he first described its advantages:

> [This] instruction . . . has the merit, from the Government's standpoint, of tending to avoid the danger that the jury will not adequately discharge its duties with respect to the greater offense, and instead will move too quickly to the lesser one. From the defendant's standpoint, it may prevent any conviction at all; a jury unable either to convict or acquit on the greater charge will not be able to reach a lesser charge on which it might have been able to agree.[7]
>
> 7. It might be thought to have the further advantage of producing a clear acquittal on the greater charge which would plainly forbid reprosecution on that charge after a successful appeal from the conviction on the lesser charge. But, here again, such a reprosecution apparently is barred by the double jeopardy clause regardless of the form of instruction. See Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957); Price v. Georgia, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970).

Tsanas, supra at 346.

He then went on to describe the disadvantages of such an instruction:

> But it entails disadvantages to both sides as well: By insisting on unanimity with respect to acquittal on the greater charge before the jury can move to the lesser, it may prevent the Government from obtaining a conviction on the lesser charge that would otherwise have been forthcoming and thus require the expense of a retrial. It also presents dangers to the defendant. If the jury is heavily for conviction on the greater offense, dissenters favoring the lesser may throw in the sponge rather than cause a mistrial that would leave the defendant with no conviction at all, although the jury might have reached sincere and unanimous agreement with respect to the lesser charge.

Id. at 346.

With regard to the option that allows the jury to move on to consider a lesser offense if the jury is unable to unanimously agree on a verdict on the greater offense, Judge Friendly said:

> An instruction permitting the jury to move on to the lesser offense if after all reasonable efforts it is unable to reach a verdict on the greater likewise has advantages and disadvantages to both sides--the mirror images of those associated with the [option discussed above]. It facilitates the Government's chances of getting a conviction for something, although at the risk of not getting the one that it prefers. And it relieves the defendant of being convicted on the greater charge just because the jury wishes to avoid a mistrial, but at the risk of a conviction on the lesser charge which might not have occurred if the jury, by being unable to agree to acquit on the greater, had never been able to reach the lesser.

Id.

He then concluded as follows:

> With the opposing considerations thus balanced, we cannot say that either form of instruction is wrong as a matter of law. The court may give the one that it prefers if the defendant expresses no choice. If he does, the court should give the form of instruction which the defendant seasonably elects. It is his liberty that is at stake, and the worst that can happen to the Government under the less rigorous instruction is his readier conviction for a lesser rather than a greater crime. As was said in Bell v. United States, 349 U.S. 81, 83, 75 S.Ct. 620, 622, 99 L.Ed. 905 (1955), albeit in a different context: It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.

Id.

In United States v. Jackson, *supra*, 726 F.2d at 1469-70, the Ninth Circuit found this reasoning persuasive, and joined the Second Circuit in holding that the district court should give whichever option the defendant elects. In addition to the reasons advanced by Judge Friendly, the Ninth Circuit argued that this approach "ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard." The Ninth Circuit explained that if the jury must unanimously agree on a not guilty verdict on the greater offense before moving on to a lesser, there is a risk that jurors who have a doubt that the defendant is guilty of the greater offense, but who are convinced the defendant is guilty of some offense, will likely resolve their doubts in favor of convicting the defendant of the greater offense, rather than holding out and not convicting the defendant of anything at all. *See also* Catches v. United States, 582 F.2d 453, 459 (8th Cir. 1978) (referring to Judge Friendly's opinion in *Tsanas* as a "well-reasoned rule").

The bracketed language in paragraph (2) allows the district court to use either approach. If the district court believes that the jurors may move on to consider a lesser offense even if they cannot unanimously agree on a verdict on the greater charge, the bracketed language should be

added to the unbracketed language used in paragraph (2). If the court believes that this concept is not appropriate, the bracketed language should be omitted. The Committee takes no position on which approach should be used.

Some judges prefer to have all jurors sign the verdict form. The bracketed language in the last sentence should be used instead of "Your foreperson" when this approach is preferred.

8.08 VERDICT LIMITED TO CHARGES AGAINST THIS DEFENDANT

(1) Remember that the defendant is only on trial for the particular crime charged in the indictment [and the lesser charges which I described]. Your job is limited to deciding whether the government has proved the crime charged [or one of those lesser charges].

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

Use Note

Any changes made in paragraphs (1) and (2) should be made in paragraphs (2) and (3) of Instruction 2.01 as well.

Bracketed paragraph (2) should be included if the possible guilt of others has been raised as an issue during the trial. Modifications of this paragraph may be necessary in conspiracy, aiding and abetting, alibi or mistaken identification cases, where the possible guilt of others may be a legitimate issue.

Committee Commentary 8.08
(current through May 1, 2025)

The purpose of this instruction is twofold. The first purpose is to remind the jurors that their verdict is limited to the particular charge made against the defendant. The second is to remind them that their verdict is limited to the particular defendant who has been charged. The instruction is a plain English restatement of various concepts found in comparable instructions.

Paragraph (2) should not be given in every case. If the possible guilt of others has not been raised during trial, this paragraph is unnecessary and should be omitted to avoid confusion. Note also that this paragraph may require modification in cases where vicarious criminal liability is alleged, such as conspiracy or aiding and abetting cases. In such cases the jury may be required to decide the guilt of other persons not charged in the indictment. Paragraph (2) may also require modification in cases in which the defendant has raised an alibi defense or has argued mistaken identification. Where the defendant claims that someone else committed crime, it may be confusing to instruct the jurors that they should not be concerned with anyone else's guilt.

The concepts covered in paragraphs (1) and (2) are also covered in Instruction 2.01. Corresponding deletions or modifications should be made there as well.

8.09 COURT HAS NO OPINION

Let me finish up by repeating something that I said to you earlier. Nothing that I have said or done during this trial was meant to influence your decision in any way. You decide for yourselves if the government has proved the defendant guilty beyond a reasonable doubt.

Committee Commentary 8.09
(current through May 1, 2025)

A panel of the Sixth Circuit has suggested that giving this instruction may help avoid error if the district judge questions the witnesses. In United States v. Voyles, 1993 WL 272448, 1993 U.S. App. LEXIS 19381 (6th Cir. 1993) (unpublished), the panel concluded that the questions the district judge asked witnesses during the trial were within the judge's authority and did not require the conviction to be reversed. In support of this conclusion, the panel noted that the district judge gave Pattern Instruction 8.09. *Voyles*, 1993 WL at 4, 1993 U.S. App. LEXIS at 11.

Similarly, a panel of the Sixth Circuit found no error in comments the judge made to the jury, in part because the district court gave an instruction identical to Pattern Instruction 8.09. In United States v. Frye, 2000 WL 32029, 2000 U.S. App. LEXIS 446 (6th Cir. 2000) (unpublished), the district court told the jury during voir dire that the court had approved the wire-tap used in the case. A panel of the Sixth Circuit found no error in refusing to strike the jury venire because of the comment and explained, "Due to the innocuous nature of the comment made to the jury, and based upon the curative instruction given by the court, it cannot be said that Frye was harmed to such an extent that reversal of the conviction is warranted." *Frye,* 2000 WL at 3, 2000 U.S. App. LEXIS at 8-9, *citing* United States v. Mosely, 810 F.2d 93, 99 (6th Cir. 1987).

8.10 JUROR NOTES

(1) Remember that if you elected to take notes during the trial, your notes should be used only as memory aids. You should not give your notes greater weight than your independent recollection of the evidence. You should rely upon your own independent recollection of the evidence or lack of evidence and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any more weight than the memory or impression of each juror.

(2) Whether you took notes or not, each of you must form and express your own opinion as to the facts of the case.

Use Note

If note-taking is permitted, the court should also give a preliminary instruction on juror note-taking.

Committee Commentary
(current through May 1, 2025)

In United States v. Johnson, 584 F.2d 148 (6th Cir. 1978), the Sixth Circuit held that it was within the sound discretion of the trial court to allow the jury to take notes during the course of trial and use them in deliberations. *Id*. at 157. The Sixth Circuit particularly noted that allowing the jury to take notes during the course of trial is appropriate where numerous defendants are charged in a multi-count indictment. *Id*. at 158. The Committee recognizes the common practice of allowing the jury to take notes, especially in complex cases. This instruction is designed to accommodate that practice.

The language of the first paragraph is based upon the last two paragraphs of Eleventh Circuit Trial Instruction 2.1 (1997 ed.). The language of the second paragraph is based upon language in Fifth Circuit Pattern Instruction 1.02, Alternative B (2001 ed.).

Chapter 9.00

SUPPLEMENTAL INSTRUCTIONS

Table of Instructions

9.01 SUPPLEMENTAL INSTRUCTIONS IN RESPONSE TO JUROR QUESTIONS

(1) Members of the jury, I have received a note from you that says _____.

(2) Let me respond by instructing you as follows: _____.

(3) Keep in mind that you should consider what I have just said together with all the other instructions that I gave you earlier. All these instructions are important, and you should consider them together as a whole.

(4) I would ask that you now return to the jury room and resume your deliberations.

Use Note

This instruction should be used when the court gives supplemental instructions in response to juror questions.

Committee Commentary 9.01
(current through May 1, 2025)

This instruction provides a standardized response to juror questions which includes a reminder that all the instructions should be considered together as a whole.

For a summary of when supplemental instructions should be given, *see* United States v. Nunez, 889 F.2d 1564, 1568 (6th Cir. 1989). *See also* United States v. Brown, 915 F.2d 219, 223 (6th Cir.1990).

In United States v. Combs, 33 F.3d 667 (6th Cir. 1994), the Sixth Circuit held that the trial court's supplemental instructions were inadequate but did not rise to the level of plain error. The court identified two problems with the content of the supplemental instructions: they answered jurors' questions with a categorical yes or no, and they referred jurors to the previous instructions without elaborating on them. The Sixth Circuit stated that generally, standards regarding supplemental instructions were "well-settled." The court explained, "In United States v. Giacalone, we made clear that a supplemental instruction is one that goes beyond reciting what has previously been given; it is not merely repetitive. Reiterating the rule . . . that a trial court has a duty 'to clear up uncertainties which the jury brings to the court's attention,' we stated that the propriety of a supplemental instruction must be measured 'by whether it fairly responds to the jury's inquiry without creating . . . prejudice.'" *Combs*, 33 F.3d at 669-70 (citations omitted), *quoting* United States v. Giacalone, 588 F.2d 1158, 1166 (6th Cir. 1978) and United States v. Nunez, 889 F.2d 1564, 1568 (6th Cir. 1989).

The Sixth Circuit also stated that ordinarily, a categorical yes or no in response to a jury question does not discharge the court's duty: "Upon receipt of questions from a deliberating jury, it is incumbent upon the district court to assume that at least some jurors are harboring confusion, which the original instructions either created or failed to clarify. Therefore, the trial judge must be meticulous in preparing supplemental instructions, taking pains adequately to

explain the point that obviously is troubling the jury. To be sure, the court must ensure that, in responding, it does not stray beyond the purpose of jury instructions, but the jury's questions here did not seek collateral or inappropriate advice." *Combs*, 33 F.3d at 670.

Finally, the *Combs* court also explained the procedures to be used for supplemental instructions: "The district court is required to follow the same procedure in giving supplemental instructions as in giving original instructions. (citation omitted.) '[I]t [i]s error for the trial judge to respond to the jury's question other than in open court and in the presence of counsel for both sides.' (Citation omitted)." *Id.* *See also* Fed. R. Crim. P. 43(a), which provides that "The defendant must be present at ... every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule." The exceptions are listed in Rule 43(b) and (c).

9.02 REREADING OF TESTIMONY

(1) Members of the jury, the court reporter will now read _____'s testimony.

(2) Keep in mind that you should consider this testimony together with all the other evidence. Do not consider it by itself, out of context. Consider all the evidence together as a whole.

Use Note

This instruction must be used when testimony is reread to the jury.

Committee Commentary 9.02
(current through May 1, 2025)

In United States v. Rodgers, 109 F.3d 1138 (6th Cir. 1997), the court stated, "[W]e hold that if a district court chooses to give a deliberating jury transcribed testimony, or chooses to reread testimony to a deliberating jury, the district court must give an instruction cautioning the jury on the proper use of that testimony." *Id.* at 1145. Thus, if testimony is reread or a transcript provided to the jury, a cautionary instruction is required.

As the Sixth Circuit stated in *Rodgers*, it had consistently relied on the giving of a cautionary instruction like Pattern Instruction 9.02 in finding that rereading testimony was not error. *Rodgers, supra. See, e.g.,* United States v. Harvey, 653 F.3d 388, 397-98 (6th Cir. 2011). In United States v. Epley, 52 F.3d 571, 579 (6th Cir. 1995), the court held that it was not error for the trial court to reread one witness's testimony upon request of jury, in part because the trial court gave a cautionary instruction both before and after the reading encouraging jurors to consider the testimony as a whole and not to emphasize this piece of evidence over the others. In addition, the jury heard the entire testimony of the witness, so it was not taken out of context, and the testimony turned out to be cumulative.

On rereading testimony generally, the Sixth Circuit relies on guidelines established in United States v. Padin, 787 F.2d 1071, 1076-77 (6th Cir. 1986). *See, e.g., Harvey, supra*; *Rodgers, supra* at 1142; *Epley, supra*. In *Padin*, the Sixth Circuit identified two inherent dangers in reading testimony to a jury during deliberations. First, undue emphasis may be accorded the testimony. Second, the limited testimony that is reviewed may be taken out of context. These concerns escalate after a jury reports it is unable to reach a verdict. *Padin*, 787 F.2d at 1077, *citing* Henry v. United States, 204 F.2d 817 (6th Cir. 1953); *see also Rodgers, supra* at 1143-44; United States v. Epley, *supra*.

In *Rodgers*, the Sixth Circuit stated that in addition to the inherent dangers identified in *Padin*, more general concerns also exist in allowing a jury to read a transcript of testimony. These concerns are that "(1) any transcript provided to a jury should be accurate; (2) transcription of side bar conferences, and any other matters not meant for jury consumption, must be redacted; and (3) as a purely practical matter, a district court should take into consideration the reasonableness of the jury's request and the difficulty of complying therewith."

Rodgers, supra at 1143 (internal quotations omitted).

The decision whether selected testimony should be reread to the jury at all depends on the nature of the questions. United States v. Harvey, 653 F.3d 388, 397-98 (6th Cir. 2011). If the jury has questions of law, the court should resolve them "with concrete accuracy." United States v. Nunez, 889 F.2d 1564, 1568 (6th Cir. 1989); *see also* United States v.McClendon, 362 F. App'x 475, 483 (6th Cir. 2010) (unpublished). If the jury has questions of fact, the court has cautioned that rereading testimony "is not always the better response." *Harvey, supra* at 397. If the questions of fact are phrased in very general terms, involve disputed facts, or are obviously related to a credibility determination, the concern that the trial judge might usurp the jury's factfinding role is most acute, and "it will often be preferable to respond by instructing the jury to rely on its collective recollection . . . ." *Harvey, supra* at 397-98 (*citing McClendon, supra*). In contrast, if the questions of fact are very specific and definitive answers can be easily located in the record, rereading the testimony facilitates rather than usurps the jury's role. *Id.* In *Harvey*, the trial court did not err by rereading portions of the testimony because the court gave a cautionary instruction (consisting of Inst. 1.07(1) and a paragraph similar but not identical to Inst. 9.02) which refocused the jury on its recollection of the evidence as a whole, and the trial court read only the portions of the record responsive to specific factual questions. *Id.* at 397 (*citing* United States v. Davis, 490 F.3d 541, 548 (6th Cir. 2007)).

9.03 PARTIAL VERDICTS

(1) Members of the jury, you do not have to reach unanimous agreement on all the charges before returning a verdict on some of them. If you have reached unanimous agreement on some of the charges, you may return a verdict on those charges, and then continue deliberating on the others. You do not have to do this, but you can if you wish.

(2) If you do choose to return a verdict on some of the charges now, that verdict will be final. You will not be able to change your minds about it later on.

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

(4) I would ask that you now return to the jury room and resume your deliberation.

Use Note

This instruction should be used if the jurors ask about, attempt to return or otherwise indicate that they may have reached a partial verdict. It may also be appropriate if the jury has deliberated for an extensive period of time.

Committee Commentary 9.03
(current through May 1, 2025)

Fed.R.Crim.P. 31(b) states that at any time during the deliberations in a multi-defendant case, the jury "may return a verdict ... as to any defendant about whom it has agreed."

The Sixth Circuit held it was not an abuse of discretion to refuse a supplemental instruction on partial verdicts under the circumstances in United States v. Ford, 987 F.2d 334 (6th Cir. 1992). The trial court had given a partial verdict instruction in its initial instructions, and the verdict forms examined by the district judge during deliberations at the request of all the defendants showed that the jury had not reached unanimous verdicts on any defendants or any charges. The court stated, “Before declaring a mistrial and dismissing a hung jury, a trial judge may inquire whether the jury has reached a partial verdict with respect to any of the defendants or any of the charges, but such an inquiry is not required where the trial judge has already given clear instructions on the point.” *Ford*, 987 F.2d at 340, *citing* United States v. MacQueen, 596 F.2d 76, 82 (2d Cir. 1979).

An instruction on partial verdicts can be included in the general instructions given before the jury retires to deliberate, or it can be included in a special instruction to be given only after the jury has indicated that it wants to return a partial verdict or after the jury has deliberated for an extensive period of time. The Committee believes that the latter approach is preferable. Initially, at least, the jury should be encouraged to try and reach unanimous agreement on all counts.

Even if the jury has not specifically asked about or attempted to return a partial verdict,

an instruction like this may be appropriate if the jury has deliberated for an extensive period of time. What constitutes an extensive period of time will depend on the nature and complexity of the particular case.

9.04 DEADLOCKED JURY

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

(2) Please keep in mind how very important it is for you to reach unanimous agreement. If you cannot agree, and if this case is tried again, there is no reason to believe that any new evidence will be presented, or that the next twelve jurors will be any more conscientious and impartial than you are.

(3) Let me remind you that it is your duty as jurors to talk with each other about the case; to listen carefully and respectfully to each other's views; and to keep an open mind as you listen to what your fellow jurors have to say. And let me remind you that it is your duty to make every reasonable effort you can to reach unanimous agreement. Each of you, whether you are in the majority or the minority, ought to seriously reconsider your position in light of the fact that other jurors, who are just as conscientious and impartial as you are, have come to a different conclusion.

(4) Those of you who believe that the government has proved the defendant guilty beyond a reasonable doubt should stop and ask yourselves if the evidence is really convincing enough, given that other members of the jury are not convinced. And those of you who believe that the government has not proved the defendant guilty beyond a reasonable doubt should stop and ask yourselves if the doubt you have is a reasonable one, given that other members of the jury do not share your doubt. None of you should hesitate to change your mind if, after reconsidering things, you are convinced that other jurors are right and that your original position was wrong.

(5) But remember this. Do not ever change your mind just because other jurors see things differently, or just to get the case over with. As I told you before, in the end, your vote must be exactly that--your own vote. As important as it is for you to reach unanimous agreement, it is just as important that you do so honestly and in good conscience.

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

(7) I would ask that you now return to the jury room and resume your deliberations.

Use Note

This instruction is designed for use when the court concludes that the jury has reached an impasse and that an *Allen* charge is appropriate.

A stronger, more explicit reminder regarding the government's burden of proof than the implicit one contained in paragraph (4) may be appropriate in unusual cases.

Committee Commentary 9.04
(current through May 1, 2025)

This instruction is for use when the court concludes that the jury has reached an impasse and that an *Allen* charge is appropriate. When such an instruction should be given is left to the trial court's sound discretion. *See, e.g.*, United States v. Sawyers, 902 F.2d 1217, 1220 (6th Cir.1990).

The Sixth Circuit endorsed the wording of this instruction in United States v. Clinton, 338 F.3d 483, 487-88 (6th Cir. 2003), quoting the instruction in full and stating:

> In this circuit, while we have generally approved use of the Sixth Circuit Pattern Instruction, we have never explicitly mandated the use of that or any instruction to the exclusion of others. We decline to do so now, although we take the occasion to express a strong preference for the pattern instruction and to point out that its use will, in most instances, insulate a resulting verdict from the type of appellate challenge that we now face in this case.

See also United States v. Reed, 167 F.3d 984, 991 (6th Cir. 1999); United States v. Frost, 125 F.3d 346, 374-75 (6th Cir. 1997); United States v. Tines, 70 F.3d 891, 896-97 (6th Cir. 1995).

A related issue is whether giving this instruction is error even when the content is correct because it is coercive under the circumstances of the case. Although the Sixth Circuit has stated that it is possible that giving Instruction 9.04 can be error as coercive even though the content is correct, the Sixth Circuit has never reached that conclusion in the cases decided since the promulgation of Instruction 9.04. Rather, it has concluded that giving Instruction 9.04 was not coercive and was not error. *See* United States v. Reed, *supra* (instruction given on twelfth day of deliberations); United States v. Frost, *supra*; United States v. Tines, *supra*. As the Sixth Circuit explained, "Although circumstances alone can render an Allen charge coercive, we traditionally have found an Allen charge coercive when the instructions themselves contained errors or omissions, not when a defendant alleges that the circumstances surrounding an otherwise correct charge created coercion." *Frost*, 125 F.3d at 375.

Instruction 9.04 is a modified version of the instruction approved by the United States Supreme Court in Allen v. United States, 164 U.S. 492, 501-502 (1896). The *Allen* decision and its progeny are analyzed in the Committee Commentary to Instruction 8.04.

9.05 QUESTIONABLE UNANIMITY AFTER POLLING

(1) It appears from the poll we just took that your verdict may not be unanimous. So I am going to ask that you return to the jury room.

(2) If you are unanimous, tell the jury officer that you want to return to the courtroom, and we will poll you again. If you are not unanimous, please resume your deliberations. Talk to each other, and make every reasonable effort you can to reach unanimous agreement, if you can do so honestly and in good conscience.

Use Note

This instruction should be used when a poll of the jury indicates that a proffered verdict may not be unanimous.

Depending on the circumstances, the court may wish to expand on the concepts contained in the last sentence of paragraph (2).

Committee Commentary 9.05
(current through May 1, 2025)

This instruction is patterned after Federal Judicial Center Instruction 59. Depending on the circumstances, the district court may wish to expand on the last sentence which briefly summarizes the concepts contained in Instructions 8.04 Duty to Deliberate and 9.04 Deadlocked Jury.

Chapter 10.00

FRAUD OFFENSES

Introduction to Fraud Instructions

The pattern instructions cover fraud offenses with five elements instructions:

Instruction 10.01 Mail Fraud (18 U.S.C. § 1341);
Instruction 10.02 Wire Fraud (18 U.S.C. § 1343);
Instruction 10.03A Bank Fraud – Scheme to Defraud a Bank (18 U.S.C. § 1344(1));
Instruction 10.03B Bank Fraud – Scheme to Obtain Bank Property by Means of False or Fraudulent Representations (18 U.S.C. § 1344(2)); and
Instruction 10.05 Health Care Fraud (18 U.S.C. § 1347).

In addition, Instruction 10.04 covers the good faith defense.

The elements of mail and wire fraud are similar except for the jurisdictional elements. The Committee drafted separate instructions for the two offenses as the most efficient way to reflect the different jurisdictional bases. Beyond the jurisdictional bases, the mail and wire fraud offenses are read in tandem and case law on the two is largely interchangeable. See Carpenter v. United States, 484 U.S. 19, 25 n.6 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here."); United States v. Daniel, 329 F.3d 480, 486 n.1 (6th Cir. 2003); Hofstetter v. Fletcher, 905 F.2d 897, 902 (6th Cir. 1988) ("This court has held that the wire fraud statutory language should be interpreted with the same breadth as the analogous language in the mail fraud statute.") (citations omitted).

The crime of bank fraud is distinguishable from mail and wire fraud. The two numbered clauses in the bank fraud statute have "separate meanings." Loughrin v. United States, 134 S. Ct. 2384, 2391 (2014). Instructions 10.03A Bank Fraud – Scheme to Defraud a Bank (18 U.S.C. § 1344(1)) and 10.03B Bank Fraud – Scheme to Obtain Bank Property by Means of False or Fraudulent Representations (18 U.S.C. § 1344(2)) reflect these different clauses.

These instructions do not cover fraud based on a deprivation of the intangible right to honest services as provided in 18 U.S.C. § 1346.

10.01 MAIL FRAUD (18 U.S.C. § 1341)

(1) Count ___ of the indictment charges the defendant with mail fraud. For you to find the defendant guilty of mail fraud, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant [knowingly participated in] [devised] [intended to devise] a scheme to defraud in order to deprive another of money or property, that is _____ [*describe scheme from indictment*];

(B) Second, that the scheme included a material misrepresentation or concealment of a material fact;

(C) Third, that the defendant had the intent to defraud; and

(D) Fourth, that the defendant [used the mail] [caused another to use the mail] in furtherance of the scheme.

(2) Now I will give you more detailed instructions on some of these terms.

(A) A "scheme to defraud" includes any plan or course of action by which someone intends to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises.

(B) The term "false or fraudulent pretenses, representations or promises" means any false statements or assertions that concern a material aspect of the matter in question, that were either known to be untrue when made or made with reckless indifference to their truth. They include actual, direct false statements as well as half-truths and the knowing concealment of material facts.

(C) An act is "knowingly" done if done voluntarily and not because of mistake or some other innocent reason.

(D) A misrepresentation or concealment is "material" if it has a natural tendency to influence or is capable of influencing the decision of a person of ordinary prudence and comprehension.

(E) To act with "intent to defraud" means to act with an intent to deceive or cheat for the purpose of depriving another of money or property.

(F) To "cause" the mail to be used is to do an act with knowledge that the use of the mail will follow in the ordinary course of business or where such use can reasonably be foreseen.

(3) [It is not necessary that the government prove [all of the details alleged concerning the precise nature and purpose of the scheme] [that the material transmitted by mail was itself false

or fraudulent] [that the alleged scheme actually succeeded in defrauding anyone] [that the use of the mail was intended as the specific or exclusive means of accomplishing the alleged fraud] [that someone relied on the misrepresentation or false statement] [that the defendant obtained money or property for his own benefit].]

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

Use Note

If the prosecution is based on a violation of § 1341 that relates to a major disaster or affects a financial institution, the maximum penalty is increased; the court should modify the instruction and consider using special verdict forms like those included with Instructions 14.07(A) and (B).

If the prosecution is based on a violation of § 1341 in connection with telemarketing, the maximum penalty is increased under 18 U.S.C. § 2326. Because the jury must unanimously agree on any fact (other than a prior conviction) that increases the maximum penalty, the telemarketing must be proved to the jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466 (2000). In this situation, the Committee recommends that the court give an instruction like Instruction 14.07(A) or (B) and use a special verdict form like those following Instructions 14.07(A) and (B).

Throughout the instruction, the word "mail" should be replaced by the term "private or commercial interstate carrier" if the facts warrant.

Paragraph (1)(D) should be amended to include the receipt of mail if the facts warrant.

In paragraph (2)(D), the word "person" should be replaced with entity or corporation or agency if the facts warrant. Also, 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 provision is discussed in the commentary below.

The provisions of paragraph (3) should be used only if relevant.

See also Instruction 2.09 Deliberate Ignorance.

If there is any evidence at all of good faith, the court should refer to Instruction 10.04 Fraud – Good Faith Defense.

Brackets indicate options for the court. Brackets with italics are notes to the court.

Committee Commentary Instruction 10.01

(current through May 1, 2025)

The mail fraud statute provides:

18 U.S.C. § 1341 Frauds and swindles

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

This instruction does not cover mail fraud based on a deprivation of the intangible right to honest services as provided in 18 U.S.C. § 1346.

The elements of mail fraud in paragraph (1) are based on the statute and case law. In paragraph (1)(A), the terms "devised," "intended to devise" and "scheme to defraud" are drawn from the statute. The term "knowingly participated in" is based on United States v. Daniel, 329 F.3d 480, 487 (6th Cir. 2003); United States v. Gold Unlimited, Inc., 177 F.3d 472, 478 (6th Cir. 1999); United States v. DeSantis, 134 F.3d 760, 764 (6th Cir. 1998); and United States v. Frost, 125 F.3d 346, 371 (6th Cir. 1997). This term is discussed further below. The phrase "deprive another of money or property" is based on numerous Supreme Court and Sixth Circuit cases. In the Supreme Court, *see* Ciminelli v. United States, 143 S. Ct. 1121, 1124 (2023) (holding that the "right to control" theory is not a valid basis for mail and wire fraud liability because potentially valuable economic information necessary to make discretionary economic decisions is not a traditional property interest); Cleveland v. United States, 121 S. Ct. 365, 379 (2000) (*quoting* McNally v. United States, 107 S.Ct. 2875, 2880 (1987)); and Carpenter v. United States, 108 S. Ct. 316, 321 (1987). In the Sixth Circuit, *see, e.g.*, United States v. Maddux, 917 F.3d 437, 443 (6th Cir. 2019) (*quoting* United States v. Faulkenberry, 614 F.3d 573, 580-81 (6th Cir. 2010)); and United States v. Kennedy, 714 F.3d 951, 957-58 (6th Cir. 2013). This phrase requiring

"money or property" is discussed further below.

In paragraph (1)(B), the element that the scheme included a material misrepresentation or concealment is based on Neder v. United States, 527 U.S. 1, 16 (1999) (*quoting* United States v. Gaudin, 515 U.S. 506, 509 (1995)) and *Maddux*, 917 F.3d 437, 448 (6th Cir. 2019).

In paragraph (1)(C), the element that the defendant had the "intent to defraud" is drawn from United States v. Daniel, 329 F.3d 480, 487 (6th Cir. 2003) (referring to "the requisite intent to defraud"); United States v. Gold Unlimited, Inc., 177 F.3d 472, 478 (6th Cir. 1999); United States v. Frost, 125 F.3d 346, 371 (6th Cir. 1997); United States v. Smith, 39 F.3d 119, 122 (6th Cir. 1994); and United States v. Stull, 743 F.2d 439, 442 (6th Cir. 1984).

In paragraph (1)(D), the jurisdictional element that the defendant used the mail in furtherance of the scheme is based on the statute and Schmuck v. United States, 489 U.S. 705, 710 (1989). *See also* United States v. Maddux, 917 F.3d 437, 443 (6th Cir. 2019) (requiring that defendant used or caused to be used an interstate wire communication or the United States mail in furtherance of the scheme); United States v. Faulkenberry, 614 F.3d 573, 581 (stating that an element of wire fraud is that defendant used or caused to be used an interstate wire communication in furtherance of the scheme); United States v. Prince, 214 F.3d 740, 748 (6th Cir. 2000) (same).

The definition of "scheme to defraud" in paragraph (2)(A) was quoted with approval in United States v. Maddux, 917 F.3d 437, 443 (6th Cir. 2019) (*quoting* United States v. Faulkenberry, 614 F.3d 573, 581 (6th Cir. 2010)). In United States v. Daniel, 329 F.3d 480, 486 (6th Cir. 2003), the court elaborated, "The scheme to defraud element required under 18 U.S.C. § 1341 is not defined according to a technical standard. The standard is a 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" *Daniel*, *id.* (cleaned up), *quoting* United States v. Van Dyke, 605 F.2d 220, 225 (6th Cir. 1979). A pyramid scheme is a scheme to defraud. *See* United States v. Gold Unlimited, Inc., 177 F.3d 472, 484-85 (6th Cir. 1999).

In paragraph (2)(B), the definition of "false or fraudulent pretenses, representations or promises" is supported by United States v. Maddux, 917 F.3d 437, 443-444 (6th Cir. 2019) *citing* United States v. Kurlemann, 736 F.3d 439, 445, 446 (6th Cir. 2013). The *Kurlemann* court quoted the complete definition in paragraph (2)(B) with approval for the offense of mail fraud in a case based on false statements to a lending institution under § 1014. *See Kurlemann* at 449. The phrase "reckless indifference to the[] truth" in the instruction is further supported by *Kennedy*, 714 F.3d at 958 ("The government met the mail- and wire-fraud statutes' intent requirements through proof that K. Kennedy was reckless in his disregard for the truth of the statements that he made to victims to obtain their money.") (citations omitted). The reference to "concealment of material facts" at the end of paragraph (2)(B) is supported by *Maddux*, where the court stated that, "Specifically, for purposes of the fraud statutes, fraudulent pretenses or representations can include 'concealment' – where one says nothing 'but has a duty to speak.' " *Maddux* at 443-444, *quoting Kurlemann and citing, inter alia*, Pasquantino v. United States, 544 U.S. 349, 357 (2005) *and* United States v. Perry, 757 F.3d 166, 176 (4th Cir. 2014)). The *Maddux* court concluded that the indictment sufficiently alleged a conspiracy to commit mail and

wire fraud where it alleged the defendants had a duty to file reports under the Jenkins Act, 15 U.S.C. §§ 376(a) and 377, and failed to do so. *Maddux* at 441, 444, 445.

The definition of "knowingly" in paragraph (2)(C) ("An act is done knowingly if it is done voluntarily and not because of mistake or some other innocent reason.") is drawn from the jury instructions given in United States v. McGuire, 744 F.2d 1197, 1201 (6th Cir. 1984) with one modification. The full definition of knowingly in *McGuire* stated, "An act is 'knowingly' done if done voluntarily *and intentionally*, and not because of mistake or some other innocent reason." (emphasis added). This instruction on mail fraud deletes the italicized words referring to "intentionally" to avoid confusion with the mens rea element of intent to defraud stated in paragraph (1)(C). Another possible definition of knowingly is, "An act is done knowingly if it is done with awareness, understanding or consciousness." *See* Arthur Andersen v. United States, 125 S.Ct. 2129, 2135-36 (2005) (උ'[K]nowledge' and 'knowingly' are normally associated with awareness, understanding, or consciousness.") (citations omitted) (construing term "knowingly" in 18 U.S.C. § 1512).

In paragraph (2)(D), the definition of "material" is based on Neder v. United States, 527 U.S. 1, 16 (1999) (*quoting* United States v. Gaudin, 515 U.S. 506, 509 (1995)) and *Maddux*, 917 F.3d at 448 (characterizing this definition as "fine"). The definition of materiality for concealment cases is discussed further below.

The "intent to defraud" definition in paragraph (2)(E) requires the defendant to intend both to deceive or cheat another and to deprive him of money or property. The "intent to deprive" another of money or property is, as noted above, based on many Supreme Court and Sixth Circuit cases. Supreme Court cases include Cleveland v. United States, 121 S. Ct. 365, 379 (2000) ("Reviewing the history of § 1341, we concluded that 'the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property.' ඏ) (*quoting* McNally v. United States, 107 S.Ct. 2875, 2880 (1987)); Carpenter v. United States, 108 S. Ct. 316, 321 (1987) ("Sections 1341 and 1343 reach any scheme to deprive another of money or property . . . ."); *see also* Shaw v. United States, 137 S. Ct. 462, 469 (2016) (construing the phrase "scheme to defraud" in the bank fraud statute, § 1344(1) and stating, "The parties agree, as do we, that the scheme must be one to deceive the bank *and* deprive it of something of value.").

Numerous Sixth Circuit cases also identify the intent to "deprive" another of money or property as an element of mail fraud. *See* United States v. Turner, 465 F.3d 667, 680 and note 18 (6th Cir. 2006) (mail fraud requires "intent to deprive a victim of money or property"); United States v. Jamieson, 427 F.3d 394, 402 (6th Cir. 2005) (scheme to defraud includes depriving someone else of money); United States v. Daniel, 329 F.3d 480, 485-486, 488 (6th Cir. 2003) (scheme to defraud includes any plan to deprive another of money or property) (*quoting* Gold Unlimited, Inc., 177 F.3d 472, 479 (6th Cir. 1999)); and United States v. Prince, 214 F.3d 740, 747-748 (6th Cir. 2000) (intent to deprive a victim of money or property is an element of wire fraud) (*citing* United States v. Merklinger, 16 F.3d 670, 678 (6th Cir. 1994) and United States v. Ames Sintering Co., 927 F.2d 232, 234 (6th Cir. 1990)).

The mail and wire fraud statutes criminalize only schemes to deprive people of

"traditional property interests." *See* Ciminelli v. United States, 143 S. Ct. 1121, 1124 (2023) (holding that the "right to control" theory is not a valid basis for mail and wire fraud liability because potentially valuable economic information necessary to make discretionary economic decisions is not a traditional property interest); *see also* the Supreme Court cases cited *supra*. As the Court noted in *Ciminelli*, this limit on liability to deprivations of money or property had been the law in the Sixth Circuit since 2014. *See Ciminelli*, 143 S. Ct. at 1127 note 3 (identifying two circuits which had expressly repudiated the right-to-control theory and citing United States v. Sadler, 750 F.3d 585, 590-592 (6th Cir. 2014), abrogated on other grounds, Kousisis v. United States, 2025 WL 1459593)). *See also Maddux*, 917 F.3d at 443 (6th Cir. 2019) (quoting United States v. Faulkenberry, 614 F.3d 573, 580-81 (6th Cir. 2010)); and U.S. v. Kennedy, 714 F.3d 951, 957-58 (6th Cir. 2013) (same). The instruction includes this limit to traditional property interests in several paragraphs by requiring "money or property," see paragraphs (1)(A), (2)(A) and (2)(E).

The Sixth Circuit noted the requirement of the intent to "deprive" another of money or property in *Maddux*, 917 F.3d at 443 (6th Cir. 2019) (quoting United States v. Faulkenberry, 614 F.3d 573, 580-81 (6th Cir. 2010)); *see also* U.S. v. Kennedy, 714 F.3d 951, 957-58 (6th Cir. 2013) (same). *But cf.* Kousisis v. United States, 2025 WL 1459593 (May 22, 2025) (holding that a defendant violates the wire fraud statute by scheming to obtain a victim's money or property regardless of whether he seeks to leave the victim economically worse off, resolving a circuit split and abrogating United States v. Sadler, 750 F.3d 585 (6th Cir. 2014)).

In describing the intent to defraud, the court has sometimes referred to the mens rea as the "specific" intent to defraud, *see, e.g., Daniel*, 329 F.3d at 487; *Frost*, 125 F.3d at 354 ("A defendant does not commit mail fraud unless he possesses the specific intent to deceive or defraud . . . ."); United States v. Smith, 39 F.3d 119, 121-22 (6th Cir. 1994). The instruction omits the word "specific." *See also* Committee Commentary to Instruction 2.07 Specific Intent.

The definition of "cause" in paragraph (2)(F) is based on *Frost*, 125 F.3d at 354 (*citing* United States v. Oldfield, 859 F.2d 392, 400 (6th Cir. 1988)).

Paragraph (3) lists some but not all items the government is not required to prove. Many pattern instructions include such a provision. This language is patterned after First Circuit Instruction 4.12; Fifth Circuit Instruction 2.59; Eighth Circuit Instruction 6.18.1341; and Eleventh Circuit Instruction 50.1. These provisions should be used only if relevant. The final bracketed provision, that the government need not prove that the defendant obtained money or property for his own benefit, is based on United States v. Kennedy, 714 F.3d 951, 958 (6th Cir. 2013).

In paragraph (1)(A), the instruction provides that the defendant must have devised, intended to devise, or "knowingly participated" in a scheme to defraud. For participation, Sixth Circuit cases often describe the mental state as "knowing." *See* United States v. Sadler, 750 F.3d 585, 590 (6th Cir. 2014) ("the government had to prove [defendant] knowingly used an interstate wire communication"), abrogated on other grounds, Kousisis v. United States, 2025 WL 1459593); United States v. Daniel, 329 F.3d 480, 487 (6th Cir. 2003) ("defendant must knowingly make a material misrepresentation or knowingly omit a material fact"); United States

v. Gold Unlimited, Inc., 177 F.3d 472, 478 (6th Cir. 1999) ("defendant knowingly devised a scheme to defraud . . . with the intent to defraud"); United States v. DeSantis, 134 F.3d 760, 764 (6th Cir. 1998) ("defendant must knowingly make a material misrepresentation or knowingly omit a material fact"); United States v. Frost, 125 F.3d 346, 371 (6th Cir. 1997) (it is a crime to "knowingly devise" a scheme to defraud; a scheme to defraud includes "knowing concealment of facts and information done with the intent to defraud").

In contrast, some Sixth Circuit authority provides that the participation must be "willful." See United States v. Maddux, 917 F.3d 437, 443 (6th Cir. 2019) (defendant "willfully participated in a scheme to defraud"); United States v. Kennedy, 714 F.3d 951, 957 (6th Cir. 2013) (same); United States v. Faulkenberry, 614 F.3d 573, 581 (6th Cir. 2010) (same) (citing United States v. Stull, 743 F.2d 439, 442 (6th Cir. 1984)). The instruction continues to use the term "knowing" rather then "willful" to describe the participation based on the weight of Sixth Circuit authority and to avoid any suggestion that knowledge of illegality is an element of mail fraud.

For the requirement that the scheme to defraud must deprive the victim of "money or property," in McNally v. United States, 483 U.S. 350 (1987), the Court noted that based on the disjunctive phrasing of the mail fraud statute, which refers to "a scheme to defraud, or for obtaining money or property," it was arguable that the two phrases should be construed independently. However, the Court then rejected this construction, explaining that the second phrase merely modifies the first. *McNally*, 483 U.S. at 358-59. In Cleveland v. United States, 531 U.S. 12 (2000), the Court reiterated this interpretation of the statute:

> We reaffirm our reading of § 1341 in McNally. . . . Were the Government correct that the second phrase of § 1341 defines a separate offense, the statute would appear to arm federal prosecutors with power to police false statements in an enormous range of submissions to state and local authorities. . . . [W]e decline to attribute to § 1341 a purpose so encompassing where Congress has not made such a design clear.

Cleveland, 531 U.S. at 25-26. *Accord*, Kelly v. United States, 140 S. Ct. 1565, 1571 (2020) (describing the disjunctive language as a "unitary whole").

In Neder v. United States, *supra* at 25, the Court held that materiality is an element of a "scheme or artifice to defraud" under mail, wire and bank fraud. Although this element is not found in a "natural reading" of the statute, the court relied on the rule of construction " '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.' " 527 U.S. at 21. At common law, the word "fraud" required proof of materiality. Because Congress did not indicate otherwise, the Court presumed that Congress intended to incorporate "materiality."

The definition of materiality is as follows: "In general, a false statement is material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decision making body to which it was addressed.'" *Neder* at 16, *quoting Gaudin*, 515 U.S. at 509.

In *Maddux*, 917 F.3d 437, 448-49 (6th Cir. 2019), the court reviewed an instruction defining materiality when the government's theory of fraud was based on concealment. The instruction provided:

> A misrepresentation or concealment is "material" if it has a natural tendency to influence or is capable of influencing the decision of a person of ordinary prudence and comprehension. A material omission, such as a failure to file required reports, may constitute a misrepresentation or concealment under the Mail and Wire Fraud statutes.

The court concluded that, "By all accounts the first sentence of this instruction was fine." *Maddux* at 448. As for the second sentence, the court stated it did not rise to the level of plain error but implied that it was error because as a grammatical matter, it "tells the reader that such a failure is always material." *Maddux, id*. The court explained, "By way of contrast, the instruction would have been fine if it had said, 'A failure to file required reports may be a material omission.' " *Maddux, id*. This sentence suggested by the court is identified in the Use Note for cases involving fraud by omission of required reports.

As to whether the fraud must be capable of deceiving persons based on a subjective ("however gullible") standard or an objective ("person of ordinary prudence") standard, case law supports the objective standard provided in paragraph (2)(D) of the instruction. *See* United States v. Petlechkov, 922 F.3d 762, 766 (6th Cir. 2019) (*citing* United States v. Jamieson, 427 F.3d 394, 415-16 (6th Cir. 2005)).

The mail fraud and wire fraud statutes are interpreted the same except for the jurisdictional element. Carpenter v. United States, 484 U.S. 19, 25 n.6 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here."); United States v. Kennedy, 714 F.3d 951, 958 (6th Cir. 2013) (*citing* United States v. Bibby, 752 F.2d 1116, 1126 (6th Cir. 1985)); Hofstetter v. Fletcher, 905 F.2d 897, 902 (6th Cir. 1988) ("This court has held that the wire fraud statutory language should be interpreted with the same breadth as the analogous language in the mail fraud statute.").

Jurisdiction for a mail fraud conviction requires the defendant to deposit, receive, or cause to be deposited any matter or thing to be sent or delivered by the United States Postal Service or any private or commercial interstate carrier for the purpose of executing a scheme to defraud. 18 U.S.C. § 1341.

As to the required connection between the scheme to defraud or obtain property and the use of the mails, the Supreme Court has stated: "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud . . . ." Schmuck v. United States, 489 U.S. 705, 710 (1989). The Court explained: "To be a part of the execution of the fraud . . . the use of the mails need not be an essential element of the scheme. It is sufficient for the mailing to be 'incident to an essential part of the scheme,' or 'a step in [the] plot.'" *Schmuck*, 489 U.S. at 710 (internal citations and

quotation marks omitted). The Court then stated: "The relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing later, through hindsight, may prove to have been counterproductive and return to haunt the perpetrator of the fraud." *Id*. at 715.

A mail fraud conviction can be based on mailings that were legally required. As the court explains, "Further, 'the mailings may be innocent or even legally necessary.'" *Frost*, 125 F.3d at 354, *quoting* United States v. Oldfield, 859 F.2d 392, 400 (6th Cir. 1988), *in turn quoting* United States v. Decastris, 798 F.2d 261, 263 (7th Cir. 1986).

It is not necessary that the defendant actually mail the material. *See* 18 U.S.C. § 1341 (mail fraud committed where defendant causes the mails to be used). The Supreme Court has explained that one causes a mailing when "one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended." Pereira v. United States, 347 U.S. 1, 8-9 (1954); *accord*, *Frost*, 125 F.3d at 354 (mailing need only be reasonably foreseeable).

Intent and knowledge need not be proved directly. Pattern Instruction 2.08 Inferring Required Mental State states this principle and should be given in appropriate cases. In addition, Pattern Instruction 2.09 Deliberate Ignorance explains one approach to proving knowledge.

If the prosecution is based on a violation of § 1341 that relates to a major disaster or affects a financial institution, the maximum penalty is increased. Because the jury must unanimously agree on any fact (other than a prior conviction) that increases the maximum penalty, the major disaster or effect on a financial institution must be proved to the jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466 (2000). In this situation, the Committee recommends that the court give an instruction like Instruction 14.07(A) or (B) and use a special verdict form like those following Instructions 14.07(A) and (B). *See also* 18 U.S.C. § 2326 (maximum penalty increased for violation in connection with telemarketing).

It is also a crime to conspire to violate § 1341. Conspiracy can be charged under either 18 U.S.C. §§ 371 or 1349. The Committee did not draft a separate instruction for conspiracy to commit mail fraud because an instruction may be compiled by combining the mail fraud instruction with the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 371 require an overt act whereas conspiracies under § 1349 do not require an overt act. See United States v. Rogers, 769 F.3d 372, 379-82 (6th Cir. 2014). Thus if the conspiracy to commit mail fraud is charged under § 371, Instruction 3.01A Conspiracy to Commit an Offense (§ 371) – Basic Elements should be used as is, but if the conspiracy is charged based on § 1349, Instruction 3.01A should be modified to omit paragraph (2)(C) on overt acts. All other references to overt acts should be deleted as well.

10.02 WIRE FRAUD (18 U.S.C. § 1343)

(1) Count ___ of the indictment charges the defendant with wire fraud. For you to find the defendant guilty of wire fraud, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant [knowingly participated in] [devised] [intended to devise] a scheme to defraud in order to deprive another of money or property, that is _____ [*describe scheme from indictment*];

(B) Second, that the scheme included a material misrepresentation or concealment of a material fact;

(C) Third, that the defendant had the intent to defraud; and

(D) Fourth, that the defendant [used wire, radio or television communications] [caused another to use wire, radio or television communications] in interstate [foreign] commerce in furtherance of the scheme.

(2) Now I will give you more detailed instructions on some of these terms.

(A) A "scheme to defraud" includes any plan or course of action by which someone intends to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises.

(B) The term "false or fraudulent pretenses, representations or promises" means any false statements or assertions that concern a material aspect of the matter in question, that were either known to be untrue when made or made with reckless indifference to their truth. They include actual, direct false statements as well as half-truths and the knowing concealment of material facts.

(C) An act is "knowingly" done if done voluntarily and not because of mistake or some other innocent reason.

(D) A misrepresentation or concealment is "material" if it has a natural tendency to influence or is capable of influencing the decision of a person of ordinary prudence and comprehension.

(E) To act with "intent to defraud" means to act with an intent to deceive or cheat for the purpose of depriving another of money or property.

(F) To "cause" wire, radio or television communications to be used is to do an act with knowledge that the use of the communications will follow in the ordinary course of business or where such use can reasonably be foreseen.

(G) The term "interstate [foreign] commerce" includes wire, radio or television

communications which crossed a state line.

(3) [It is not necessary that the government prove [all of the details alleged concerning the precise nature and purpose of the scheme] [that the material transmitted by wire, radio or television communications was itself false or fraudulent] [that the alleged scheme actually succeeded in defrauding anyone] [that the use of the wire, radio or television communications was intended as the specific or exclusive means of accomplishing the alleged fraud] [that someone relied on the misrepresentation or false statement] [that the defendant obtained money or property for his own benefit].]

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

Use Note

If the prosecution is based on a violation of § 1343 that relates to a major disaster or affects a financial institution, the maximum penalty is increased; the court should modify the instruction and consider using special verdict forms like those included with Instructions 14.07(A) and (B).

If the prosecution is based on a violation of § 1343 in connection with telemarketing, the maximum penalty is increased under 18 U.S.C. § 2326. Because the jury must unanimously agree on any fact (other than a prior conviction) that increases the maximum penalty, the telemarketing must be proved to the jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466 (2000). In this situation, the Committee recommends that the court give an instruction like Instruction 14.07(A) or (B) and use a special verdict form like those following Instructions 14.07(A) and (B).

In paragraph (2)(D), the word "person" should be replaced with entity or corporation or agency if the facts warrant. Also, 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 provision is discussed in the commentary below.

The provisions of paragraph (3) should be used only if relevant.

See also Instruction 2.09 Deliberate Ignorance.

If there is any evidence at all of good faith, the court should refer to Instruction 10.04 Fraud – Good Faith Defense.

Brackets indicate options for the court. Brackets with italics are notes to the court.

Committee Commentary Instruction 10.02

(current through May 1, 2025)

The wire fraud statute provides:

18 U.S.C. § 1343 Fraud by wire, radio, or television

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

This instruction does not cover wire fraud based on a deprivation of the intangible right to honest services as provided in 18 U.S.C. § 1346.

The wire fraud statute was modeled after the mail fraud statute, and therefore the same analysis should be used for both. Carpenter v. United States, 484 U.S. 19, 25 n.6 (1987); United States v. Kennedy, 714 F.3d 951, 958 (6th Cir. 2013) (*citing* United States v. Bibby, 752 F.2d 1116, 1126 (6th Cir. 1985)). "The wire fraud statutory language should be interpreted with the same breadth as the analogous language in the mail fraud statute." Hofstetter v. Fletcher, 905 F.2d 897, 902 (6th Cir. 1988). The only difference in the two offenses is the jurisdictional element.

The elements of wire fraud in paragraph (1) are based on the statute and case law. In paragraph (1)(A), the terms "devised," "intended to devise" and "scheme to defraud" are drawn from the statute. The term "knowingly participated in" is based on United States v. Daniel, 329 F.3d 480, 487 (6th Cir. 2003); United States v. Gold Unlimited, Inc., 177 F.3d 472, 478 (6th Cir. 1999); United States v. DeSantis, 134 F.3d 760, 764 (6th Cir. 1998); and United States v. Frost, 125 F.3d 346, 371 (6th Cir. 1997). This term is discussed further below. The phrase "deprive another of money or property" is based on numerous Supreme Court and Sixth Circuit cases. In the Supreme Court, *see* Ciminelli v. United States, 143 S. Ct. 1121, 1124 (2023) (holding that the "right to control" theory is not a valid basis for mail and wire fraud liability because potentially valuable economic information necessary to make discretionary economic decisions is not a traditional property interest); Cleveland v. United States, 121 S. Ct. 365, 379 (2000) (*quoting* McNally v. United States, 107 S. Ct. 2875, 2880 (1987)); and Carpenter v. United States, 108 S. Ct. 316, 321 (1987). In the Sixth Circuit, *see, e.g.*, United States v. Maddux, 917 F.3d 437, 443 (6th Cir. 2019) (*quoting* United States v. Faulkenberry, 614 F.3d 573, 580-81 (6th Cir. 2010)); and United States v. Kennedy, 714 F.3d 951, 957-58 (6th Cir. 2013). This phrase requiring

"money or property" is discussed further below.

In paragraph (1)(B), the element that the scheme included a material misrepresentation or concealment is based on Neder v. United States, 527 U.S. 1, 16 (1999) (*quoting* United States v. Gaudin, 515 U.S. 506, 509 (1995)) and *Maddux*, 917 F.3d 437, 448 (6th Cir. 2019).

In paragraph (1)(C), the element that the defendant had the "intent to defraud" is drawn from United States v. Daniel, 329 F.3d 480, 487 (6th Cir. 2003) (referring to "the requisite intent to defraud"); United States v. Gold Unlimited, Inc., 177 F.3d 472, 478 (6th Cir. 1999); United States v. Frost, 125 F.3d 346, 371 (6th Cir. 1997); United States v. Smith, 39 F.3d 119, 122 (6th Cir. 1994); and United States v. Stull, 743 F.2d 439, 442 (6th Cir. 1984).

In paragraph (1)(D), the phrase "wire, radio or television communications" is drawn from the statute. Some Sixth Circuit cases use the term "electronic communications," *see, e.g.*, United States v. Daniel, 329 F.3d 480, 489 (6th Cir. 2003); VanDenBroeck v. CommonPoint Mortgage Co., 210 F.3d 696, 701 (6th Cir. 2000), *overruled on other grounds*, Bridge v. Phoenix Bond & Indemnity Co., 128 S.Ct. 2131 (2008); United States v. Smith, 39 F.3d 119, 122 (6th Cir. 1994).

The definition of "scheme to defraud" in paragraph (2)(A) was quoted with approval in United States v. Maddux, 917 F.3d 437, 443 (6th Cir. 2019) (*quoting* United States v. Faulkenberry, 614 F.3d 573, 581 (6th Cir. 2010)). In United States v. Daniel, 329 F.3d 480, 486 (6th Cir. 2003), the court elaborated, "The scheme to defraud element required under 18 U.S.C. § 1341 is not defined according to a technical standard. The standard is a 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" *Daniel*, *id.* (cleaned up), *quoting* United States v. Van Dyke, 605 F.2d 220, 225 (6th Cir. 1979). A pyramid scheme is a scheme to defraud. *See* United States v. Gold Unlimited, Inc., 177 F.3d 472, 484-85 (6th Cir. 1999).

In paragraph (2)(B), the definition of "false or fraudulent pretenses, representations or promises" is supported by United States v. Maddux, 917 F.3d 437, 443-444 (6th Cir. 2019) *citing* United States v. Kurlemann, 736 F.3d 439, 445, 446 (6th Cir. 2013). The *Kurlemann* court quoted the complete definition in paragraph (2)(B) with approval for the offense of mail fraud in a case based on false statements to a lending institution under § 1014. *See Kurlemann* at 449. The phrase "reckless indifference to the[] truth" in the instruction is further supported by *Kennedy*, 714 F.3d at 958 ("The government met the mail- and wire-fraud statutes' intent requirements through proof that K. Kennedy was reckless in his disregard for the truth of the statements that he made to victims to obtain their money.") (citations omitted). The reference to

"concealment of material facts" at the end of paragraph (2)(B) is supported by *Maddux*, where the court stated that, "Specifically, for purposes of the fraud statutes, fraudulent pretenses or representations can include 'concealment' – where one says nothing 'but has a duty to speak.' " *Maddux* at 443-444, *quoting Kurlemann and citing, inter alia*, Pasquantino v. United States, 544 U.S. 349, 357 (2005) *and* United States v. Perry, 757 F.3d 166, 176 (4th Cir. 2014)). The *Maddux* court concluded that the indictment sufficiently alleged a conspiracy to commit mail and wire fraud where it alleged the defendants had a duty to file reports under the Jenkins Act, 15 U.S.C. §§ 376(a) and 377, and failed to do so. *Maddux* at 441, 444, 445.

The definition of "knowingly" in paragraph (2)(C) ("An act is done knowingly if it is done voluntarily and not because of mistake or some other innocent reason.") is drawn from the jury instructions given in United States v. McGuire, 744 F.2d 1197, 1201 (6th Cir. 1984) with one modification. The full definition of knowingly in *McGuire* stated, "An act is 'knowingly' done if done voluntarily *and intentionally*, and not because of mistake or some other innocent reason." (emphasis added). This instruction on wire fraud deletes the italicized words referring to "intentionally" to avoid confusion with the mens rea element of intent to defraud stated in paragraph (1)(C). Another possible definition of knowingly is, "An act is done knowingly if it is done with awareness, understanding or consciousness." *See* Arthur Andersen v. United States, 125 S.Ct. 2129, 2135-36 (2005) ("'[K]nowledge' and 'knowingly' are normally associated with awareness, understanding, or consciousness.") (citations omitted) (construing term "knowingly" in 18 U.S.C. § 1512).

In paragraph (2)(D), the definition of "material" is based on Neder v. United States, 527 U.S. 1, 16 (1999) (*quoting* United States v. Gaudin, 515 U.S. 506, 509 (1995)) and *Maddux*, 917 F.3d at 448 (characterizing this definition as "fine"). The definition of materiality for concealment cases is discussed further below.

The "intent to defraud" definition in paragraph (2)(E) requires the defendant to intend both to deceive or cheat another and to deprive him of money or property. The "intent to deprive" another of money or property is, as noted above, based on many Supreme Court and Sixth Circuit cases. Supreme Court cases include Cleveland v. United States, 121 S. Ct. 365, 379 (2000) ("Reviewing the history of § 1341, we concluded that 'the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property.' ") (*quoting* McNally v. United States, 107 S.Ct. 2875, 2880 (1987)); Carpenter v. United States, 108 S. Ct. 316, 321 (1987) ("Sections 1341 and 1343 reach any scheme to deprive another of money or property . . . ."); *see also* Shaw v. United States, 137 S. Ct. 462, 469 (2016) (construing the phrase "scheme to defraud" in the bank fraud statute, § 1344(1) and stating, "The parties agree, as do we, that the scheme must be one to deceive the bank *and* deprive it of something of value.").

Numerous Sixth Circuit cases also identify the intent to "deprive" another of money or property as an element of wire fraud. *See* United States v. Turner, 465 F.3d 667, 680 and note 18 (6th Cir. 2006) (mail fraud requires "intent to deprive a victim of money or property"); United States v. Jamieson, 427 F.3d 394, 402 (6th Cir. 2005) (scheme to defraud includes depriving someone else of money); United States v. Daniel, 329 F.3d 480, 485-486, 488 (6th Cir. 2003) (scheme to defraud includes any plan to deprive another of money or property) (*quoting* Gold Unlimited, Inc., 177 F.3d 472, 479 (6th Cir. 1999)); and United States v. Prince, 214 F.3d 740, 747-748 (6th Cir. 2000) (intent to deprive a victim of money or property is an element of wire fraud) (*citing* United States v. Merklinger, 16 F.3d 670, 678 (6th Cir. 1994) and United States v. Ames Sintering Co., 927 F.2d 232, 234 (6th Cir. 1990)).

The mail and wire fraud statutes criminalize only schemes to deprive people of "traditional property interests." *See* Ciminelli v. United States, 143 S. Ct. 1121, 1124 (2023) (holding that the "right to control" theory is not a valid basis for mail and wire fraud liability

because potentially valuable economic information necessary to make discretionary economic decisions is not a traditional property interest); *see also* the Supreme Court cases cited *supra*. As the Court noted in *Ciminelli*, this limit on liability to deprivations of money or property had been the law in the Sixth Circuit since 2014. *See Ciminelli*, 143 S. Ct. at 1127 note 3 (identifying two circuits which had expressly repudiated the right-to-control theory and citing United States v. Sadler, 750 F.3d 585, 590-592 (6th Cir. 2014), abrogated on other grounds, Kousisis v. United States, 2025 WL 1459593)). *See also Maddux*, 917 F.3d at 443 (6th Cir. 2019) (quoting United States v. Faulkenberry, 614 F.3d 573, 580-81 (6th Cir. 2010)); and U.S. v. Kennedy, 714 F.3d 951, 957-58 (6th Cir. 2013) (same). The instruction includes this limit to traditional property interests in several paragraphs by requiring "money or property," see paragraphs (1)(A), (2)(A) and (2)(E).

The Sixth Circuit noted the requirement of the intent to "deprive" another of money or property in *Maddux*, 917 F.3d at 443 (6th Cir. 2019) (quoting United States v. Faulkenberry, 614 F.3d 573, 580-81 (6th Cir. 2010)); *see also* U.S. v. Kennedy, 714 F.3d 951, 957-58 (6th Cir. 2013) (same). *But cf.* Kousisis v. United States, 2025 WL 1459593 (May 22, 2025) (holding that a defendant violates the wire fraud statute by scheming to obtain a victim's money or property regardless of whether he seeks to leave the victim economically worse off, resolving a circuit split and abrogating United States v. Sadler, 750 F.3d 585 (6th Cir. 2014)).

In describing the intent to defraud, the court has sometimes referred to the mens rea as the "specific" intent to defraud, *see, e.g., Daniel*, 329 F.3d at 487; *Frost*, 125 F.3d at 354 ("A defendant does not commit mail fraud unless he possesses the specific intent to deceive or defraud . . . ."); United States v. Smith, 39 F.3d 119, 121-22 (6th Cir. 1994). The instruction omits the word "specific." *See also* Committee Commentary to Instruction 2.07 Specific Intent.

The definition of "cause" in paragraph (2)(F) is based on *Frost*, 125 F.3d at 354 (*citing* United States v. Oldfield, 859 F.2d 392, 400 (6th Cir. 1988)).

Paragraph (3) lists some but not all items the government is not required to prove. Many pattern instructions include such a provision. This language is patterned after First Circuit Instruction 4.12; Fifth Circuit Instruction 2.59; Eighth Circuit Instruction 6.18.1341; and Eleventh Circuit Instruction 50.1. These provisions should be used only if relevant. The final bracketed provision, that the government need not prove that the defendant obtained money or property for his own benefit, is based on United States v. Kennedy, 714 F.3d 951, 958 (6th Cir. 2013).

In paragraph (1)(A), the instruction provides that the defendant must have devised, intended to devise, or "knowingly participated" in a scheme to defraud. For participation, Sixth Circuit cases often describe the mental state as "knowing." *See* United States v. Sadler, 750 F.3d 585, 590 (6th Cir. 2014) ("the government had to prove [defendant] knowingly used an interstate wire communication"), abrogated on other grounds, Kousisis v. United States, 2025 WL 1459593); United States v. Daniel, 329 F.3d 480, 487 (6th Cir. 2003) ("defendant must knowingly make a material misrepresentation or knowingly omit a material fact"); United States v. Gold Unlimited, Inc., 177 F.3d 472, 478 (6th Cir. 1999) ("defendant knowingly devised a scheme to defraud . . . with the intent to defraud"); United States v. DeSantis, 134 F.3d 760, 764

(6th Cir. 1998) ("defendant must knowingly make a material misrepresentation or knowingly omit a material fact"); United States v. Frost, 125 F.3d 346, 371 (6th Cir. 1997) (it is a crime to "knowingly devise" a scheme to defraud; a scheme to defraud includes "knowing concealment of facts and information done with the intent to defraud").

In contrast, some Sixth Circuit authority provides that the participation must be "willful." See United States v. Maddux, 917 F.3d 437, 443 (6th Cir. 2019) (defendant "willfully participated in a scheme to defraud"); United States v. Kennedy, 714 F.3d 951, 957 (6th Cir. 2013) (same); United States v. Faulkenberry, 614 F.3d 573, 581 (6th Cir. 2010) (same) (citing United States v. Stull, 743 F.2d 439, 442 (6th Cir. 1984)). The instruction continues to use the term "knowing" rather then "willful" to describe the participation based on the weight of Sixth Circuit authority and to avoid any suggestion that knowledge of illegality is an element of mail fraud.

For the requirement that the scheme to defraud must deprive the victim of "money or property," in McNally v. United States, 483 U.S. 350 (1987), the Court noted that based on the disjunctive phrasing of the mail fraud statute, which refers to "a scheme to defraud, or for obtaining money or property," it was arguable that the two phrases should be construed independently. However, the Court then rejected this construction, explaining that the second phrase merely modifies the first. *McNally*, 483 U.S. at 358-59. In Cleveland v. United States, 531 U.S. 12 (2000), the Court reiterated this interpretation of the statute:

> We reaffirm our reading of § 1341 in McNally. . . . Were the Government correct that the second phrase of § 1341 defines a separate offense, the statute would appear to arm federal prosecutors with power to police false statements in an enormous range of submissions to state and local authorities. . . . [W]e decline to attribute to § 1341 a purpose so encompassing where Congress has not made such a design clear.

Cleveland, 531 U.S. at 25-26. *Accord*, Kelly v. United States, 140 S. Ct. 1565, 1571 (2020) (describing the disjunctive language as a "unitary whole").

In Neder v. United States, *supra* at 25, the Court held that materiality is an element of a "scheme or artifice to defraud" under mail, wire and bank fraud. Although this element is not found in a "natural reading" of the statute, the court relied on the rule of construction " '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.' " 527 U.S. at 21. At common law, the word "fraud" required proof of materiality. Because Congress did not indicate otherwise, the Court presumed that Congress intended to incorporate "materiality."

The definition of materiality is as follows: "In general, a false statement is material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decision making body to which it was addressed.'" *Neder* at 16, *quoting Gaudin*, 515 U.S. at 509.

In *Maddux*, 917 F.3d 437, 448-49 (6th Cir. 2019), the court reviewed an instruction

defining materiality when the government's theory of fraud was based on concealment. The instruction provided:

> A misrepresentation or concealment is "material" if it has a natural tendency to influence or is capable of influencing the decision of a person of ordinary prudence and comprehension. A material omission, such as a failure to file required reports, may constitute a misrepresentation or concealment under the Mail and Wire Fraud statutes.

The court concluded that, "By all accounts the first sentence of this instruction was fine." *Maddux* at 448. As for the second sentence, the court stated it did not rise to the level of plain error but implied that it was error because as a grammatical matter, it "tells the reader that such a failure is always material." *Maddux, id*. The court explained, "By way of contrast, the instruction would have been fine if it had said, 'A failure to file required reports may be a material omission.' " *Maddux, id*. This sentence suggested by the court is identified in the Use Note for cases involving fraud by omission of required reports.

As to whether the fraud must be capable of deceiving persons based on a subjective ("however gullible") standard or an objective ("person of ordinary prudence") standard, case law supports the objective standard provided in paragraph (2)(D) of the instruction. *See* United States v. Petlechkov, 922 F.3d 762, 766 (6th Cir. 2019) (*citing* United States v. Jamieson, 427 F.3d 394, 415-16 (6th Cir. 2005)).

As to the required connection between the scheme to defraud or obtain property and the use of the wires, the Supreme Court has stated: "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud . . . ." Schmuck v. United States, 489 U.S. 705, 710 (1989). The Court explained: "To be a part of the execution of the fraud . . . the use of the mails need not be an essential element of the scheme. It is sufficient for the mailing to be 'incident to an essential part of the scheme,' or 'a step in [the] plot.'" *Schmuck*, 489 U.S. at 710 (internal citations and quotation marks omitted). The Court then stated: "The relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing later, through hindsight, may prove to have been counterproductive and return to haunt the perpetrator of the fraud." *Id*. at 715.

Intent and knowledge need not be proved directly. Pattern Instruction 2.08 Inferring Required Mental State states this principle and should be given in appropriate cases. In addition, Pattern Instruction 2.09 Deliberate Ignorance explains one approach to proving knowledge.

If the prosecution is based on a violation of § 1343 that relates to a major disaster or affects a financial institution, the maximum penalty is increased. Because the jury must unanimously agree on any fact (other than a prior conviction) that increases the maximum penalty, the major disaster or effect on a financial institution must be proved to the jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466 (2000). In this situation, the Committee recommends that the court give an instruction like Instruction 14.07(A) or (B) and use a special verdict form like those following Instructions 14.07(A) and (B). *See also* 18 U.S.C.

§ 2326 (maximum penalty increased for violation in connection with telemarketing).

It is also a crime to conspire to violate § 1343. Conspiracy can be charged under either 18 U.S.C. §§ 371 or 1349. The Committee did not draft a separate instruction for conspiracy to commit wire fraud because an instruction may be compiled by combining the wire fraud instruction with the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 371 require an overt act whereas conspiracies under § 1349 do not require an overt act. See United States v. Rogers, 769 F.3d 372, 379-82 (6th Cir. 2014). Thus if the conspiracy to commit wire fraud is charged under § 371, Instruction 3.01A Conspiracy to Commit an Offense (§ 371) – Basic Elements should be used as is, but if the conspiracy is charged based on § 1349, Instruction 3.01A should be modified to omit paragraph (2)(C) on overt acts. All other references to overt acts should be deleted as well.

10.03A BANK FRAUD – Scheme to Defraud a Bank (18 U.S.C. § 1344(1))

(1) Count ___ of the indictment charges the defendant with bank fraud. For you to find the defendant guilty of bank fraud, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant [knowingly executed] [attempted to execute] a scheme to defraud, that is, a scheme to deceive [cheat] a bank [financial institution] and to deprive it of something of value.

(B) Second, that the scheme [related to a material fact] [included a material misrepresentation or concealment of a material fact].

(C) Third, that the defendant had the intent to deceive [cheat] the bank [financial institution] and to deprive it of something of value.

(D) Fourth, that the bank [financial institution] was federally insured.

(2) Now I will give you more detailed instructions on some of these terms.

(A) A "scheme" means any deliberate plan of action or course of conduct.

(B) [The term "misrepresentation or concealment" means any false statements or assertions that concern a material fact of the matter in question, that were either known to be untrue when made or made with reckless indifference to their truth. They include actual, direct false statements as well as half-truths and the knowing concealment of material facts.]

(C) An act is done "knowingly" if it is done voluntarily, and not because of mistake or some other innocent reason.

(D) A misrepresentation or concealment of fact is "material" if it has a natural tendency to influence or is capable of influencing the decision of a person of ordinary prudence and comprehension.

[(3) It is not necessary that the government prove [*insert from options below as appropriate*]].

(A) [that the bank [financial institution] suffered financial harm].

(B) [that the defendant intended to cause the bank financial harm].

(C) [that the alleged scheme actually succeeded].

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

Use Note

The two numbered clauses in the bank fraud statute, § 1344(1) and 1344(2), have "separate meanings." Loughrin v. United States, 134 S. Ct. 2384, 2391 (2014). The bank fraud instructions reflect the two clauses in separate instructions: Inst. 10.03A Bank Fraud – Scheme to Defraud a Bank (18 U.S.C. § 1344(1)) and Inst. 10.03B Bank Fraud – Scheme to Obtain Bank Property by Means of False or Fraudulent Representations (18 U.S.C. § 1344(2)).

If the prosecution is based on a violation of § 1344 in connection with telemarketing, the maximum penalty is increased under 18 U.S.C. § 2326. Because the jury must unanimously agree on any fact (other than a prior conviction) that increases the maximum penalty, the telemarketing must be proved to the jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466 (2000). In this situation, the Committee recommends that the court give an instruction like Instruction 14.07(A) or (B) and use a special verdict form like those following Instructions 14.07(A) and (B).

As to the terms "bank" or financial institution," the instruction uses the term "bank" as the default and then offers the term "financial institution" in brackets as an option. The statute defining the offense uses the term "bank" in the title of the offense but then uses the term "financial institution" in the text. See 18 U.S.C. § 1344. The term "financial institution" is broader than the term "bank." See 18 U.S.C. § 20. The Committee recommends that the court use the term raised by the facts of the case.

Paragraph (1)(D) (that the bank [financial institution] was federally insured) fits most cases but the statute defining "financial institution," 18 U.S.C. § 20, includes other definitions for financial institution beyond institutions that are federally insured. If the definition of "financial institution" is an issue in the case, the court should consult the list of definitions for "financial institution" in 18 U.S.C. § 20.

The definition of "misrepresentation or concealment" in paragraph (2)(B) should be given only when the bracketed option including those terms in paragraph (1)(B) is used.

The provisions of paragraph (3) stating items the government need not prove are bracketed and should be used only if relevant.

See also Instruction 2.09 Deliberate Ignorance.

If there is any evidence at all of good faith, the court should refer to Instruction 10.04 Fraud – Good Faith Defense.

Brackets indicate options for the court; bracketed italics are notes to the court.

Committee Commentary Instruction 10.03A

(current through May 1, 2025)

This instruction covers Bank Fraud – Scheme to Defraud a Bank under 18 U.S.C. § 1344(1).

Section 1344 provides:

§ 1344. Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice--
(1) to defraud a financial institution; or
(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

The two numbered clauses in the bank fraud statute have separate meanings. See Loughrin v. United States, 134 S. Ct. 2384 (2014) at 2390 (describing the statute as having "two entirely distinct statutory phrases") and 2391 (describing § 1344's two clauses as having separate numbers and punctuation indicating that they have "separate meanings.") The bank fraud instructions reflect these two clauses in separate instructions: Inst. 10.03A Bank Fraud – Scheme to Defraud a Bank (18 U.S.C. § 1344(1)) and Inst. 10.03B Bank Fraud – Scheme to Obtain Bank Property by Means of False or Fraudulent Representations (18 U.S.C. § 1344(2)). In the wake of *Loughrin*, the Sixth Circuit has not ruled on whether these two clauses state different offenses or just different means of committing a single offense. In the absence of authority from the Sixth Circuit on whether these two clauses are multiple crimes or multiple means, the court should consider whether to give a specific unanimity instruction or use a special verdict form.

In paragraph (1), the elements are based on the statute and case law. In paragraph (1)(A), the first phrase tracks the statutory language with one exception. The statute refers to a "scheme or artifice," but the instruction uses the term "scheme" and omits "artifice" based on a plain-English approach and for consistency with the other fraud instructions. The last part of paragraph (1)(A) is based on Shaw v. United States, 137 S. Ct. 462 (2016) (holding that a knowing execution of a scheme to defraud a bank was established under § 1344(1) when the defendant made false statements to the bank leading it to release money from another customer's deposit account). In *Shaw*, the Court stated, "The parties agree, as do we, that the scheme must be one to deceive the bank *and* deprive it of something of value.") (emphasis in original). *Id*. at 469; *see also* United States v. Hall, 979 F.3d 1107, 1117 (6th Cir. 2020) (quoting *Shaw*). The term "cheat" is offered as a synonym for "deceive" based on its repeated use in *Shaw*. *See also* United States v. Reaume, 338 F.3d 577, 580 (bank fraud requires "intent to defraud") and United States v. Hoglund, 178 F.3d 410, 412-13 (6th Cir. 1999) (bank fraud under § 1344(1) requires intent to defraud). The definition of "something of value" is discussed below.

In paragraph (1)(B), the language describing the materiality element is based on Neder v. United States, 527 U.S.1, 20-23 (1999) and Field v. Mans, 516 U.S. 59 (1995).

In paragraph (1)(C), the element that the defendant had the intent to deceive [cheat] the bank and to deprive it of something of value, is based on Shaw v. United States, 137 S. Ct. 462, 469 (2016), quoted above. *See also* Loughrin v. United States, 134 S. Ct. 2384, 2389-90 (2014) ("[T]he *first* clause of § 1344, as all agree, includes the requirement that a defendant intend to 'defraud a financial institution'; indeed, that is § 1344(1)'s whole sum and substance.").

In paragraph (1)(D), the element that the bank was federally insured is based on the statutory definition of financial institution as one which is insured by, *inter alia*, the F.D.I.C. or the National Credit Union Share Insurance Fund, *see* 18 U.S.C. § 20(1) and (2). The Sixth Circuit has held that it is an element of bank fraud that the financial institution is federally insured. *See, e.g.*, United States v. Reaume, 338 F.3d 577, 580 (6th Cir. 2003); United States v. Everett, 270 F.3d 986, 989 (6th Cir. 2001); United States v. Hoglund, 178 F.3d 410, 413 (6th Cir. 1999).

The definition of "scheme" in paragraph (2)(A) is based on United States v. Frost, 125 F.3d 346, 371 (6th Cir. 1997) (construing scheme to defraud under mail fraud statute).

In paragraph (2)(B), the definition of "misrepresentation or concealment" is based on United States v. Stull, 743 F.2d 439, 446 (6th Cir. 1984) and United States v. O'Boyle, 680 F.2d 34, 36 (6th Cir. 1982). The reference to reckless indifference to the truth is further supported by United States v. Kennedy, 714 F.3d 951, 958 (6th Cir. 2013) (construing mail and wire fraud) ("The government met the mail- and wire-fraud statutes' intent requirements through proof that K. Kennedy was reckless in his disregard for the truth of the statements that he made to victims to obtain their money.") (citations omitted). *See also* Instruction 2.09 Deliberate Ignorance.

The definition of "knowingly" in paragraph (2)(C) ("An act is done knowingly if it is done voluntarily, and not because of mistake or some other innocent reason.") is supported by United States v. Skouteris, 51 F.4th 658, 670-671 (6th Cir. 2022).

The definition of "material" in paragraph (2)(D) is based on *Neder*, 527 U.S. at 16, *quoting* United States v. Gaudin, 515 U.S. 506, 509 (1995).

Paragraph (3) lists some but not all items the government is not required to prove. These provisions identifying items the government need not prove are bracketed and should be used only if relevant.

In paragraph (3)(A), the statement that the government need not prove that the bank suffered financial harm is based on *Shaw*, 137 S. Ct. at 467 ("We have found no case from this Court interpreting the bank fraud statute as requiring that the victim bank ultimately suffer financial harm . . . ."); *see also* United States v. Hoglund, 178 F.3d 410, 412 (6th Cir. 1999) (approving an instruction stating "it is not necessary for the government to prove anyone lost money.").

In United States v. Hall, 979 F.3d 1107 (6th Cir. 2020), the court stated that this offense requires no proof that the victim bank suffered financial harm or financial loss but does require

proof that the defendant executed a scheme to deprive the bank of "something of value," see paragraph (1)(A). In *Hall*, the defendant took out bank loans in relatives' names without their consent. She later filed a request for the bank's forbearance on one of the loans, signing her sister's name electronically. The bank granted the forbearance. The defendant argued that the evidence of bank fraud was insufficient because forbearance on a loan did not deprive the bank of "something of value." The Sixth Circuit disagreed, analogizing forbearance on a loan to a loss of the chance to bargain knowing all the facts:

> A signee putting someone else's name on a request for forbearance deprives the bank of knowing the financial status and ability of the signee to pay back that money. Instead, the bank thinks the person whose name appears is the individual who can stand by paying back the money related to the forbearance request. So the bank loses the chance to bargain with the facts before it, which is something of value.

Hall, supra at 1117 (cleaned up). The government need not prove financial loss to the bank to establish that the object of the scheme was something of value because the definition of financial loss or harm is "narrower" than the definition of something of value. *Hall, supra* at 1117, *citing Shaw*, 137 S. Ct. at 467, 469 and United States v. Springer, 866 F.3d 949, 954 (8th Cir. 2017).

In paragraph (3)(B), the statement that the government need not prove that the defendant intended to cause the bank financial harm is based on *Shaw*, 137 S. Ct. at 469 ("[T]he Government need not prove that the defendant intended that the bank ultimately suffer monetary loss.")

In paragraph (3)(C), the statement that the government need not prove that the alleged scheme actually succeeded is based on Loughrin v. United States, 134 S. Ct. at 2395 n. 9 *citing Neder*, 527 U.S. at 25 (stating that gravamen of § 1344 is the scheme and damage is not required); Pasquantino v. United States, 544 U.S. 349, 371 (2005) (stating that scheme to defraud under wire fraud statute was complete when scheme was executed; success of scheme was not required); and United States v. Turner, 465 F.3d 667, 680 (6th Cir. 2006) ("Of course, the mail fraud statute does not require an actual loss of property because success of the scheme is not an element of the offense.").

In cases decided before *Shaw*, the Sixth Circuit held that the government need not prove that defendant's conduct exposed the bank to a risk of loss as long as the defendant intended to expose the bank to a risk of loss, and that the government need not prove that the defendant benefitted personally from the scheme to defraud the bank. United States v. Hoglund, 178 F.3d 410, 413 (6th Cir. 1999) and United States v. Knipp, 963 F.2d 839, 846 (6th Cir. 1992), *citing* United States v. Goldblatt, 813 F.2d 619, 624 (3rd Cir. 1987)**.** These cases should be consulted until the Sixth Circuit has the opportunity to reaffirm, modify, or repudiate these precedents in light of *Shaw*.

Generally, the bank fraud statute was modeled on and is similar to the mail and wire fraud statutes. *Neder*, 527 U.S. at 20-21 (1999). However, in Loughrin v. United States, 134 S. Ct. 2384 (2014), the Court distinguished the bank fraud statute from the mail fraud statute. The mail fraud statute sets forth just one offense. *Loughrin* at 2391, *citing* McNally v. United States, 483 U.S. 350, 358-59 (1987). In contrast, the bank fraud statute includes two clauses with separate meanings: scheming to defraud a bank under § 1344(1), and scheming to obtain bank property by means of false or fraudulent representations under § 1344(2). *See Loughrin* at 2390 (describing the statute as having "two entirely distinct statutory phrases") and 2391 (describing § 1344's two clauses as having separate numbers and punctuation indicating that they have "separate meanings.")

Intent and knowledge need not be proved directly. Pattern Instruction 2.08, Inferring Required Mental State, states this principle and should be given in appropriate cases. In addition, Pattern Instruction 2.09 Deliberate Ignorance describes one approach to proving knowledge.

In *Neder*, 527 U.S. at 4, the Court held that materiality is an element of the bank fraud offense. Although this element is not found in a "natural reading" of the statute, the Court relied on the rule of construction that " '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.' " *Id*. at 21 (citations omitted). At common law, the words "fraud" and "defraud" required proof of materiality. *Id*. at 22-23. Likewise, the terms "false pretenses" and "false representations" are common-law terms of art with meanings that imply elements that the common law defined them to include. *Neder*, 527 U.S. at 23 n.6, *quoting* Field v. Mans, 516 U.S. 59, 69 (1995). Because Congress did not indicate otherwise, the Court presumed that Congress intended to incorporate the common-law element of "materiality" into the crime of bank fraud.

The definition of materiality is as follows: "In general, a false statement is material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decision making body to which it was addressed.'" *Id*. at 16, *quoting* United States v. Gaudin, 515 U.S. at 509.

As to whether the fraud must be capable of deceiving persons based on a subjective ("however gullible") standard or an objective ("person of ordinary prudence") standard, in most cases the objective standard provided in paragraph (2)(C) of the instruction is appropriate. The Sixth Circuit has stated that the standard to be used is an objective one. *See, e.g*., United States v. Jamieson, 427 F.3d 394, 415-16 (6th Cir. 2005); Berent v. Kemper Corp., 973 F.2d 1291, 1294 (6th Cir. 1992); Blount Fin. Servs., Inc. v. Walter E. Heller and Co., 819 F.2d 151, 153 (6th Cir. 1987); United States v. Van Dyke, 605 F.2d 220, 225 (6th Cir. 1979); and United States v. Bohn, 2008 WL 2332226 at 9, 2008 U.S. App. LEXIS 12474 at 26 (6th Cir. 2008) (unpublished). *But see* Norman v. United States, 100 F.2d 905, 907 (6th Cir. 1939) (using a subjective standard, explaining that: "the lack of guile on the part of those generally solicited may itself point with persuasion to the fraudulent character of the artifice."). In United States v. Frost, 125 F.3d 346, 371 (6th Cir. 1997), the court affirmed an instruction with an objective standard, but the issue of objective-vs.-subjective standard was not raised. *See id.* (affirming instruction which provided, "There must be proof of either a misrepresentation, false statement, or omission calculated to

deceive a person of ordinary prudence and comprehension."). However, none of these cases involved vulnerable victims who were targeted by the defendant specifically because of their vulnerability. If this situation arises, the parties should address whether the appropriate standard is objective or subjective based on the facts of the case.

In United States v. Svete, 556 F.3d 1157 (11th Cir. 2009) (en banc), the court adopted a subjective standard, concluding that "[m]ail fraud does not require proof that a scheme to defraud would deceive persons of ordinary prudence." *Id*. at 1169. In discussing the Sixth Circuit decisions in *Norman* (using a subjective standard) and *Jamieson* (stating an objective standard, but not citing or distinguishing *Norman*), the Eleventh Circuit found *Norman* more persuasive because in *Jamieson*, the "'ordinary prudence' language was invoked to . . . affirm [a] conviction . . . ." *Svete* at 1168-69. The subjective standard articulated by the Sixth Circuit in *Norman* is consistent with other older Sixth Circuit precedent. *See* Henderson v. United States, 218 F.2d 14, 19 (6th Cir. 1955); Tucker v. United States, 224 F. 833, 837 (6th Cir. 1915); O'Hara v. United States, 129 F. 551, 555 (6th Cir. 1904).

Check kiting constitutes a "scheme to defraud" under the bank fraud statute. United States v. Stone, 954 F.2d 1187, 1190 (6th Cir. 1992).

It is also a crime to attempt or conspire to violate § 1344. *See* 18 U.S.C. § 1344 (attempt); §§ 371 and 1349 (conspiracy). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled by using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 371 require an overt act whereas conspiracies under § 1349 do not require an overt act. See United States v. Rogers, 769 F.3d 372, 377 (6th Cir. 2014) (listing elements of conspiracy under § 1349 without including overt act). Thus if the conspiracy to commit fraud charge is based on § 371, Instruction 3.01A Conspiracy to Commit an Offense–Basic Elements should be used as is, but if the charge is based on § 1349, Instruction 3.01A should be modified to omit paragraph (2)(C) on overt acts. All other references to overt acts should be deleted as well.

10.03B BANK FRAUD – Scheme to Obtain Bank Property by Means of False or Fraudulent Representations (18 U.S.C. § 1344(2))

(1) Count ___ of the indictment charges the defendant with bank fraud. For you to find the defendant guilty of bank fraud, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant [knowingly executed] [attempted to execute] a scheme to obtain any of the money, funds, or property [owned by] [under the control of] a bank [financial institution] by means of false or fraudulent pretenses, representations or promises.

(B) Second, that the scheme [related to a material fact] [included a material misrepresentation or concealment of a material fact].

(C) [Third, that the defendant had the intent to deceive or cheat someone for the purpose of either causing a financial loss to another or bringing about a financial gain to himself [to another person].]

(D) Fourth, that the bank [financial institution] was federally insured.

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "false or fraudulent pretenses, representations or promises" means any false statements or assertions that concern a material aspect of the matter in question, that were either known to be untrue when made or made with reckless indifference to their truth. They include actual, direct false statements as well as half-truths and the knowing concealment of material facts.

(B) An act is done "knowingly" if it is done voluntarily, and not because of mistake or some other innocent reason.

(C) A misrepresentation or concealment of fact is "material" if it has a natural tendency to influence or is capable of influencing the decision of a person of ordinary prudence and comprehension.

[(3) It is not necessary that the government prove [*insert from options below as appropriate*]].

(A) [that the bank [financial institution] suffered a financial loss.]

(B) [that defendant intended to defraud a bank [financial institution].]

(C) [that the defendant's scheme created a risk of financial loss to the bank [financial institution].]

(D) [that the false or fraudulent pretenses, representations, or promises were made to a bank [financial institution].]

(E) [that the alleged scheme actually succeeded.]

(F) [that someone relied upon the misrepresentation.]

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

Use Note

In paragraph (1)(C), the element that the defendant had the intent to deceive or cheat for the purpose of causing a financial loss or a financial gain is bracketed to indicate some conflicting authority. The authority is detailed below in the Commentary.

The two numbered clauses in the bank fraud statute, § 1344(1) and 1344(2), have separate meanings. Loughrin v. United States, 134 S. Ct. 2384, 2391 (2014). The bank fraud instructions reflect the two clauses in separate instructions: Inst. 10.03A Bank Fraud – Scheme to Defraud a Bank (18 U.S.C. § 1344(1)) and Inst. 10.03B Bank Fraud – Scheme to Obtain Bank Property by Means of False or Fraudulent Representations (18 U.S.C. § 1344(2)).

If the prosecution is based on a violation of § 1344 in connection with telemarketing, the maximum penalty is increased under 18 U.S.C. § 2326. Because the jury must unanimously agree on any fact (other than a prior conviction) that increases the maximum penalty, the telemarketing must be proved to the jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466 (2000). In this situation, the Committee recommends that the court give an instruction like Instruction 14.07(A) or (B) and use a special verdict form like those following Instructions 14.07(A) and (B).

As to the terms "bank" or financial institution," the instruction generally uses the term "bank" as the default and then offers the term "financial institution" in brackets as an option. The statute defining the offense uses the term "bank" in the title of the offense but then uses the term "financial institution" in the two numbered clauses of its text. See 18 U.S.C. § 1344. The term "financial institution" is broader than the term "bank." See 18 U.S.C. § 20. The Committee recommends that the court use the term raised by the facts of the case.

In paragraph (1)(A), some of the types of property listed in § 1344(2), i.e., "credits, assets, securities," were omitted because they are adequately covered by the simpler phrase "money, funds, or property." If a case raises issues about this definition, substitute the more detailed statutory language.

Paragraph (1)(D) (that the bank [financial institution] was federally insured) fits most cases but the statute defining "financial institution," 18 U.S.C. § 20, includes other definitions for financial institution beyond institutions that are federally insured. If the definition of "financial institution" is an issue in the case, the court should consult the list of definitions for "financial institution" in 18 U.S.C. § 20.

The provisions of paragraph (3) stating items the government need not prove are bracketed and should be used only if relevant.

See also Instruction 2.09 Deliberate Ignorance.

If there is any evidence at all of good faith, the court should refer to Instruction 10.04 Fraud – Good Faith Defense.

Brackets indicate options for the court; bracketed italics are notes to the court.

Committee Commentary Instruction 10.03B
(current through May 1, 2025)

This instruction covers Bank Fraud – Scheme to Obtain Bank Property by Means of False or Fraudulent Representations under 18 U.S.C. § 1344(2).

Section 1344 provides:

§ 1344. Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice--
(1) to defraud a financial institution; or
(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

The two numbered clauses in the bank fraud statute have separate meanings. See Loughrin v. United States, 134 S. Ct. 2384 (2014) at 2390 (describing the statute as having "two entirely distinct statutory phrases") and 2391 (describing § 1344's two clauses as having separate numbers and punctuation indicating that they have "separate meanings.") The bank fraud instructions reflect these two clauses in separate instructions: Inst. 10.03A Bank Fraud – Scheme to Defraud a Bank (18 U.S.C. § 1344(1)) and Inst. 10.03B Bank Fraud – Scheme to Obtain Bank Property by Means of False or Fraudulent Representations (18 U.S.C. § 1344(2)). In the wake of *Loughrin*, the Sixth Circuit has not ruled on whether these two clauses state different offenses or different means of committing a single offense. In the absence of authority from the Sixth Circuit on whether these two clauses are multiple crimes or multiple means, the court should consider whether to give a specific unanimity instruction or use a special verdict form.

In paragraph (1), the elements are based on the statute and case law. Paragraph (1)(A) tracks the statutory language with two exceptions. First, the statute refers to a "scheme or artifice," but the instruction uses the term "scheme" and omits "artifice" based on a plain-English approach and for consistency with the other fraud instructions. Second, some of the types of property listed in § 1344(2) of the statute, *i.e.*, "credits, assets, securities," were omitted because

they are adequately covered by the simpler phrase "money, funds, or property." If a case raises issues about this definition, the court should consider using the more detailed statutory language.

The statutory phrase "by means of" in paragraph (1)(A) was defined by the Court in Loughrin v. United States, *supra*. In *Loughrin*, the defendant stole checks and forged them in order to buy merchandise at Target. He then immediately returned the merchandise for cash. He argued that there was no evidence he intended to defraud a bank, only evidence that he intended to defraud Target. The Supreme Court held that the government need not prove the defendant intended to defraud a bank, and that § 1344(2)'s "by means of" language is satisfied when "the defendant's false statement is the mechanism naturally inducing a bank (or custodian of bank property) to part with money in its control." *Loughrin*, 134 S. Ct. at 2393.

In paragraph (1)(B), the language describing the materiality element is based on Neder v. United States, 527 U.S.1, 20-23 (1999) and Field v. Mans, 516 U.S. 59 (1995).

In paragraph (1)(C), the element that the defendant had the intent to deceive or cheat for the purpose of causing a financial loss or a financial gain is based on Loughrin v. United States, 134 S. Ct. 2384 (2014) and United States v. Kerley, 784 F.3d 327, 343 (6th Cir. 2015). This element is bracketed to indicate some conflicting authority on what kind of intent is an element under § 1344(2). In *Loughrin*, the Court states repeatedly that § 1344(2) requires no "intent to defraud a bank." *See, e.g.*, 134 S. Ct. at 2387 (stating "The question presented is whether the Government must prove that a defendant charged with violating that provision intended to defraud a bank."); *see also id*. at 2388 and 2389. While *Loughrin* makes clear that the defendant need not intend to defraud a bank, whether the defendant must nonetheless intend to defraud someone is uncertain. The *Loughrin* Court also states:

> We begin with common ground. All parties agree, as do we and the Courts of Appeals, that § 1344(2) requires that a defendant "knowingly execute[ ], or attempt[ ] to execute, a scheme or artifice" with at least two elements. First, the clause requires that the defendant intend "to obtain any of the moneys ... or other property owned by, or under the custody or control of, a financial institution." (We refer to that element, more briefly, as intent "to obtain bank property.")

Loughrin, 134 S. Ct. at 2388-2389 (citations omitted). This passage supports the conclusion that while the defendant must intend to obtain money or property under the control of a bank, he need not intend to defraud anyone. In United States v. Kerley, 784 F.3d 327, 343 (6th Cir. 2015), decided in the wake of *Loughrin*, the Sixth Circuit states:

> The elements of bank fraud under 18 U.S.C. § 1344 are: "(1) the defendant knowingly executed or attempted to execute a scheme to defraud a financial institution; (2) the defendant had an intent to defraud, and (3) the financial institution was insured by the FDIC." United States v. Dowlen, 514 Fed. Appx. 559, 563 (6th Cir.2013) (citing United States v. Everett, 270 F.3d 986, 989 (6th Cir.2001)). "Intent to defraud means to act with intent to deceive or cheat for the purpose of causing a financial loss to another or bringing about a financial gain to oneself." United States v. Olds, 309 Fed. Appx. 967, 972 (6th Cir.2009).

This passage supports the conclusion that intent to defraud remains an element in the wake of *Loughrin*.

Other circuits' pattern instructions reflect the confusion in interpreting *Loughrin*. For example, in the Fifth Circuit, pattern instruction 2.58B Bank Fraud 18 U.S.C. § 1344(2) does not include intent to defraud as an element and explains in commentary, "The Loughrin Court made clear that, for offenses charged under § 1344(2), the Government need prove neither intent to defraud nor that the defendant placed the financial institution at risk. See id., 134 S. Ct. at 2387, 2395 n.9. Accordingly, these elements have not been included in this instruction." (However, the Fifth Circuit instruction does include an "intent to deceive" as part of the definition of scheme or artifice.) Meanwhile, in the Ninth Circuit, the pattern instruction retains intent to defraud as element. See Ninth Circuit Instruction 8.127 Bank Fraud—Scheme to Defraud by False Promises (18 U.S.C. § 1344(2)). In view of the conflicting authority in the Sixth Circuit, the Committee decided to bracket the element and alert the court and parties to the question.

In paragraph (1)(D), the element that the bank was federally insured is based on the statutory definition of financial institution as one which is insured by, *inter alia*, the F.D.I.C. or the National Credit Union Share Insurance Fund, *see* 18 U.S.C. § 20(1) and (2). The Sixth Circuit has held that it is an element of bank fraud that the financial institution is federally insured. *See, e.g.*, United States v. Reaume, 338 F.3d 577, 580 (6th Cir. 2003); United States v. Everett, 270 F.3d 986, 989 (6th Cir. 2001); United States v. Hoglund, 178 F.3d 410, 413 (6th Cir. 1999).

In paragraph (2)(A), the definition of "false or fraudulent pretenses, representations, or promises" is based on the Sixth Circuit's approval of similar definitions, *see* United States v. Stull, 743 F.2d 439, 446 (6th Cir. 1984) and United States v. O'Boyle, 680 F.2d 34, 36 (6th Cir. 1982). The reference to reckless indifference to the truth is further supported by United States v. Kennedy, 714 F.3d 951, 958 (6th Cir. 2013) (construing mail and wire fraud) ("The government met the mail- and wire-fraud statutes' intent requirements through proof that K. Kennedy was reckless in his disregard for the truth of the statements that he made to victims to obtain their money.") (citations omitted). *See also* Instruction 2.09 Deliberate Ignorance.

The definition of "knowingly" in paragraph (2)(B) ("An act is done knowingly if it is done voluntarily, and not because of mistake or some other innocent reason.") is drawn from the jury instructions given in United States v. McGuire, 744 F.2d 1197, 1201 (6th Cir. 1984) with one modification. The full definition of knowingly in *McGuire* stated, "An act is 'knowingly' done if done voluntarily *and intentionally*, and not because of mistake or some other innocent reason." (emphasis added). This instruction on bank fraud deletes the italicized words referring to intent based on the Court's discussion of bank fraud under § 1344(1) in Shaw v. United States, 137 S. Ct. 462 (2016). In *Shaw*, the Court distinguished the terms knowingly and purposefully and concluded that the correct mens rea under § 1344(1) was knowingly. *See Shaw*, 137 S. Ct. at 468 ("[T]he statute itself makes criminal the the '*knowin[g]* execut[ion of] a scheme ... to defraud.'"). Another possible definition of knowingly is, "An act is done knowingly if it is done with awareness, understanding or consciousness." *See* Arthur Andersen v. United States, 125 S.Ct. 2129, 2135-36 (2005) (ৎ'[K]nowledge' and 'knowingly' are normally associated with awareness, understanding, or consciousness.") (citations omitted) (construing term "knowingly" in 18 U.S.C. § 1512).

The definition of "material" in paragraph (2)(C) is based on *Neder*, 527 U.S. at 16, *quoting* United States v. Gaudin, 515 U.S. 506, 509 (1995).

Paragraph (3) lists some but not all items the government is not required to prove. These provisions are bracketed and should be used only if relevant. They are based on Loughrin v. United States, 134 S. Ct. 2384 (2014).

The statements in paragraphs (3)(A) and (3)(C), that the government need not prove that the bank suffered a financial loss and need not prove that the defendant's scheme created a risk of financial loss to the bank, are based on *Loughrin*, 134 S. Ct. at 2395 n. 9 (explaining that language of § 1344(2) is broad and "appears calculated to avoid entangling courts in technical issues of banking law" about who suffers the loss) (citation omitted).

In paragraph (3)(B), the statement that the government need not prove that the defendant intended to defraud a bank is based on *Loughrin*, 134 S. Ct. at 2387 and at 2388 n. 2, *citing* United States v. Everett, 270 F.3d 986, 991 (6th Cir. 2001).

In paragraph (3)(D), the statement that the government need not prove that the false or fraudulent pretenses, representations, or promises were made to a bank, is based on *Loughrin*, 134 S. Ct. at 2393 & n. 6.

In paragraph (3)(E), the statement that the government need not prove that the alleged scheme actually succeeded is based on *Loughrin*, 134 S. Ct. at 2393-94 *quoting Neder*, 527 U.S. at 25 ("And we have long made clear that such failure is irrelevant in a bank fraud case, because § 1344 punishes not 'completed frauds' but instead fraudulent 'scheme[s].'").

In paragraph (3)(F), the statement that the government need not prove that someone relied upon the misrepresentation is based on *Loughrin*, 134 S. Ct. at 2395 n. 9 (referring to "our prior holding that . . . the [bank fraud] offense . . . does not require 'damage' or 'reliance'") (*citing* Neder v. United States, 527 U.S. 1, 25 (1999)).

Generally, the bank fraud statute was modeled on and is similar to the mail and wire fraud statutes. *Neder*, 527 U.S. at 20-21 (1999). However, in Loughrin v. United States, 134 S. Ct. 2384 (2014), the Court distinguished the bank fraud statute from the mail fraud statute. The mail fraud statute sets forth just one offense. *Loughrin* at 2391, *citing* McNally v. United States, 483 U.S. 350, 358-59 (1987). In contrast, the bank fraud statute includes two clauses with separate meanings: scheming to defraud a bank under § 1344(1), and scheming to obtain bank property by means of false or fraudulent representations under § 1344(2). *See Loughrin*, 134 S. Ct. at 2390 (describing the statute as having "two entirely distinct statutory phrases") and 2391 (describing § 1344's two clauses as having separate numbers and punctuation indicating that they have "separate meanings.")

Intent and knowledge need not be proved directly. Pattern Instruction 2.08, Inferring Required Mental State, states this principle and should be given in appropriate cases. In addition, Pattern Instruction 2.09 Deliberate Ignorance describes one approach to proving knowledge.

In *Neder*, 527 U.S. at 4, the Court held that materiality is an element of the bank fraud offense. Although this element is not found in a "natural reading" of the statute, the Court relied on the rule of construction that " '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.' " *Id*. at 21 (citations omitted). At common law, the words "fraud" and "defraud" required proof of materiality. *Id*. at 22-23. Likewise, the terms "false pretenses" and "false representations" are common-law terms of art with meanings that imply elements that the common law defined them to include. *Neder*, 527 U.S. at 23 n.6, *quoting* Field v. Mans, 516 U.S. 59, 69 (1995). Because Congress did not indicate otherwise, the Court presumed that Congress intended to incorporate the common-law element of "materiality" into the crime of bank fraud.

The definition of materiality is as follows: "In general, a false statement is material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decision making body to which it was addressed.'" *Neder*, 527 U.S. at 16, *quoting* United States v. Gaudin, 515 U.S. at 509.

As to whether the fraud must be capable of deceiving persons based on a subjective ("however gullible") standard or an objective ("person of ordinary prudence") standard, in most cases the objective standard provided in paragraph (2)(C) of the instruction is appropriate. The Sixth Circuit has stated that the standard to be used is an objective one. *See, e.g*., United States v. Jamieson, 427 F.3d 394, 415-16 (6th Cir. 2005); Berent v. Kemper Corp., 973 F.2d 1291, 1294 (6th Cir. 1992); Blount Fin. Servs., Inc. v. Walter E. Heller and Co., 819 F.2d 151, 153 (6th Cir. 1987); United States v. Van Dyke, 605 F.2d 220, 225 (6th Cir. 1979); and United States v. Bohn, 2008 WL 2332226 at 9, 2008 U.S. App. LEXIS 12474 at 26 (6th Cir. 2008) (unpublished). *But see* Norman v. United States, 100 F.2d 905, 907 (6th Cir. 1939) (using a subjective standard, explaining that: "the lack of guile on the part of those generally solicited may itself point with persuasion to the fraudulent character of the artifice."). In United States v. Frost, 125 F.3d 346, 371 (6th Cir. 1997), the court affirmed an instruction with an objective standard, but the issue of objective-vs.-subjective standard was not raised. *See id.* (affirming instruction which provided, "There must be proof of either a misrepresentation, false statement, or omission calculated to deceive a person of ordinary prudence and comprehension."). However, none of these cases involved vulnerable victims who were targeted by the defendant specifically because of their vulnerability. If this situation arises, the parties should address whether the appropriate standard is objective or subjective based on the facts of the case.

In United States v. Svete, 556 F.3d 1157 (11th Cir. 2009) (en banc), the court adopted a subjective standard, concluding that "[m]ail fraud does not require proof that a scheme to defraud would deceive persons of ordinary prudence." *Id*. at 1169. In discussing the Sixth Circuit decisions in *Norman* (using a subjective standard) and *Jamieson* (stating an objective standard, but not citing or distinguishing *Norman*), the Eleventh Circuit found *Norman* more persuasive because in *Jamieson*, the "'ordinary prudence' language was invoked to . . . affirm [a] conviction . . . ." *Svete* at 1168-69. The subjective standard articulated by the Sixth Circuit in *Norman* is consistent with other older Sixth Circuit precedent. *See* Henderson v. United States, 218 F.2d 14, 19 (6th Cir. 1955); Tucker v. United States, 224 F. 833, 837 (6th Cir. 1915); O'Hara v. United States, 129 F. 551, 555 (6th Cir. 1904).

It is also a crime to attempt or conspire to violate § 1344. *See* 18 U.S.C. § 1344 (attempt); §§ 371 and 1349 (conspiracy). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled by using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 371 require an overt act whereas conspiracies under § 1349 do not require an overt act. See United States v. Rogers, 769 F.3d 372, 377 (6th Cir. 2014) (listing elements of conspiracy under § 1349 without including overt act). Thus if the conspiracy to commit fraud charge is based on § 371, Instruction 3.01A Conspiracy to Commit an Offense–Basic Elements should be used as is, but if the charge is based on § 1349, Instruction 3.01A should be modified to omit paragraph (2)(C) on overt acts. All other references to overt acts should be deleted as well.

10.04 FRAUD – GOOD FAITH DEFENSE

(1) The good faith of the defendant is a complete defense to the charge of _____ contained in [Count ___ of] the indictment because good faith on the part of the defendant is, simply, inconsistent with an intent to defraud.

(2) A person who acts, or causes another person to act, on a belief or an opinion honestly held is not punishable under this statute merely because the belief or opinion turns out to be inaccurate, incorrect, or wrong. An honest mistake in judgment or an honest error in management does not rise to the level of criminal conduct.

(3) A defendant does not act in good faith if, even though he honestly holds a certain opinion or belief, that defendant also knowingly makes false or fraudulent pretenses, representations, or promises to others.

(4) While the term "good faith" has no precise definition, it encompasses, among other things, a belief or opinion honestly held, an absence of malice or ill will, and an intention to avoid taking unfair advantage of another.

(5) The burden of proving good faith does not rest with the defendant because the defendant does not have any obligation to prove anything in this case. It is the government's burden to prove to you, beyond a reasonable doubt, that the defendant acted with an intent to defraud.

(6) If the evidence in this case leaves you with a reasonable doubt as to whether the defendant acted with an intent to defraud or in good faith, you must acquit the defendant.

Use Note

Brackets indicate options for the court.

Committee Commentary Instruction 10.04
(current through May 1, 2025)

This instruction is based on Kevin F. O'Malley et al., Federal Jury Practice and Instructions (5th ed. 2000), § 19.06 The Good Faith Defense – Explained.

Several Sixth Circuit cases endorse instructions including good faith provisions. *See* United States v. Frost, 125 F.3d 346, 372 (6th Cir. 1997) (endorsing an instruction that stated, *inter alia*, "good faith on the part of a defendant is inconsistent with an intent to defraud."); United States v. McGuire, 744 F.2d 1197, 1200-02 (6th Cir. 1984); United States v. Stull, 743 F.2d 439, 445-46 (6th Cir. 1984).

In *Stull*, 743 F.2d at 446, the court approved a good faith instruction that stated, *inter alia*, "Good faith does not include the defendant's belief or faith that the venture will eventually meet his or her expectations." This provision can be added to the instruction if relevant in the case.

The good faith instruction should be given if there is any evidence at all to support the charge. United States v. McGuire, 744 F.2d 1197, 1201 (6th Cir. 1984), *quoting* United States v. Curry, 681 F.2d 406, 416 (5th Cir. 1982).

10.05 HEALTH CARE FRAUD (18 U.S.C. § 1347)

(1) Count ____ of the indictment charges the defendant with health care fraud. For you to find the defendant guilty of health care fraud, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant knowingly and willfully [executed] [attempted to execute] a scheme [*insert at least one of two options below*]

--[to defraud any health care benefit program]

--[to obtain, by means of false or fraudulent pretenses, representations, or promises any of the money or property [owned by] [in the control of] a health care benefit program]

in connection with the [delivery of] [payment for] health care benefits, items, or services.
(B) Second, that the scheme [related to a material fact] [included a material misrepresentation or concealment of a material fact].

(C) Third, that the defendant had the intent to defraud.

(2) Now I will give you more detailed instructions on some of these terms.

(A) A "health care benefit program" is any [public or private] [plan or contract], affecting interstate [foreign] commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract. A health care program affects commerce if the health care program had any impact on the movement of any money, goods, services, or persons from one state to another [between another country and the United States]. The government need only prove that the health care program itself either engaged in interstate [foreign] commerce or that its activity affected interstate [foreign] commerce to any degree.

[(B) A "scheme to defraud" includes any plan or course of action by which someone intends to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises.]

[(C) The term "false or fraudulent pretenses, representations, or promises" means any false statements or assertions that concern a material aspect of the matter in question, that were either known to be untrue when made or made with reckless indifference to their truth. They include actual, direct false statements as well as half-truths and the knowing concealment of material facts.]

(D) An act is done "knowingly and willfully" if it is done voluntarily and intentionally, and not because of mistake or some other innocent reason.

(E) A misrepresentation [concealment] is "material" if it has a natural tendency to

influence or is capable of influencing the decision of a person of ordinary prudence and comprehension.

(F) To act with "intent to defraud" means to act with an intent to deceive or cheat for the purpose of either causing a financial loss to another or bringing about a financial gain to oneself [to another person].

[(3) [The government need not prove [that the defendant had actual knowledge of the statute or specific intent to commit a violation of the statute] [that the health care benefit program suffered any financial loss] [that the defendant engaged in interstate [foreign] commerce or that the acts of the defendant affected interstate commerce].]

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

Use Note

If the prosecution is based on a violation of § 1347 that results in serious bodily injury or death, the maximum penalty is increased; the court should modify the instruction and consider using special verdict forms like those included with Instructions 14.07(A) and (B).

If there is any evidence at all of good faith, the court should refer to Instruction 10.04 Fraud – Good Faith Defense.

In paragraph (2)(A) defining health care benefit program, the instruction presumes that the commerce involved is interstate commerce, and the bracketed term "foreign" should be substituted if warranted by the facts.

The bracketed provisions in paragraph (3) should be used only if relevant.

Brackets indicate options for the court. Bracketed italics are notes to the court.

Committee Commentary

(current through May 1, 2025)

This instruction covers health care fraud under 18 U.S.C. § 1347. That statute provides:

§ 1347. Health care fraud

(a) Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice--
(1) to defraud any health care benefit program; or
(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control

of, any health care benefit program,

in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 10 years, or both. If the violation results in serious bodily injury (as defined in section 1365 of this title), such person shall be fined under this title or imprisoned not more than 20 years, or both; and if the violation results in death, such person shall be fined under this title, or imprisoned for any term of years or for life, or both.

(b) With respect to violations of this section, a person need not have actual knowledge of this section or specific intent to commit a violation of this section.

In paragraph (1), the elements are based on a combination of the statute and case law. The two options in paragraph (1)(A) track the statutory language of § 1347(a)(1) and (a)(2) with one exception: The statute refers to a "scheme or artifice," while the instruction uses the term "scheme" and omits "artifice" based on a plain-English approach and for consistency with the other fraud instructions.

Paragraph (1)(A) includes a mens rea of "knowingly and willfully." This phrase is drawn verbatim from the statute. Case law in the Sixth Circuit generally uses the term "knowingly" and omits the term "willfully," *see* United States v. Semrau, 693 F.3d 510, 524 (6th Cir. 2012); United States v. Jones, 641 F.3d 706, 710 (6th Cir. 2011); United States v. Martinez, 588 F.3d 301, 314 (6th Cir. 2009); United States v. Hunt, 521 F.3d 636, 645 (6th Cir. 2008); and United States v. Raithatha, 385 F.3d 1013, 1021 (6th Cir. 2004), *vacated on other grounds,* 543 U.S. 1136 (2005). Other circuits' pattern instructions are evenly split on whether "knowingly" alone is sufficient or "willfully" should be used as well. *Compare* Seventh Circuit and Eleventh Circuit ("willfully" is used) *with* Third Circuit and Eighth Circuit ("willfully" is not used). The instruction tracks the statutory language.

In paragraph (1)(B), the materiality element is based on Neder v. United States, 527 U.S. 1 (1999). The term "materiality" does not appear in the health care fraud statute. The statute was adopted in 1996. Three years later, in 1999, the Court construed three other fraud statutes that similarly did not include the term "materiality," and the Court held that materiality was an element of the crime of fraud. The Court's theory was that Congress meant to adopt the well established common law meaning of the term fraud, which included materiality. Based on that rationale, materiality is an element of health care fraud as well.

In paragraph (1)(C), the intent to defraud element is based on United States v. Semrau, 693 F.3d 510, 524 (6th Cir. 2012); United States v. Jones, 641 F.3d 706, 710 (6th Cir. 2011); United States v. Martinez, 588 F.3d 301, 314 (6th Cir. 2009); United States v. Hunt, 521 F.3d 636, 645 (6th Cir. 2008); and United States v. Raithatha, 385 F.3d 1013, 1021 (6th Cir. 2004), *vacated on other grounds,* 543 U.S. 1136 (2005).

In paragraph (2)(A), the definition of health care benefit program is based on 18 U.S.C. § 24(b). That statute defines "health care benefit program" as one that "affect[s] commerce." The instruction adds the terms "interstate [foreign]" based on United States v. Klein, 543 F.3d 206,

211 n.2 (5th Cir. 2008). The phrasing of paragraph (2)(A) is drawn from Seventh Circuit Pattern Instruction 18 U.S.C. § 1347 HEALTH CARE BENEFIT PROGRAM/INTERSTATE COMMERCE – DEFINITION.

In bracketed paragraph (2)(B), the definition of "scheme to defraud" is based on United States v. Daniel, 329 F.3d 480, 485-86 (6th Cir. 2003), *citing* United States v. Gold Unlimited, Inc., *supra* at 479. In the instruction, the words "by deception" were omitted because that requirement is adequately covered in paragraph (2)(F) defining intent to defraud. In *Daniel*, the court further states, "The scheme to defraud element required under 18 U.S.C. § 1341 is not defined according to a technical standard. The standard is a 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" *Daniel*, 329 F.3d at 486 (brackets and some internal quotation marks omitted), *quoting* United States v. Van Dyke, 605 F.2d 220, 225 (6th Cir. 1979).

In bracketed paragraph (2)(C), the definition of "false or fraudulent pretenses, representations or promises" is based on the definition of "false or fraudulent pretenses" in First Circuit Instruction 4.12 Mail Fraud. In the instruction, the Committee omitted a reference to the intent to defraud because that element is covered in paragraph (2)(F). The Sixth Circuit has approved similar definitions, *see* United States v. Stull, 743 F.2d 439, 446 (6th Cir. 1984) and United States v. O'Boyle, 680 F.2d 34, 36 (6th Cir. 1982). The reference to reckless indifference to the truth is further supported by *Kennedy*, 714 F.3d at 958 ("The government met the mail- and wire-fraud statutes' intent requirements through proof that K. Kennedy was reckless in his disregard for the truth of the statements that he made to victims to obtain their money.") (citations omitted). *See also* Instruction 2.09 Deliberate Ignorance.

In paragraph (2)(D), for the definition of "knowingly and willfully," neither the Supreme Court nor the Sixth Circuit has discussed that phrase in the context of health care fraud. In the absence of specific authority, the Committee relied on the definition of "knowingly" approved for the crime of fraud under § 1005 in United States v. McGuire, 744 F.2d 1197, 1201 (6th Cir. 1984).

The definition of "willfully" may be uncertain. Clearly the term "willfully" in the health care fraud statute does not require knowledge of this statute. *See* § 1347(b) ("[w]ith respect to violations of this section, a person need not have actual knowledge of this section or specific intent to commit a violation of this section."). Generally, courts interpret the term "willfully" to require knowledge of illegality. *See, e.g.*, Chapter 13 instructions on § 1001 offenses. As noted above, however, Sixth Circuit cases often omit the term willfully in health care fraud cases, and the Sixth Circuit has not defined the term willfully in this context. Inst. 10.05 includes the term willfully in paragraph (1)(A) listing the elements in order to track the statutory language, but in the absence of Supreme Court and Sixth Circuit authority on the definition of willfully, the definition in paragraph (2)(D) makes no reference to knowledge of illegality.

In paragraph (2)(E), the definition of "material" is based on Neder v. United States, 527 U.S. 1, 16 (1999), *quoting* United States v. Gaudin, 515 U.S. 506, 509 (1995).

In paragraph (2)(F) the definition of "intent to defraud" is a restatement of the language in United States v. Frost, 125 F.3d 346, 371 (6th Cir. 1997). The court quoted this definition with

approval in United States v. McAuliffe, 490 F.3d 526, 531 (6th Cir. 2007). For other phrasing of the definition, *see* United States v. Daniel, 329 F.3d 480, 487 (6th Cir. 2003) (quoting United States v. DeSantis, 134 F.3d 760, 764 (6th Cir. 1998)).

Bracketed paragraph (3) lists some but not all items the government is not required to prove. These provisions should be used only if relevant. The first bracketed item, that the government need not prove the defendant's actual knowledge or specific intent, is based on § 1347(b). The second bracketed item, that the government need not prove that the health care benefit program suffered any loss, is based on United States v. Davis, 490 F.3d 541, 547 (6th Cir. 2007). The third bracketed item (that for the jurisdictional element, the government need not prove that the defendant engaged in interstate commerce or that the defendant's acts affected interstate commerce) is based on Seventh Circuit Pattern Instruction 18 U.S.C. § 1347 HEALTH CARE BENEFIT PROGRAM/INTERSTATE COMMERCE – DEFINITION.

The Use Note counseling the court on when to give Instruction 10.04 Fraud – Good Faith Defense in health care fraud prosecutions is based on United States v. Semrau, 693 F.3d 510, 528 (6th Cir. 2012).

It is also a crime to attempt or conspire to violate § 1347. Attempt can be charged under 18 U.S.C. § 1344; conspiracy can be charged under either 18 U.S.C. §§ 371 or 1349. The Committee did not draft separate instructions for these crimes. If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled by using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 371 require an overt act whereas conspiracies under § 1349 do not require an overt act. United States v. Rogers, 769 F.3d 372, 379-82 (6th Cir. 2014). Thus if the conspiracy to commit health care fraud is charged under § 371, Instruction 3.01A Conspiracy to Commit an Offense (18 U.S.C. § 371) – Basic Elements should be used as is, but if the conspiracy is charged under § 1349, Instruction 3.01A should be modified to omit paragraph (2)(C) on overt acts. All other references to overt acts should be deleted as well.

If the prosecution is based on a violation of § 1347 that results in serious bodily injury or death, the maximum penalty is increased. Because the jury must unanimously agree on any fact (other than a prior conviction) that increases the maximum penalty, the serious bodily injury or death must be proved to the jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466 (2000). In this situation, the Committee recommends that the court give an instruction like Instruction 14.07(A) or (B) and use a special verdict form like those following Instructions 14.07(A) and (B).

Chapter 11.00

MONEY LAUNDERING OFFENSES

Introduction to Money Laundering Instructions

(current through May 1, 2025)

The main money laundering statute, 18 U.S.C. § 1956, defines the crime in three subsections. Subsection (a)(1) covers domestic financial transactions; subsection (a)(2) covers international transportations; subsection (a)(3) covers undercover investigations. Diagrams of the three subsections appear in the appendix.

The instructions describe the crimes of § 1956 in five instructions. Instructions 11.01 and 11.02 cover subsection (a)(1)(domestic financial transactions). Instructions 11.03 and 11.04 cover subsection (a)(2)(international transportations). Instruction 11.05 applies to subsection (a)(3)(undercover investigations).

The Committee drafted two instructions for each of the first two subsections, (a)(1) and (a)(2), mainly because of different mens rea options within each subsection. Under (a)(1), Instructions 11.01 and 11.02 (which reflect subsections (a)(1)(A) and (a)(1)(B) respectively) are similar; the only difference is in the mens rea element. For (a)(1)(A), the mens rea is intent, either to promote the carrying on of specified unlawful activity (characterized as "promotional money laundering" in United States v. McGahee, 257 F.3d 520, 526 (6th Cir. 2001)) or to violate certain tax laws. For (a)(1)(B), the mens rea is knowledge that the transaction was designed either to conceal the proceeds of specified unlawful activity (characterized as "concealment money laundering," *id.*) or to avoid a reporting requirement.

Under § 1956(a)(2), Instructions 11.03 and 11.04 (which cover subsections (a)(2)(A) and (a)(2)(B) respectively) again reflect differences in the two subsections. The first difference is the mens rea. For (a)(2)(A), the mens rea is intent to promote the carrying on of specified unlawful activity; for (a)(2)(B), the mens rea is knowing that the funds are proceeds of crime and knowing that the transaction was designed either to conceal the proceeds of specified unlawful activity or to avoid a reporting requirement. A second possible difference between the two subsections is less clear. This difference between (a)(2)(A) and (a)(2)(B) is that subsection (a)(2)(B) arguably requires that the funds involved be proceeds of unlawful activity whereas subsection (a)(2)(A) clearly does not. These distinctions are discussed in more detail in the commentaries to the instructions.

Section 1956(a)(3) is covered in Instruction 11.05.

The Committee also drafted Instruction 11.06 to cover the money laundering crime of Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity (18 U.S.C. § 1957).

Chapter 11.00

MONEY LAUNDERING OFFENSES

Table of Instructions

11.01 MONEY LAUNDERING – Domestic Financial Transaction (18 U.S.C. § 1956(a)(1)(A) (intent to promote the carrying on of specified unlawful activity))

(1) Count ___ of the indictment charges the defendant with [conducting] [attempting to conduct] a financial transaction in violation of federal law. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant [conducted] [attempted to conduct] a financial transaction.

(B) Second, that the financial transaction involved property that represented the proceeds of [*insert the specified unlawful activity from § 1956(c)(7)*].

(C) Third, that the defendant knew that the property involved in the financial transaction represented the proceeds of some form of unlawful activity.

(D) Fourth, that the defendant had the intent [to promote the carrying on of [*insert the specified unlawful activity from § 1956(c)(7)*]] [to engage in conduct violating §§ 7201 or 7206 of the Internal Revenue Code of 1986].

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "financial transaction" means [*insert definition from § 1956(c)(4)*].

(B) [The term "financial institution" means [*insert definition from 31 U.S.C. § 5312(a)(2) or the regulations promulgated thereunder*]].

(C) The word "conducts" includes initiating, concluding, or participating in initiating or concluding a transaction.

(D) The word "proceeds" means any property [derived from] [obtained] [retained], directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.

(E) The phrase "knew that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the defendant knew the property involved in the transaction represented the proceeds of some form, though not necessarily which form, of activity that constitutes a felony under state or federal [foreign] law. [The government does not have to prove the defendant knew the property involved represented proceeds of a felony as long as he knew the property involved represented proceeds of some form of unlawful activity.]

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

Use Note

Brackets indicate options for the court. Brackets with italics are notes to the court.

The definition of financial institution in paragraph (2)(B) should be given only when a financial institution is used to prove the presence of a financial transaction.

The final bracketed sentence in paragraph (2)(E) should be given only when the defendant raises as an issue whether he knew that the unlawful activity which generated the proceeds was a felony or a misdemeanor.

Committee Commentary Instruction 11.01

(current through May 1, 2025)

The purpose of this instruction is to outline the elements of the crime of money laundering through a domestic financial transaction based on a mens rea of intent, which is characterized as "promotional money laundering." United States v. McGahee, 257 F.3d 520, 526 (6th Cir. 2001). The intent can be either to promote the carrying on of specified unlawful activity or to violate 26 U.S.C. §§ 7201 or 7206 of the tax code. *See generally* 18 U.S.C. § 1956(a)(1). Subsections (a)(1)(A) and (a)(1)(B) of § 1956 have been interpreted as alternative means of committing the same offense. United States v. Navarro, 145 F.3d 580, 592 (3d Cir. 1998). *See also* United States v. Westine, 1994 WL 88831, 1994 U.S.App. LEXIS 5144 (6th Cir. 1994) (unpublished). Thus, the instructions for subsections (a)(1)(A) and (a)(1)(B) are similar; the difference is in the mens rea element. For (a)(1)(A), the mens rea is intent, either to promote the carrying on of specified unlawful activity or to violate certain tax laws. For (a)(1)(B), which is covered in the next instruction, the mens rea is knowledge that the transaction is designed either to conceal the proceeds of specified unlawful activity or to avoid a reporting requirement.

If the defendant is charged with intent to violate §§ 7201 or 7206 of the Internal Revenue Code, 26 U.S.C. §§ 7201, 7206, a supplemental instruction on these provisions should be given.

The definition of the term proceeds in paragraph (2)(D) is taken verbatim from the definition in § 1956(c)(9), effective May 20, 2009. Congress added this definition to the statute following the Supreme Court's decision in United States v. Santos, 128 S.Ct. 2020 (2008) which stated in a plurality opinion that the term "proceeds" is limited to profits in a case where gambling was the specified unlawful activity.

In cases arising from conduct prior to May 20, 2009, the trial court must determine whether *Santos* applies to the specified unlawful activity at issue. *See, e.g.*, United States v. Kratt, 2009 U.S.App.Lexis 19798, 2009 WL 2767152 (6th Cir. September 2, 2009), discussing *Santos* in a § 1957 money laundering case with bank fraud as the specified unlawful activity. The Sixth Circuit held that *Santos* applies to § 1957 money laundering cases, and that there is a rule of general applicability derived from *Santos* based on the "outcomes" upon which the

plurality in Santos and Justice Stevens, who wrote a concurring opinion, would agree. Specifically, in any case in which there is a "merger" problem and that merger problem results in the underlying crime being punishable by a significantly increased sentence because the money laundering statute was used, then "proceeds" must be construed to mean "profit." The Sixth Circuit affirmed the conviction in *Kratt* because the statutory maximum sentence for bank fraud was actually higher than for money laundering. Since use of the money laundering statute did not expose the defendant to a significantly higher sentence for the underlying conduct, there was no *Santos* problem and circuit precedent construing "proceeds" to mean "gross receipts" controlled. *See* United States v. Prince, 214 F.3d 740, 747 (6th Cir. 2000); United States v. Haun, 90 F.3d 1096, 1101 (6th Cir. 1996).

The government does not have to trace the origin of all the proceeds involved in the financial transactions to determine precisely which proceeds were used for which transactions. United States v. Jamieson, 427 F.3d 394, 403-04 (6th Cir. 2005); United States v. Bencs, 28 F.3d 555, 562 (6th Cir. 1994). Also, the statute does not require that the entire property involved represent the proceeds of specified unlawful activity. United States v. Conner, 1991 WL 213756 at 4, 1991 U.S. App. LEXIS 25370 at 10 (6th Cir. 1991) (unpublished). As long as the jury can infer that a portion of the funds involved represented the proceeds of the specified unlawful activity, there is no minimum percentage requirement. *Westine*, 1994 WL at 2, 1994 U.S.App. LEXIS at 8.

It is an element of all crimes under subsection (a)(1) that the property involved in fact represent the proceeds of specified unlawful activity. See § 1956(a)(1). However, the defendant need only know that the property involved represents proceeds of some form of unlawful activity. The statute defines this mens rea in subsection (c)(1): "[T]he term 'knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity' means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under state, Federal or foreign law, regardless of whether or not such activity is specified in paragraph (7) [as specified unlawful activity]." This definition of the mens rea makes clear that although the property must actually represent proceeds of certain listed unlawful activities, the defendant need not know this. The government does not have to prove that the defendant knew the property represented proceeds of a particular type of unlawful activity as long as the defendant knew it represented proceeds of "some form of unlawful activity."

The statute requires that the defendant know that the property involved in the financial transaction represented the proceeds of "some form of unlawful activity." The statutory definition of this phrase is quoted *supra*. Subsection (a)(1) "does not require the government to prove that the defendant knew that the alleged unlawful activity was a felony . . ., as opposed to a misdemeanor, so long as the defendant knew that the laundered proceeds were derived from unlawful activity." United States v. Hill, 167 F.3d 1055, 1065 (6th Cir. 1999).

In United States v. Santos, 128 S.Ct. 2020, 2029 (2008), the plurality elaborated on methods of proving knowledge for the money laundering statute:

> As for the knowledge element of the money-laundering offense— knowledge that

> the transaction involves profits of unlawful activity—that will be provable (as knowledge must almost always be proved) by circumstantial evidence. For example, someone accepting receipts from what he knows to be a long-continuing drug-dealing operation can be found to know that they include some profits. And a jury could infer from a long-running launderer-criminal relationship that the launderer knew he was hiding the criminal's profits. Moreover, the Government will be entitled to a willful blindness instruction if the professional money launderer, aware of a high probability that the laundered funds were profits, deliberately avoids learning the truth about them—as might be the case when he knows that the underlying crime is one that is rarely unprofitable.

See also United States v. Bohn, 2008 U.S. App. Lexis 12474 at 28, 2008 WL 2332226 at 10 (6th Cir. 2008) (unpublished) ("In this Circuit the knowledge requirements of § 1956 are construed to include instances of willful blindness.") (*citing* United States v. Hill, 167 F.3d 1055, 1067 (6th Cir. 1999)).

Conviction under this subsection of § 1956 can be based on an intent to promote the carrying on of specified unlawful activity. Several Sixth Circuit cases have defined intent to promote the carrying on of specified unlawful activity. In United States v. McGahee, *supra*, the court held that paying for personal goods, alone, was not sufficient to establish that the funds were used to promote an illegal activity. The court further stated that payment of the general business expenditures of a business that is used to defraud is not sufficient to establish promotion of the underlying crime; rather, the transaction "must be explicitly connected to the mechanism of the crime." *McGahee*, 257 F.3d at 527, *citing* United States v. Brown, 186 F.3d 661, 669-70 (5th Cir. 1999). *See also Haun*, 90 F.3d 1096 (evidence of promotion sufficient when checks for proceeds of fraudulent car sales were cashed or deposited into company's bank account); United States v. Reed, 167 F.3d 984, 992-93 (6th Cir. 1999) (evidence of promotion sufficient when money used to pay antecedent drug debt and ease payer/defendant's position); United States v. King, 169 F.3d 1035 (6th Cir. 1999) (evidence of promotion sufficient when proceeds used to pay for drugs).

The presence of four options for proving mens rea under subsection (a)(1) has raised unanimity issues. The Sixth Circuit has not addressed the question of whether an augmented unanimity instruction is required, but it has characterized subsections (a)(1)(A) and (a)(1)(B) as alternative bases for a conviction either of which is sufficient. *Westine*, 1994 WL at 2, 1994 U.S. App. Lexis at 7. Other circuits have found that a specific unanimity instruction is not required; rather, a general unanimity instruction is sufficient. These courts have concluded that the alternative mental states of subsection (a)(1) do not constitute multiple crimes but rather separate means of committing a single crime. *Navarro*, 145 F.3d at 592 n.6 (3d Cir. 1998) *citing* United States v. Holmes, 44 F.3d 1150, 1155–56 (2d Cir. 1995) ((B)(i) and (B)(ii) are alternative improper purposes for single crime under (a)(1)). The Third Circuit reasoned that the fact that multiple purposes could satisfy the end of money laundering did not mean that Congress intended to create multiple offenses. Thus the absence of a specific unanimity instruction was not plain error. (This holding was limited in two ways: although a specific unanimity instruction was not given, a general one was; and the court was reviewing only for plain error. Whether the court would decide the same way without these two conditions is unclear.) The Eighth Circuit has reached the same conclusion, finding that subsections (A)(i) and (B)(i) are two mens rea options

under the one crime stated in (a)(1), so giving a general unanimity instruction rather than a specific one was not error. United States v. Nattier, 127 F.3d 655 (8th Cir. 1997). These cases suggest that giving Pattern Instruction 8.03 Unanimous Verdict is sufficient and that giving an augmented unanimity instruction is not required in § 1956(a)(1) prosecutions involving multiple mental states. *See also* Instruction 8.03B Unanimity Not Required – Means.

Attempted money laundering is also a crime under § 1956. If the crime of attempt is charged, the instructions should be supplemented by the instructions in Chapter 5.00 on Attempts.

The Committee recommends against giving an instruction recounting the statutory language because it would be difficult for the jury to absorb. See the Committee Commentary to Instruction 2.02.

11.02 MONEY LAUNDERING – Domestic Financial Transaction (18 U.S.C. § 1956(a)(1)(B) (knowing the transaction is designed to conceal facts related to proceeds))

(1) Count _____ of the indictment charges the defendant with [conducting] [attempting to conduct] a financial transaction in violation of federal law. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant [conducted] [attempted to conduct] a financial transaction.

(B) Second, that the financial transaction involved property that represented the proceeds of [*insert the specified unlawful activity from § 1956(c)(7)*].

(C) Third, that the defendant knew that the property involved in the financial transaction represented the proceeds from some form of unlawful activity.

(D) Fourth, that the defendant knew that the transaction was designed in whole or in part

-- [to conceal or disguise the [nature] [location] [source] [ownership] [control] of the proceeds of [insert the specified unlawful activity from § 1956(c)(7)]]

-- [to avoid a transaction reporting requirement under state or federal law].

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "financial transaction" means [insert the definition from § 1956(c)(4)].

(B) [The term "financial institution" means [*insert definition from 31 U.S.C. § 5312(a)(2) or the regulations promulgated thereunder*]].

(C) The word "conducts" includes initiating, concluding, or participating in initiating or concluding a transaction.

(D) The word "proceeds" means any property [derived from] [obtained] [retained], directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.

(E) The phrase "knew that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the defendant knew the funds involved in the transaction represented the proceeds of some form, though not necessarily which form, of activity that constitutes a felony under state or federal [foreign] law. [The government does not have to prove the defendant knew the property involved represented proceeds of a felony as long as he knew the property involved represented proceeds of some form of unlawful activity.]

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

Use Note

Brackets indicate options for the court. Brackets with italics are notes to the court.

The definition of financial institution in paragraph (2)(B) should be given only when a financial institution is used to prove the presence of a financial transaction.

The final bracketed sentence in paragraph (2)(E) should be given only when the defendant raises an issue on whether he knew that the unlawful activity which generated the proceeds was a felony or misdemeanor.

Committee Commentary Instruction 11.02
(current through May 1, 2025)

The purpose of this instruction is to outline the elements of the crime of money laundering through a domestic financial transaction based on a mens rea of knowledge that the transaction is designed to conceal facts related to proceeds. *See generally* § 1956(a)(1). The court has characterized this as "concealment money laundering," *see* United States v. McGahee, 257 F.3d 520, 526 (6th Cir. 2001). Subsections (a)(1)(A) and (a)(1)(B) of § 1956 have been interpreted as alternative means of committing the same offense. United States v. Navarro, 145 F.3d 580, 592 (3rd Cir. 1998). *See also* United States v. Westine, 1994 WL 88831, 1994 U.S.App. LEXIS 5144 (6th Cir. 1994) (unpublished). Thus, the instructions for subsections (a)(1)(A) and (a)(1)(B) are similar; the difference is in the mens rea element. For subsection (a)(1)(A), covered in the preceding instruction, the statutory mens rea is intent to promote the carrying on of specified unlawful activity. For subsection (a)(1)(B), the statutory mens rea is knowledge that the transaction has particular purposes. The Sixth Circuit has acknowledged the mens rea for subsection (a)(1)(B) as knowledge, *see* United States v. Moss, 9 F.3d 543, 551 (6th Cir. 1993), *but see* United States v. Loehr, 966 F.2d 201, 204 (6th Cir. 1992) (mens rea for (a)(1)(B) is intent) and United States v. Beddow, 957 F.2d 1330, 1334-35 (6th Cir. 1992) (same). The pattern instruction tracks the statutory language. The mens rea for subsection (a)(1)(B) offenses is discussed further below.

The term "financial transaction" is defined in subsection 1956(c)(4). Some examples of covered transactions include transactions at financial institutions (e.g., deposits, withdrawals, check cashings); transfers of title to real estate, cars, boats and aircraft; and wire transfers. The Committee recommends that the court define financial transaction by quoting only the specific portion of the definition involved in the case.

The definition of the term proceeds in paragraph (2)(D) is taken verbatim from the definition in § 1956(c)(9), effective May 20, 2009. Congress added this definition to the statute

following the Supreme Court's decision in United States v. Santos, 128 S.Ct. 2020 (2008) which stated in a plurality opinion that the term "proceeds" is limited to profits in a case where gambling was the specified unlawful activity.

In cases arising from conduct prior to May 20, 2009, the trial court must determine whether *Santos* applies to the specified unlawful activity at issue. *See, e.g.*, United States v. Kratt, 2009 U.S.App.Lexis 19798, 2009 WL 2767152 (6th Cir. September 2, 2009), discussing *Santos* in a § 1957 money laundering case with bank fraud as the specified unlawful activity. The Sixth Circuit held that *Santos* applies to § 1957 money laundering cases, and that there is a rule of general applicability derived from *Santos* based on the "outcomes" upon which the plurality in Santos and Justice Stevens, who wrote a concurring opinion, would agree. Specifically, in any case in which there is a "merger" problem and that merger problem results in the underlying crime being punishable by a significantly increased sentence because the money laundering statute was used, then "proceeds" must be construed to mean "profit." The Sixth Circuit affirmed the conviction in *Kratt* because the statutory maximum sentence for bank fraud was actually higher than for money laundering. Since use of the money laundering statute did not expose the defendant to a significantly higher sentence for the underlying conduct, there was no *Santos* problem and circuit precedent construing "proceeds" to mean "gross receipts" controlled. *See* United States v. Prince, 214 F.3d 740, 747 (6th Cir. 2000); United States v. Haun, 90 F.3d 1096, 1101 (6th Cir. 1996).

The government does not have to trace the origin of all the proceeds involved in the financial transactions to determine precisely which proceeds were used for which transactions. United States v. Jamieson, 427 F.3d 394, 403-04 (6th Cir. 2005); United States v. Bencs, 28 F.3d 555, 562 (6th Cir. 1994). Also, the statute does not require that the entire property involved represent the proceeds of specified unlawful activity. United States v. Conner, 1991 WL 213756 at 4, 1991 U.S. App. LEXIS 25370 at 10 (6th Cir. 1991) (unpublished). As long as the jury can infer that a portion of the funds involved represented the proceeds of the specified unlawful activity, there is no minimum percentage requirement. United States v. Westine, 1994 WL 88831, 2, 1994 U.S.App. LEXIS 5144, 8 (6th Cir. 1994) (unpublished).

It is an element of all crimes under (a)(1) that the property involved in fact represent the proceeds of specified unlawful activity. *See* § 1956(a)(1). However, the defendant need only know that the property involved represents proceeds of some form of unlawful activity. The statute defines this mens rea in subsection (c)(1): "[T]he term 'knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity' means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal or foreign law, regardless of whether or not such activity is specified in paragraph (7) [as specified unlawful activity]." This definition of the mens rea makes clear that although the property must actually represent proceeds of certain listed unlawful activities, the defendant need not know this. The government does not have to prove that the defendant knew the property represented proceeds of a particular type of unlawful activity as long as the defendant knew it represented proceeds of "some form of unlawful activity."

The statute requires that the defendant know that the property involved in the financial

transaction represented the proceeds of "some form of unlawful activity." The statutory definition of this phrase is quoted in the preceding paragraph. Subsection (a)(1) "does not require the government to prove that the defendant knew that the alleged unlawful activity was a felony . . ., as opposed to a misdemeanor, so long as the defendant knew that the laundered proceeds were derived from unlawful activity." United States v. Hill, 167 F.3d 1055, 1065 (6th Cir. 1999).

In United States v. Santos, 128 S.Ct. 2020, 2029 (2008), the plurality elaborated on proving knowledge for the money laundering statute:

> As for the knowledge element of the money-laundering offense—knowledge that the transaction involves profits of unlawful activity—that will be provable (as knowledge must almost always be proved) by circumstantial evidence. For example, someone accepting receipts from what he knows to be a long-continuing drug-dealing operation can be found to know that they include some profits. And a jury could infer from a long-running launderer-criminal relationship that the launderer knew he was hiding the criminal's profits. Moreover, the Government will be entitled to a willful blindness instruction if the professional money launderer, aware of a high probability that the laundered funds were profits, deliberately avoids learning the truth about them—as might be the case when he knows that the underlying crime is one that is rarely unprofitable.

See also United States v. Bohn, 2008 U.S. App. Lexis 12474 at 28, 2008 WL 2332226 at 10 (6th Cir. 2008) (unpublished) ("In this Circuit the knowledge requirements of § 1956 are construed to include instances of willful blindness.") (*citing* United States v. Hill, 167 F.3d 1055, 1067 (6th Cir. 1999)).

Under § 1956(a)(1)(B), the government must prove that the defendant engaged in a financial transaction in addition to the acquisition of the unlawful proceeds. United States v. Hamrick, 983 F.2d 1069 (6th Cir. 1992). The financial transaction must go beyond the defendant's involvement in the underlying specified unlawful activity. *Id*.

Proof that the defendant knew that a transaction was designed to conceal or disguise facts requires that concealment be "an animating purpose" of the transaction. United States v. Faulkenberry, 614 F.3d 573, 586 (6th Cir. 2010). In *Faulkenberry*, the court reversed a conviction for concealment money laundering under subsection § 1956(a)(1)(B)(i) based on insufficient evidence that the defendant had that animating purpose. *Id.* at 587. The court relied on Cuellar v. United States, 128 S. Ct. 1994 (2008) (construing § 1956(a)(2)(B)(i); see discussion in commentary to Inst. 11.04 International Transportation). In *Faulkenberry*, the court elaborated:

> To prove a violation of [concealment laundering under subsection 1956(a)(1)(B)(i)], therefore, it is not enough for the government to prove merely that a transaction had a concealing effect. Nor is it enough that the transaction was *structured* to conceal the nature of illicit funds. Concealment—even deliberate concealment—as mere facilitation of some *other* purpose, is not enough to convict (*quoting Cuellar* at 2005 for the conclusion that evidence was insufficient to convict where it suggested that the secretive aspects of the transportation were employed to *facilitate* the transportation, but not necessarily that secrecy was the

> *purpose* of the transportation") (emphasis in original). What is required, rather, is that concealment be an animating purpose of the transaction (*citing Cuellar* at 2003).
>
> That is not to say, of course, that concealment must be the *only* purpose of the transaction; the statute requires only that the transaction be designed "in whole or *in part* " to conceal. 18 U.S.C. § 1956(a)(1)(B) (emphasis added). Moreover, "purpose and structure are often related[,]" *Cuellar,* 128 S.Ct. at 2004; and thus, depending on context, proof that a transaction was structured to conceal a listed attribute of the funds can yield an inference that concealment was a purpose of the transaction. *See id.* at 2004-05. But the ultimate question under the statute is one of purpose, not structure.

Faulkenberry, supra at 586.

Proof that the defendant knew that a transaction was designed to conceal or disguise facts related to the proceeds requires the government to introduce more evidence than the simple fact of a retail purchase using illegally obtained money. United States v. Marshall, 248 F.3d 525, 538 (6th Cir. 2001). The Sixth Circuit declined to infer evidence of a design to disguise proceeds solely because the defendant bought items with investment value and the defendant bought items from a pool of money derived from another illegal transaction. *Marshall*, 248 F.3d at 539-41. The court commented, "We are also of the opinion that a few isolated purchases of wearable or consumable items directly by the wrongdoer is not the type of money-laundering transaction that Congress had in mind when it enacted § 1956(a)(1)(B)(i), especially where the value of the items is relatively small in relation to the amount stolen by the defendant." *Id*. at 541. *See also McGahee*, 257 F.3d at 527-28.

The transaction reporting requirements under federal law referred to in paragraph (D) of the instruction include at least the three reporting requirements of the Bank Secrecy Act, 31 U.S.C. §§ 5313, 5314, 5316 and the trade or business transaction reporting requirement under 26 U.S.C. § 6050I. Of course, the statutory language, which refers only to "a transaction reporting requirement under state or federal law," may also include other reporting requirements.

The presence of four options for proving mens rea under subsection (a)(1) has raised unanimity issues. The Sixth Circuit has not addressed the question of whether an augmented unanimity instruction is required, but it has characterized subsections (a)(1)(A) and (a)(1)(B) as alternative bases for a conviction either of which is sufficient. *Westine*, 1994 WL at 2, 1994 U.S. App. LEXIS at 7. Other circuits have found that a specific unanimity instruction is not required; rather, a general unanimity instruction is sufficient. These courts have concluded that the alternative mens reas of subsection (a)(1) do not constitute multiple crimes but rather separate means of committing a single crime. *Navarro*, 145 F.3d at 592 n.6 (3d Cir. 1998), *citing* United States v. Holmes, 44 F.3d 1150, 1155–56 (2d Cir. 1995) ((B)(i) and (B)(ii) are alternative improper purposes for single crime under (a)(1)). The Third Circuit reasoned that the fact that multiple purposes could satisfy the end of money laundering did not mean that Congress intended to create multiple offenses. Thus the absence of a specific unanimity instruction was not plain error. (This holding was limited in two ways: although a specific unanimity instruction was not

given, a general one was; and the court was reviewing only for plain error. Whether the court would decide the same way without these two conditions is unclear.) The Eighth Circuit has reached the same conclusion, finding that subsections (A)(i) and (B)(i) are two mens rea options under the one crime stated in (a)(1), so giving a general unanimity instruction rather than a specific one was not error. United States v. Nattier, 127 F.3d 655 (8th Cir. 1997). These cases suggest that giving Pattern Instruction 8.03 Unanimous Verdict is sufficient and that giving an augmented unanimity instruction is not required in § 1956(a)(1) prosecutions involving multiple mental states. *See also* Instruction 8.03B Unanimity Not Required – Means.

11.03 MONEY LAUNDERING – International Transportation (18 U.S.C. § 1956(a)(2)(A) (intent to promote the carrying on of specified unlawful activity))

(1) Count ____ of the indictment charges the defendant with [attempting to] [transport[ing]] [transmit[ting]] [transfer[ring]] a monetary instrument or funds in violation of federal law. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant [attempted to] [transport[ed]] [transmit[ted]] [transfer[red]] a monetary instrument or funds.

(B) Second, that the defendant's [attempted] [transportation] [transmission] [transfer] was [from a place in the United States to or through a place outside the United States] [to a place in the United States from or through a place outside the United States].

(C) Third, that the defendant's [attempted] [transportation] [transmission] [transfer] of the monetary instrument or funds was done with the intent to promote the carrying on of [insert the specified unlawful activity from § 1956(c)(7)].

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "monetary instruments" means

--[coin or currency of the United States, or of any other country]

--[travelers' checks]

--[personal checks]

--[bank checks]

--[money orders]

--[investment securities or negotiable instruments, in bearer form or otherwise in such form that title passes upon delivery].

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

Use Note

Brackets indicate options for the court.

Committee Commentary Instruction 11.03

(current through May 1, 2025)

The purpose of this instruction is to outline the elements of the crime of money laundering through international transportation of monetary instruments or funds with the intent to promote specified unlawful activity as defined in 18 U.S.C. § 1956(a)(2)(A). Subsection (a)(2)(A) has two important characteristics. First, it is based on a mens rea of intent to promote the carrying on of specified unlawful activity, as contrasted with the other part of (a)(2) which is based on a mens rea of knowledge. Second, subsection (a)(2)(A) contains no requirement that the funds be the proceeds of specified unlawful activity. In other words, the monetary instrument or funds need not be dirty; the money used by the defendant under this subsection can be from a completely legitimate source. It is how the money was used, not how it was generated, that defines the defendant's conduct as criminal. *See generally* United States v. Hamilton, 931 F.2d 1046 (5th Cir. 1991); United States v. Piervinanzi, 23 F.3d 670 (2d Cir. 1994).

As paragraph (1)(C) states, the mens rea element is that the defendant transported the funds with the "intent to promote" the carrying on of specified unlawful activity. United States v. Maddux, 917 F.3d 437, 446 (6th Cir. 2019) (quoting § 1956(a)(2)(A)). The court sometimes refers to this mens rea as the "specific" intent to promote, *see Maddux* at 446. The statute uses the term "intent to promote," *see* § 1956(a)(2)(A). The instruction tracks the statutory language. *See also* Inst. 2.07 Specific Intent (recommending no general instruction on that term). In *Maddux*, the court concluded there was sufficient evidence that the defendants conspired to launder money by transferring money internationally in furtherance of a scheme to defraud the federal and state governments of tax revenues. *Id.* at 447. *See also* United States v. Bohn, 2008 U.S. App. Lexis 12474 at 29-31, 2008 WL 2332226 at 10 (6th Cir. 2008) (unpublished) (concluding it is sufficient for the government to prove that the defendant transferred checks generated by the underlying fraud scheme and noting that the Sixth Circuit has followed the line of cases holding that transferring or cashing a check is sufficient evidence of promoting the prior unlawful activity) (*quoting* United States v. Reed, 167 F.3d 984, 992 (6th Cir. 1999) and *citing* United States v. Haun, 90 F.3d 1096, 1100 (6th Cir. 1996)).

Subsection 1956(a)(2) can be prosecuted with either of two mental states, *see* subsections (a)(2)(A) (intent) and (a)(2)(B) (knowing). A panel of the Sixth Circuit has characterized these as alternative bases for a conviction either of which is sufficient. United States v. Bohn, 2008 U.S. App. Lexis 12474 at 31-32, 2008 WL 2332226 at 11 (6th Cir. 2008) (unpublished). This case suggests that giving Instruction 8.03 Unanimous Verdict is sufficient and that giving an augmented unanimity instruction is not required in § 1956(a)(2) prosecutions where the government alleges multiple mental states. *See also* Instruction 8.03B Unanimity Not Required – Means.

11.04 MONEY LAUNDERING – International Transportation (18 U.S.C. § 1956(a)(2)(B) (knowing that the transportation involves proceeds of some form of unlawful activity and that it is designed to conceal facts related to proceeds))

(1) Count _____ of the indictment charges the defendant with [attempting to] [transport[ing]] [transmit[ting]] [transfer[ring]] a monetary instrument or funds in violation of federal law. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant [attempted to] [transport[ed]] [transmit[ted]] [transfer[red]] a monetary instrument or funds.

(B) Second, that the defendant's [attempted] [transportation] [transmission] [transfer] was [from a place in the United States to or through a place outside the United States] [to a place in the United States from or through a place outside the United States].

(C) Third, that the defendant knew that the monetary instrument or funds involved in the [transportation] [transmission] [transfer] represented the proceeds of some form of unlawful activity.

(D) Fourth, that the defendant knew that the [transportation] [transmission] [transfer] was designed in whole or in part

--[to conceal or disguise the [nature] [location] [source] [ownership] [control] of the proceeds of [*insert the specified unlawful activity from § 1956(c)(7)*]]

--[to avoid a transaction reporting requirement under state or federal law].

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "monetary instruments" means

--[coin or currency of the United States, or of any other country]

--[travelers' checks]

--[personal checks]

--[bank checks]

--[money orders]

--[investment securities or negotiable instruments, in bearer form or otherwise in such form that title passes upon delivery].

(B) The word "proceeds" means any property [derived from] [obtained] [retained],

directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.

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

Use Note

Brackets indicate options for the court. Brackets with italics are notes to the court.

Committee Commentary Instruction 11.04
(current through May 1, 2025)

The purpose of this instruction is to outline the elements of the crime of money laundering through international transportation of monetary instruments or funds based on a mens rea of knowledge under subsection (a)(2)(B). In Cuellar v. United States, 128 S.Ct. 1994 (2008), the Court identified three elements the government was required to prove for a conviction under § 1956(a)(2)(B)(i): (1) that defendant attempted international transport of the funds; (2) that defendant knew that the funds represented the proceeds of some form of unlawful activity; and (3) that defendant knew that the transportation was designed to conceal or disguise the nature, the location, the source, the ownership, or the control of the funds. *Id*. at 2002. The elements of the crime identified in paragraph (1) of the instruction repeat these elements with a minor variation (in the instruction, the requirement of international transportation is subdivided into two elements).

Beyond the transportation or attempted transportation, the government must prove that the defendant had two types of knowledge. *See Cuellar, supra* at 2002 (listing the two types of knowledge involved in that case). First, the defendant must know that the instruments or funds represent the proceeds of some form of unlawful activity. Second, the defendant must know that the transportation, transmission or transfer was designed in whole or in part either (i) to conceal or disguise the nature, location, source, ownership or control of the proceeds of specified unlawful activity, or (ii) to avoid a transaction reporting requirement. In order to prove the second type of knowledge under subsection (i) (that defendant knew the transportation was designed at least in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds), the government must prove that the purpose of the transportation was to conceal or disguise. This element (that the defendant knew the transportation was designed to conceal or disguise) cannot be satisfied solely by evidence that the defendant concealed funds during transport. *Cuellar, supra* at 2005-06.

In the Sixth Circuit, "the knowledge requirements of § 1956 are construed to include instances of willful blindness." United States v. Bohn, 2008 U.S. App. Lexis 12474 at 28, 2008 WL 2332226 at 10 (6th Cir. 2008) (unpublished) (*citing* United States v. Hill, 167 F.3d 1055, 1067 (6th Cir. 1999)).

In *Cuellar*, the Court further held that in order to prove the transportation was "designed . . . to conceal . . . the nature, the location, the source, the ownership, or the control of the proceeds," the government was not required to prove that the transportation was designed to create the appearance of legitimate wealth. *Cuellar, supra* at 2000-2001.

The definition of the term proceeds in paragraph (2)(B) is taken verbatim from the definition in § 1956(c)(9), effective May 20, 2009. Congress added this definition to the statute following the Supreme Court's decision in United States v. Santos, 128 S.Ct. 2020 (2008) (interpreting subsection (a)(1) of the statute) which stated in a plurality opinion that the term "proceeds" is limited to profits in a case where gambling was the specified unlawful activity.

In cases arising from conduct prior to May 20, 2009, the trial court must determine whether *Santos* applies to the specified unlawful activity at issue. *See, e.g.*, United States v. Kratt, 2009 U.S.App.Lexis 19798, 2009 WL 2767152 (6th Cir. September 2, 2009), discussing *Santos* in a § 1957 money laundering case with bank fraud as the specified unlawful activity. The Sixth Circuit held that *Santos* applies to § 1957 money laundering cases, and that there is a rule of general applicability derived from *Santos* based on the "outcomes" upon which the plurality in Santos and Justice Stevens, who wrote a concurring opinion, would agree. Specifically, in any case in which there is a "merger" problem and that merger problem results in the underlying crime being punishable by a significantly increased sentence because the money laundering statute was used, then "proceeds" must be construed to mean "profit." The Sixth Circuit affirmed the conviction in *Kratt* because the statutory maximum sentence for bank fraud was actually higher than for money laundering. Since use of the money laundering statute did not expose the defendant to a significantly higher sentence for the underlying conduct, there was no *Santos* problem and circuit precedent construing "proceeds" to mean "gross receipts" controlled. *See* United States v. Prince, 214 F.3d 740, 747 (6th Cir. 2000); United States v. Haun, 90 F.3d 1096, 1101 (6th Cir. 1996).

The government does not have to trace the origin of all the proceeds involved in the financial transactions to determine precisely which proceeds were used for which transactions. United States v. Jamieson, 427 F.3d 394, 403-04 (6th Cir. 2005); United States v. Bencs, 28 F.3d 555, 562 (6th Cir. 1994). Also, the statute does not require that the entire property involved represent the proceeds of specified unlawful activity. United States v. Conner, 1991 WL 213756 at 4, 1991 U.S. App. LEXIS 25370 at 10 (6th Cir. 1991) (unpublished). As long as the jury can infer that a portion of the funds involved represented the proceeds of the specified unlawful activity, there is no minimum percentage requirement. United States v. Westine, 1994 WL 88831, 2, 1994 U.S.App. LEXIS 5144, 8 (6th Cir. 1994) (unpublished).

Subsection 1956(a)(2) can be prosecuted with either of two mental states, *see* subsections (a)(2)(A) (intent) and (a)(2)(B) (knowing). A panel of the Sixth Circuit has characterized these as alternative bases for a conviction either of which is sufficient. United States v. Bohn, 2008 U.S. App. Lexis 12474 at 31-32, 2008 WL 2332226 at 11 (6th Cir. 2008) (unpublished). This case suggests that giving Instruction 8.03 Unanimous Verdict is sufficient and that giving an augmented unanimity instruction is not required in § 1956(a)(2) prosecutions where the government alleges multiple mental states. *See also* Instruction 8.03B Unanimity Not Required – Means.

11.05 MONEY LAUNDERING –Undercover Investigation (18 U.S.C. § 1956(a)(3))

(1) Count ____ of the indictment charges the defendant with [conducting] [attempting to conduct] a financial transaction in violation of federal law. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant [conducted] [attempted to conduct] a financial transaction.

(B) Second, that the property involved in the financial transaction was represented to be [the proceeds of *[insert the specified unlawful activity from § 1956(c)(7)]*] [property used to conduct or facilitate *[insert the specified unlawful activity from § 1956(c)(7)]*].

(C) Third, that the defendant had the intent

– [to promote the carrying on of specified unlawful activity]

– [to conceal or disguise the [nature] [location] [source] [ownership] [control] of property believed to be the proceeds of specified unlawful activity]

– [to avoid a transaction reporting requirement under state or federal [or foreign] law].

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "financial transaction" means *[insert definition from § 1956(c)(4)]*.

(B) [The term "financial institution" means *[insert definition from 31 U.S.C. § 5312(a)(2) or the regulations promulgated thereunder]*].

(C) The word "conducts" includes initiating, concluding, or participating in initiating or concluding a transaction.

(D) The word "proceeds" means any property [derived from] [obtained] [retained], directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.

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

Use Note

Brackets indicate options for the court. Brackets with italics are notes to the court.

The definition of financial institution in paragraph (2)(B) should be given only when a

financial institution is used to prove the presence of a financial transaction.

Committee Commentary Instruction 11.05
(current through May 1, 2025)

The purpose of this instruction is to outline the elements of the crime of money laundering through a government undercover investigation as defined in 18 U.S.C. § 1956(a)(3). Subsection (a)(3) combines parts of subsections (a)(1)(A) and (a)(1)(B). One difference in subsection (a)(3) is that the property involved need only be "represented" to be the proceeds of the specified unlawful activity. The funds used by law enforcement officials to pursue the undercover investigation need not be unlawfully generated. It is only necessary that the defendant "believed" the funds to be the proceeds of other crimes. United States v. Palazzolo, 1995 WL 764416 at 4, 1995 U.S. App. LEXIS 36853 at 10-11 (6th Cir. 1995) (unpublished). The representations made by law enforcement officials must relate to the specified unlawful activity. United States v. Loehr, 966 F.2d 201, 204 (6th Cir. 1992).

A second difference between § 1956(a)(3) and (a)(1) is that subsection (a)(3) requires a mens rea of intent whereas some parts of subsection (a)(1) allow the lesser mens rea of knowing. *See* subsection (a)(1)(B). Congress intended this difference to "fine tune" the sting provision. *See* 134 Cong. Rec. § S17,365 (daily ed. Nov. 10, 1988).

The involvement of a financial institution may be used to establish the presence of a financial transaction. See § 1956(c)(4). The term "financial institution" is defined in § 1956(c)(6) by reference to 31 U.S.C. § 5312 (a)(2) or the regulations thereunder.

The definition of the term proceeds in paragraph (2)(D) is taken verbatim from the definition in § 1956(c)(9), effective May 20, 2009. Congress added this definition to the statute following the Supreme Court's decision in United States v. Santos, 128 S.Ct. 2020 (2008) which stated in a plurality opinion that the term "proceeds" is limited to profits in a case where gambling was the specified unlawful activity.

In cases arising from conduct prior to May 20, 2009, the trial court must determine whether *Santos* applies to the specified unlawful activity at issue. *See, e.g.*, United States v. Kratt, 2009 U.S.App.Lexis 19798, 2009 WL 2767152 (6th Cir. September 2, 2009), discussing *Santos* in a § 1957 money laundering case with bank fraud as the specified unlawful activity. The Sixth Circuit held that *Santos* applies to § 1957 money laundering cases, and that there is a rule of general applicability derived from *Santos* based on the "outcomes" upon which the plurality in Santos and Justice Stevens, who wrote a concurring opinion, would agree. Specifically, in any case in which there is a "merger" problem and that merger problem results in the underlying crime being punishable by a significantly increased sentence because the money laundering statute was used, then "proceeds" must be construed to mean "profit." The Sixth Circuit affirmed the conviction in *Kratt* because the statutory maximum sentence for bank fraud was actually higher than for money laundering. Since use of the money laundering statute did not expose the defendant to a significantly higher sentence for the underlying conduct, there was no *Santos* problem and circuit precedent construing "proceeds" to mean "gross receipts" controlled. *See*

United States v. Prince, 214 F.3d 740, 747 (6th Cir. 2000); United States v. Haun, 90 F.3d 1096, 1101 (6th Cir. 1996).

The government does not have to trace the origin of all the proceeds involved in the financial transactions to determine precisely which proceeds were used for which transactions. United States v. Jamieson, 427 F.3d 394, 403-04 (6th Cir. 2005); United States v. Bencs, 28 F.3d 555, 562 (6th Cir. 1994). Also, the statute does not require that the entire property involved represent the proceeds of specified unlawful activity. United States v. Conner, 1991 WL 213756 at 4, 1991 U.S. App. LEXIS 25370 at 10 (6th Cir. 1991)(unpublished). As long as the jury can infer that a portion of the funds involved represented the proceeds of the specified unlawful activity, there is no minimum percentage requirement. United States v. Westine, 1994 WL 88831, 2, 1994 U.S.App. LEXIS 5144, 8 (6th Cir. 1994)(unpublished).

11.06 MONEY LAUNDERING – Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity (18 U.S.C. § 1957)

(1) Count ___ of the indictment charges the defendant with [engaging] [attempting to engage] in a monetary transaction in violation of federal law. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant knowingly [engaged] [attempted to engage] in a monetary transaction.

(B) Second, that the monetary transaction was in property derived from specified unlawful activity.

(C) Third, that the property had a value greater than $10,000.

(D) Fourth, that the defendant knew that the transaction was in criminally derived property.

(E) Fifth, that the monetary transaction took place [within the United States] [within the United States' jurisdiction] [outside the United States but the defendant is a United States person].

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "monetary transaction" means [*insert definition from § 1957(f)(1)*].

(B) The term "specified unlawful activity" means [*insert definition from § 1956(c)(7)]*.

(C) The term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense.

(D) [The term "United States person" includes [*insert definition from 18 U.S.C. § 3077*]].

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

Use Note

Brackets indicate options for the court. Brackets with italics are notes to the court.

Committee Commentary Instruction 11.06
(current through May 1, 2025)

The purpose of this instruction is to outline the elements of the crime of engaging in monetary transactions in property derived from specified unlawful activity. The instruction is based primarily on United States v. Rayborn, 491 F.3d 513, 517 (6th Cir. 2007).

The term "specified unlawful activity" is defined in § 1957(f)(3) by reference to § 1956(c)(7).

The term "criminally derived property" is defined in § 1957(f)(2).

It is an element that the property in the monetary transaction must in fact be the proceeds of *specified unlawful activity*. See § 1957(a). However, the defendant need only know that the property involved was *criminally derived.* The statute makes this clear in § 1957(c), which states: "In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally deri December 20, 2017 ved property was derived was specified unlawful activity." Thus, although the property must in fact be derived from the certain listed crimes constituting specified unlawful activity, the defendant need not know this. The government does not have to prove that the defendant knew the property was derived from a particular type of unlawful activity as long as the government proves that defendant knew it was criminally derived.

In order for property to qualify as criminally derived under § 1957, the underlying criminal activity must have been completed and the defendant must have obtained or controlled the tainted funds. The court explained, "[B]oth the plain language of § 1957 and the legislative history behind it suggest that Congress targeted only those transactions occurring *after* the proceeds have been obtained from the underlying unlawful activity." United States v. Rayborn, 491 F.3d 513, 517 (6th Cir. 2007), *quoting* United States v. Butler, 211 F.3d 826, 829 (4th Cir. 2000). To meet this element, the funds need not be in the defendant's physical possession or in a personal bank account, as long as he exercised control over the funds. *Rayborn, supra* at 517-18. This element was established in *Rayborn* when the defendant signed documents directing a bank to transfer the funds to another agent. *See also* United States v. Griffith, 17 F.3d 865, 878-79 (6th Cir. 1994) (affirming defendant's § 1957 conviction because he was in control of the criminally derived property before he engaged in the illegal monetary transaction).

Jurisdiction for § 1957 is based on the monetary transaction affecting interstate or foreign commerce. See § 1957(f)(1). The government need show only a *de minimus* effect upon commerce; this standard for § 1957 was not affected by United States v. Lopez, 514 U.S. 549 (1995). United States v. Ables, 167 F.3d 1021, 1029-30 (6th Cir. 1999). However, "the government still must prove that the transaction involved had at least some impact on interstate commerce." United States v. Peterson, 1999 WL 685917, 10, 1999 U.S. App. LEXIS 20336, 28 (6th Cir. 1999)(unpublished)(convictions reversed because no participation in or effect on commerce).

Attempted money laundering is also a crime under § 1957. If the crime of attempt is

charged, the instructions should be supplemented by the instructions in Chapter 5.00 on Attempts.

The Committee recommends against giving an instruction recounting the statutory language because it would be difficult for the jury to absorb. See the Committee Commentary to Instruction 2.02.

Chapter 12.00

FIREARMS OFFENSES

Table of Instructions

Instruction

Introduction to Firearms Instructions
(current through May 1, 2025)

This chapter first includes an instruction for the firearms crime defined in 18 U.S.C. § 922(g)(1) (possession of firearm or ammunition by convicted felon). If the crime charged is based on § 922(g)(3) (possession of firearm by unlawful user of controlled substance), the instruction can be easily modified by substituting the term unlawful user and using the definition provided in the commentary. If the crime charged is based on the other disabilities affecting firearms established in subsection (g)(2) or subsections (g)(4) through (g)(9), the instruction can be modified as necessary.

Title 18 U.S.C. § 922(g)(1) provides:

(g) It shall be unlawful for any person–

> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
> . . .
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Instruction 12.01A Possession of Firearm or Ammunition by Convicted Felon (18 U.S.C. § 922(g)(1)) covers the simple offense of possessing a firearm or ammunition. If the conduct charged is shipping or transporting a firearm or receiving a firearm, the instruction should be modified.

Next this chapter includes an instruction for the increased penalty codified in the Armed Career Criminal Act that applies when the defendant convicted under § 922(g)(1) had three previous qualifying convictions for offenses committed on different occasions, see 18 U.S.C. § 924(e)(1). Section 924(e)(1) provides:

> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

Instruction 12.01B Unanimity Required: Determining Whether Defendant Had Three Previous Convictions for Offenses Committed on Occasions Different from One Another (18 U.S.C. § 924(e)(1)) and the accompanying special verdict form cover this increased penalty.

This chapter also includes four instructions to cover the crimes under 18 U.S.C. § 924(c)(1)(A)(i) (using or carrying a firearm during and in relation to a crime of violence or drug

trafficking crime; possessing a firearm in furtherance of a crime of violence or drug trafficking crime).

Title 18 U.S.C. § 924(c) provides:

> (c) (1) (A) ... [A]ny person who, during and in relation to any crime of violence or drug trafficking crime ... for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall [be sentenced to the mandatory terms provided in the statute].

The Committee drafted four instructions to cover the offenses of 18 U.S.C. § 924(c) based on United States v. Combs, 369 F.3d 925 (6th Cir. 2004) and United States v. Henry, 2015 WL 4774558 (6th Cir. Aug. 14, 2015). Instruction 12.02 covers using or carrying a firearm during and in relation to a crime of violence or drug trafficking crime under subsection (c)(1)(A)(i), and Instruction 12.03 covers possessing a firearm in furtherance of a crime of violence or drug trafficking crime under the same subsection, (c)(1)(A)(i). Instruction 12.04 covers the using-or-carrying offense of Instruction 12.02 when the charge is based on aiding and abetting under 18 U.S.C. § 2, and Instruction 12.05 covers the possession-in-furtherance offense of Instruction 12.03 when the charge is based on aiding and abetting under § 2.

The Committee did not draft instructions specifically to cover subsections (c)(1)(A)(ii) (brandishing a firearm) or (c)(1)(A)(iii) (discharging a firearm), but the pattern instructions can be easily modified to fit these provisions.

12.01A FIREARMS – Possession of Firearm or Ammunition by Convicted Felon (18 U.S.C. § 922(g)(1))

(1) Count ___ of the indictment charges the defendant with being a convicted felon in possession of a firearm [ammunition].

For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant has been convicted of a crime punishable by imprisonment for more than one year. [The government and the defendant have agreed that defendant has previously been convicted of a crime punishable by imprisonment for more than one year.]

(B) Second: That the defendant, following his conviction, knowingly possessed a firearm [the ammunition] specified in the indictment.

(C) Third: That at the time the defendant possessed the firearm [ammunition], he knew he had been convicted of a crime punishable by imprisonment for more than one year.

(D) Fourth: That the specified firearm [ammunition] crossed a state line prior to [during] the alleged possession. [It is sufficient for this element to show that the firearm [ammunition] was manufactured in a state other than [*name state in which offense occurred*].]

(2) Now I will give you more detailed instructions on some of these elements.

(A) [*Insert applicable definition of possession from Instructions 2.10, 2.10A, and 2.11 here or as a separate instruction*]. [The defendant does not have to own the firearm in order to possess the firearm.]

(B) [*Insert one or both of the definitions below*].

[(1) The term "firearm" means any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive. [The term firearm also means the frame or receiver of any such weapon, any firearm muffler or firearm silencer, or any destructive device.] [The term firearm does not include an antique firearm.] [The term firearm includes starter guns.]]

[(2) The term "ammunition" means ammunition or cartridge cases, primers, bullets, or propellant powder designed for use in any firearm.]

(C) The term "knowingly" means voluntarily and intentionally, and not because of mistake or accident.

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

Use Note

This instruction covers only the conduct of possession; if the prosecution is based on the conduct of shipping, transporting or receiving a firearm or ammunition, the instruction should be modified.

This instruction assumes that the prosecution is based on firearms; if the prosecution is based on ammunition, the court should substitute that term which is provided in brackets following the term firearm. The court should also provide the definition of ammunition in bracketed paragraph (2)(B)(2).

This instruction covers only subsection 922(g)(1). If the crime charged is based on subsection 922(g)(3) (possession of firearm or ammunition by unlawful user of controlled substance), the instruction can be easily modified by substituting the term unlawful user in paragraph (1) and using the definition of unlawful user (provided below in the commentary) in paragraph (2). If the crime charged is based on the other disabilities affecting firearms or ammunition established in subsection (g)(2) or subsections (g)(4) through (g)(9), the instruction can be modified as necessary.

Brackets indicate options for the court. Brackets with italics are notes to the court.

In paragraph (2)(A), the second bracketed sentence should be used only if relevant.

Committee Commentary Instruction 12.01A

(current through May 1, 2025)

The language of § 922(g)(1) relating to the conduct of possession provides, "It shall be unlawful for any person . . . who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess in or affecting commerce, any firearm or ammunition; . . . ." Section 924(a)(2) provides that anyone who "knowingly violates" § 922(g) shall be fined or imprisoned.

The four elements listed in paragraph (1) are supported by Rehaif v. United States, 139 S. Ct. 2191, 2195-2196 (2019) (identifying the elements as "(1) a status element . . .; (2) a possession element . . .; (3) a jurisdictional element . . .; and (4) a firearm element . . . ."). In the instruction, these elements are in a slightly different order. The element in paragraph (1)(C) (that at the time the defendant possessed the firearm, he knew he had been convicted of a crime punishable by imprisonment for more than one year) was added to the instruction in 2019 based on *Rehaif, id*.

For the element in paragraph (1)(A) that the defendant have a conviction for a crime punishable by imprisonment for a term exceeding one year, § 921(a)(20) provides that a "crime punishable for a term exceeding one year" does not include any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulations of business practices, or any State offense classified by the

laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less. The laws of the jurisdiction in which the proceedings are held determine what constitutes a conviction. The phrase in § 922(g)(1) "convicted in any court" refers only to domestic, not foreign, courts, Small v. United States, 544 U.S. 385 (2005), so the element in paragraph (1)(A) that the defendant be convicted of a crime includes only domestic convictions.

Section 921(a)(20) further provides, "Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." This restoration of rights provision is a difficult area that has generated many opinions. *See, e.g,* United States v. Cassidy, 899 F.2d 543 (6th Cir.1990); United States v. Driscoll, 970 F.2d 1472 (6th Cir. 1992); United States v. Gilliam, 979 F.2d 436 (6th Cir. 1992); United States v. Morgan, 216 F.3d 557 (6th Cir. 2000). The meaning of this restoration of rights provision is a question of law, so it is not implicated in the instruction, but it is an area of caution for the district judge.

When a defendant offers to concede a prior judgment, and the name or nature of the prior crime raises the risk of a verdict tainted by improper considerations and the purpose of the evidence is solely to prove the element of prior conviction, the court should use the bracketed language in paragraph (1)(A). Old Chief v. United States, 519 U.S. 172 (1997).

If the defendant is charged under § 922(g)(3) with possession of a firearm by an unlawful user of a controlled substance, the instruction should be modified to include the following definition of "unlawful user":

> The term "unlawful user of a controlled substance" contemplates the regular and repeated use of a controlled substance in a manner other than as prescribed by a licensed physician. The one time or infrequent use of a controlled substance is not sufficient to establish the defendant as an "unlawful user." Rather, the defendant must have been engaged in use that was sufficiently consistent and prolonged as to constitute a pattern of regular and repeated use of a controlled substance. The government need not show that defendant used a controlled substance at the precise time he possessed a firearm. It must, however, establish that he was engaged in a pattern of regular and repeated use of a controlled substance during a period that reasonably covers the time a firearm was possessed.

United States v. Burchard, 580 F.3d 341, 352 (6th Cir. 2009). *See also* United States v. Roberge, 565 F.3d 1005 (6th Cir. 2009).

In paragraph (2)(A), possession is defined by reference to Instructions 2.10, 2.10A and 2.11. For convictions under § 922(g)(1), both actual and constructive possession are sufficient. United States v. Murphy, 107 F.3d 1199, 1208 (6th Cir. 1997), *citing* United States v. Craven, 478 F.2d 1329, 1329-33 (6th Cir. 1973). Actual possession occurs when a party has "immediate possession or control" over the firearm. *Craven*, 478 F.2d at 1333; *see also* United States v. Beverly, 750 F.2d 34, 37 (6th Cir. 1984). Constructive possession exists when "a person does not have actual possession but instead knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others." *Moreno*, 933

F.2d at 373, *citing Craven*, 478 F.2d at 1333. Constructive possession also exists when the person has dominion over the premises where the firearm is located. United States v. Clemis, 11 F.3d 597, 601 (6th Cir. 1993). Actual and constructive possession are discussed further in commentary to Pattern Instructions 2.10 and 2.10A.

Aside from possession, § 922(g)(1) also prohibits persons from receiving or shipping or transporting firearms. The instruction is drafted only to cover possession, but if receipt, shipping or transporting are charged, the instruction can be modified. In United States v. Manni, 810 F.2d 80, 84 (6th Cir. 1987), the court stated that the term receipt included any knowing acceptance or possession of a firearm. Proof of possession is equivalent to proof of receipt for most purposes. *See also Beverly*, 750 F.2d at 36 ("To prove 'receipt' beyond a reasonable doubt, the government may establish 'receipt' by inference after proving constructive possession."). The Sixth Circuit has "equated circumstantial proof of constructive possession with circumstantial proof of constructive receipt under § 922." *Id., citing Craven*, 478 F.2d at 1336.

The definition of "firearm" in paragraph (2)(B)(1) is based on the statute, which defines firearm as: "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer, or (D) any destructive device. Such term does not include an antique firearm." 18 U.S.C. § 921(a)(3). Subsection 921(a)(4) defines destructive device in detail, and subsection 921(a)(16) defines antique firearm in detail. As to the antique firearms exception, *see* United States v. Smith, 981 F.2d 887, 891-92 (6th Cir.1992) ("antique firearms" exception is an affirmative defense which must be raised by defendant before the burden shifts to the government to disprove its applicability).

The firearm need not be operable to support a conviction. United States v. Yannott, 42 F.3d 999, 1006 (6th Cir. 1994). In *Yannott*, the court further held that it does not matter that the defendant may not have known how to alter the weapon to make it operable. The broken firing pin only temporarily altered the weapon's capability and did not alter the design so that it no longer served the purpose for which it was originally designed. The determination of what constitutes a firearm under the statute is a question of law; however, whether a particular weapon fits in the legal definition of a firearm is a question of fact. *Id.* at 1005-07.

Section 922(g)(1) also prohibits the possession of ammunition by a convicted felon. *See* 18 U.S.C. § 922(g)(1); United States v. Johnson, 62 F.3d 849, 850 (6th Cir. 1995). The definition of the term "ammunition" in paragraph (2)(B)(2) is based on § 921(a)(17)(A), which states that "The term 'ammunition' means ammunition or cartridge cases, primers, bullets, or propellant powder designed for use in any firearm."

The mens rea requirement for § 922(g)(1) is set forth in § 924(a)(2), which states, "Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both." In United States v. Odom, 13 F.3d 949 (6th Cir. 1994), the Sixth Circuit approved an instruction defining knowingly under § 922(g)(1) as "voluntarily and intentionally, and not because of mistake or accident." *Id.* at 961. The definition of knowingly in paragraph (2)(C) is based on this case.

The knowledge requirement applies to both the possession element and the status element of the offense. Rehaif v. United States, 139 S. Ct. 2191, 2200 (2019) ("We conclude that in a

prosecution under 18 U. S. C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm."). However, § 942(a)(2) does not require that the defendant knew that the conduct was illegal. *Rehaif*, *supra* at 2198 (*citing* Lafave & Scott, Substantive Criminal Law § 5.1(a); Model Penal Code § 2.04; and Liparota v. United States, 471 U. S. 419 (1985)); *see also* United States v. Beavers, 206 F.3d 706, 710 (6th Cir. 2000) (holding that § 922(g)(9) is constitutional even though it does not require the government to prove that the defendant knew his possession of a firearm was illegal).

The court has sometimes discussed the mens rea in terms of intent. Only general intent, not specific intent, is required for a firearms possession charge under § 922(g)(1). United States v. Jobson, 102 F.3d 214, 221 (6th Cir. 1996).

As to the jurisdictional element in paragraph (1)(D), the statute provides that the defendant must possess the firearm "in or affecting commerce...." 18 U.S.C. § 922(g)(1). The statute defines "interstate or foreign commerce" to include "commerce between any place in a State and any place outside of that State, or within any possession of the United States (not including the Canal Zone) or the District of Columbia, but such term does not include commerce between places within the same State but through any place outside of that State." 18 U.S.C. § 921(a)(2).

In Scarborough v. United States, 431 U.S. 563, 566-67 (1977), the Court interpreted the phrase "in commerce or affecting commerce" in 18 U.S.C.App. § 1202(a), a predecessor statute of § 922(g)(1). It approved an instruction which provided that jurisdiction was established by proof that the firearm "previously traveled in interstate commerce." *Id.* In the wake of *Scarborough*, the court has concluded that the commerce element is met if the defendant possessed the firearm outside its state of manufacture. *See, e.g.,* United States v. Pedigo, 879 F.2d 1315, 1319 (6th Cir. 1989), *citing* Scarborough v. United States, *supra*. *See also* United States v. Fish, 928 F.2d 185, 186 (6th Cir. 1991). A firearm that has moved in interstate commerce at any time provides a sufficient nexus between defendant's conduct and interstate commerce. United States v. Chesney, 86 F.3d 564, 571 (6th Cir. 1996), *citing Scarborough*, 431 U.S. at 566-67. *See also* United States v. Wolak, 923 F.2d 1193, 1198 (6th Cir. 1991) (even if firearm possessed by defendant had been brought into country by serviceman, that transportation would still satisfy the interstate commerce nexus offense as to anyone who later possessed the weapon). *Cf.* United States v. Lopez, 514 U.S. 549 (1995) (18 U.S.C. § 922(q) prohibiting possession of firearm in school zone contains no requirement that the possession be connected in any way to interstate commerce, so the statute exceeds the authority of Congress and is unconstitutional).

The instruction reflects this case law by requiring for the jurisdictional element that the specified firearm at some time crossed state lines. If a particular case involves possession of a firearm that did not travel in interstate commerce but in some other way "affected" commerce, the instruction should be modified.

The government need not prove that the defendant knew that the firearm traveled in or affected interstate commerce. Rehaif v. United States, 139 S. Ct. 2191, 2196 (2019) ("No one here claims that the word 'knowingly' modifies the statute's jurisdictional element. . . . Because jurisdictional elements normally have nothing to do with the wrongfulness of the defendant's

conduct, such elements are not subject to the presumption in favor of scienter.") (*citing* Luna Torres v. Lynch, 136 S. Ct. 1619, 1630-1631 (2016).

The court has held that "the particular firearm possessed is not an element of the crime under § 922(g), but instead the means used to satisfy the element of 'any firearm.'" United States v. DeJohn, 368 F.3d 533, 542 (6th Cir. 2004). *See also* reference to *DeJohn* in Commentary to Instruction 8.03B Unanimity Not Required – Means.

In 1990, the Sixth Circuit held that a defense of justification for possession of a firearm by a convicted felon may arise in rare situations. United States v. Singleton, 902 F.2d 471, 472-73 (6th Cir. 1990). This defense is covered in Instruction 6.07 Justification. *See also* Instruction 6.05 Coercion/Duress.

Inst. 12.01B Unanimity Required – Determining Whether Defendant Had Three Previous Convictions for Offenses Committed on Occasions Different from One Another (18 U.S.C. § 924(e)(1)) and Special Verdict Form

(1) Members of the jury, in the first phase of the trial you reached a verdict that the defendant is guilty of being a felon in possession of a firearm, as charged in [count(s) _____ of] the indictment. That guilty verdict remains in place.

(2) Related to that verdict, I need to ask you another question about the defendant's previous convictions. All of the instructions I have previously given you continue to apply and those instructions, in addition to the new instructions below, govern your deliberations and actions on these final issues.

(3) For this second phase of the trial, the government has the burden to prove whether, before committing the crimes charged in [count(s) _____ of] the indictment (and for which you rendered a guilty verdict in the first phase of this trial), the defendant had been convicted of at least three previous offenses that were committed on occasions different from one another.

(4) Here, the government has presented evidence [by stipulation] that the defendant had the following previous convictions:

> (A) _____ [*insert identifying information on violent felony or serious drug offense*].
>
> (B) _____ [*insert identifying information on violent felony or serious drug offense*].
>
> (C)_____ [*insert identifying information on violent felony or serious drug offense*].
>
> [(D) _____ [*insert identifying information on any additional qualifying offenses on which the government has presented evidence.*]]

(5) In determining whether [at least three of] the defendant's previous offenses were committed on different occasions, you may consider a range of circumstances, including:

> (A) whether the offenses were committed close in time or separated by substantial gaps in time or significant intervening events;
>
> (B) whether the locations of the offenses were near to or far from one another; and
>
> (C) the character and relationship of the offenses to one another, such as whether they are similar or intertwined and whether they share a common scheme or purpose.
>
> (D) A single criminal episode does not require that the crimes occurred simultaneously. A single occasion may encompass multiple, temporally distinct activities. No particular lapse of time or distance between offenses automatically separates a single occasion from distinct ones.

(6) I have prepared a special verdict form for you to record your answer to this question.

(7) If you are convinced that the government has proved beyond a reasonable doubt that the defendant had at least three previous convictions for offenses that were committed on occasions different from one another, say so by having your foreperson mark the appropriate place on the on the special verdict form. If you decide that the government has not proved that the defendant had at least three previous convictions for offenses that were committed on occasions different from one another, say so by having your foreperson mark the appropriate place on the on the special verdict form.

SPECIAL VERDICT FORM

We, the jury, as to the questions posed in Phase II for our verdict say:

We find the defendant, [*insert name*]

_____ _____

DID OR DID NOT

have at least three previous felony convictions for offenses that were committed on occasions different from one another.

_____ _____

DATE PRESIDING JUROR

Use Note

This instruction assumes the trial was bifurcated and covers the second phase when the government has charged the increased penalty under § 924(e)(1).

The three previous convictions must be for qualifying violent felonies or serious drug offenses.

Brackets indicate options for the judge.

Bracketed italics are notes to the judge.

Committee Commentary Instruction 12.01B

(current through May 1, 2025)

> The Armed Career Criminal Act provides in 18 U.S.C. § 924(e)(1):
>
> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be [sentenced to] not less than fifteen years . . . .

This instruction is designed for use in the second phase of a bifurcated trial when the government has charged the increased penalty in § 924(e)(1). In Erlinger v. United States, 144 S. Ct. 1840 (2024), the Court held that defendants are entitled under the Fifth and Sixth Amendments to have a unanimous jury determine beyond a reasonable doubt whether their past offenses were committed on separate occasions for ACCA purposes. *Erlinger*, 144 S. Ct. at 1851. The Court stated that for this different-occasions inquiry, the jury may consider whether the crimes were committed close in time, the proximity of their location, and whether the character and relationship of the offenses were similar or intertwined. *Erlinger*, 144 S. Ct. at 1851, quoting Wooden v. United States, 142 S. Ct. 1063, 1071 (2022). The *Wooden* Court's original description of the relevant factors stated:

> The inquiry that [the different-occasions] requirement entails, given what "occasion" ordinarily means, is more multi-factored in nature . . . . [A]ll the examples . . . suggest that a range of circumstances may be relevant to identifying episodes of criminal activity. Timing of course matters . . . . Offenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion; not so offenses separated by substantial gaps in time or significant intervening events. Proximity of location is also important; the further away crimes take place, the less likely they are components of the same criminal event. And the character and relationship of the offenses may make a difference: The more similar or intertwined the conduct giving rise to the offenses – the more, for example, they share a common scheme or purpose – the more apt they are to compose one occasion.

Id.

In *Erlinger*, the Court responded to the argument that as a practical matter, it may do more to prejudice than protect defendants "to regale juries with the details" of defendants past misconduct by endorsing the traditional tool of bifurcating the proceedings as a common and fair practice. See *Erlinger*, 144 S. Ct. at 1859.

Inst. 12.01B Unanimity Required – Determining Whether Defendant Had Three Previous Convictions for Offenses Committed on Occasions Different from One Another assumes that the court has bifurcated the proceedings and applies to the second phase. Paragraphs (1) and (2) of the instruction provide background for the jury on the bifurcated process. Paragraph (3) states the question for the jury in the second phase and reiterates the government's burden of proof. Paragraph (4) provides a structure for the court to identify the previous convictions alleged by the government.

Paragraph (5) states the criteria for the jury to use in deciding whether the previous offenses were "committed on occasions different from one another" or were a single criminal episode. Specifically, paragraphs (5)(A) through (5)(C) are drawn from *Erlinger*, 144 S. Ct. at 1851, *quoting* Wooden v. United States, 142 S. Ct. at 1071. The three sentences in paragraph (5)(D) are drawn from *Wooden* at 1067, *Wooden* at 1069, and *Erlinger* at 1855 citing *Wooden* at 1071, respectively.

This instruction includes a special verdict form for the jury to record its conclusion. Paragraphs (6) and (7) of Inst. 12.01B describe the special verdict form and how jurors can use it. These two paragraphs are based on Inst. 8.06 Verdict Form.

12.02 FIREARMS – USING OR CARRYING A FIREARM DURING AND IN RELATION TO A CRIME OF VIOLENCE OR DRUG TRAFFICKING CRIME (18 U.S.C. § 924(c)(1)(A)(i))

(1) Count ___ of the indictment charges the defendant with using or carrying a firearm during and in relation to a crime of violence or a drug trafficking crime.

For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant committed the crime charged in Count ___. _____ is a [crime of violence] [drug trafficking crime] which may be prosecuted in a court of the United States.

(B) Second: That the defendant knowingly used or carried a firearm.

(C) Third: That the use or carrying of the firearm was during and in relation to the crime charged in Count ____.

(2) Now I will give you more detailed instructions on some of these terms.

(A) To establish "use," the government must prove active employment of the firearm during and in relation to the crime charged in Count ____ . "Active employment" means activities such as brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm. "Use" also includes a person's reference to a firearm in his possession for the purpose of helping to commit the crime charged in Count ____. "Use" requires more than mere possession or storage. [The term "use" includes receiving drugs in exchange for giving a firearm.] [The term "use" does not include receiving a firearm in exchange for giving drugs.]

(B) "Carrying" a firearm includes carrying it on or about one's person. ["Carrying" also includes knowingly possessing and conveying a firearm in a vehicle which the person accompanies including in the glove compartment or trunk.]

(C) The term "firearm" means any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive. [The term "firearm" also includes the frame or receiver of any such weapon, and any firearm muffler or firearm silencer, and any destructive device.] [The term firearm does not include an antique firearm.] [The term firearm includes starter guns.][The firearm need not be loaded.]

(D) In the phrase during and in relation to, "during" means at any point in the course of the offense conduct charged in Count _____. "In relation to" means that the firearm must have some purpose or effect with respect to the crime charged in Count ____; in other words, the firearm must facilitate or further, or have the potential of facilitating or furthering the crime charged in Count ___, and its presence or involvement cannot be the result of accident or coincidence.

(E) The term "knowingly" means voluntarily and intentionally, and not because of

mistake or accident.

[(3) The government need not prove that a particular firearm was used or carried during and in relation to the [crime of violence] [drug trafficking crime]].

(4) 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 of these elements, then you must find the defendant not guilty of this charge.

Use Note

If aiding and abetting is involved, use Instruction 12.04 instead of Instruction 4.01.

Any fact that increases the maximum penalty or triggers a mandatory minimum penalty must be submitted to the jury and found beyond a reasonable doubt. The Inst. 12.02 offense of using or carrying provides for the following increased penalties that must be tried to a jury:

– if the firearm is brandished – § 924(c)(1)(A)(ii) (minimum penalty increased to 7 years of imprisonment)

– if the firearm is discharged – § 924(c)(1)(A)(iii) (minimum penalty increased to 10 years of imprisonment)

– if the firearm possessed by a person convicted of a violation of this subsection is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon – § 924(c)(1)(B)(i) (minimum penalty increased to 10 years of imprisonment)

– if the firearm possessed by a person convicted of a violation of this subsection is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler – § 924(c)(1)(B)(ii) (minimum penalty increased to 30 years of imprisonment)

– if the firearm possessed by a person convicted of a violation of this subsection occurs after a prior conviction under this subsection has become final and the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler – § 924(c)(1)(C) (minimum penalty increased to imprisonment for life)

– if the defendant, during and in relation to any crime of violence or drug trafficking crime, used or carried armor piercing ammunition – § 924(c)(5)(A) (minimum penalty increased to 15 years of imprisonment)

– if the defendant during and in relation to any crime of violence or drug trafficking crime used or carried armor piercing ammunition and death resulted from the use of such ammunition and the killing was murder – § 924(c)(5)(B)(i) (penalty increased to any term of years or life)

if the defendant during and in relation to any crime of violence or drug trafficking crime used or carried armor piercing ammunition and death resulted from the use of such ammunition and the killing was manslaughter – § 924(c)(5)(B)(ii) (penalty increased as provided in § 1112)

If the prosecution is based on a violation of § 924(c) involving an increased penalty, the Committee recommends that the court give an instruction like Insts. 14.07(A) or (B) and use a special verdict form like those following Instructions 14.07(A) and (B).

The Committee did not draft instructions specifically to cover subsections (c)(1)(A)(ii) (brandishing a firearm) or (c)(1)(A)(iii) (discharging a firearm), but the pattern instructions can be easily modified to fit these provisions.

In paragraph (2)(B), the bracketed sentence should be used only if raised by the facts.

In paragraph (2)(C), the four bracketed sentences should be used only if raised by the facts.

In paragraph (3), the bracketed sentence should be used only if raised by the facts.

Brackets indicate options for the judge.

Committee Commentary Instruction 12.02
(current through May 1, 2025)

Title 18 U.S.C. § 924(c)(1)(A) provides that "any person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall [be sentenced to the mandatory terms provided in the statute]."

This instruction is designed to cover the use-or-carry-during-and-in-relation-to offense in subsection (c)(1)(A)(i). If aiding and abetting is involved, use Instruction 12.04 along with this instruction.

This instruction assumes that the defendant is charged in the same indictment with both the predicate crime of violence or drug trafficking crime and the § 924(c) firearms crime, and that the evidence of both is sufficient. The Committee took this approach because the underlying crime and the firearms crime are usually charged in the same indictment. *See generally* United States v. Davis, 139 S. Ct. 2319, 2327, 2337-2338 (2019) (all justices agree that § 924(c) prosecutions are based on currently charged conduct rather than on a prior conviction). But the law does not require the two offenses to be charged together; indeed, the predicate crime may not ever be charged. *See* United States v. Smith, 182 F.3d 452, 457 (6th Cir. 1999) (§ 924(c) "does not even require that the [predicate] crime be charged; a fortiori, it does not require that [the defendant] be convicted."). So if the § 924(c) firearms count is charged separately, the instruction should be modified. Specifically, if the predicate crime is not charged in the same indictment, the court must instruct the jury on its duty to find the elements of the predicate offense beyond a reasonable doubt. United States v. Kuehne, 547 F.3d 667, 680-81 (6th Cir.

2008) (failure to separately instruct jury regarding elements of underlying drug trafficking offense was error but harmless).

This instruction assumes that the defendant is charged with both using and carrying a firearm. If the defendant is charged with both, sufficient evidence under either element will sustain a § 924(c) conviction. United States v. Layne, 192 F.3d 556, 569 (6th Cir. 1999), *citing* Fair v. United States, 157 F.3d 427, 430 (6th Cir. 1998). *See also* United States v. Kuehne, 547 F.3d 667, 683-85 (6th Cir. 2008) (instruction permitting jurors to convict defendant of either "using or carrying" although the indictment alleged only "using" a firearm was error but not reversible because instructing on two different methods of committing the same crime was variance that did not affect defendant's substantial rights).

The definition of "use" in paragraph (2)(A) is derived from Bailey v. United States, 516 U.S. 137 (1995) and United States v. Combs, 369 F.3d 925, 932 (6th Cir. 2004) (*quoting Bailey*'s definition of use). In *Bailey*, the Court held that under § 924(c)(1), use of a firearm requires more than mere possession of the firearm. The correct definition of use "requires evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." *Bailey*, 516 U.S. at 143. The Court explained further:

> To illustrate the activities that fall within the definition of "use" provided here, we briefly describe some of the activities that fall within "active employment" for a firearm, and those that do not.
>
> The active-employment understanding of "use" certainly includes brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm. ... [E]ven an offender's reference to a firearm in his possession could satisfy § 924(c)(1). Thus, a reference to a firearm calculated to bring about a change in the circumstances of the predicate offense is a "use," just as the silent but obvious and forceful presence of a gun on a table can be a "use."
>
> . . . .
>
> "[U]se" takes on different meanings depending on context. ... [M]ere possession of a firearm by a drug offender, at or near the site of a drug crime or its proceeds or paraphernalia, is [not sufficient]. ... [T]he inert presence of a firearm, without more, is not enough to trigger § 924(c)(1). Perhaps the nonactive nature of this asserted "use" is clearer if a synonym is used: storage. A defendant cannot be charged under § 924(c)(1) merely for storing a weapon near drugs or drug proceeds. Storage of a firearm, without its more active employment, is not reasonably distinguishable from possession.
>
> A possibly more difficult question arises where an offender conceals a gun nearby to be at the ready for an imminent confrontation [citation omitted]. ... In our view, "use" cannot extend to encompass this action. If the gun is not disclosed or mentioned by the offender, it is not actively employed, and it is not "used." ... Placement for later active use does not constitute "use."

Bailey, 516 U.S. at 148-49.

The bracketed sentence at the end of paragraph (2)(A) stating that "use" does not include receiving a firearm in exchange for giving drugs is based on Watson v. United States, 128 S. Ct. 579 (2007). In explaining why use of a firearm during and in relation to a drug trafficking crime is not met when a defendant receives a firearm in exchange for giving drugs, the Court reaffirmed its conclusion in Smith v. United States, 508 U.S. 223 (1993) that use is established in the converse situation, *i.e.*, when a defendant receives drugs in exchange for giving firearms.

In the aftermath of *Bailey*, the Sixth Circuit has interpreted use under § 924(c)(1) to be established in the following circumstances: reaching for a gun under a mattress, United States v. Anderson, 89 F.3d 1306, 1315 (6th Cir. 1996); orally referring to a gun in such a way as to influence others, Darnell v. United States, 1999 WL 1281773 at 2, 1999 U.S. App. LEXIS 34587 at 7 (6th Cir. 1999) (unpublished), *quoting* United States v. Anderson, *supra*; admitting in plea agreement that defendant used a gun to protect himself while selling cocaine, United States v. Mitchell, 1997 WL 720435 at 2, 1997 U.S. App. LEXIS 32348 at 7 (6th Cir. 1997) (unpublished); actively negotiating an exchange of firearms for drugs, United States v. Jones, 102 F.3d 804, 809 (6th Cir. 1996).

The Sixth Circuit has held that use was not established in the following circumstances: inert presence of firearm without display, *Darnell*, 1999 WL at 3, 1999 U.S. App. LEXIS at 7-8; passively receiving a firearm from an undercover officer in exchange for drugs, *Layne*, 192 F.3d at 570 and United States v. Warwick, 167 F.3d 965, 975 (6th Cir. 1999); clandestinely placing an undetonated bomb nearby with intent to put firearm to a future active use, United States v. Stotts, 176 F.3d 880, 888-89 (6th Cir. 1999); carrying firearm in back pocket when it is not visible until exiting the car, Napier v. United States, 159 F.3d 956, 960 (6th Cir. 1998); transferring a firearm to co-conspirator days in advance of the time when the object of the conspiracy was to occur, United States v. Taylor, 176 F.3d 331, 339 (6th Cir. 1999); reaching for firearm in briefcase, United States v. Allen, 106 F.3d 695, 702 (6th Cir. 1997); storing firearm under the seat of a car, United States v. Myers, 102 F.3d 227, 237 (6th Cir. 1996); storing six firearms throughout residence where drug trafficking occurred, United States v. Deveaux, 1996 WL 683765, 3-4, 1996 U.S. App. Lexis 330877, 10-11 (6th Cir. 1996) (unpublished).

The language in paragraph (2)(A) "for the purpose of helping to commit the crime charged in Count ___" is a plain English version of the standard "calculated to bring about a change in the circumstances of the predicate offense" articulated in *Bailey* and quoted *supra*.

The definition of "carry" in paragraph (2)(B) is based on Muscarello v. United States, 524 U.S. 125 (1998) and *Combs*, 369 F.3d at 932 (*quoting Muscarello*'s definition of carry). In *Muscarello*, the Court held that under § 924(c), the word carry is not limited to the carrying of firearms directly on the person but also "applies to a person who knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car, which the person accompanies." 524 U.S. at 126-27. To come within the definition of carry, the firearm need not be immediately accessible to the defendant; as long as he meets the requirements of carrying the firearm both "during and in relation to" the predicate offense, the elements of § 924(c) are satisfied. *Id*. at 137. However, carrying requires more than mere transportation. The Court explained: "'Carry' implies personal agency and some degree of possession, whereas 'transport' does not have such a limited connotation.... Therefore, 'transport' is a broader category that includes 'carry' but also encompasses other activity." *Id*. at 134-35.

The Sixth Circuit or panels of the circuit have found carrying to be established in the following cases: Rose v. United States, 1999 WL 1000852, 2, 1999 U.S. App. LEXIS 28517, 6 (6th Cir. 1999) (unpublished) (firearm in front seat console of defendant's car); United States v. Gibbs, 182 F.3d 408 (6th Cir. 1999) (firearm tucked in defendant's pants); United States v. Clemons, 2001 WL 278596 at 4, 2001 U.S. App. LEXIS 4403 at 12 (6th Cir. 2001) (unpublished) (defendant had firearm on his person and threw firearm into car); United States v. Davis, 1999 WL 238664 at 2, 1999 U.S. App. LEXIS 7287 at 7 (6th Cir. 1999) (unpublished) (defendant aided and abetted another who physically transported firearm and had it immediately available for use); United States v. Mann, 2001 WL 302049 at 2, 2001 U.S. App. LEXIS at 6-7 (6th Cir. 2001) (unpublished) (defendant aided and abetted as getaway driver although he did not carry firearm personally); Clark v. United States, 2000 WL 282447 at 4, 2000 U.S. App. LEXIS 3642 at 13 (6th Cir. 2000) (unpublished) (defendant conspired with co-defendant who carried firearm personally); Carthorn v. United States, 1999 WL 644347 at 2, 1999 U.S. App. LEXIS 20366 at 6 (6th Cir. 1999) (unpublished) (firearm found under driver's seat of defendant's car); Hilliard v. United States, 157 F.3d 444 (6th Cir. 1998) (defendant fleeing scene of drug crime had firearm in his waistband).

The Sixth Circuit has found that carrying was not established in United States v. Sheppard, 149 F.3d 458 (6th Cir. 1998) (mere presence of firearm at scene of drug crime is not sufficient; "carry" requires more than the fact that the defendant at some time previously had carried the firearm to a particular location).

The second sentence of paragraph (2)(B) on the definition of carrying is bracketed because it is only relevant when a vehicle is involved.

"Firearm" is defined in paragraph (2)(C) based on the statute, which provides: "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer, or (D) any destructive device. Such term does not include an antique firearm." 18 U.S.C. § 921(a)(3). Subsection 921(a)(4) further defines destructive device, and subsection 921(a)(16) defines antique firearm. As to the antique firearms exception, *see* United States v. Smith, 981 F.2d 887, 891-92 (6th Cir. 1992) ("antique firearms" exception is an affirmative defense which must be raised by defendant before the burden shifts to the government to disprove its applicability). The last bracketed sentence in paragraph (2)(C) stating that the firearm need not be loaded is based on United States v. Pannell, 1999 WL 685936 at 6 n.3, 1999 U.S. App. LEXIS 20629 at 17 n.3 (6th Cir. 1999) (unpublished) and United States v. Malcuit, 1999 WL 238672 at 2, 1999 U.S. App. LEXIS 7387 at 5 (6th Cir. 1999) (unpublished) (per curiam), *both citing* United States v. Turner, 157 F.3d 552, 557 (8th Cir. 1998). *See also* United States v. Bandy, 239 F.3d 802, 805 (6th Cir. 2001) (quoting with approval other circuits' conclusions that firearm need not be loaded). In addition, the firearm need not be operable. *Id*.

For the definition in paragraph (2)(D) of "during and in relation to," Supreme Court authority indicates that this phrase is composed of two distinct elements, "during" and "in relation to." *See* Muscarello v. United States, 524 U.S. 125, 137 (1998) (stating that § 924(c)(1) applies only where "a defendant carries a gun *both* 'during *and* in relation to' a drug crime") (emphasis in opinion); Smith v. United States, 508 U.S. 223, 237 (1993) (noting that defendant did not and could not deny that his use of a firearm occurred "during" a drug trafficking crime

but rather disputed whether his use of the firearm was ꞏin relation toꞏ a drug trafficking crime). The Sixth Circuit also recognizes two elements, *see* United States v. Layne, 192 F.3d 556, 571 (6th Cir. 1999):

> [A] defendant does not violate § 924(c)(1) merely by carrying a firearm. Rather, he must ꞏcarryꞏ the firearm ꞏduring and in relation toꞏ his drug trafficking offense.
>
> * * *
>
> Assuming that Defendant ꞏcarriedꞏ a firearm under § 924(c)(1) when he took the Colt Python away from the drug transaction . . . , we cannot say that, at that point, he ꞏcarriedꞏ a firearm ꞏduring and in relation toꞏ a drug trafficking offense. Although Defendant potentially ꞏcarriedꞏ the Colt Python, he did so after the completion of the drug trafficking offense, and not ꞏduringꞏ it.

The *Layne* court vacated the § 924(c)(1) conviction for insufficient proof, 192 F.3d at 580.

The Committee revised the definition of "during and in relation to" in paragraph (2)(D) in 2025 so that the definition distinguishes these two elements and defines each of them. *See generally* United States v. Edwards, 2025 WL 789558, 5-10 (6th Cir. 2025) (unpublished) (Readler, J., concurring). In the 2025 revision of paragraph (2)(D), the definition of the term during (" 'during' means at any point in the course of the offense conduct charged in Count _____") is drawn from dictionary definitions of the term, *see Edwards*, 2025 WL at 6. *See also* Seventh Circuit Pattern Instruction 18 U.S.C. § 924(c) Definition of "During" ("During means at any point within the offense conduct charged in Count ___ of the indictment."). When the defendant brandished a firearm during flight immediately following a robbery, sufficient evidence established that the brandishing occurred "during" the ongoing robbery. United States v. Cecil, 615 F.3d 678, 693 (6th Cir. 2010).

In the 2025 revision of paragraph (2)(D), the definition of the term "in relation to" was not changed. The definition is based on Smith v. United States, 508 U.S. 223 (1993). In *Smith*, the Supreme Court defined "in relation to" in these terms: "The phrase 'in relation to' thus, at a minimum, clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence. ... [T]he gun at least must 'facilitate, or have the potential of facilitating,' the drug trafficking offense." *Id*. at 238 (citations omitted). Furthermore, in *Smith*, the Court stated that the in-relation-to language "does illuminate § 924(c)(1)'s boundaries." 508 U.S. at 237. The Court explained that the in-relation-to language "'allay[s] explicitly the concern that a person could be' punished under § 924(c)(1) . . . even though the firearm's presence is coincidental or entirely 'unrelated' to the crime." *Id*. at 238, *quoting* United States v. Stewart, 779 F.2d 538, 539 (9th Cir. 1985).

In paragraph (2)(E), the definition of "knowingly" is based on United States v. Odom, 13 F.3d 949, 961 (6th Cir. 1994). Section 924(c) does not include any mens rea term in the language of the statute (*cf*. § 922(g), for which the mens rea of knowingly is supplied by § 924(a)), but courts have imposed a mens rea of knowingly. *See* Muscarello v. United States, 524 U.S. 125 (1998). In *Odom*, the Sixth Circuit defined the term knowingly in the context of a firearms

offense under § 922(g)(1), and the Committee relied on that definition of knowingly for the § 924(c) firearms offense.

Paragraph (3) recognizes that as a general rule, the jury need not decide which specific gun a defendant used or carried. *See* United States v. Steele, 919 F.3d 965, 973 (6th Cir. 2019) ("§ 924(c) generally does not require jury unanimity as to a specific gun that a defendant possessed, used, or carried in violating § 924(c)."). The court stated there may be exceptions to this general rule, *id.*, *citing* United States v. Correa-Ventura, 6 F.3d 1070, 1087 (5th Cir. 1993), and concluded that the district court appropriately addressed the concerns underlying the exceptions by giving the following instruction:

> The Government does not have to prove that a particular firearm was possessed in furtherance of a drug trafficking crime, but in order to return a guilty verdict, all 12 of you must unanimously agree as to at least one specific occurrence on which [defendant] personally possessed a firearm in furtherance of a conspiracy to distribute a controlled substance.

The Sixth Circuit characterized this instruction as "proper" and not plain error. *Steele* at 973. In prosecutions based on using or carrying rather than possession, this instruction can be modified.

Conviction on the predicate offense is not required. United States v. Smith, *supra* at 458 ("We also hold that § 924(c) does not require a conviction for the predicate offense."); United States v. Ospina, 18 F.3d 1332, 1335-36 (6th Cir. 1994) (mandatory sentence of § 924(c)(1) can be imposed in absence of conviction on underlying drug offense), *citing, inter alia*, United States v. Hill, 971 F.2d 1461, 1467 (10th Cir. 1992) ("[A] conviction on an underlying drug trafficking offense is not a prerequisite to a substantive 924(c) conviction"). As *Smith* indicates, the § 924(c) conviction can stand even if the jury acquits the defendant on the predicate crime of violence or drug trafficking. United States v. Smith, *supra*. However, the § 924(c) conviction cannot stand if the conviction on the predicate crime is declared void for lack of jurisdiction. United States v. Wang, 222 F.3d 234, 240-41 (6th Cir. 2000) (§ 924(c) conviction must be reversed because underlying Hobbs Act robbery charge had no effect on interstate commerce and therefor did not qualify as a crime that could be prosecuted in federal court).

In Rosemond v. United States, 134 S. Ct. 1240 (2014), the Court vacated a conviction for using or carrying under § 924(c) based on aiding and abetting because of error in the jury instructions. In the wake of *Rosemond*, the Sixth Circuit reversed a § 924(c) conviction, finding a jury instruction using paragraph (2)(C) of Instruction 4.01 Aiding and Abetting to be plain error. The court explained, "*Rosemond* clarifies that intent must go to the *entire crime* – that [defendant] intended to aid in an *armed* bank robbery." United States v. Henry, 2015 WL 4774558, at *2, (6th Cir. Aug. 14, 2015) (italics in original, *citing Rosemond*, 134 S. Ct. at 1248, 1251). *See also* United States v. Richardson, 2015 WL 4174809, at *14-15 (6th Cir. July 13, 2015) (jury instruction was error but harmless). New Instruction 12.04 Aiding and Abetting Using or Carrying a Firearm During and in Relation to a Crime of Violence or Drug Trafficking Crime responds to these cases and should be used in conjunction with Inst. 12.02 on Using or Carrying a Firearm when the charge is based on accomplice liability.

Any fact that increases a mandatory minimum sentence constitutes an element of the crime and must be proved to the jury beyond a reasonable doubt. Alleyne v. United States, 133

S. Ct. 2151 (2013), citing Apprendi v. New Jersey, 530 U.S. 466 (2000) and overuling Harris v. United States, 536 U.S. 545 (2002). In *Alleyne*, the Court held that because the determination of whether the defendant "brandished" the firearm under § 924(c)(1)(A)(i) increased the mandatory minimum imprisonment from 5 years to 7 years, that fact had to be submitted to the jury and proved beyond a reasonable doubt. *Alleyne*, 133 S. Ct. at 2160. Thus, the activities of brandishing and discharge must be submitted to the jury and proved beyond a reasonable doubt.

In addition, the type of firearm must be proved to the trier of fact beyond a reasonable doubt. Castillo v. United States, 530 U.S. 120 (2000). The type of firearm involved, *i.e*, a "short-barreled rifle, short-barreled shotgun or semiautomatic assault weapon" under subsection 924(c)(1)(B)(i); or "a machinegun or a destructive device, or . . . [a firearm] equipped with a firearm silencer or firearm muffler" under subsection 924(c)(1)(B)(ii), is an element of the offense and must be proved beyond a reasonable doubt to the trier of fact. Castillo v. United States, *supra*. *Castillo*, which interpreted the statute, was followed in the Sixth Circuit by United States v. Harris, 397 F.3d 404 (6th Cir. 2005), which reached the same conclusion based on Sixth Amendment grounds.

12.03 FIREARMS – POSSESSING A FIREARM IN FURTHERANCE OF A CRIME OF VIOLENCE OR DRUG TRAFFICKING CRIME (18 U.S.C. § 924(c)(1)(A)(i))

(1) Count ___ of the indictment charges the defendant with violating federal law by possessing a firearm in furtherance of a crime of violence or a drug trafficking crime.

For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant committed the crime charged in Count ____. _____ is a [crime of violence] [drug trafficking crime] which may be prosecuted in a court of the United States.

(B) Second: That the defendant knowingly possessed a firearm.

(C) Third: That the possession of the firearm was in furtherance of the crime charged in Count ____.

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "firearm" means any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive. [The term "firearm" also includes the frame or receiver of any such weapon, and any firearm muffler or firearm silencer, and any destructive device.] [The term firearm does not include an antique firearm.] [The term firearm includes starter guns.] [The firearm need not be loaded.]

(B) The term "knowingly" means voluntarily and intentionally, and not because of mistake or accident.

(C) [*Insert applicable definition of possession from Instructions 2.10, 2.10A, and 2.11 here or as a separate instruction*].

(D) The term "in furtherance of" means that the firearm was possessed to advance or promote the crime charged in Count ____ . In deciding whether the firearm was possessed to advance or promote the crime charged in Count ___ , you may consider these factors: (1) whether the firearm was strategically located so that it was quickly and easily available for use; (2) whether the firearm was loaded; (3) the type of weapon; (4) whether possession of the firearm was legal; (5) the type of [crime of violence] [drug trafficking crime]; and (6) the time and circumstances under which the firearm was found. This list is not exhaustive.

[(3) The government need not prove that a particular firearm was possessed in furtherance of the [crime of violence] [drug trafficking crime]].

(4) 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 of these elements, then you must find the defendant not guilty of this charge.

Use Note

If aiding and abetting is involved, use Instruction 12.05 instead of Instruction 4.01.

Any fact that increases the maximum penalty or triggers a mandatory minimum penalty must be submitted to the jury and found beyond a reasonable doubt. The Inst. 12.03 offense of possessing a firearm in furtherance of a crime of violence or a drug trafficking crime provides for the following increased penalties that must be tried to a jury:

– if the firearm is brandished – § 924(c)(1)(A)(ii) (minimum penalty increased to 7 years of imprisonment)

– if the firearm is discharged – § 924(c)(1)(A)(iii) (minimum penalty increased to 10 years of imprisonment)

– if the firearm possessed by a person convicted of a violation of this subsection is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon – § 924(c)(1)(B)(i) (minimum penalty increased to 10 years of imprisonment)

– if the firearm possessed by a person convicted of a violation of this subsection is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler – § 924(c)(1)(B)(ii) (minimum penalty increased to 30 years of imprisonment)

– if the firearm possessed by a person convicted of a violation of this subsection occurs after a prior conviction under this subsection has become final and the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler – § 924(c)(1)(C) (minimum penalty increased to imprisonment for life)

– if the defendant, in furtherance of any such crime of violence or drug trafficking crime, possessed armor piercing ammunition – § 924(c)(5)(A) (minimum penalty increased to 15 years of imprisonment)

– if the defendant possessed armor piercing ammunition in furtherance of any crime of violence or drug trafficking crime and death resulted from the use of such ammunition and the killing was murder – § 924(c)(5)(B)(i) (penalty increased to any term of years or life)

– if the defendant possessed armor piercing ammunition in furtherance of any crime of violence or drug trafficking crime and death resulted from the use of such ammunition and the killing was manslaughter – § 924(c)(5)(B)(ii) (penalty increased as provided in § 1112)

If the prosecution is based on a violation of § 924(c) involving an increased penalty, the Committee recommends that the court give an instruction like Insts. 14.07(A) or (B) and use a special verdict form like those following Instructions 14.07(A) and (B).

The Committee did not draft instructions specifically to cover subsections (c)(1)(A)(ii) (brandishing a firearm) or (c)(1)(A)(iii) (discharging a firearm), but the pattern instructions can be easily modified to fit these provisions.

In paragraph (2)(A), the four bracketed sentences should be used only if relevant.

The bracketed sentence in paragraph (3) should be used only if raised by the facts.

Brackets indicate options for the judge. Brackets with italics are notes to the court.

Committee Commentary Instruction 12.03
(current through May 1, 2025)

Title 18 U.S.C. § 924(c)(1)(A)(i) provides that "any person who, during and in relation to any crime of violence or drug trafficking crime ... for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall [be sentenced to the mandatory terms provided in the statute]."

This instruction is designed to cover the possession-in-furtherance offense described last in subsection (c)(1)(A)(i), *i.e.*, the offense described by the language: "any person ... who, in furtherance of any such crime, possesses a firearm, shall [be sentenced to the mandatory terms provided in the statute]." Congress added this language to the statute in 1998 to respond to the *Bailey* holding that the term use did not include mere possession. See Public Law 105-386, November, 1998. In *Bailey*, the Court stated that, "Had Congress intended possession alone to trigger liability under § 924(c)(1), it easily could have so provided." Bailey v. United States, 516 U.S. 137, 143 (1995). Congress added the possession-in-furtherance offense to insure that possession triggered the mandatory sentences of § 924(c)(1)(A)(i).

If aiding and abetting is involved, use Instruction 12.05 along with this instruction.

This instruction assumes that the defendant is charged in the same indictment with both the predicate crime of violence or drug trafficking crime and the § 924(c) firearms crime, and that the evidence of both is sufficient. The Committee took this approach because the underlying crime and the firearms crime are usually charged in the same indictment. *See generally* United States v. Davis, 139 S. Ct. 2319, 2327, 2337-2338 (2019) (all justices agree that § 924(c) prosecutions are based on currently charged conduct rather than on a prior conviction). But the law does not require the two offenses to be charged together; indeed, the predicate crime may not ever be charged. *See* United States v. Smith, 182 F.3d 452, 457 (6th Cir. 1999)(§ 924(c) "does not even require that the [predicate] crime be charged; a fortiori, it does not require that [the defendant] be convicted."). So if the § 924(c) firearms count is charged separately, the instruction should be modified.

The definition of "firearm" in paragraph (2)(A) is based on the definition provided in the statute with no significant changes. *See* 18 U.S.C. § 921(a)(3). The last bracketed sentence stating that the firearm need not be loaded is based on United States v. Pannell, 1999 WL 685936 at 6 n.3, 1999 U.S. App. LEXIS 20629 at 17 n.3 (6th Cir. 1999) (unpublished) and United States

v. Malcuit, 1999 WL 238672 at 2, 1999 U.S. App. LEXIS 7387 at 5 (6th Cir. 1999) (unpublished), *both citing* United States v. Turner, 157 F.3d 552, 557 (8th Cir. 1998). *See also* United States v. Bandy, 239 F.3d 802, 805 (6th Cir. 2001) (quoting with approval other circuits' conclusions that firearm need not be loaded). In addition, the firearm need not be operable. *Id.*

In paragraph (2)(B), the definition of "knowingly" is based on United States v. Odom, 13 F.3d 949, 961 (6th Cir. 1994).

Paragraph (2)(C) of the instruction defines the term "possession" by reference to Instructions 2.10, 2.10A and 2.11. In United States v. Paige, 470 F.3d 603 (6th Cir. 2006), the court stated that possession in the context of § 924(c) "may be either actual or constructive and it need not be exclusive but may be joint." *Id.* at 610 (interior quotation and citation omitted). This definition is consistent with Instructions 2.10, 2.10A and 2.11.

To define "in furtherance of" in paragraph (2)(D), the Committee relied on United States v. Mackey, 265 F.3d 457 (6th Cir. 2001). The overall requirement that the firearm "advance or promote" the underlying crime is drawn from *Mackey*, 265 F.3d at 461, *quoting* H.R. Rep. No. 105-344 (1977). The first factor, whether the firearm was strategically located so that it is quickly and easily available for use, is also based on *Mackey*, 265 F.3d at 462, *citing* United States v. Feliz-Cordero, 859 F.2d 250, 254 (2d Cir. 1988), *overruled on other grounds by Bailey*, 516 U.S. 137. Factors (2) through (6) are based on the *Mackey* court's statement:

> Other factors that may be relevant to a determination of whether the weapon was possessed in furtherance of the crime include whether the gun was loaded, the type of weapon, the legality of its possession, the type of drug activity conducted, and the time and circumstances under which the firearm was found.

Mackey, 265 F.3d at 462, *citing* United States v. Ceballos-Torres, 218 F.3d 409, 414-15 (5th Cir. 2000). *See also* United States v. Steele, 919 F.3d 965, 970 (6th Cir. 2019) (*citing* United States v. Swafford, 385 F.3d 1026, 1029 (6th Cir. 2004)); United States v. Brown, 715 F.3d 985 (6th Cir. 2013); United States v. Gill, 685 F.3d 606 (6th Cir. 2012); United States v. Ham, 628 F.3d 801 (6th Cir. 2011).

The *Mackey* factors should not simply be added up but rather analyzed holistically; the absence of some factors does not mean that the evidence of possession-in-furtherance is insufficient. United States v. Maya, 966 F.3d 493, 501 (6th Cir. 2020). The in-furtherance-of element depends on the defendant's intent to possess the firearm to aid drug trafficking, and this element may be proved by evidence the defendant possessed a firearm to protect drug proceeds alone (but not drugs or drug transactions). *Maya*, 966 F.3d at 503. The *Maya* court also collected conflicting Sixth Circuit cases on whether the first *Mackey* factor (whether the firearm was "strategically located" so it was readily available for use) is required; the court noted that it was "skeptical of treating this factor as an absolute mandate" but declined to reconcile the cases because the facts in this case showed the firearm was strategically located. *Id.* at 502.

In United States v. Frederick, 406 F.3d 754, 759 (6th Cir. 2005), the court approved an instruction stating that the "in furtherance of" element was met if the defendant "acquired the gun by trading drugs or drug proceeds for the gun." The *Frederick* court distinguished United States v. Lawrence, 308 F.3d 623, 631 (6th Cir. 2002), which held that the "in furtherance of"

element was not met if the defendant acquired the gun as an unsolicited gift. *Frederick*, 406 F.3d at 764.

Generally, the mere possession of a firearm on the same premises as a drug transaction would not, without a showing of a connection between the two, sustain a § 924(c) conviction. *Mackey*, 265 F.3d at 462. The court further explained, "[W]e conclude that 'in furtherance of' differs from 'during and in relation to' and requires the government to prove a defendant used the firearm with greater participation in the commission of the crime or that the firearm's presence in the vicinity of the crime was something more than mere chance or coincidence. Although the differences between the standards are 'subtle' and 'somewhat elusive,' they exist nonetheless." United States v. Combs, 369 F.3d 925, 933 (6th Cir. 2004) (footnotes omitted); *see also* United States v. Maya, 966 F.3d 493, 500 (6th Cir. 2020).

Paragraph (3) recognizes that as a general rule, the jury need not decide which specific gun a defendant possessed. *See* United States v. Steele, 919 F.3d 965, 973 (6th Cir. 2019). The court stated there may be exceptions to this general rule, *id., citing* United States v. Correa-Ventura, 6 F.3d 1070, 1087 (5th Cir. 1993)), and concluded that the district court appropriately addressed the concerns underlying the exceptions by giving the following instruction:

> The Government does not have to prove that a particular firearm was possessed in furtherance of a drug trafficking crime, but in order to return a guilty verdict, all 12 of you must unanimously agree as to at least one specific occurrence on which [defendant] personally possessed a firearm in furtherance of a conspiracy to distribute a controlled substance.

The Sixth Circuit characterized this instruction as "proper" and not plain error. *Steele* at 973.

Conviction on the predicate offense is not required. United States v. Smith, *supra* at 458 ("We also hold that § 924(c) does not require a conviction for the predicate offense."); United States v. Ospina, 18 F.3d 1332, 1335-1336 (6th Cir.1994) (mandatory sentence of § 924(c)(1) can be imposed in absence of conviction on underlying drug offense), *citing, inter alia,* United States v. Hill, 971 F.2d 1461, 1467 (10th Cir. 1992) ("[A] conviction on an underlying drug trafficking offense is not a prerequisite to a substantive 924(c) conviction."). As *Smith, supra* indicates, the § 924(c) conviction can stand even if the jury acquits the defendant on the predicate crime of violence or drug trafficking. However, the § 924(c) conviction cannot stand if the conviction on the predicate crime is declared void for lack of jurisdiction. United States v. Wang, 222 F.3d 234, 240-41 (6th Cir. 2000) (§ 924(c) conviction must be reversed because underlying Hobbs Act robbery charge had no effect on interstate commerce and therefor did not qualify as a crime that could be prosecuted in federal court).

In Rosemond v. United States, 134 S. Ct. 1240 (2014), the Court vacated a conviction for using or carrying under § 924(c) based on aiding and abetting because of error in the jury instructions. In the wake of *Rosemond*, the Sixth Circuit reversed a § 924(c) conviction, finding a jury instruction using paragraph (2)(C) of Instruction 4.01 Aiding and Abetting to be plain error. The court explained, "*Rosemond* clarifies that intent must go to the *entire crime* – that [defendant] intended to aid in an *armed* bank robbery." United States v. Henry, 2015 WL 4774558, at *2, (6th Cir. Aug. 14, 2015) (italics in original, *citing Rosemond*, 134 S. Ct. at 1248, 1251). *See also* United States v. Richardson, 2015 WL 4174809, at *14-15 (6th Cir. July 13,

2015) (jury instruction was error but harmless). New Instruction 12.05 Aiding and Abetting Possession of a Firearm in Furtherance of a Crime of Violence or Drug Trafficking Crime responds to these cases and should be used in conjunction with Inst. 12.03 when the charge is based on accomplice liability.

Any fact that increases a mandatory minimum sentence constitutes an element of the crime and must be proved to the jury beyond a reasonable doubt. Alleyne v. United States, 133 S. Ct. 2151 (2013), citing Apprendi v. New Jersey, 530 U.S. 466 (2000) and overuling Harris v. United States, 536 U.S. 545 (2002). In *Alleyne*, the Court held that because the determination of whether the defendant "brandished" the firearm under § 924(c)(1)(A)(i) increased the mandatory minimum imprisonment from 5 years to 7 years, that fact had to be submitted to the jury and proved beyond a reasonable doubt. *Alleyne*, 133 S. Ct. at 2160. Thus, the activities of brandishing and discharge must be submitted to the jury and proved beyond a reasonable doubt.

In addition, the type of firearm must be proved to the trier of fact beyond a reasonable doubt. Castillo v. United States, 530 U.S. 120 (2000). The type of firearm involved, *i.e*, a "short-barreled rifle, short-barreled shotgun or semiautomatic assault weapon" under subsection 924(c)(1)(B)(i); or "a machinegun or a destructive device, or . . . [a firearm] equipped with a firearm silencer or firearm muffler" under subsection 924(c)(1)(B)(ii), is an element of the offense and must be proved beyond a reasonable doubt to the trier of fact. Castillo v. United States, *supra*. *Castillo*, which interpreted the statute, was followed in the Sixth Circuit by United States v. Harris, 397 F.3d 404 (6th Cir. 2005), which reached the same conclusion based on Sixth Amendment grounds.

12.04 AIDING AND ABETTING USING OR CARRYING A FIREARM DURING AND IN RELATION TO A CRIME OF VIOLENCE OR DRUG TRAFFICKING CRIME (18 U.S.C. §§ 924(c)(1)(A)(i) and 2)

(1) For you to find _____ guilty of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime], it is not necessary for you to find that he personally committed the crime. You may also find him guilty if he intentionally helped [or encouraged] someone else to commit the crime. A person who does this is called an aider and abettor.

(2) But for you to find _____ guilty of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime] as an aider and abettor, 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 crime of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime] was committed.
>
> (B) Second, that the defendant helped to commit [or encouraged someone else to commit] the crime of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime].
>
> (C) And third, that the defendant intended to help commit [or encourage] the crime of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime]. The defendant intended to aid and abet the crime of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime] if he had advance knowledge that an accomplice would use or carry a firearm during the commission of a [crime of violence] [drug trafficking crime]. Advance knowledge means knowledge at a time the defendant can attempt to alter the plan or withdraw from the enterprise. Knowledge of the firearm may, but does not have to, exist before the underlying crime is begun. [It is sufficient if the defendant gained the knowledge in the midst of the underlying crime, as long as the defendant chose to continue to participate in the crime and had a realistic opportunity to withdraw. You may, but need not, infer that the defendant had sufficient foreknowledge if you find that the defendant chose to continue his participation in the crime after the defendant knew an accomplice was using or carrying a firearm.]

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you cannot find the defendant guilty of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime] as an aider and abettor.

Use Note

If aiding and abetting the offense of Using or Carrying a Firearm During and in Relation to a Crime of Violence or Drug Trafficking Crime (see Instruction 12.02) is involved, use this instruction instead of Instruction 4.01.

In paragraph (2)(C), the two bracketed sentences at the end of the paragraph should be used only if the evidence suggests that the defendant gained knowledge of the firearm in the midst of the underlying crime.

The Committee did not draft instructions specifically to cover subsections (c)(1)(A)(ii) (brandishing a firearm) or (c)(1)(A)(iii) (discharging a firearm), but the pattern instructions can be easily modified to fit these provisions.

Committee Commentary
(current through May 1, 2025)

In Rosemond v. United States, 134 S. Ct. 1240 (2014), the Court vacated a conviction for using or carrying under § 924(c) based on aiding and abetting because of error in the jury instructions. In the wake of *Rosemond*, the Sixth Circuit reversed a § 924(c) conviction, finding a jury instruction using paragraph (2)(C) in Instruction 4.01 Aiding and Abetting to be plain error. The court explained, "*Rosemond* clarifies that intent must go to the *entire crime* – that [defendant] intended to aid in an *armed* bank robbery." United States v. Henry, 2015 WL 4774558, at *2, (6th Cir. Aug. 14, 2015) (italics in original, *citing Rosemond*, 134 S. Ct. at 1248, 1251). *See also* United States v. Richardson, 2015 WL 4174809, at *14-15 (6th Cir. July 13, 2015) (jury instruction was error but harmless). This new instruction, 12.04 Aiding and Abetting Using or Carrying a Firearm During and in Relation to a Crime of Violence or Drug Trafficking Crime, responds to these cases and should be used in conjunction with Instruction 12.02 Using or Carrying a Firearm when the charge is based on accomplice liability.

12.05 AIDING AND ABETTING POSSESSION OF A FIREARM IN FURTHERANCE OF A CRIME OF VIOLENCE OR DRUG TRAFFICKING CRIME (18 U.S.C. §§ 924(c)(1)(A)(i) and 2)

(1) For you to find _____ guilty of possessing a firearm in furtherance of a [crime of violence] [drug trafficking crime], it is not necessary for you to find that he personally committed the crime. You may also find him guilty if he intentionally helped [or encouraged] someone else to commit the crime. A person who does this is called an aider and abettor.

(2) But for you to find _____ guilty of possessing a firearm in furtherance of a [crime of violence] [drug trafficking crime] as an aider and abettor, 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 crime of possessing a firearm in furtherance of a [crime of violence] [drug trafficking crime] was committed.

(B) Second, that the defendant helped to commit [or encouraged someone else to commit] the crime of possessing a firearm in furtherance of a [crime of violence] [drug trafficking crime].

(C) And third, that the defendant intended to help commit [or encourage] the crime of possessing a firearm in furtherance of a [crime of violence] [drug trafficking crime]. The defendant intended to aid and abet the crime of possessing a firearm in furtherance of a [crime of violence] [drug trafficking crime] if he had advance knowledge that an accomplice would possess a firearm during the commission of a [crime of violence] [drug trafficking crime]. Advance knowledge means knowledge at a time the defendant can attempt to alter the plan or withdraw from the enterprise. Knowledge of the firearm may, but does not have to, exist before the underlying crime is begun. [It is sufficient if the defendant gained the knowledge in the midst of the underlying crime, as long as the defendant chose to continue to participate in the crime and had a realistic opportunity to withdraw. You may, but need not, infer that the defendant had sufficient foreknowledge if you find that the defendant chose to continue his participation in the crime after the defendant knew an accomplice possessed a firearm.]

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you cannot find the defendant guilty of possessing a firearm in furtherance of a [crime of violence] [drug trafficking crime] as an aider and abettor.

Use Note

If aiding and abetting the offense of Possessing a Firearm in Furtherance of a Crime of Violence or Drug Trafficking Crime (see Instruction 12.03) is involved, use this instruction instead of Instruction 4.01.

In paragraph (2)(C), the two bracketed sentences at the end of the paragraph should be used only if the evidence suggests that the defendant gained knowledge of the firearm in the midst of the underlying crime.

The Committee did not draft instructions specifically to cover subsections (c)(1)(A)(ii) (brandishing a firearm) or (c)(1)(A)(iii) (discharging a firearm), but the pattern instructions can be easily modified to fit these provisions.

Committee Commentary
(current through May 1, 2025)

In Rosemond v. United States, 134 S. Ct. 1240 (2014), the Court vacated a conviction for using or carrying under § 924(c) based on aiding and abetting because of error in the jury instructions. In the wake of *Rosemond*, the Sixth Circuit reversed a § 924(c) conviction, finding a jury instruction using paragraph (2)(C) in Instruction 4.01 Aiding and Abetting to be plain error. The court explained, "*Rosemond* clarifies that intent must go to the *entire crime* – that [defendant] intended to aid in an *armed* bank robbery." United States v. Henry, 2015 WL 4774558, at *2, (6th Cir. Aug. 14, 2015) (italics in original, *citing Rosemond*, 134 S. Ct. at 1248, 1251). *See also* United States v. Richardson, 2015 WL 4174809, at *14-15 (6th Cir. July 13, 2015) (jury instruction was error but harmless). This new instruction, 12.05 Aiding and Abetting Possession of a Firearm in Furtherance of a Crime of Violence or Drug Trafficking Crime, responds to these cases and should be used in conjunction with Inst. 12.03 Possessing a Firearm in Furtherance of a Crime of Violence or Drug Trafficking Crime when the charge is based on accomplice liability.

Chapter 13.00

FALSE STATEMENTS TO THE UNITED STATES GOVERNMENT

Table of Instructions

Introduction to False Statements Instructions
(current through May 1, 2025)

Title 18 U.S.C. § 1001 provides:

§ 1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
(2) makes any materially false, fictitious, or fraudulent statement or representation; or
(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to--

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or
(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

The pattern instructions cover the three subsections of 18 U.S.C. § 1001(a) with three elements instructions:

13.01 Concealing a Material Fact in a Matter within the Jurisdiction of the United States Government (18 U.S.C. § 1001(a)(1))
13.02 Making a False Statement in a Matter within the Jurisdiction of the United States Government (18 U.S.C. § 1001(a)(2))
13.03 Making or Using a False Writing in a Matter within the Jurisdiction of the United States Government (18 U.S.C. § 1001(a)(3))

The Committee defined the crime in three instructions because it is the most effective way to describe the three subsections, (a)(1), (a)(2), and (a)(3). The Sixth Circuit has made clear that these subsections are stated in the disjunctive and constitute alternative means of committing

a single crime. United States v. Hixon, 987 F.2d 1261, 1265 (6th Cir. 1993) (construing pre-1996 version of statute, but disjunctive language was carried forward in 1996 revision); United States v. Zalman, 870 F.2d 1047, 1054 (6th Cir. 1989) (same).

13.01 CONCEALING A MATERIAL FACT IN A MATTER WITHIN THE JURISDICTION OF THE UNITED STATES GOVERNMENT (18 U.S.C. § 1001(a)(1))

(1) The defendant is charged with [falsifying] [concealing] [covering up] a material fact in a matter within the jurisdiction of the United States government. For you to find the defendant guilty of this offense, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant [falsified] [concealed] [covered up] a fact that he had a duty to disclose;

(B) Second, that the fact was material;

(C) Third, that the defendant [falsified] [concealed] [covered up] the fact by using a trick, scheme, or device;

(D) Fourth, that the defendant acted knowingly and willfully; and

(E) Fifth, that the fact pertained to a matter within the jurisdiction of the [executive] [legislative] [judicial] branch of the United States government.

(2) Now I will give you more detailed instructions on some of these terms.

(A) A "material" fact or matter is one that has the natural tendency to influence or is capable of influencing a [decision] [function] of [*insert name of government entity*].

(B) The term "using a trick, scheme, or device" means acting in a way intended to deceive others.

(C) A defendant acts "knowingly and willfully" if the defendant knows that he [falsified] [concealed] [covered up] a fact that he had a duty to disclose and knows that his conduct is unlawful. It is not necessary for the government to prove that the defendant was aware of the specific provision of the law that he is charged with violating.

(D) A matter is "within the jurisdiction of the [executive] [legislative] [judicial] branch of the United States government" if [*insert name of government entity*] has the power to exercise authority in that matter.

(3) [It is not necessary that the government prove [that the defendant knew the matter was within the jurisdiction of the United States government] [that the statements were made directly to, or even received by, the United States government]].

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

Use Note

The court may need to modify the language if the charge is based on aiding and abetting or causing under 18 U.S.C. § 2.

Brackets indicate options for the court. Brackets with italics are notes to the court.

The provisions of paragraph (3) should be used only if relevant.

Committee Commentary Instruction 13.01
(current through May 1, 2025)

This instruction covers violations of § 1001 listed in subsection (a)(1) which prohibits falsifying, concealing or covering up a material fact.

Paragraph (1), which sets out the five elements for violating § 1001 by concealment, is based on United States v. Rogers, 118 F.3d 466, 470 (6th Cir. 1997) (*citing* United States v. Steele, 933 F.2d 1313, 1318-19 (6th Cir. 1991) (en banc)). For the legal duty element of concealment, the Committee relied on United States v. Gibson, 409 F.3d 325, 332 (6th Cir. 2005) (*citing* United States v. Zalman, 870 F.2d 1047, 1055 (6th Cir. 1989) and United States v. Curran, 20 F.3d 560, 566-67 (3d Cir. 1994)). In paragraph (1)(E), the term "pertained to" is from *Steele*, *supra* at 1319, and the phrase "a matter within the jurisdiction of the [executive] [legislative] [judicial] branch of" the United States government is based on the language of § 1001(a).

The basic definition of "material" in paragraph (2)(A) is based on United States v. White, 270 F.3d 356, 365 (6th Cir. 2001) (*citing* United States v. Lutz, 154 F.3d 581, 588 (6th Cir. 1998)). The bracketed terms "decision" and "function" are drawn from United States v. Dedhia, 134 F.3d 802, 806 (6th Cir. 1998). The term "function" may be appropriate, for example, when the defendant is charged with making a false statement to a federal law enforcement official conducting an investigation. The use of brackets for the name of the government entity is based on Tenth Circuit Pattern Instruction Inst. 2.46.

The definition of "using a trick, scheme, or device" in paragraph (2)(B) as requiring an intent to deceive is based on United States v. Geisen, 612 F.3d 471, 487 (6th Cir. 2010).

As to the definition of "knowingly" in paragraph (2)(C), the government must prove that the defendant knew the statement was false. United States v. Geisen, 612 F.3d 471, 487 (6th Cir. 2010); United States v. Brown, 151 F.3d 476, 484 (6th Cir. 1998); United States v. Arnous, 122 F.3d 321, 322-23 (6th Cir. 1997). The government need not prove that the defendant made the statement with knowledge of federal agency jurisdiction. United States v. Yermian, 468 U.S. 63 (1984).

For the term "willfully" in paragraph (2)(C), aside from the discussion of knowledge of federal jurisdiction in *Yermian, supra*, the Supreme Court has not defined the term in the context

of § 1001. While considering the sufficiency of the evidence under Rule 29, the Sixth Circuit applied a standard indicating that "willfully" for § 1001 requires the government to prove that the defendant acted with knowledge that his conduct was unlawful. United States v. Emmons, 8 F.4th 454, 477-479 (6th Cir. 2021), *citing* Bryan v. United States, 524 U.S. 184, 191-192, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998). As background, the district court in *Emmons* instructed the jury as follows:

> An act is done "knowingly and willfully" if the Defendant knew that he was causing the . . . Campaign to file a statement that was false, fictitious, or fraudulent, and not because of mistake or some other innocent reason.
>
> It is not necessary for the Government to prove that the Defendant was aware of the specific provision of the law that he is charged with violating. Rather, it is sufficient for the Defendant to act knowing that some part of his course of conduct is unlawful, even if he does not know precisely which law or regulation makes it so.

United State v. Lundergan, Criminal No. 5:18-cr-00106-GFVT-MAS, jury instructions on Making a False Statement in a Matter within the Jurisdiction of the United States Government, 18 U.S.C. § 1001(a)(2), Nos. 20-5869, 20-5890. In the instruction, the two sentences in the second paragraph are used in reverse order.

The definition of "within the jurisdiction of the [executive] [legislative] [judicial] branch of the United States government" in paragraph (2)(D) is based on United States v. Rodgers, 466 U.S. 475 (1984). The Court explained, "A department or agency has jurisdiction . . . when it has the power to exercise authority in a particular situation. . . . [T]he phrase 'within the jurisdiction' merely differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body." *Id.* at 479 (citation omitted). *See also* United States v. Gibson, 881 F.2d 318, 322 (6th Cir. 1989) (quoting this definition from *Rodgers*). The Sixth Circuit has further explained that, "'[W]hen the federal agency has power to exercise its authority, even if the federal agency does not have complete control over the matter,' the matter is within the agency's jurisdiction." United States v. Grenier, 513 F.3d 632, 638 (6th Cir. 2008) (*quoting* United States v. Shafer, 199 F.3d 826, 829 (6th Cir. 1999)). The term "[executive] [legislative] [judicial] branch" was substituted for the term "department or agency" to reflect the statutory amendment in 1996.

Paragraph (3) lists some but not all items the government is not required to prove. Many pattern instructions include such a provision. These provisions should be used only if relevant. The bracketed provision stating that the government need not prove the defendant knew the matter was within the jurisdiction of the federal government is based on United States v. Yermian, 468 U.S. 63 (1984) and United States v. Gibson, 881 F.2d 318, 323 (6th Cir. 1989) (*citing* United States v. Lewis, 587 F.2d 854 (6th Cir. 1978)). The bracketed provision stating that the false statement need not be made directly to, or even received by, the United States government is based on United States v. Lutz, 154 F.3d 581, 587 (6th Cir. 1998) (*quoting* United States v. Gibson, 881 F.2d 318, 322 (6th Cir. 1989)).

Intent and knowledge need not be proved directly. Pattern Instruction 2.08 Inferring Required Mental State states this principle and should be given in appropriate cases. In addition, Pattern Instruction 2.09 Deliberate Ignorance explains one approach to proving knowledge under § 1001. *See, e.g.*, United States v. Brown, 151 F.3d 476, 484 (6th Cir. 1998) (*quoting* United States v. Arnous, 122 F.3d 321, 323 (6th Cir. 1997) (conviction affirmed based on evidence defendant deliberately ignored a high probability that food stamp application contained a material false statement)).

13.02 MAKING A FALSE STATEMENT IN A MATTER WITHIN THE JURISDICTION OF THE UNITED STATES GOVERNMENT (18 U.S.C. § 1001(a)(2))

(1) The defendant is charged with making a false [statement] [representation] in a matter within the jurisdiction of the United States government. For you to find the defendant guilty of this offense, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant made a [statement] [representation];

(B) Second, that the statement was [false] [fictitious] [fraudulent];

(C) Third, that the [statement] [representation] was material;

(D) Fourth, that the defendant acted knowingly and willfully; and

(E) Fifth, that the statement pertained to a matter within the jurisdiction of the [executive] [legislative] [judicial] branch of the United States government.

(2) Now I will give you more detailed instructions on some of these terms.

(A) A statement is "false" or "fictitious" if it was untrue when it was made, and the defendant knew it was untrue at that time. A statement is "fraudulent" if it was untrue when it was made, the defendant knew it was untrue at that time, and the defendant intended to deceive.

(B) A "material" statement or representation is one that has the natural tendency to influence or is capable of influencing a [decision] [function] of [*insert name of government entity*].

(C) A defendant acts "knowingly and willfully" if the defendant knows that his statement is [false] [fictitious] [fraudulent] and knows that his conduct is unlawful. It is not necessary for the government to prove that the defendant was aware of the specific provision of the law that he is charged with violating.

(D) A matter is "within the jurisdiction of the [executive] [legislative] [judicial] branch of the United States government" if [*insert name of government entity*] has the power to exercise authority in that matter.

(3) [It is not necessary that the government prove [that the defendant knew the matter was within the jurisdiction of the United States government] [that the statements were made directly to, or even received by, the United States government]].

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

Use Note

The court may need to modify the language if the charge is based on aiding and abetting or causing under 18 U.S.C. § 2.

Brackets indicate options for the court. Brackets with italics are notes to the court.

The provisions of paragraph (3) should be used only if relevant.

Committee Commentary Instruction 13.02
(current through May 1, 2025)

This instruction covers violations of § 1001 listed in subsection (a)(2) based on making a false statement to the United States government.

Paragraph (1), which characterizes the false statement violation of § 1001 as having five elements, is supported by United States v. Hills, 27 F.4th 1155, 1186 (6th Cir. 2022) (recounting five elements and citing Inst. 13.02 with approval). *See also* United States v. Geisen, 612 F.3d 471, 489 (6th Cir. 2010); United States v. Lutz, 154 F.3d 581, 587 (6th Cir. 1998); and United States v. Rogers, 118 F.3d 466, 470 (6th Cir. 1997) (*citing* United States v. Steele, 933 F.2d 1313, 1318-1319 (6th Cir. 1991) (en banc)). The Sixth Circuit has occasionally used a different formulation of the five elements. *See, e.g.,* United States v. Gatewood, 173 F.3d 983, 986 (6th Cir. 1999) (*citing* United States v. Hixon, 987 F.2d 1261, 1266 (6th Cir. 1993)). The Committee chose the formulation based on *Hills* and *Steele* because it is closer to the statutory language. In paragraph (1)(E), the phrase "the statement pertained to" is from *Steele*, *supra* at 1319, and the phrase "a matter within the jurisdiction of the [executive] [legislative] [judicial] branch of" the United States government is based on the language of § 1001(a).

In paragraph (2)(A), the definitions of false, fictitious and fraudulent are, in the absence of Sixth Circuit authority, based on the Seventh Circuit Pattern Instructions for § 1001. The definition of "false or fictitious" is substantially verbatim from the Seventh Circuit definition. The definition of "fraudulent" is based on the Seventh Circuit instruction; the Sixth Circuit implicitly approved the language in United States v. Brown, 151 F.3d 476, 484 (6th Cir. 1998) (*quoting* United States v. Shah, 44 F.3d 285, 289 (5th Cir. 1995)).

The basic definition of "material" in paragraph (2)(B) is based on United States v. White, 270 F.3d 356, 365 (6th Cir. 2001) (*citing* United States v. Lutz, 154 F.3d 581, 588 (6th Cir. 1998)). The bracketed terms "decision" and "function" are drawn from United States v. Dedhia, 134 F.3d 802, 806 (6th Cir. 1998). The term "function" may be appropriate, for example, when the defendant is charged with making a false statement to a federal law enforcement official conducting an investigation. The use of brackets for the name of the government entity is based on Tenth Circuit Pattern Instruction Inst. 2.46.

As to the definition of "knowingly" in paragraph (2)(C), no Supreme Court or Sixth

Circuit cases define this term in the context of § 1001. In the absence of specific authority, the Committee relied on the definition of knowingly given in United States v. McGuire, 744 F.2d 1197, 1201 (6th Cir. 1984) (prosecution under 18 U.S.C. § 1005 for making a false entry in a bank report). Beyond the general definition of knowingly, case law on § 1001 does establish particular elements to which the term "knowingly" applies. The government must prove that the defendant knew the statement was false. United States v. Brown, 151 F.3d 476, 484 (6th Cir. 1998); United States v. Arnous, 122 F.3d 321, 322-23 (6th Cir. 1997). The government need not prove that the defendant made the statement with knowledge of federal agency jurisdiction. United States v. Yermian, 468 U.S. 63 (1984).

For the term "willfully" in paragraph (2)(C), aside from the discussion of knowledge of federal jurisdiction in *Yermian, supra*, the Supreme Court has not defined the term in the context of § 1001. While considering the sufficiency of the evidence under Rule 29, the Sixth Circuit applied a standard indicating that "willfully" for § 1001 requires the government to prove that the defendant acted with knowledge that his conduct was unlawful. United States v. Emmons, 8 F.4th 454, 477-479 (6th Cir. 2021), *citing* Bryan v. United States, 524 U.S. 184, 191-192, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998). As background, the district court in *Emmons* instructed the jury as follows:

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United State v. Lundergan, Criminal No. 5:18-cr-00106-GFVT-MAS, jury instructions on Making a False Statement in a Matter within the Jurisdiction of the United States Government, 18 U.S.C. § 1001(a)(2), Nos. 20-5869, 20-5890. In the instruction, the two sentences in the second paragraph are used in reverse order.

The definition of "within the jurisdiction of the [executive] [legislative] [judicial] branch of the United States government" in paragraph (2)(D) is based on United States v. Rodgers, 466 U.S. 475 (1984). The Court explained, "A department or agency has jurisdiction . . . when it has the power to exercise authority in a particular situation. . . . [T]he phrase 'within the jurisdiction' merely differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body." *Id.* at 479 (citation omitted). *See also* United States v. Gibson, 881 F.2d 318, 322 (6th Cir. 1989) (quoting this definition from *Rodgers*). The Sixth Circuit has further explained that, "'[W]hen the federal agency has power to exercise its authority, even if the federal agency does not have complete control over the matter,' the matter is within the agency's jurisdiction." United States v. Grenier, 513 F.3d 632, 638 (6th Cir. 2008) (*quoting* United States v. Shafer, 199 F.3d 826, 829 (6th Cir. 1999)). The term "[executive] [legislative] [judicial] branch" was substituted for the term "department or agency" to reflect the

statutory amendment in 1996.

Paragraph (3) lists some but not all items the government is not required to prove. Many pattern instructions include such a provision. These provisions should be used only if relevant. The bracketed provision stating that the government need not prove the defendant knew the matter was within the jurisdiction of the federal government is based on United States v. Yermian, 468 U.S. 63 (1984) and United States v. Gibson, 881 F.2d 318, 323 (6th Cir. 1989) (*citing* United States v. Lewis, 587 F.2d 854 (6th Cir. 1978)). The bracketed provision stating that the false statement need not be made directly to, or even received by, the United States government is based on United States v. Lutz, 154 F.3d 581, 587 (6th Cir. 1998) (*quoting* United States v. Gibson, 881 F.2d 318, 322 (6th Cir. 1989)).

Sixth Circuit cases on falsity indicate that a conviction cannot be based on an ambiguous question where the response is not false on its face and may be literally and factually correct. United States v. Gatewood, 173 F.3d 983, 986 (6th Cir. 1999); United States v. Hixon, 987 F.2d 1261, 1267 (6th Cir. 1993) (*quoting* United States v. Gahagan, 881 F.2d 1380, 1383 (6th Cir. 1989) *and citing* United States v. Vesaas, 586 F.2d 101, 103 (8th Cir. 1978)). In addition, the false statement need not be express; an implied false statement can support a conviction. In United States v. Brown, *supra* at 484-85, the court affirmed a conviction on the basis that the use of a document makes the factual assertions necessarily implied from the statute, regulations and announced policies that created the document. The court explained, "While no case law is directly on point, we conclude that the body of law, in the aggregate, makes plain that implied falsity is a basis for a conviction." *Id*. at 485.

Oral and written statements are treated the same under § 1001. United States v. Steele, 933 F.2d 1313, 1319 n.4 (6th Cir. 1991) (en banc) (*citing* United States v. Bramblett, 348 U.S. 503 (1955)).

Intent and knowledge need not be proved directly. Pattern Instruction 2.08 Inferring Required Mental State states this principle and should be given in appropriate cases. In addition, Pattern Instruction 2.09 Deliberate Ignorance explains one approach to proving knowledge under § 1001. *See, e.g.*, United States v. Brown, 151 F.3d 476, 484 (6th Cir. 1998) (*quoting* United States v. Arnous, 122 F.3d 321, 323 (6th Cir. 1997) (conviction affirmed based on evidence defendant deliberately ignored a high probability that food stamp application contained a material false statement)).

13.03 MAKING OR USING A FALSE WRITING IN A MATTER WITHIN THE JURISDICTION OF THE UNITED STATES GOVERNMENT (18 U.S.C. § 1001(a)(3))

(1) The defendant is charged with making or using a false writing or document in a matter within the jurisdiction of the United States government. For you to find the defendant guilty of this offense, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant [made] [used] a false [writing] [document];

(B) Second, that the [writing] [document] contained a [statement] [entry] that was [false] [fictitious] [fraudulent];

(C) Third, that the [statement] [entry] was material;

(D) Fourth, that the defendant acted knowingly and willfully; and

(E) Fifth, that the [writing] [document] pertained to a matter within the jurisdiction of the [executive] [legislative] [judicial] branch of the United States government.

(2) Now I will give you more detailed instructions on some of these terms.

(A) A [statement] [entry] is "false" or "fictitious" if it was untrue when it was made, and the defendant knew it was untrue at that time. A statement is "fraudulent" if it was untrue when it was made, the defendant knew it was untrue at that time, and the defendant intended to deceive.

(B) A "material" statement or entry is one that has the natural tendency to influence or is capable of influencing a [decision] [function] of [*insert name of government entity*].

(C) A defendant acts "knowingly and willfully" if the defendant knows that his [writing] [document] contained a statement or entry that was [false] [fictitious] [fraudulent] and knows that his conduct is unlawful. It is not necessary for the government to prove that the defendant was aware of the specific provision of the law that he is charged with violating.

(D) A matter is "within the jurisdiction of the [executive] [legislative] [judicial] branch of the United States government" if [*insert name of government entity*] has the power to exercise authority in that matter.

(3) [It is not necessary that the government prove [that the defendant knew the matter was within the jurisdiction of the United States government] [that the statements were made directly to, or even received by, the United States government]].

(4) If you are convinced that the government has proved all of the elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of the elements, then

you must find the defendant not guilty of this charge.

Use Note

The court may need to modify the language if the charge is based on aiding and abetting or causing under 18 U.S.C. § 2.

Brackets indicate options for the court. Bracketed italics are notes to the court.

The provisions of paragraph (3) should be used only if relevant.

Committee Commentary Instruction 13.03
(current through May 1, 2025)

This instruction covers violations of § 1001 listed in subsection (a)(3) which prohibits making or using a false writing or document within the jurisdiction of the United States government.

In Paragraph (1), the five elements of the false writing offense are based on United States v. White, 492 F.3d 380, 396 (6th Cir. 2007) (*quoting* United States v. Raithatha, 385 F.3d 1013, 1022 (6th Cir. 2004), *vacated on other grounds*, 543 U.S. 1136 (2005)). *See also* United States v. Geisen, 612 F.3d 471, 489 (6th Cir. 2010). Some of the language used in *White* was modified to reflect the language of the statute more completely. In paragraph (1)(E), the term "pertained to" is drawn from United States v. Steele, 933 F.2d 1313, 1319 (6th Cir. 1991) (en banc), and the phrase "a matter within the jurisdiction of the [executive] [legislative] [judicial] branch of" the United States government is based on the language of § 1001(a).

In paragraph (2)(A), the definitions of false, fictitious and fraudulent are, in the absence of Sixth Circuit authority, based on the Seventh Circuit Pattern Instructions for § 1001. The definition of "false or fictitious" is substantially verbatim from the Seventh Circuit definition. The definition of "fraudulent" is based on the Seventh Circuit instruction; the Sixth Circuit implicitly approved the language in United States v. Brown, 151 F.3d 476, 484 (6th Cir. 1998) (*quoting* United States v. Shah, 44 F.3d 285, 289 (5th Cir. 1995)).

The basic definition of "material" in paragraph (2)(B) is based on United States v. White, 270 F.3d 356, 365 (6th Cir. 2001) (*citing* United States v. Lutz, 154 F.3d 581, 588 (6th Cir. 1998)). The bracketed terms "decision" and "function" are drawn from United States v. Dedhia, 134 F.3d 802, 806 (6th Cir. 1998). The term "function" may be appropriate, for example, when the defendant is charged with making a false statement to a federal law enforcement official conducting an investigation. The use of brackets for the name of the government entity is based on Tenth Circuit Pattern Instruction Inst. 2.46.

As to the definition of "knowingly" in paragraph (2)(C), no Supreme Court or Sixth Circuit cases define this term in the context of § 1001. In the absence of specific authority, the Committee relied on the definition of knowingly given in United States v. McGuire, 744 F.2d

1197, 1201 (6th Cir. 1984) (prosecution under 18 U.S.C. § 1005 for making a false entry in a bank report). Beyond the general definition of knowingly, case law on § 1001 does establish particular elements to which the term "knowingly" applies. The government must prove that the defendant knew the statement was false. United States v. Brown, 151 F.3d 476, 484 (6th Cir. 1998); United States v. Arnous, 122 F.3d 321, 322-23 (6th Cir. 1997). The government need not prove that the defendant made the statement with knowledge of federal agency jurisdiction. United States v. Yermian, 468 U.S. 63 (1984).

For the term "willfully," in paragraph (2)(C), aside from the discussion of knowledge of federal jurisdiction in *Yermian, supra*, the Supreme Court has not defined the term in the context of § 1001. While considering the sufficiency of the evidence under Rule 29, the Sixth Circuit applied a standard indicating that "willfully" for § 1001 requires the government to prove that the defendant acted with knowledge that his conduct was unlawful. United States v. Emmons, 8 F.4th 454, 477-479 (6th Cir. 2021), *citing* Bryan v. United States, 524 U.S. 184, 191-192, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998). As background, the district court in *Emmons* instructed the jury as follows:

> An act is done "knowingly and willfully" if the Defendant knew that he was causing the . . . Campaign to file a statement that was false, fictitious, or fraudulent, and not because of mistake or some other innocent reason.
>
> It is not necessary for the Government to prove that the Defendant was aware of the specific provision of the law that he is charged with violating. Rather, it is sufficient for the Defendant to act knowing that some part of his course of conduct is unlawful, even if he does not know precisely which law or regulation makes it so.

United State v. Lundergan, Criminal No. 5:18-cr-00106-GFVT-MAS, jury instructions on Making a False Statement in a Matter within the Jurisdiction of the United States Government, 18 U.S.C. § 1001(a)(2), Nos. 20-5869, 20-5890. In the instruction, the two sentences in the second paragraph are used in reverse order.

The definition of "within the jurisdiction of the [executive] [legislative] [judicial] branch of the United States government" in paragraph (2)(D) is based on United States v. Rodgers, 466 U.S. 475 (1984). The Court explained, "A department or agency has jurisdiction . . . when it has the power to exercise authority in a particular situation. . . . [T]he phrase 'within the jurisdiction' merely differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body." *Id.* at 479 (citation omitted). *See also* United States v. Gibson, 881 F.2d 318, 322 (6th Cir. 1989) (quoting this definition from *Rodgers*). The Sixth Circuit has further explained that, "'[W]hen the federal agency has power to exercise its authority, even if the federal agency does not have complete control over the matter,' the matter is within the agency's jurisdiction." United States v. Grenier, 513 F.3d 632, 638 (6th Cir. 2008) (*quoting* United States v. Shafer, 199 F.3d 826, 829 (6th Cir. 1999)). The term "[executive] [legislative] [judicial] branch" was substituted for the term "department or agency" to reflect the statutory amendment in 1996.

Paragraph (3) lists some but not all items the government is not required to prove. Many pattern instructions include such a provision. These provisions should be used only if relevant. The bracketed provision stating that the government need not prove the defendant knew the matter was within the jurisdiction of the federal government is based on United States v. Yermian, 468 U.S. 63 (1984) and United States v. Gibson, 881 F.2d 318, 323 (6th Cir. 1989) *citing* United States v. Lewis, 587 F.2d 854 (6th Cir. 1978). The bracketed provision stating that the false statement need not be made directly to, or even received by, the United States government is based on United States v. Lutz, 154 F.3d 581, 587 (6th Cir. 1998) *quoting* United States v. Gibson, 881 F.2d 318, 322 (6th Cir. 1989).

Oral and written statements are treated the same under § 1001. United States v. Steele, 933 F.2d 1313, 1319 n.4 (6th Cir. 1991) (en banc) *citing* United States v. Bramblett, 348 U.S. 503 (1955).

Sixth Circuit cases on falsity indicate that a conviction cannot be based on an ambiguous question where the response is not false on its face and may be literally and factually correct. United States v. Gatewood, 173 F.3d 983, 986 (6th Cir. 1999); United States v. Hixon, 987 F.2d 1261, 1267 (6th Cir. 1993) (*quoting* United States v. Gahagan, 881 F.2d 1380, 1383 (6th Cir. 1989) *and citing* United States v. Vesaas, 586 F.2d 101, 103 (8th Cir. 1978)). In addition, the false statement need not be express; an implied false statement can support a conviction. In United States v. Brown, 151 F.3d 476, 484-85 (6th Cir. 1998), the court affirmed a conviction on the basis that the use of a document makes the factual assertions necessarily implied from the statute, regulations and announced policies that created the document. The court explained, "While no case law is directly on point, we conclude that the body of law, in the aggregate, makes plain that implied falsity is a basis for a conviction." *Id*. at 485.

Intent and knowledge need not be proved directly. Pattern Instruction 2.08 Inferring Required Mental State states this principle and should be given in appropriate cases. In addition, Pattern Instruction 2.09 Deliberate Ignorance explains one approach to proving knowledge under § 1001. *See, e.g.*, United States v. Brown, *supra* at 484 (*quoting* United States v. Arnous, 122 F.3d 321, 323 (6th Cir. 1997) (conviction affirmed based on evidence defendant deliberately ignored a high probability that food stamp application contained a material false statement)).

Chapter 14.00

CONTROLLED SUBSTANCES OFFENSES

Table of Instructions

Introduction to Controlled Substance Elements Instructions

Chapter 14 includes elements instructions for selected controlled substances offenses based on the frequency of prosecution. The instructions cover the following:

– offenses codified in 21 U.S.C. § 841(a)(1)
  – Possession of a controlled substance with intent to distribute
  – Distribution of a controlled substance,
  – Dispensing or distribution of a controlled substance by a practitioner
  – Manufacture of a controlled substance
  – Manufacture of a controlled substance by a practitioner
– the offense codified in 21 U.S.C. § 844, possession of a controlled substance;
– one offense codified in 21 U.S.C. § 846, conspiracy; and
– the offense and sentence enhancement codified in 21 U.S.C. § 860(a), distribution of a controlled substance in or near schools or colleges.

In addition, this chapter includes three instructions to cover the jury's role in sentencing under Alleyne v. United States, 133 S. Ct. 2151 (2013) and Apprendi v. New Jersey, 530 U.S. 466 (2000) and special verdict forms for the jury.

Title 21 U.S.C. § 841(a)(1) provides, "[I]t shall be unlawful for any person knowingly or intentionally – (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ."

The instructions cover the most frequently prosecuted offenses under § 841(a)(1) as follows:

14.01 Possession of a Controlled Substance with Intent to Distribute (21 U.S.C. § 841(a)(1))

14.02A Distribution of a Controlled Substance (21 U.S.C. § 841(a)(1))

14.02B Dispensing or Distribution of a Controlled Substance by a Practitioner (21 U.S.C. § 841(a)(1))

14.03A Manufacture of a Controlled Substance (21 U.S.C. § 841(a)(1))

14.03B Manufacture of a Controlled Substance by a Practitioner (21 U.S.C. § 841(a)(1))

Section 844(a) provides, "It shall be unlawful for any person knowingly or intentionally to possess a controlled substance . . . ." This offense is covered by Instruction 14.04 Possession of a Controlled Substance (21 U.S.C. § 844).

Section 846 provides, "Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." The Committee did not draft

an instruction for attempted drug crimes because an instruction may be compiled by combining the substantive crime instructions in this chapter with the instructions in Chapter 5 Attempts. The conspiracy offense established by § 846 is covered in this chapter by Instruction 14.05 Conspiracy (21 U.S.C. § 846) because it has some features requiring treatment distinct from the conspiracy offenses covered in Chapter 3 Conspiracy.

Section 860(a) provides, "Any person who violates [§§ 841(a)(1) or 856] by distributing, possessing with intent to distribute, or manufacturing a controlled substance . . . within one thousand feet of [a school, playground or public housing facility], or within 100 feet of a [youth center, public swimming pool or video arcade facility] is . . . subject to . . . [increased] maximum punishment . . . ." The Committee drafted Instruction 14.06 Distribution in or near Schools or Colleges to cover the basic offense of distributing a controlled substance near a prohibited place. This instruction covers only the crime of distributing a controlled substance near a prohibited area; if the § 860(a) offense charged is not distributing but rather possessing with intent to distribute or manufacturing in the prohibited area, the instruction may be modified. If the underlying violation is based on § 856 rather than § 841, the instruction may be modified. If the charged conduct is based not on § 860(a) but on §§ 860(b) regarding second offenders or 860(c) regarding employing children, the instruction may be modified.

In addition, this chapter includes three instructions for cases where jury unanimity is required based on increased punishment.

Inst. 14.07A Unanimity Required – Determining Amount of Controlled Substance (§ 841) and Inst. 14.07B Unanimity Required – Determining Amount of Controlled Substance (§ 846) cover the amount of controlled substances when it increases the sentence. These two instructions explain the background to the jury, and special verdict forms are provided for the jury to work through and record its decisions.

Instruction 14.07C Unanimity Required – Determining Whether Death or Serious Bodily Injury Resulted for Distributing/Dispensing or Manufacturing (§ 841) covers cases requiring jury unanimity on whether death or serious bodily injury resulted from the distribution, dispensing, or manufacturing of a controlled substance, see § 841(b)(1)(A) - (C) and (b)(1)(E)(i) & (ii). This instruction explains the background to the jury and includes a special verdict form.

14.01 POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE (21 U.S.C. § 841(a)(1))

(1) The defendant is charged with the crime of possession of [*name controlled substance*] with intent to distribute. [*Name controlled substance*] is a controlled substance. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, the defendant knowingly [or intentionally] possessed [*name controlled substance*].

(B) Second, the defendant intended to distribute [*name controlled substance*].

(2) Now I will give you more detailed instructions on some of these terms.

(A) [*Insert applicable definition of possession from Instructions 2.10, 2.10A, and 2.11 here or as a separate instruction*].

(B) To prove that the defendant "knowingly" possessed the [*name controlled substance*], the defendant did not have to know that the substance was [*name controlled substance*]. It is enough that the defendant knew that it was some kind of controlled substance. Further, the defendant did not have to know how much [*name controlled substance*] he possessed. It is enough that the defendant knew that he possessed some quantity of [*name controlled substance*].

(C) The phrase "intended to distribute" means the defendant intended to deliver or transfer a controlled substance sometime in the future. [The term distribute includes the actual, constructive, or attempted transfer of a controlled substance.] [To distribute a controlled substance, there need not be an exchange of money.]

[(3) In determining whether the defendant had the intent to distribute, you may consider all the facts and circumstances shown by the evidence, including the defendant's words and actions. Intent to distribute can be inferred from the possession of a large quantity of drugs, too large for personal use alone. You may also consider the estimated street value of the drugs, the purity of the drugs, the manner in which the drugs were packaged, the presence or absence of a large amount of cash, the presence or absence of weapons, and the presence or absence of equipment used for the sale of drugs. The law does not require you to draw such an inference, but you may draw it.]

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

Use Note

The bracketed sentences in paragraph (2)(C) should be used only if relevant.

Optional paragraph (3) should be given only when a basis for inferring the defendant's intent to distribute has been admitted into evidence.

This instruction covers possession with intent to distribute; if the charges include increased penalties based on the amount of the controlled substance, see Inst. 14.07A Unanimity Required – Determining Amount of Controlled Substance (§ 841).

Committee Commentary Instruction 14.01
(current through May 1, 2025)

Title 21 U.S.C. § 841(a)(1) provides that except as authorized by that subchapter, "[I]t shall be unlawful for any person knowingly or intentionally-- (1) to . . . possess with intent to . . . distribute a controlled substance . . . ."

In paragraph (1), the second sentence recognizes that the court determines whether the substance the defendant is charged with possessing falls within the definition of a controlled substance under 21 U.S.C. § 812.

The list of elements in paragraph (1) is adapted from United States v. Russell, 595 F.3d 633, 645 (6th Cir. 2010) (*quoting* United States v. Coffee, 434 F.3d 887, 897 (6th Cir. 2006)).

Paragraph (1)(A), which requires that the defendant knowingly possessed a controlled substance, is based on Sixth Circuit case law. The instruction requires a mens rea of knowingly and then offers in brackets the option of adding an alternative mens rea of intentionally. As noted above, the statute states that the defendant must "knowingly or intentionally" possess a controlled substance. However, the Sixth Circuit often omits the optional term "intentionally" from the list of elements. *See, e.g.,* United States v. Russell, 595 F.3d 633, 645 (6th Cir. 2010) (*quoting* United States v. Coffee, 434 F.3d 887, 897 (6th Cir. 2006)) ("The elements of [possession with intent to distribute] are that the defendant: (1) knowingly, (2) possessed a controlled substance, (3) with intent to distribute it."). *See also* United States v. Jackson, 55 F.3d 1219, 1225 (6th Cir. 1995); United States v. Peters, 15 F.3d 540, 544 (6th Cir. 1994). Based on this case law, the basic instruction uses the term knowingly. This approach is consistent with the mens rea for possession generally, see Inst. 2.10A Actual Possession. The phrase "or intentionally" is provided in brackets as an option for inclusion based on the language in § 841(a) and for cases where the government used that phrase in the indictment.

In paragraph (2)(A), possession is defined by cross-reference to Pattern Instructions 2.10, 2.10A, and 2.11.

Paragraph (2)(B), which states that to act "knowingly," the defendant is not required to know the type or quantity of controlled substance involved, is based on United States v. Villarce, 323 F.3d 435, 439 (6th Cir. 2003) (*quoting* United States v. Garcia, 252 F.3d 838, 844 (6th Cir.

2001)). Knowledge that the defendant possessed "some type of controlled substance" is sufficient. United States v. Stapleton, 297 F. App'x 413, 426 (6th Cir. 2008) (unpublished) (*citing Villarce, supra*). Also, knowledge that the defendant possessed "some quantity" of the controlled substance is sufficient. *Villarce, supra* at 438 (italics omitted). This authority was not overruled by Alleyne v. United States, 133 S. Ct. 2151 (2013). United States v. Dado, 759 F.3d 550, 571 (6th Cir. 2014).

The definition of "intended to distribute" in paragraph (2)(C) is based on several sources. The terms deliver and transfer are drawn from the statute. The term "distribute" is defined as "to deliver . . . a controlled substance." § 802(11). The terms "deliver" and "delivery" are defined as "the actual, constructive, or attempted transfer of a controlled substance . . . ." § 802(8). In United States v. Vincent, 20 F.3d 229, 233 (6th Cir. 1994), the court used the term deliver and cited § 802(11). The phrase "sometime in the future" is based on United States v. Pope, 561 F.2d 663 at 670 (6th Cir. 1977) (holding that omission to instruct on intent-to-distribute element was plain error and suggesting that § 802(11) definition should be given). The first bracketed sentence is drawn from § 802(8), quoted *supra*. The second bracketed sentence, stating that distribution does not require an exchange of money, is based on United States v. Vincent, *supra* (citing United States v. Coady, 809 F.2d 119, 124 (1st Cir. 1987)). *Accord*, United States v. Campbell, 1995 WL 699614 (6th Cir. 1995) (unpublished).

The mens reas of knowledge and intent to distribute need not be proved directly. Instruction 2.08 Inferring Required Mental State states this principle and should be given in appropriate cases. In addition, Instruction 2.09 Deliberate Ignorance explains one approach to proving knowledge under § 841(a). *See, e.g., Stapleton, supra* at 427-28.

Paragraph (3) identifies specifically some circumstances the jury may consider and the inferences it may draw regarding the defendant's intent to distribute the controlled substance. The second sentence ("Intent to distribute can be inferred from the possession of a large quantity of drugs, too large for personal use alone.") is drawn verbatim from United States v. Jackson, 55 F.3d 1219, 1226 (6th Cir. 1995). The Sixth Circuit frequently cites the quantity of drugs as a basis for inferring intent to distribute. *See, e.g.*, United States v. Hill, 142 F.3d 305, 311 (6th Cir. 1998); United States United States v. Phibbs, 999 F.2d 1053, 1065-66 (6th Cir. 1993); United States v. Giles, 536 F.2d 136, 141 (6th Cir. 1976). The reference to the estimated street value is based on *Hill, supra*; United States v. Jackson, 55 F.3d 1219, 1226 (6th Cir. 1995); United States v. Vincent, 20 F.3d 229, 233 (6th Cir. 1994); and United States v. Dotson, 871 F.2d 1318, 1323 (6th Cir. 1989), *vacated in part on other grounds*, 895 F.2d 263 (6th Cir. 1990). The reference to purity of the drugs is based on *Vincent, supra*. The manner in which the controlled substance was packaged was approved in United States v. Coffee, 434 F.3d 887, 897 (6th Cir. 2006) and *Dotson, supra*. The presence or absence of a large amount of cash is based on United States v. Stewart, 69 F. App'x 213, 216 (6th Cir. 2003) (unpublished) and United States v. Wade, 1991 WL 158674, 1991 U.S. App Lexis 19418 at *5 (6th Cir. 1991) (unpublished). The presence or absence of weapons is based on *Coffee, supra*, and the presence or absence of equipment used for the sale of drugs is based on *Coffee, supra*; *Hill, supra* (noting presence of a scale, a blender, currency, razor blades and packaging materials); *Vincent, supra* (noting presence of hand scales suitable for weighing and measuring marijuana, growing lamps and a book describing how to grow marijuana); and *Dotson, supra*. In United States v. White, 932 F.2d 588, 590 (6th Cir.

1991), the court reversed a conviction based on, inter alia, insufficient evidence to support an inference of intent to distribute.

There is no requirement that the government prove that the defendant knew that the drugs he possessed were subject to federal regulation. United States v. Balint, 258 U.S. 250 (1922).

14.02A DISTRIBUTION OF A CONTROLLED SUBSTANCE (21 U.S.C. § 841(a)(1))

(1) The defendant is charged with the crime of distributing [*name controlled substance*]. [*Name controlled substance*] is a controlled substance. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) The defendant knowingly [or intentionally] distributed [*name controlled substance*]; and

(B) That the defendant knew at the time of distribution that the substance was a controlled substance.

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "distribute" means the defendant delivered or transferred a controlled substance. [The term distribute includes the actual, constructive, or attempted transfer of a controlled substance.] [The term distribute includes the sale of a controlled substance.]

(B) To prove that the defendant "knowingly" distributed the [*name controlled substance*], the defendant did not have to know that the substance was [*name controlled substance*]. It is enough that the defendant knew that it was some kind of controlled substance. Further, the defendant did not have to know how much [*name controlled substance*] he distributed. It is enough that the defendant knew that he distributed some quantity of a controlled substance.

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

Use Note

This instruction covers simple distributing of a controlled substance. If the defendant is a practitioner, use Inst. 14.02B Dispensing or Distribution of a Controlled Substance by a Practitioner.

If the charges include increased penalties based on the amount of the controlled substance, see also Inst. 14.07A Unanimity Required: Determining Amount of Controlled Substance (§ 841). If the conduct charged includes distributing with death or serious bodily injury resulting, see also Instruction 14.07C Unanimity Required: Determining Whether Death or Serious Bodily Injury Resulted.

If the first bracketed sentence in paragraph (2)(A) is given, the court should further define the terms actual, constructive, or attempted transfer. The terms actual and constructive are defined in the context of possession in Instructions 2.10 and 2.10A. The term attempt is defined

in Instruction 5.01.

Committee Commentary Instruction 14.02A
(current through May 1, 2025)

Title 21 U.S.C. § 841(a)(1) provides that except as authorized by that subchapter, "[I]t shall be unlawful for any person knowingly or intentionally-- (1) to . . . distribute . . . a controlled substance . . . ."

The list of elements in paragraph (1) is adapted from United States v. Harris, 293 F.3d 970, 974 (6th Cir. 2002).

In paragraph (1), the second sentence recognizes that the court determines whether the substance the defendant is charged with possessing falls within the definition of a controlled substance under 21 U.S.C. § 812.

In paragraph (1)(A), the requirement that the defendant "knowingly [or intentionally]" distributed a controlled substance is based on the statute and Sixth Circuit case law. The instruction requires a mens rea of knowingly, and then offers in brackets the option of adding an alternative mens rea of intentionally. As noted above, the statute states that the defendant must "knowingly or intentionally" distribute a controlled substance. However, as noted in the commentary to Instruction 14.01 on possession with intent to distribute, the Sixth Circuit often omits the optional term intentionally from the list of elements for that crime. Based on these cases construing the same statute, the instruction for distribution uses the term knowingly, and then provides the phrase "or intentionally" in brackets as an option for inclusion based on the language in § 841(a) and for cases where the government used that term in the indictment.

In paragraph (1)(B), the language requiring the defendant to know at the time of distribution that the substance was a controlled substance is based on *Harris, supra* and United States v. Gibbs, 182 F.3d 408 (6th Cir. 1999).

The definition of "distribute" in paragraph (2)(A) is based on several sources. The term "distribute" is defined as "to deliver . . . a controlled substance." § 802(11). The terms "deliver" and "delivery" are defined as "the actual, constructive, or attempted transfer of a controlled substance . . . ." § 802(8). In United States v. Vincent, 20 F.3d 229, 233 (6th Cir. 1994), the court used the term deliver and cited § 802(11). The first bracketed sentence is drawn from § 802(8), quoted *supra*. The second bracketed sentence, stating that distribution includes the sale of a controlled substance, is based on United States v. Robbs, 75 F. App'x 425, 431 (6th Cir. 2003) (unpublished).

Paragraph (2)(B), which states that to act "knowingly," the defendant is not required to know the type or quantity of controlled substance involved, is based on United States v. Villarce, 323 F.3d 435, 439 (6th Cir. 2003) (*quoting* United States v. Garcia, 252 F.3d 838, 844 (6th Cir. 2001)). Knowledge that the defendant distributed "some type of controlled substance" is sufficient. United States v. Stapleton, 297 F. App'x 413, 426 (6th Cir. 2008) (unpublished)

(*citing Villarce, supra*). Also, knowledge that the defendant distributed "some quantity" of the controlled substance is sufficient. *Villarce, supra* at 438 (italics omitted). This authority was not overruled by Alleyne v. United States, 133 S. Ct. 2151 (2013). United States v. Dado, 759 F.3d 550, 571 (6th Cir. 2014).

Knowledge need not be proved directly. Pattern Instruction 2.08 Inferring Required Mental State states this principle and should be given in appropriate cases. In addition, Pattern Instruction 2.09 Deliberate Ignorance explains one approach to proving knowledge under § 841(a). *See, e.g.*, United States v. Stapleton, 297 F. App'x 413, 427-28 (6th Cir. 2008) (unpublished). The Sixth Circuit has identified particular circumstances the jury may consider and the inferences it may draw regarding the defendant's knowing distribution of the controlled substance. This issue often arises in the context of the crime of possession with intent to distribute. For that crime, the Sixth Circuit frequently cites the quantity of drugs as a basis for inferring intent to distribute. *See, e.g.*, United States v. Hill, 142 F.3d 305, 311 (6th Cir. 1998); United States United States v. Phibbs, 999 F.2d 1053, 1065-66 (6th Cir. 1993); United States v. Giles, 536 F.2d 136, 141 (6th Cir. 1976). The estimated street value is also relevant, *see Hill, supra*; United States v. Jackson, 55 F.3d 1219, 1226 (6th Cir. 1995); United States v. Vincent, 20 F.3d 229, 233 (6th Cir. 1994); and United States v. Dotson, 871 F.2d 1318, 1323 (6th Cir. 1989), *vacated in part on other grounds*, 895 F.2d 263 (6th Cir. 1990). The purity of the drugs may be considered, *see Vincent, supra*. The manner in which the controlled substance was packaged was approved in United States v. Coffee, 434 F.3d 887, 897 (6th Cir. 2006) and *Dotson, supra*. The presence or absence of a large amount of cash is relevant, see United States v. Stewart, 69 F. App'x 213, 216 (6th Cir. 2003) (unpublished) and United States v. Wade, 1991 WL 158674, 1991 U.S. App Lexis 19418 at *5 (6th Cir. 1991) (unpublished). The presence or absence of weapons may be considered, *see Coffee, supra*, as may the presence or absence of equipment used for the sale of drugs, *see Coffee, supra; Hill, supra* (noting presence of a scale, a blender, currency, razor blades and packaging materials); *Vincent, supra* (noting presence of hand scales suitable for weighing and measuring marijuana, growing lamps and a book describing how to grow marijuana); and *Dotson, supra*. In United States v. White, 932 F.2d 588, 590 (6th Cir. 1991), the court reversed a conviction for possession with intent to distribute based on, *inter alia*, insufficient evidence to support an inference of intent to distribute.

The offense of simple distribution covered in Inst. 14.02A is a lesser included offense of distribution when death or serious bodily injury results covered in Inst. 14.07C. *See* Burrage v. United States, 134 S. Ct. 881, 887 & note 3 (2014).

14.02B DISPENSING OR DISTRIBUTION OF A CONTROLLED SUBSTANCE BY A PRACTITIONER (21 U.S.C. § 841(a)(1))

(1) The defendant is charged with the crime of dispensing [distributing] [*name controlled substance*]. [*Name controlled substance*] is a controlled substance. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) The defendant knowingly [or intentionally] dispensed [distributed] [*name controlled substance*];

(B) The defendant knew at the time of dispensing [distribution] that the substance was a controlled substance;

(C) The defendant's dispensing [distribution] was unauthorized, that is to say the dispensing [distribution] was not for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice; and

(D) The defendant knew [or intended] that his dispensing [distribution] was unauthorized.

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "dispense" means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling or compounding necessary to prepare the substance for such delivery. The term "dispenser" means a practitioner who so delivers a controlled substance to an ultimate user or research subject.

(B) The term "distribute" means to deliver (other than by administering or dispensing) a controlled substance. [The term "distributor" means a person who so delivers a controlled substance.] [The term "distribute" includes the actual, constructive, or attempted transfer of a controlled substance.] [The term "distribute" includes the sale of a controlled substance.]

(C) The phrase "a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice" means acting in accordance with generally recognized and accepted professional standards in the field in which the individual practices. In considering whether the defendant acted for a legitimate medical purpose in the usual course of professional practice, you may consider all of the defendant's actions and the circumstances surrounding them.

[(D) The term "practitioner" means a physician [dentist, veterinarian, scientific investigator, pharmacy, hospital or other person] licensed [registered, or otherwise permitted] by the United States or the jurisdiction in which he practices, to distribute or dispense a controlled substance in the course of professional practice.]

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

Use Note

This instruction covers dispensing or distributing a controlled substance by a practitioner; if the defendant is not a practitioner, use Inst. 14.02A Distribution of a Controlled Substance.

This instruction covers simple dispensing or distributing of a controlled substance by a practitioner. If the charges include increased penalties based on the amount of the controlled substance, see also Inst. 14.07A. If the conduct charged includes distributing with death or serious bodily injury resulting, see also Instruction 14.07C.

This instruction should be given only after the defendant produces evidence that he or she was authorized as a practitioner to dispense or distribute controlled substances; this burden on the defendant to produce evidence is discussed below in the commentary.

If the bracketed sentence in paragraph (2)(B) defining distribution to include the actual, constructive and attempted transfer is given, the court should further define the terms actual, constructive, or attempted transfer. The terms "actual" and "constructive" are defined in the context of possession in Instructions 2.10 and 2.10A. The term "attempt" is defined in Instruction 5.01.

In paragraph (2)(C), the instruction refers to an individual practitioner "acting in accordance with generally recognized and accepted professional standards in the field in which the individual practices." Standards for the different kinds of professional practice are set by various organizations. The law applicable to this offense does not define this phrase further.

The definition of "practitioner" in paragraph (2)(D) is based on the statutory definition in § 802(21); if the case involves a type of practitioner not specifically listed, the definition may be modified to cover a qualifying "other person."

Brackets indicate options for the court. Bracketed italics are notes to the court.

Committee Commentary Instruction 14.02C

(current through May 1, 2025)

Title 21 U.S.C. § 841(a)(1) provides, "Except as authorized . . . , it shall be unlawful for any person knowingly or intentionally-- (1) to . . . distribute, or dispense . . . a controlled substance . . . ." Practitioners may be prosecuted under this provision if their conduct is unauthorized, i.e., not for a legitimate medical purpose in the usual course of professional practice. 21 C.F.R. § 1306.04(a); United States v. Ruan, 142 S. Ct. 2370, 2374 (2022); United

States v. Moore, 96 S. Ct. 335, 337 (1975); *see also* United States v. Godofsky, 943 F.3d 1011, 1017, 1029 (6th Cir. 2019); United States v. Chaney, 921 F.3d 572, 589 (6th Cir. 2019) (*quoting* United States v. Johnson, 71 F.3d 539, 542 (6th Cir. 1995) (cleaned up)); and United States v. Kirk, 584 F.2d 773, 784 (6th Cir. 1978). The instruction uses "dispense" as the primary term and offers "distribute" as an option in brackets. Sixth Circuit cases can be found to support the use of either term, *see, e.g.*, United States v. Seelig, 622 F.2d 207, 211 (6th Cir. 1980) (approving use of term "distribute" in instruction but finding error on other grounds) and United States v. Voorhies, 663 F.2d 30, 33 (6th Cir. 1981) (approving instruction that used term "dispense"). The Committee decided to use "dispensing" as the primary term based on this term's repeated use by the Supreme Court in *Ruan*, *see, e.g.*, 142 S. Ct. 2370, 2375; *see also* United States v. Fabode, 2022 WL 16825408, 6-7 (6th Cir. 2022) (unpublished).

In paragraph (1), the elements are based on the statute, regulation and cases cited in the paragraph above. In paragraph (1)(A), the requirement that the defendant "knowingly [or intentionally]" distributed a controlled substance is based on § 841(a)(1) and Sixth Circuit case law. The instruction requires a mens rea of knowingly, and then offers in brackets the option of adding an alternative mens rea of intentionally. As quoted above, the statute states that the defendant must "knowingly or intentionally" distribute a controlled substance. However, as noted in the commentary to Instruction 14.01 on possession with intent to distribute, the Sixth Circuit often omits the optional term "intentionally" from the list of elements for that crime. Based on these cases construing the same statute, the instruction for dispensing or distribution by a practitioner uses the term knowingly, and then provides the phrase "or intentionally" in brackets as an option for inclusion based on the language in § 841(a) and for cases where the government used that term in the indictment.

In paragraph (1)(B), the language requiring the defendant to know at the time of dispensing or distribution that the substance was a controlled substance is supported by United States v. Godofsky, 943 F.3d 1011, 1017 & 1029 (6th Cir. 2019). *See also* United States v. Harris, 293 F.3d 970, 974 (6th Cir. 2002) (requiring this knowledge for distribution by non-practitioners) and United States v. Gibbs, 182 F.3d 408 (6th Cir. 1999) (same).

In paragraph (1)(C), the requirement that the defendant's dispensing or distribution was unauthorized, that is to say the dispensing [distribution] was not for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice, is based on 21 C.F.R. § 1306.04(a), United States v. Ruan, 142 S. Ct. 2370 (2022), and United States v. Moore, 96 S. Ct. 335, 337 (1975); *see also* United States v. Godofsky, 943 F.3d 1011, 1017, 1029 (6th Cir. 2019); United States v. Chaney, 921 F.3d 572, 589 (6th Cir. 2019) (*quoting* United States v. Johnson, 71 F.3d 539, 542 (6th Cir. 1995) (cleaned up)); and United States v. Kirk, 584 F.2d 773, 784 (6th Cir. 1978).

In paragraph (1)(D), the requirement that the defendant knew or intended that his dispensing or distribution was unauthorized is based on *Ruan*, 142 S. Ct. 2370, 2382 (2022).

In paragraph (2), the definitions of dispense, distribute, and practitioner in paragraphs (A), (B), and (D) are drawn primarily from the definitions in 18 U.S.C. §§ 802(10); 802(11) and 802(8); and 802(21), respectively. Some of these definitions have been edited to use plain

English and to fit the usual case.

The definition of "dispense" in paragraph (2)(A) uses the language of § 802(10) verbatim. The definition of "distribute" in paragraph (2)(B) is based on §§ 802(11) and 802(8). Section 802(11) defines "distribute" as "to deliver (other than by administering or dispensing) a controlled substance." Section 802(8) then defines the terms "deliver" and "delivery" as "the actual, constructive, or attempted transfer of a controlled substance . . . ." The first bracketed sentence (defining "distributor") is drawn from § 802(11), and the second bracketed sentence (defining "distribute" to include actual, constructive, or attempted transfers of a controlled substance) is drawn from § 802(8). The third bracketed sentence (defining distribution to include the sale of a controlled substance) is based on United States v. Robbs, 75 F. App'x 425, 431 (6th Cir. 2003) (unpublished). Sixth Circuit authority recognizes that the term "distribute" includes the act of writing a prescription, *see* United States v. Johnson, 831 F.2d 124, 128 (6th Cir. 1987) and United States v. Flowers, 818 F.2d 464, 467 (6th Cir. 1987). The instruction covers the conduct of writing prescriptions under the definition of "dispense."

The definition of "practitioner" in paragraph (2)(D) uses the language of § 802(21) but has omitted references to research and teaching and has bracketed the types of practitioners after the term "physician" and the types of licensing to fit the usual case. As noted above, some of these definitions have been edited; the court should consult the full statutory definitions if the facts warrant.

In paragraph (2)(C) the phrase "a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice" is defined to mean "acting in accordance with generally recognized and accepted standards of that individual's professional practice." As stated in the Use Note, standards for the different kinds of professional practice are set by various organizations. The law applicable to this offense does not define this phrase further.

This instruction is properly given only after the defendant meets the burden of producing evidence that he or she was authorized as a practitioner to dispense or distribute controlled substances. As the *Ruan* Court stated, "[O]nce a defendant meets the burden of producing evidence that his or her conduct was 'authorized,' the Government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner." *Ruan*, 142 S. Ct. 2370, 2376 (2022). The Court did not define the burden on the defendant to produce evidence further; the concurring opinion noted that cert. was not granted on that question and no party briefed it. *Ruan*, *supra* at 2384 (Alito, Thomas, and Barrett, JJ., concurring in the judgment).

The instruction does not include a good faith defense and does not use the term good faith. See United States v. Bauer, 82 F.4th 522, 532 (6th Cir. 2023) (describing the good faith defense as one that "*Ruan* likely makes obsolete").

The minimum mens rea for this crime is knowingly, so the provisions of Inst. 2.09 Deliberate Ignorance are properly given in cases under Inst. 14.02C. See United States v. Bauer, 82 F.4th 522, 530-531 (6th Cir. 2023) (approving a jury instruction that was substantially the same as pattern Inst. 2.09 Deliberate Ignorance); United States v. Anderson, 67 F.4th 755, 766

(6th Cir. 2023) (same).

In United States v. Chaney, 921 F.3d 572 (6th Cir. 2019) the three defendants (a physician, a clinic, and the CEO of the clinic) were convicted of distribution under § 841(a) and § 2. The defendants argued that the evidence they acted without a "legitimate medical purpose" was insufficient because the patients who received the drugs had various serious underlying conditions that justified the prescription of drugs. The trial court rejected this argument, and the Sixth Circuit affirmed, explaining:

> [The defendants'] arguments are incorrect.
> . . . .
> Instead, as the word ❍purpose❍ implies, we look at a provider's reason for issuing the prescription when determining whether it was issued for a legitimate medical purpose, rather than the patient's underlying conditions. As the district court made abundantly clear, a doctor prescribing opioid painkillers to anyone walking through the door is not saved if a person happens to have an underlying condition that could justify the prescription; likewise, a doctor who acts in good faith and with all due care but nevertheless issues a prescription to a patient who was merely faking symptoms is nevertheless acting with a legitimate medical purpose. To say otherwise would be absurdity.
> . . . .
> Evidence of the circumstances surrounding a prescription allows juries to infer that a physician's purpose was something other than legitimate medical treatment; the underlying conditions a patient may have had are not dispositive.

14.03A MANUFACTURE OF A CONTROLLED SUBSTANCE (21 U.S.C. § 841(a)(1))

(1) The defendant is charged with the crime of manufacturing [*name controlled substance*]. [*Name controlled substance*] is a controlled substance. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, the defendant manufactured [*name controlled substance*].

(B) Second, the defendant did so knowingly [or intentionally].

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "manufacture" means the [production] [preparation] [propagation] [compounding] [processing] of a [drug] [other substance] either directly or indirectly [by extraction from substances of natural origin] [independently by means of chemical synthesis] [by a combination of extraction and chemical synthesis]. [The term "manufacture" includes any packaging or repackaging of a substance or labeling or relabeling of its container.] [The term "manufacture" does not include the preparation, compounding, packaging, or labeling of a drug or other substance in conformity with applicable law by a practitioner as an incident to the administration or dispensing of such drug or substance in the course of a professional practice.] [The term "production" includes the planting, cultivating, growing, or harvesting of a controlled substance.]

(B) To prove that the defendant knowingly manufactured the [*name controlled substance*], the defendant did not have to know that the substance was [*name controlled substance*]. It is enough that the defendant knew that it was some kind of controlled substance. Further, the defendant did not have to know how much [*name controlled substance*] he manufactured. It is enough that the defendant knew that he manufactured some quantity of controlled substance.

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

Use Note

This instruction covers simple manufacturing of a controlled substance. If the charges include increased penalties based on the amount of the controlled substance, see also Inst. 14.07A Unanimity Required: Determining Amount of Controlled Substance (§ 841). If the conduct charged includes manufacturing with death or serious bodily injury resulting, see also Instruction 14.07C Unanimity required: Determining Whether Death or Serious Bodily Injury Resulted and Special Verdict Form.

If the conduct charged is possession with intent to manufacture, Instruction 14.01

Possession with Intent to Distribute may be modified.

Bracketed language indicates options for the court.

Bracketed italics are notes to the court.

Committee Commentary Instruction 14.03A
(current through May 1, 2025)

Title 21 U.S.C. § 841(a)(1) provides that except as authorized by that subchapter, "[I]t shall be unlawful for any person knowingly or intentionally-- (1) to manufacture . . . a controlled substance . . . ."

In paragraph (1), the second sentence recognizes that the court determines whether the substance the defendant is charged with manufacturing falls within the definition of a controlled substance under 21 U.S.C. § 812.

The list of elements in paragraph (1) is based on the statute.

In paragraph (1)(B), the requirement that the defendant knowingly manufactured a controlled substance is based on Sixth Circuit case law. The instruction requires a mens rea of knowingly and then offers in brackets the option of adding an alternative mens rea of intentionally. As noted above, the statute states that the defendant must "knowingly or intentionally" manufacture a controlled substance. However, as noted in the commentary to Instruction 14.01 on possession with intent to distribute, the Sixth Circuit often omits the optional term "intentionally" from the list of elements for that crime. Based on these cases construing the same statute, the instruction for manufacturing uses the term knowingly, and then provides the term "or intentionally" in brackets as an option based on the language in § 841(a) and for cases where the government used that term in the indictment.

In paragraph (2)(A), the definition of manufacture is based on § 802(15). Some options in that definition have been bracketed to minimize unnecessary words. The bracketed statement on production including planting, cultivating, etc. is based on § 802(22) with the redundant term manufacturing deleted.

Paragraph (2)(B), which states that to act "knowingly," the defendant need not know the type or quantity of controlled substance involved, is based on United States v. Villarce, 323 F.3d 435, 439 (6th Cir. 2003) (*quoting* United States v. Garcia, 252 F.3d 838, 844 (6th Cir. 2001)). Knowledge that the defendant manufactured "some type of controlled substance" is sufficient. United States v. Stapleton, 297 F. App'x 413, 426 (6th Cir. 2008) (unpublished) (*citing Villarce, supra*). Also, knowledge that the defendant manufactured "some quantity" of the controlled substance is sufficient. *Villarce, supra* at 438 (italics omitted). This authority was not overruled by Alleyne v. United States, 133 S. Ct. 2151 (2013). United States v. Dado, 759 F.3d 550, 571 (6th Cir. 2014).

Knowledge need not be proved directly. Pattern Instruction 2.08 Inferring Required Mental State states this principle and should be given in appropriate cases. In addition, Pattern Instruction 2.09 Deliberate Ignorance explains one approach to proving knowledge under § 841(a). *See, e.g., Stapleton, supra* at 428.

The offense of simple manufacturing covered in instruction 14.03A is a lesser included offense of manufacturing when death or serious bodily injury results covered in Inst. 14.07C. *Cf.* Burrage v. United States, 134 S. Ct. 881, 887 & note 3 (2014) (stating that simple distribution is a lesser included offense of distribution when death or serious bodily injury results).

14.03B MANUFACTURE OF A CONTROLLED SUBSTANCE BY A PRACTITIONER (21 U.S.C. § 841(a)(1))

(1) The defendant is charged with the crime of manufacturing [*name controlled substance*]. [*Name controlled substance*] is a controlled substance. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) The defendant manufactured [*name controlled substance*].

(B) The defendant did so knowingly [or intentionally].

(C) The defendant's manufacturing was unauthorized, that is to say the manufacturing was not for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice; and

(D) The defendant knew [or intended] that his manufacturing was unauthorized.

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "manufacture" means the [production] [preparation] [propagation] [compounding] [processing] of a [drug] [other substance] either directly or indirectly [by extraction from substances of natural origin] [independently by means of chemical synthesis] [by a combination of extraction and chemical synthesis]. [The term "manufacture" includes any packaging or repackaging of a substance or labeling or relabeling of its container.] [The term "manufacture" does not include the preparation, compounding, packaging, or labeling of a drug or other substance in conformity with applicable law by a practitioner as an incident to the administration or dispensing of such drug or substance in the course of a professional practice.] [The term "production" includes the planting, cultivating, growing, or harvesting of a controlled substance.]

(B) To prove that the defendant knowingly manufactured the [*name controlled substance*], the defendant did not have to know that the substance was [*name controlled substance*]. It is enough that the defendant knew that it was some kind of controlled substance. Further, the defendant did not have to know how much [*name controlled substance*] he manufactured. It is enough that the defendant knew that he manufactured some quantity of controlled substance.

(C) The phrase "a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice" means acting in accordance with generally recognized and accepted professional standards in the field in which the individual practices. In considering whether the defendant acted for a legitimate medical purpose in the usual course of professional practice, you may consider all of the defendant's actions and the circumstances surrounding them.

[(D) The term "practitioner" means a physician [dentist, veterinarian, scientific

investigator, pharmacy, hospital or other person] licensed [registered, or otherwise permitted] by the United States or the jurisdiction in which he practices, to distribute or dispense a controlled substance in the course of professional practice.]

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

Use Note

This instruction covers the conduct of manufacturing a controlled substance by a practitioner; if the defendant is not a practitioner, use Instruction 14.03A.

This instruction covers simple manufacturing of a controlled substance. If the charges include increased penalties based on the amount of the controlled substance, see also Inst. 14.07A Unanimity requireed – Determining Amount of Controlled Substance (§ 841). If the conduct charged includes manufacturing with death or serious bodily injury resulting, see also Instruction 14.07C Unanimity Required – Determining Whether Death or Serious Bodily Injury Resulted and Special Verdict Form.

This instruction should be given only after the defendant produces evidence that he or she was authorized as a practitioner to manufacture controlled substances; this burden on the defendant to produce evidence is discussed below in the commentary.

In paragraph (2)(C), the instruction refers to an individual practitioner "acting in accordance with generally recognized and accepted professional standards in the field in which the individual practices." Standards for the different kinds of professional practice are set by various organizations. The law applicable to this offense does not define this phrase further.

The definition of "practitioner" in paragraph (2)(D) is based on the statutory definition in § 802(21); if the case involves a type of practitioner not specifically listed, the definition may be modified to cover a qualifying "other person."

Bracketed language indicates options for the court.

Bracketed italics are notes to the court.

Committee Commentary Instruction 14.03B
(current through May 1, 2025)

Title 21 U.S.C. § 841(a)(1) provides, "Except as authorized . . . , it shall be unlawful for any person knowingly or intentionally-- (1) to . . . manufacture . . . a controlled substance . . . ." Practitioners may be prosecuted under this provision if their conduct is unauthorized, i.e., not for a legitimate medical purpose in the usual course of professional practice. 21 C.F.R. §

1306.04(a); United States v. Ruan, 142 S. Ct. 2370, 2374 (2022); United States v. Moore, 96 S. Ct. 335, 337 (1975); *see also* United States v. Godofsky, 943 F.3d 1011, 1017, 1029 (6th Cir. 2019); United States v. Chaney, 921 F.3d 572, 589 (6th Cir. 2019) (*quoting* United States v. Johnson, 71 F.3d 539, 542 (6th Cir. 1995) (cleaned up)); and United States v. Kirk, 584 F.2d 773, 784 (6th Cir. 1978).

In paragraph (1), the elements are based on the statute, regulation and cases cited in the paragraph above. In paragraph (1)(B), the requirement that the defendant "knowingly [or intentionally]" manufactured a controlled substance is based on § 841(a)(1) and Sixth Circuit case law. The instruction requires a mens rea of knowingly, and then offers in brackets the option of adding an alternative mens rea of intentionally. As quoted above, the statute states that the defendant must "knowingly or intentionally" distribute a controlled substance. However, as noted in the commentary to Instruction 14.01 on possession with intent to distribute, the Sixth Circuit often omits the optional term "intentionally" from the list of elements for that crime. Based on these cases construing the same statute, the instruction for manufacturing by a practitioner uses the term knowingly, and then provides the phrase "or intentionally" in brackets as an option for inclusion based on the language in § 841(a) and for cases where the government used that term in the indictment.

In paragraph (1)(C), the requirement that the defendant's manufacturing was unauthorized, that is to say the manufacturing was not for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice, is based on 21 C.F.R. § 1306.04(a), United States v. Ruan, 142 S. Ct. 2370 (2022), and United States v. Moore, 96 S. Ct. 335, 337 (1975); *see also* United States v. Godofsky, 943 F.3d 1011, 1017, 1029 (6th Cir. 2019); United States v. Chaney, 921 F.3d 572, 589 (6th Cir. 2019) (*quoting* United States v. Johnson, 71 F.3d 539, 542 (6th Cir. 1995) (cleaned up)); and United States v. Kirk, 584 F.2d 773, 784 (6th Cir. 1978).

In paragraph (1)(D), the requirement that the defendant knew or intended that his manufacturing was unauthorized is based on *Ruan*, 142 S. Ct. 2370, 2382 (2022).

In paragraph (2)(A), the definition of manufacture is based on § 802(15). Some options in that definition have been bracketed to minimize unnecessary words. The bracketed statement on production including planting, cultivating, etc. is based on § 802(22) with the redundant term manufacturing deleted.

Paragraph (2)(B), which states that to act "knowingly," the defendant need not know the type or quantity of controlled substance involved, is based on United States v. Villarce, 323 F.3d 435, 439 (6th Cir. 2003) (*quoting* United States v. Garcia, 252 F.3d 838, 844 (6th Cir. 2001)). Knowledge that the defendant manufactured "some type of controlled substance" is sufficient. United States v. Stapleton, 297 F. App'x 413, 426 (6th Cir. 2008) (unpublished) (*citing Villarce, supra*). Also, knowledge that the defendant manufactured "some quantity" of the controlled substance is sufficient. *Villarce, supra* at 438 (italics omitted). This authority was not overruled by Alleyne v. United States, 133 S. Ct. 2151 (2013). United States v. Dado, 759 F.3d 550, 571 (6th Cir. 2014).

In paragraph (2)(C) the phrase "a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice" is defined to mean "acting in accordance with generally recognized and accepted standards of that individual's professional practice." As stated in the Use Note, standards for the different kinds of professional practice are set by various organizations. The law applicable to this offense does not define this phrase further.

The definition of "practitioner" in paragraph (2)(D) uses the language of § 802(21) but has omitted references to research and teaching and has bracketed the types of practitioners after the term "physician" and the types of licensing to fit the usual case. As noted above, these definitions have been edited; the court should consult the full statutory definitions if the facts warrant.

This instruction is properly given only after the defendant meets the burden of producing evidence that he or she was authorized as a practitioner to manufacture controlled substances. As the *Ruan* Court stated, "[O]nce a defendant meets the burden of producing evidence that his or her conduct was 'authorized,' the Government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner." *Ruan*, 142 S. Ct. 2370, 2376 (2022). The Court did not define the burden on the defendant to produce evidence further; the concurring opinion noted that cert. was not granted on that question and no party briefed it. *Ruan*, *supra* at 2384 (Alito, Thomas, and Barrett, JJ., concurring in the judgment).

The instruction does not include a good faith defense and does not use the term good faith. See United States v. Bauer, 82 F.4th 522, 532 (6th Cir. 2023) (describing the good faith defense as one that "*Ruan* likely makes obsolete").

The minimum mens rea for this crime is knowingly, so the provisions of Inst. 2.09 Deliberate Ignorance are properly given in cases under Inst. 14.03C. See United States v. Bauer, 82 F.4th 522, 530-531 (6th Cir. 2023) (approving a jury instruction that was substantially the same as pattern Inst. 2.09 Deliberate Ignorance); United States v. Anderson, 67 F.4th 755, 766 (6th Cir. 2023) (same).

In United States v. Chaney, 921 F.3d 572 (6th Cir. 2019) the three defendants (a physician, a clinic, and the CEO of the clinic) were convicted of distribution under § 841(a) and § 2. The defendants argued that the evidence they acted without a "legitimate medical purpose" was insufficient because the patients who received the drugs had various serious underlying conditions that justified the prescription of drugs. The trial court rejected this argument, and the Sixth Circuit affirmed, explaining:

> [The defendants'] arguments are incorrect.
>
> . . . .
>
> Instead, as the word "purpose" implies, we look at a provider's reason for issuing the prescription when determining whether it was issued for a legitimate medical purpose, rather than the patient's underlying conditions. As the district court made abundantly clear, a doctor prescribing opioid painkillers to anyone walking through the door is not saved if a person happens to have an underlying condition that could justify the prescription; likewise, a doctor who acts in good faith and

with all due care but nevertheless issues a prescription to a patient who was merely faking symptoms is nevertheless acting with a legitimate medical purpose. To say otherwise would be absurdity.

. . . .

Evidence of the circumstances surrounding a prescription allows juries to infer that a physician's purpose was something other than legitimate medical treatment; the underlying conditions a patient may have had are not dispositive.

14.04 POSSESSION OF A CONTROLLED SUBSTANCE (21 U.S.C. § 844)

(1) The defendant is charged with the crime of possessing [*name controlled substance*]. [*Name controlled substance*] is a controlled substance. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, the defendant possessed [*name controlled substance*].

(B) Second, the defendant did so knowingly [or intentionally].

(2) Now I will give you more detailed instructions on some of these terms.

(A) [*Insert applicable definition of possession from Instructions 2.10, 2.10A, and 2.11 here or as a separate instruction*].

(B) To prove that the defendant "knowingly" possessed the [*name controlled substance*], the defendant does not have to know that the substance was [*name controlled substance*]. It is enough that the defendant knew that it was some kind of controlled substance. Further, the defendant did not have to know how much [*name controlled substance*] he possessed. It is enough that the defendant knew that he possessed some quantity of [*name controlled substance*].

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

Committee Commentary 14.04
(current through May 1, 2025)

Title 21 U.S.C. § 844 provides that "It shall be unlawful for any person knowingly or intentionally . . . to possess a controlled substance."

In paragraph (1), the second sentence recognizes that the court determines whether the substance the defendant is charged with possessing falls within the definition of a controlled substance under 21 U.S.C. § 812.

The elements in paragraph (1) are adapted from United States v. Colon, 268 F.3d 367, 375 (6th Cir. 2001).

Paragraph (1)(B), which requires that the defendant knowingly possessed a controlled substance, is based on Sixth Circuit case law. The instruction requires a mens rea of knowingly and then offers in brackets the option of adding the alternative mens rea of intentionally. As noted above, the statute states that the defendant must "knowingly or intentionally" possess a controlled substance. However, the Sixth Circuit often omits the optional term "intentionally"

from the list of elements in the context of § 841(a). *See, e.g.,* United States v. Russell, 595 F.3d 633, 645 (6th Cir. 2010) (*quoting* United States v. Coffee, 434 F.3d 887, 897 (6th Cir. 2006)) ("The elements of [possession with intent to distribute] are that the defendant: (1) knowingly, (2) possessed a controlled substance, (3) with intent to distribute it."). *See also* United States v. Jackson, 55 F.3d 1219, 1225 (6th Cir. 1995); United States v. Peters, 15 F.3d 540, 544 (6th Cir. 1994) (*citing* United States v. Clark, 928 F.2d 733, 736 (6th Cir. 1991)). Based on this case law, the instruction for simple possession uses the term knowingly. This approach is consistent with the mens rea for possession generally, see Inst. 2.10A Actual Possession. The term "or intentionally" is provided in brackets as an option based on the language in § 844 and for cases where the government used that term in the indictment.

In paragraph (2)(A), the definition of possessed is a cross-reference to Pattern Instructions 2.10, 2.10A and 2.11.

In paragraph (2)(B), the statement that to act "knowingly" under § 844, the defendant need not know the type of controlled substance involved, is based on United States v. Clay, 346 F.3d 173, 177 (6th Cir. 2003). The statement that the defendant need not know the amount of the controlled substance involved is based on cases construing § 841, including United States v. Villarce, 323 F.3d 435, 439 (6th Cir. 2003) (*quoting* United States v. Garcia, 252 F.3d 838, 844 (6th Cir. 2001)) and United States v. Stapleton, 297 F. App'x 413, 426 (6th Cir. 2008) (unpublished). This § 841 authority was not overruled by Alleyne v. United States, 133 S. Ct. 2151 (2013). United States v. Dado, 759 F.3d 550, 571 (6th Cir. 2014).

Inst. 14.05 CONSPIRACY TO VIOLATE THE DRUG LAWS (21 U.S.C. § 846)

(1) Count ___ of the indictment charges the defendant(s) with conspiracy to [*insert substantive crime*]. It is a crime for two or more persons to conspire, or agree, to commit a drug crime, even if they never actually achieve their goal.

(2) A conspiracy is a kind of criminal partnership. For you to find the defendant [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 [*insert substantive crime*].

(B) Second, that the defendant(s) knew of the conspiracy and its [objects] [aims] [goals], and

(C) Third, that the defendant joined the conspiracy with the intent that at least one of the conspirators engage in conduct that satisfies the elements of [*insert substantive crime*].

(3) Now I will give you more detailed instructions on some of these terms.

(A) 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 [*insert substantive crime*].

(1) Proof of conspiracy 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. Nor is a single transaction between a buyer and a seller sufficient to establish the existence of a conspiracy. These are things that you may consider in deciding whether the government has proved an agreement. But without more they are not enough.

(2) 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 [*insert substantive crime*]. This is essential.

(3) 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.

[(4) One more point about the agreement. The indictment accuses the defendant(s) of conspiring to commit several drug crimes. The government does not have to prove that the defendant[s] 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.]

(B) With regard to the second and third element**s** – the defendant's connection to the conspiracy – the government must prove that the defendant(s) knew of the conspiracy and its [objects] [aims] [goals] and joined the conspiracy with the intent that at least one of conspirators engage in conduct that satisfies the elements of [*insert substantive crime*].

(1) [You must consider each defendant separately in this regard.]

(2) Proof of conspiracy 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) Further, this does not require proof that the defendant knew the drug involved was [*name controlled substance*]. It is enough that the defendant knew that it was some kind of controlled substance. Nor does this require proof that the defendant knew how much [*name controlled substance*] was involved. It is enough that the defendant knew that some quantity was involved.

(4) 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.

(5) A defendant's knowledge can be proved indirectly by facts and circumstances which lead to a conclusion that he knew of the conspiracy and its [objects] [aims] [goals]. But it is up to the government to convince you that such facts and circumstances existed in this particular case.

Use Note

This instruction should be followed by Instructions 3.05 through 3.14 as appropriate based on the facts of the case. If the court gives any of these additional instructions, all references to overt acts should be deleted.

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

This instruction covers simple conspiracy to violate the drug laws. If the prosecution involves conspiracy with increased penalties based on the amount of the controlled substance, see also Inst. 14.07B Unanimity Required – Determining Amount of Controlled Substance (§ 846). If the prosecution involves conspiracy with increased penalties based on death or serious bodily injury, Inst. 14.07C Unanimity Required – Determining Whether Death or Serious Bodily Injury Resulted for Distributing/Dispensing or Manufacturing (§ 841) may be modified to fit the facts.

Bracketed paragraph (3)(A)(4) 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.

The bracketed sentence in paragraph (3)(B)(1) on considering each defendant separately should be included when multiple defendants are charged with conspiracy.

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

Committee Commentary 14.05
(current through May 1, 2025)

This instruction outlines the basic elements of conspiracy to violate the drug laws under 21 U.S.C. § 846, which imposes penalties on "[a]ny person who . . . conspires to commit any offense defined in [Title 21] . . . ."

The structure of this instruction is based on the conspiracy instructions in Chapter 3 (Insts. 3.01A Conspiracy to Commit an Offense (18 U.S.C. § 371) – Basic Elements, 3.02 Agreement, and 3.03 Defendant's Connection to the Conspiracy), but it is specifically tailored for conspiracies to violate the drug laws. Paragraph (1) is based on paragraph (1) of Inst. 3.01A as revised in 2024.

The list of elements in paragraph (2) is based on Inst. 3.01A(2), which applies to conspiracies charged under § 371. The elements have been modified to delete the overt act requirement because conspiracies charged under § 846 do not require an overt act. United States v. Shabani, 513 U.S. 10 (1994). The elements in Inst. 14.05(2) were revised in 2024 to be consistent with changes made that year to other conspiracy instructions, Insts. 3.01A, 3.01B, and 3.03. These revisions are described in detail in the commentary to Inst. 3.01A.

In United States v. Potter, 927 F.3d 446, 453 (6th Cir. 2019), the court noted that many Sixth Circuit cases identify three elements for a § 846 conspiracy, including ৰ(1) an agreement to violate drug laws, (2) knowledge and intent to join the conspiracy, and (3) participation in the

conspiracy.” *See Potter, supra* (*quoting* United States v. Welch, 97 F.3d 142, 148 (6th Cir. 1996) *and citing* United States v. Hines, 398 F.3d 713, 718 (6th Cir. 2005)). The *Potter* court then compared these elements with the elements in the pattern instruction and concluded:

> Conflict? We see it as a semantic difference. The ‘participation’ element [in the case law] cannot mean an ‘action’ furthering the conspiracy because proof of an overt act is not required to establish a violation of § 846. That is not what our cases meant by the term. As best we can tell, this [participation] element . . . [was used] to distinguish joining the conspiracy (which our instructions require) with mere presence at the crime scene (which our instructions find insufficient). In that sense, ‘participation’ is synonymous with ‘joinder.’ So whether phrased as two elements or three, a conviction under § 846 requires an agreement to violate the drug laws, the defendant’s knowledge of the agreement, and the defendant’s decision to voluntarily join (or ‘participate in’) it.

Potter, supra (interior citations and quotation marks omitted).

The paragraphs under (3)(A) defining the first element, a criminal agreement, are drawn from Instruction 3.02 Agreement. In paragraph (3)(A)(1), the language is basically adopted from Instruction 3.02(2), but the Committee added a new sentence to the paragraph, *i.e.*, “Nor is a single transaction between a buyer and a seller sufficient to establish the existence of a conspiracy.” This sentence is based on the buyer-seller exception to drug conspiracy liability described in United States v. Wheat, 988 F.3d 299, 307 (6th Cir. 2021) (cleaned up); *see also* United States v. Hamm, 952 F.3d 728, 736 (6th Cir. 2020). This exception is discussed in detail below. 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 Inst. 3.02(2) with approval in a § 846 prosecution.

Sixth Circuit cases establish that “[P]roof of a formal agreement is not necessary; a tacit or material understanding among the parties will suffice.” United States v. Deitz, 577 F.3d 672, 677 (6th Cir. 2009) (interior quotations omitted) (*quoting* United States v. Martinez, 430 F.3d 317, 330 (6th Cir. 2005) *and citing* United States v. Welch, 97 F.3d 142, 148-49 (6th Cir. 1996)). 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). However, the government must prove beyond a reasonable doubt that the defendant entered an agreement to violate the drug laws. United States v. Sliwo, 620 F.3d 630 (6th Cir. 2010) (reversing conviction under § 846 for insufficient evidence because all the government proved was that the defendant probably was involved in some illegal enterprise, which failed the requirement to prove an agreement to violate the drug laws).

Paragraph (3)(A)(2) is based on Inst. 3.02(3). The requirement that the agreement involve “two or more persons” reflects the settled law 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).

The language of paragraph (3)(A)(3) is taken verbatim from Inst. 3.02(4). A § 846 conspiracy may be proved by direct or circumstantial evidence. United States v. Gunter, 551 F.3d 472, 482 (6th Cir. 2008). 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). The conspiracy may be inferred from circumstantial evidence that can reasonably be interpreted as participation in the common plan. United States v. Salgado, 250 F.3d 438, 447 (6th Cir. 2001) (*quoting* United States v. Avery, 128 F.3d 966, 971 (6th Cir. 1997)).

Paragraph (3)(A)(4) is based on Inst. 3.02(5).

The paragraphs under (3)(B) defining the second element, the defendant's connection to the conspiracy, are generally based on Instruction 3.03 Defendant's Connection to the Conspiracy as revised in 2024. In paragraph (3)(B), the introductory language (that the government must prove that the defendant(s) knew of the conspiracy and its [objects] [aims] [goals] and joined the conspiracy with the intent that at least one of conspirators engage in conduct that satisfies the elements of [*insert substantive crime*]), is adapted from Instruction 3.01A(2)(B) and (2)(C). In *Gibbs*, the court stated: "To be found guilty of conspiracy [under § 846], the government must prove that [the defendant] was aware of the object of the conspiracy and that he voluntarily associated himself with it to further its objectives." 182 F.3d at 421 (internal quotation marks omitted) (*quoting* United States v. Hodges, 935 F.2d 766, 772 (6th Cir. 1991)). *See also Sliwo, supra* at 633 ("This court has repeatedly held that participation in a scheme whose ultimate purpose a defendant does not know is insufficient to sustain a conspiracy conviction under 21 U.S.C. § 846.")

Occasionally the § 846 conspiracy cases have referred to proof that the defendant was a "willful" member of the conspiracy. *See, e.g., Deitz, supra* at 678 (*quoting* United States v. Gardner, 488 F.3d 700, 711 (6th Cir. 2007)). Because the term "willfully" does not appear in the language of § 846, nor does it appear consistently in case law from the Sixth Circuit, the Committee did not use the term in the instruction. The drawbacks of using the term "willfully" in conspiracy cases are discussed in more detail in the commentary to Inst. 3.01A.

Paragraph (3)(B)(2) on a defendant's knowledge and participation is drawn verbatim from Instruction 3.03(1). The Sixth Circuit has characterized the language of this paragraph as the correct legal standard. United States v. Young, 553 F.3d 1035, 1050 (6th Cir. 2009). Other § 846 cases establish that once the government has proved a § 846 conspiracy beyond a reasonable doubt, the defendant's connection to the conspiracy "need only be slight, and the government is only required to prove that the defendant was a party to the conspiratorial agreement." United States v. Salgado, 250 F.3d 438, 447 (6th Cir. 2001). The defendant does not have to be an active participant in each phase of the conspiracy, so long as he is a party to the general conspiratorial agreement. *Gibbs*, 182 F.3d at 421 (*quoting* United States v. Hodges, 935 F.2d 766, 772 (6th Cir. 1991)).

The language of paragraph (3)(B)(3), which states that the defendant is not required to know the type or quantity of controlled substance involved for a conviction under § 846, is based on United States v. Villarce, 323 F.3d 435, 439 & n.1 (6th Cir. 2003) (*quoting* United States v.

Garcia, 252 F.3d 838, 844 (6th Cir. 2001)). Knowledge that the defendant possessed "some type of controlled substance" is sufficient. United States v. Stapleton, 297 F. App'x 413, 426 (6th Cir. 2008) (unpublished) (*citing Villarce, supra* at 439). Also, knowledge that the defendant possessed "some quantity" of the controlled substance is sufficient. *Villarce, supra* at 438 (italics omitted). This authority was not overruled by Alleyne v. United States, 133 S. Ct. 2151 (2013). United States v. Dado, 759 F.3d 550, 571 (6th Cir. 2014).

The language of paragraph (3)(B)(4) is taken verbatim from Instruction 3.03(2), which has been endorsed by a panel of the Sixth Circuit. 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 § 846, and the court did not give 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(2). *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.").

The language of paragraph (3)(B)(5) is drawn verbatim from Instruction 3.03(3). Proving the defendant's knowledge indirectly is also authorized by Instruction 2.08 Inferring Required Mental State.

The Sixth Circuit provides further guidance on the proof of a defendant's participation based on the type of conspiracy. Drug conspiracies can often be described as "chain" conspiracies because an agreement can be inferred from the interdependence of the enterprise. *See* United States v. Henley, 360 F.3d 509, 513 (6th Cir. 2004) (*quoting* United States v. Spearman, 186 F.3d 743, 746 (6th Cir. 1999)). In a chain conspiracy, jurors are permitted to infer that participants understand they are participating in a joint enterprise because success of the enterprise itself is dependent upon the success of those from whom they buy and sell. *Id*.

The Sixth Circuit recognizes a buyer-seller exception to drug conspiracy liability. The "buyer-seller rule . . . refuses to equate a buyer-seller agreement with a conspiratorial agreement." United States v. Wheat, 988 F.3d 299, 307 (6th Cir. 2021) (cleaned up); *see also* United States v. Hamm, 952 F.3d 728, 736 (6th Cir. 2020). The rationale is that when the conspiracy statute uses the common-law term "conspire," the word includes its common-law concepts. *Wheat* at 307 (citations omitted). One of those concepts, Wharton's Rule, holds that "two parties cannot conspire to commit a substantive crime when the crime *itself* requires two parties for its completion (such as dueling or prostitution)." *Wheat* at 307 (citations omitted). Courts presume that Wharton's Rule applies to conspiracy statutes unless the text of the statute suggests otherwise, *Wheat* at 308 *citing* Iannelli v. United States, 420 U.S. 770, 786 (1975). The text of § 846 does not suggest otherwise, so Wharton's Rule applies to it. And the buyer-seller exception based on Wharton's Rule "might be better named the transferor-transferee exception" because it does not require a sale but extends to any distribution. *Wheat* at 308 (internal quotation marks and citation omitted). Earlier cases also recognized this exception, *see, e.g.,* United States v. Dietz, 577 F.3d 672, 680 (6th Cir. 2003), *quoting* United States v. Cole, 59 F.

App'x 696, 699 (6th Cir. 2003) (unpublished).

However, the court has often upheld conspiracy convictions based on additional evidence beyond a mere purchase or sale from which knowledge of the conspiracy could be inferred. The court has identified factors that provide circumstantial evidence to establish a drug sale as part of a larger conspiracy: "evidence of advanced planning; multiple transactions involving large quantities of drugs; repeat purchases or other enduring arrangements; the length of the relationship; the established method of payment; the extent to which transactions are standardized; and the level of mutual trust between the buyer and the seller." United States v. Hamm, 952 F.3d at 736 (6th Cir. 2020) (cleaned up), *quoting* United States v. Deitz, 577 F.3d 672, 680-81 (6th Cir. 2003). In *Hamm*, the court concluded that the evidence was sufficient to establish a conspiracy agreement to distribute drugs based *inter alia* on large drug quantities, extensive planning, a relationship that was new but meant to be exclusive and ongoing, and evidence that the defendants worked as a unit with others. *Hamm* at 736-737. *See also* United States v. Williams, 998 F.3d 716, 729-730 (6th Cir. 2021) (finding sufficient evidence of conspiracy where the defendant was a purchaser of drugs but was also charged with distribution); United States v. Rosales, 990 F.3d 989, 995-996 (6th Cir. 2021) (finding sufficient evidence of conspiracy based on the factors identified in *Hamm*). Earlier cases reached the same result, *see, e.g.*, United States v. Nesbitt, 90 F.3d 164, 167 (6th Cir. 1996) (finding that evidence of advanced planning and multiple transactions involving large quantities of drugs may show that the defendant was involved in the conspiracy and was not merely engaged in a buyer-seller relationship); United States v. Anderson, 89 F.3d 1306, 1310 (6th Cir. 1996) (holding that repeat purchases, purchases of large quantities, or other enduring arrangements, are sufficient to support a conspiracy conviction). In contrast, in *Wheat*, the court reversed a drug conspiracy conviction based on insufficient evidence under the buyer-seller exception. *Wheat*, 988 F.3d at 304. The evidence in *Wheat* showed the defendant once gave a potential purchaser a .3-gram free sample of heroin that led to no further exchanges between them. *Wheat* at 304. Examining the factors that permit a jury to find more than a buyer-seller transaction, the court concluded the conviction had to be reversed based on insufficient evidence of an agreement. *Wheat* at 308-312.

A district court need not give a separate instruction on the buyer-seller exception. In United States v. Williams, 998 F.3d 716 (6th Cir. 2021), the court held the district court did not err in declining to give a buyer-seller instruction, stating that when a district court gives complete instructions on the elements of conspiracy, refusing to give a buyer-seller instruction is not reversible error. *See Williams* at 732 (collecting cases). The *Williams* court further noted that in any event, sufficient evidence in that case established that the defendants were not mere customers purchasing drugs for personal use. In *Wheat*, the court explained, "We generally will not reverse a district court for failing to give an instruction on the buyer-seller limitation (and it does not appear that Wheat's counsel requested such an instruction here anyway). . . . But we cannot ignore this buyer-seller rule when we ask whether there was enough evidence for all essential elements of the crime." *Wheat*, 988 F.3d at 311-12 (6th Cir. 2021) (citations omitted).

Indictments charging conspiracies under 21 U.S.C. § 846 may include multiple drugs as objects of the agreement. When an augmented unanimity instruction is given and the jury returns a general verdict of guilty to a charge that the conspiratorial agreement covered multiple drugs, the general verdict is ambiguous if it cannot be determined whether jurors agreed as to "one or

another of the multiple drugs allegedly involved in a conspiracy." United States v. Neuhausser, 241 F.3d 460, 470 (6th Cir. 2001) (discussing United States v. Dale, 178 F.3d 429 (6th Cir. 1999)). Under these conditions the defendant must be sentenced as if he conspired only as to the drug with the lower penalty. *Id*. at 432-34. In these circumstances the judge should use a special verdict form. *See Neuhausser*, 241 F.3d at 472 n.8 ("[W]e do not wish to discourage the Government or the trial court from using separate counts, special verdict forms, or more specific instructions in future cases involving multiple-object conspiracies. Plainly, it is appropriate to take any reasonable steps which might ensure that the jury properly understands the task before it, and that its resulting verdict is susceptible of only one interpretation.") On the other hand, if the indictment and the instructions consistently refer to the multiple drugs using the conjunctive "and," the general verdict is not ambiguous and the sentence is not limited to the lesser penalty. *Id*. at 468-70. *See also* United State v. Tosh, 330 F.3d 836 (6th Cir. 2003).

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.

14.06 DISTRIBUTION OF A CONTROLLED SUBSTANCE IN OR NEAR SCHOOLS OR COLLEGES (21 U.S.C. § 860(a))

(1) The defendant is charged with the crime of distributing [*name controlled substance*] in or near [*name prohibited place*]. [*Name controlled substance*] is a controlled substance. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant knowingly [or intentionally] distributed [*name controlled substance*] and

(B) Second, that he did so within [*insert one option from below*]

– [1000 feet of an [*insert prohibited place from this list:* elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority]]

– [100 feet of a [*insert prohibited place from this list:* public or private youth center, public swimming pool, or video arcade facility]].

(2) Now I will give you more detailed instructions on some of these terms.

(A) *[Insert definition of relevant prohibited place(s) from list below]*

– [The term "playground" means any outdoor facility [including any parking lot appurtenant thereto] intended for recreation, open to the public, and with any portion thereof containing three or more separate apparatus intended for the recreation of children including, but not limited to, sliding boards, swingsets, and teeterboards.]

– [The term "youth center" means any recreational facility and/or gymnasium [including any parking lot appurtenant thereto], intended primarily for use by persons under 18 years of age, which regularly provides athletic, civic, or cultural activities.]

– [The term "swimming pool" includes any parking lot appurtenant thereto.]

– [The term "video arcade facility" means any facility, legally accessible to persons under 18 years of age, intended primarily for the use of pinball and video machines for amusement containing a minimum of ten pinball and/or video machines.]

(B) The term "distribute" means the defendant delivered or transferred a controlled substance. [The term distribute includes the actual, constructive, or attempted transfer of a controlled substance.] [The term distribute includes the sale of a controlled substance.]

(C) To prove that the defendant knowingly distributed the [*name controlled substance*],

the defendant did not have to know that the substance was [*name controlled substance*]; it is enough that the defendant knew that it was some kind of controlled substance. Further, the defendant did not have to know how much [*name controlled substance*] he distributed. It is enough that the defendant knew that he distributed some quantity of [*name controlled substance*]. And, the defendant did not have to know that his distribution of the [*name controlled substance*] occurred within [*insert one option from below*]

– [1000 feet of [*name prohibited place from paragraph (1)(B)*]]
– [100 feet of [*name prohibited place from paragraph (1)(B)*]].

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

Use Note

This instruction covers only the crime of distributing a controlled substance near a prohibited place; if the offense charged is not distributing but rather possessing with intent to distribute or manufacturing near a prohibited place, the instruction should be modified. If the underlying violation is based on § 856 rather than § 841, the instruction should be modified. If the charged conduct is based not on § 860(a) but on §§ 860(b) regarding second offenders or 860(c) regarding employing children, the instruction should be modified.

If the first bracketed sentence in paragraph (2)(B) is given, the court should further define the terms actual, constructive, or attempted transfer. The terms actual and constructive are defined in the context of possession in Instructions 2.10 and 2.10A. The term attempt is defined in Instruction 5.01.

Committee Commentary Instruction 14.06
(current through May 1, 2025)

Title 21 U.S.C. § 860(a) provides, "Any person who violates [§§ 841(a)(1) or 856] by distributing, possessing with intent to distribute, or manufacturing a controlled substance . . . within one thousand feet of [a school, playground or public housing facility], or within 100 feet of a [youth center, public swimming pool or video arcade facility] is . . . subject to . . . [increased] maximum punishment . . . ." The Committee drafted Instruction 14.06 Distribution in or near Schools or Colleges to cover the basic offense of distributing a controlled substance in or near a prohibited place.

The offense defined in § 860(a) is a distinct offense and not a sentencing enhancement. United States v. Osborne, 673 F.3d 508, 511 (6th Cir. 2012). It is separate from but based on the offenses described in § 841 or § 856. *Id*. Proof of a violation of § 860(a) depends upon proof of an underlying violation of §§ 841(a)(1) or 856 as an element of the offense. The instruction satisfies this by requiring the jury to find the defendant distributed a controlled substance, an

offense under § 841(a)(1) (see Instruction 14.02).

This instruction assumes that the defendant is charged in the same indictment with both the underlying § 841 drug offense and the schoolyard enhancement offense, and that the evidence of both is sufficient. The Committee used this approach because the underlying drug offense and the schoolyard enhancement offense will usually be charged in the same indictment. *See, e.g.,* United States v. Cross, 900 F.2d 66 (6th Cir. 1990). No authority from the Supreme Court or Sixth Circuit addresses whether these specific crimes must be charged in the same indictment, but based on cases construing the analogous firearms crime of using or carrying a firearm during and in relation to a crime of violence or drug trafficking crime, the crimes need not be charged in the same indictment. In the context of that § 924(c) firearms crime, the law does not require the two offenses to be charged together; indeed, the predicate crime need not be charged at all. *See* U.S. v. Kuehne, 547 F.3d 667, 680 (6th Cir. 2008); United States v. Smith, 182 F.3d 452, 457 (6th Cir. 1999). So if the underlying drug offense and the schoolyard enhancement offense are not charged in the same indictment, this instruction should be modified. Moreover, if the underlying drug offense is not charged in the same indictment, the court must instruct the jury on its duty to find the elements of that underlying offense beyond a reasonable doubt. *Kuehne*, 547 F.3d at 680-81 (finding that in § 924(c) case, failure to separately instruct jury regarding elements of underlying drug trafficking offense was error but harmless).

In paragraph (1), the second sentence recognizes that the court determines whether the substance the defendant is charged with possessing falls within the definition of a controlled substance under 21 U.S.C. § 812.

The list of elements in paragraph (1) is based on the statute, § 860(a).

As provided in paragraph (1)(B), the defendant's proximity to a prohibited place is an element of the offense for the jury to decide as opposed to a sentencing factor for the judge to decide. United States v. Osborne, *supra*.

The statute includes no mens rea term. The Committee inserted the mens rea of knowingly in paragraph (1)(A) based on cases defining the mens rea required for the underlying § 841 drug offense. As explained in the commentaries for the § 841 crimes (Instructions 14.01, 14.02 and 14.03), that statute includes a mens rea of "knowingly or intentionally" but the Sixth Circuit often omits the optional term intentionally from the list of elements for § 841 offenses. Based on these cases using the mens rea of knowingly in the context of § 841, in this situation where the statute by its terms includes no mens rea, the Committee used the term "knowingly."

The definitions in paragraph (2)(A) are provided in § 860(e). Some phrases in the definitions were bracketed to help minimize unnecessary words.

The definition of "distribute" in paragraph (2)(B) is based on several sources. The term "distribute" in § 841(a)(1) is defined as "to deliver . . . a controlled substance." § 802(11). The terms "deliver" and "delivery" are defined as "the actual, constructive, or attempted transfer of a controlled substance . . . ." § 802(8). In United States v. Vincent, 20 F.3d 229, 233 (6th Cir. 1994), the court used the term deliver and cited § 802(11). The first bracketed sentence is drawn

from § 802(8), quoted *supra*. The second bracketed sentence, stating that distribution includes the sale of a controlled substance, is based on United States v. Robbs, 75 F. App'x 425, 431 (6th Cir. 2003) (unpublished).

In paragraph (2)(C), the definition of "knowingly" which states that the defendant need not know the type or quantity of controlled substance involved is based on cases construing § 841, including United States v. Villarce, 323 F.3d 435, 439 (6th Cir. 2003); United States v. Garcia, 252 F.3d 838, 844 (6th Cir. 2001); and United States v. Stapleton, 297 F. App'x 413, 425-26 (6th Cir. 2008) (unpublished). Under these cases, knowledge that the defendant possessed "some type of controlled substance" is sufficient. *Stapleton, supra* at 426 (*citing Villarce, supra*). Also, knowledge that the defendant possessed "some quantity" of the controlled substance is sufficient. *Villarce, supra* at 438 (italics omitted). This § 841 authority was not overruled by Alleyne v. United States, 133 S. Ct. 2151 (2013). United States v. Dado, 759 F.3d 550, 571 (6th Cir. 2014).

The final sentence in paragraph (2)(C) (stating that the defendant need not know that the distribution was near a prohibited place) is based on Sixth Circuit cases holding that § 860(a) does not incorporate any *mens rea* requirement on the proximity of the prohibited place. *See* United States v. Lloyd, 10 F.3d 1197, 1218 (6th Cir. 1993); United States v. Cross, 900 F.2d 66, 69 (6th Cir. 1990).

The Sixth Circuit has determined that § 860(a) convictions withstand commerce clause challenges because congressional power derives from the interstate nature of the illegal drug trade. The jurisdictional element need not be proved in the individual case because the offense necessarily affects interstate commerce. United States v. Tucker, 90 F.3d 1135 (6th Cir. 1996).

The title for the instruction is based on the title of the statute establishing the offense, § 860.

14.07A UNANIMITY REQUIRED – DETERMINING AMOUNT OF CONTROLLED SUBSTANCE (§ 841)

(1) The defendant is charged in Count ____ of the indictment with [*insert name of § 841 offense*]. If you find the defendant guilty of this charge, you will then be asked to determine the quantity of the controlled substance involved in the offense. You will be provided with a special verdict form for this purpose.

(2) If you find by unanimous agreement that the government has proved beyond a reasonable doubt that the offense involved a quantity of at least _____ of a mixture or substance containing a detectable amount of [*name controlled substance*], then please indicate this finding by checking that line on the special verdict form.

[(3) If you do not so find, you will then be asked to determine whether the government has proved a lesser quantity. If you unanimously find that the government has proved beyond a reasonable doubt that the offense involved a quantity of at least _____ of a mixture or substance containing a detectable amount of [*name controlled substance*], then please indicate this finding by checking that line on the special verdict form.]

(4) In determining the quantity of the controlled substance involved in the offense, you need not find that the defendant knew the quantity involved in the offense.

Use Note

This instruction explains the requirements of Apprendi v. New Jersey, 530 U.S. 466 (2000) and Alleyne v. United States, 133 S.Ct. 2151 (2013) for a § 841 prosecution when the penalties are increased based on the amount of the controlled substance. In these cases, the committee recommends that the court give this instruction and use a special verdict form. Special verdict forms are provided below following the commentary.

Depending upon the nature and quantity of the controlled substance alleged in the indictment and the special verdict form used, bracketed paragraph (3) may not be necessary to determine the quantity.

Committee Commentary 14.07A
(current through May 1, 2025)

Aside from the requirement that the jury unanimously agree on all facts that are elements of the offense, *see* Richardson v. United States, 526 U.S. 813, 817 (1999), the jury must also unanimously agree beyond a reasonable doubt on any fact (other than a prior conviction) that increases the statutory maximum or triggers a mandatory minimum penalty. Alleyne v. United States, 133 S.Ct. 2151 (2013); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); *see also* Jones v. United States, 526 U.S. 227 (1999). Under subsections 841(b)(1)(A) and (B), the quantity of a controlled substance can trigger a mandatory minimum penalty and can increase the statutory maximum of 20 years provided in subsection 841(b)(1)(C). In those cases, the jury must agree

unanimously on a minimum quantity involved in the § 841 offense. Instruction 14.07A Unanimity Required – Determining Amount of Controlled Substance (§ 841) is designed for these cases where jury unanimity is required. The instruction explains the background to the jury, and special verdict forms follow to allow the jury to work through the questions and record its decisions on the quantity.

As an example, if the indictment alleges a quantity of 280 grams or more of cocaine base, this instruction and the special verdict forms are intended to elicit, first, whether the government has proved an amount of 280 grams or more. Such a finding would invoke a statutory maximum sentence of life imprisonment and a mandatory minimum sentence of 10 years imprisonment under § 841(b)(1)(A)(iii) (assuming that the defendant has no prior felony drug convictions, which would further enhance his sentence). If the jury does not find that the government proved this quantity, it must then determine whether the government proved a quantity that met or exceeded a lesser threshold, in this case 28 grams of cocaine base. Such a finding would invoke a statutory maximum sentence of 40 years imprisonment and a mandatory minimum sentence of 5 years imprisonment under § 841(b)(1)(B)(iii). If the jury finds that the government has proved neither of these threshold quantities, then the base statutory maximum sentence of 20 years imprisonment would apply under § 841(b)(1)(C). These threshold amounts for cocaine base became effective on August 3, 2010 as part of the Fair Sentencing Act of 2010, and they apply to all defendants who are sentenced on that date or later. Defendants sentenced before August 3, 2010 are subject to the greater threshold amounts that were in effect on the date of sentencing. See 18 U.S.C. § 3553(a)(4)(A)(ii); Dorsey v. United States, 132 S.Ct. 2321 (2012).

The government need not prove that the defendant knew the quantity of drugs involved in the offense. The Sixth Circuit explained:

> It is settled, even after Apprendi, that the "government need not prove mens rea as to the type and quantity of the drugs" in order to establish a violation of § 841(b). United States v. Villarce, 323 F.3d 435, 439 (6th Cir. 2003); United States v. Garcia, 252 F.3d 838, 844 (6th Cir. 2001). As the *Garcia* Court explained, drug type and quantity are irrelevant to the mens rea element of § 841(a), which requires nothing more specific than an intent to distribute a controlled substance. 252 F.3d at 844. Likewise, intent is irrelevant to the penalty provisions of § 841(b), which require only that the specified drug types and quantities be "involved" in an offense. *Id*.

United States v. Gunter, 551 F.3d 472, 484-85 (6th Cir. 2009). This authority was not overruled by Alleyne v. United States, 133 S. Ct. 2151 (2013). United States v. Dado, 759 F.3d 550, 571 (6th Cir. 2014).

Provided below are two special verdict forms designed for § 841 prosecutions, Forms 14.07A-1 and 14.07A-2. The Committee decided to provide two versions of a special verdict form so district judges may choose the form they prefer. Form A-1 asks the jury to identify the amount of drugs proved by asking one question and giving the jury several choices for the answer, from which it must choose just one. Form A-2 asks the jury to identify the amount of drugs by asking two sequential questions, first whether the greater amount was proved, and if not, whether the lesser amount was proved.

Special Verdict Form § 841
Form 14.07A-1

We, the jury, unanimously find the following:

COUNT ____

Question 1. With respect to the charge in count ____ of the indictment for [*insert name of § 841 offense*], we find the defendant [*insert name*]:

Guilty _____ Not Guilty _____

If you answered guilty in response to Question 1, proceed to Question 1(a).

If you answered not guilty in response to Question 1, skip Question 1(a) and proceed to [*next count or signature line*].

Question 1(a). With respect to Count ____ , the amount of the mixture or substance containing a detectable amount of [*name controlled substance*] was (indicate answer by checking one line below):

_____ [*identify amount from § 841(b)(1)(A)*] or more.

_____ less than [*identify amount from § 841(b)(1)(A)*] but more than [*identify amount from § 841(b)(1)(B)*].

_____ less than [*identify amount from § 841(b)(1)(B)*].

Proceed to [*next count or signature line*].

Special Verdict Form § 841
Form 14.07A-2

We, the jury, unanimously find the following:

COUNT ____

Question 1. With respect to the charge in count ____ of the indictment for [*insert name of § 841 offense*], we find the defendant [*insert name*]:

Guilty _____ Not Guilty _____

If you answered guilty in response to Question 1, proceed to Question 1(a).

If you answered not guilty in response to Question 1, skip Questions 1(a) and 1(b) and proceed to [*next count or signature line*].

Question 1(a). With respect to Count ____ , the amount of the mixture or substance containing a detectable amount of [*name controlled substance*] was:

_____ [*identify amount from § 841(b)(1)(A)*] or more.
_____ less than [*identify amount from § 841(b)(1)(A)*].

If you chose the first option of [*identify amount from § 841(b)(1)(A)*] or more, skip
Question 1(b) and proceed to [*next count or signature line*].

If you chose the second option of less than [*identify amount from § 841(b)(1)(A)*], proceed to Question 1(b).

Question 1(b). With respect to Count ____ , the amount of the mixture or substance containing a detectable amount of [*name controlled substance*] was:

_____ [*identify amount from § 841(b)(1)(B)*] or more.
_____ less than [*identify amount from § 841(b)(1)(B)*].

Proceed to [*next count or signature line*].

14.07B UNANIMITY REQUIRED – DETERMINING AMOUNT OF CONTROLLED SUBSTANCE (§ 846)

(1) The defendant is charged in Count _____ of the indictment with conspiracy to [*insert object(s) of conspiracy*]. If you find the defendant guilty of this charge, you will then be asked to determine the quantity of the controlled substance involved in the conspiracy that was attributable to him as the result of his own conduct and the conduct of other co-conspirators that was reasonably foreseeable to him. You will be provided with a special verdict form for this purpose.

(2) If you find by unanimous agreement that the government has proved beyond a reasonable doubt that a quantity of at least _____ of a mixture or substance containing a detectable amount of [*name controlled substance*] was attributable to defendant as the result of his own conduct and the conduct of other co-conspirators that was reasonably foreseeable to him, then please indicate this finding on the special verdict form.

[(3) If you do not so find, you will then be asked to determine whether the government has proved a lesser quantity. If you unanimously find that the government has proved beyond a reasonable doubt that a quantity of at least _____ of a mixture or substance containing a detectable amount of [*name controlled substance*] was attributable to defendant as the result of his own conduct and the conduct of other co-conspirators that was reasonably foreseeable to him, then please indicate that finding on the special verdict form.]

(4) In determining the quantity of the controlled substance, you need not find that the defendant knew that his offense involved this quantity of drugs.

Use Note

This instruction explains the requirements of Apprendi v. New Jersey, 530 U.S. 466 (2000) and Alleyne v. United States, 133 S. Ct. 2151 (2013) in a controlled substances conspiracy case. In these cases, the committee recommends that the court give this instruction and use a special verdict form. Special verdict forms are provided below following the commentary.

Depending upon the nature and quantity of the controlled substance alleged in the indictment and the special verdict form used, bracketed paragraph (3) may not be necessary to determine the quantity for sentencing purposes.

Committee Commentary 14.07B
(current through May 1, 2025)

As described in the Commentary to Instruction 14.07A, under *Apprendi* and *Alleyne*, the jury must unanimously agree on any fact (other than a prior conviction) that increases the statutory maximum penalty or triggers a mandatory minimum penalty. In § 846 conspiracy prosecutions, the quantity of a controlled substance can increase the statutory maximum penalty and/or trigger a statutory mandatory minimum penalty and therefore requires the jury to agree

unanimously on a minimum quantity involved. Instruction 14.07B Unanimity Required – Determining Amount of Controlled Substance (§ 846) and the accompanying special verdict forms are designed for these cases where jury unanimity is required. The instruction explains the background to the jury, and the special verdict forms provided below allow the jury to work through the questions and record its decisions on the amount.

The Sixth Circuit recently stated that to determine the quantity of drugs attributable to a defendant in a § 846 drug conspiracy, the jury must identify the quantity of drugs attributable to defendant as the result of his own conduct and the conduct of other co-conspirators that was reasonably foreseeable to him. United States v. Rosales, 990 F.3d 989, 997-998 (6th Cir. 2021) (*citing* United States v. Swiney, 203 F.3d 397, 402 (6th Cir. 2000) and United States v. Hamm, 952 F.3d 728, 745-746 (6th Cir. 2020)). The court characterized this approach for determining quantity as "defendant-specific" rather than "conspiracy-wide." *Rosales* at 997. The court further concluded that the conspiracy-wide instruction the trial court gave was error but it was harmless in that case. *Id.* at 998. Based on *Rosales* and the other cases cited above, paragraphs (1), (2), and (3) of the instruction and the accompanying two special verdict forms tell the jury to identify the quantity of drugs that was "attributable to the defendant as the result of his own conduct and the conduct of other co-conspirators that was reasonably foreseeable to him."

Paragraph (4), which states that the mens rea of the defendant as to the amount of drugs involved is irrelevant, is supported by United States v. Mahaffey, 983 F.3d 238, 243 (6th Cir. 2020); United States v. Dado, 759 F.3d 550, 571 (6th Cir. 2014); United States v. Gunter, 551 F.3d 472, 484-85 (6th Cir. 2009) (*citing* United States v. Villarce, 323 F.3d 435, 439 (6th Cir. 2003) and United States v. Garcia, 252 F.3d 838, 844 (6th Cir. 2001)). This authority was not overruled by Alleyne v. United States, 133 S. Ct. 2151 (2013). United States v. Dado, *supra*. Nor was this authority abrogated by Rehaif v. United States, 139 S. Ct. 2191 (2019). United States v. Mahaffey, *supra* at 239.

Provided below are two special verdict forms designed for § 846 prosecutions, Forms 14.07B-1 and 14.07B-2. The Committee decided to provide two versions of a special verdict form so district judges may choose the form they prefer. Form B-1 asks the jury to identify the amount of drugs proved by asking one question on the amount and giving the jury several choices for the answer, from which it must choose just one. Form B-2 asks the jury to identify the amount of drugs by asking two sequential questions, first whether the greater amount was proved, and if not, whether the lesser amount was proved.

Special Verdict Form § 846
Form 14.07B-1

We, the jury, unanimously find the following:

COUNT ____

Question 1. With respect to the charge in count ____ of the indictment for conspiracy to [*insert object(s) of conspiracy*], we find the defendant [*insert name*]:

Guilty _____ Not Guilty _____

If you answered guilty in response to Question 1, proceed to Question 1(a).

If you answered not guilty in response to Question 1, skip Question 1(a) and proceed to [*next count or signature line*].

Question 1(a). With respect to Count ____ , the amount of the mixture or substance containing a detectable amount of [*name controlled substance*] that was attributable to defendant as the result of his own conduct and the conduct of other co-conspirators reasonably foreseeable to him was (indicate answer by checking one line below):

_____ [*identify amount from § 841(b)(1)(A)*] or more.

_____ less than [*identify amount from § 841(b)(1)(A)*] but more than [*identify amount from § 841(b)(1)(B)*].

_____ less than [*identify amount from § 841(b)(1)(B)*].

Proceed to [*next count or signature line*].

Special Verdict Form § 846
Form 14.07B-2

We, the jury, unanimously find the following:

COUNT ____

Question 1. With respect to the charge in count ____ of the indictment for conspiracy to *[insert object(s) of conspiracy]*, we find the defendant [*insert name*]:

Guilty _____ Not Guilty _____

If you answered guilty in response to Question 1, proceed to Question 1(a).

If you answered not guilty in response to Question 1, skip Questions 1(a) and 1(b) and proceed to [*next count or signature line*].

Question 1(a). With respect to Count ____ , the amount of the mixture or substance containing a detectable amount of [*name controlled substance*] that was attributable to defendant as the result of his own conduct and the conduct of other co-conspirators reasonably foreseeable to him was (indicate answer by checking one line below):

_____ [*identify amount from § 841(b)(1)(A)*] or more.

_____ less than [*identify amount from § 841(b)(1)(A)*].

If you chose the first option of [*identify amount from § 841(b)(1)(A)*] or more, skip Question 1(b) and proceed to [*next count or signature line*].

If you chose the second option of less than [*identify amount from § 841(b)(1)(A)*], proceed to Question 1(b).

Question 1(b). With respect to Count ____ , the amount of the mixture or substance containing a detectable amount of [*name controlled substance*] that was attributable to defendant as the result of his own conduct and the conduct of other co-conspirators reasonably foreseeable to him was (indicate answer by checking one line below):

_____ [*identify amount from § 841(b)(1)(B)*] or more.

_____ less than [*identify amount from § 841(b)(1)(B)*].

Proceed to [*next count or signature line*].

14.07C UNANIMITY REQUIRED – DETERMINING WHETHER DEATH OR SERIOUS BODILY INJURY RESULTED FROM DISTRIBUTING/DISPENSING OR MANUFACTURING (§ 841) AND SPECIAL VERDICT FORM

(1) The defendant is charged in Count ____ of the indictment with [distributing/dispensing] [manufacturing] [*name controlled substance*]. If you find the defendant guilty of this charge, you will then be asked to determine whether this [distributing/dispensing] [manufacturing] offense resulted in [death] [serious bodily injury]. You will be provided with a special verdict form to answer this question.

(2) For you to find defendant guilty of [distributing/dispensing] [manufacturing] [*name controlled substance*] resulting in [death] [serious bodily injury], you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

> (A) First, that [*name of person injured/deceased*] would not have [sustained serious bodily injury] [died] but for the use of that same [*name controlled substance*] [distributed/dispensed] [manufactured] by the defendant;
>
> [(B) Second, the defendant was part of the of the distribution chain that placed the [*name controlled substance*] into the hands of [*name of person injured/deceased*].]

(3) Now I will give you more detailed instructions on some of these terms.

> (A) But-for causation means that without using the controlled substance [distributed/dispensed] [manufactured] by the defendant, [*name of person injured/deceased*] would not have [sustained serious bodily injury] [died]. The government need not prove that [serious bodily injury] [death] was foreseeable to the defendant.
>
> [(B) The term "serious bodily injury" means bodily injury which involves [*insert at least one from the options below*]
>
> > [a substantial risk of death] or
> > [protracted and obvious disfigurement] or
> > [protracted loss or impairment of the function of a bodily member, organ, or mental faculty]].

(4) If you find by unanimous agreement that the government has proved beyond a reasonable doubt that the [distributing/dispensing] [manufacturing] resulted in [death] [serious bodily injury], then please indicate this finding by checking that line on the verdict form.

Use Note

This instruction explains the requirements of Apprendi v. New Jersey, 530 U.S. 466 (2000) and Alleyne v. United States, 133 S.Ct. 2151 (2013) in a prosecution for distributing or dispensing, or

manufacturing, a controlled substance under § 841 when death or serious bodily injury results. In these cases, the committee recommends that the court give this instruction and use a special verdict form, provided below following the commentary.

Bracketed paragraph (2)(B) should be used if the defendant's liability for the offense of distributing or dispensing, or manufacturing, a controlled substance is based on being part of a conspiracy under *Pinkerton*, but if the defendant's liability for distributing or dispensing, or manufacturing, is based on his own actions, the court may omit paragraph (2)(B). This is discussed in the commentary below.

Bracketed paragraph (3)(B) defining serious bodily injury may be deleted if the question is not raised by the facts.

Like the instruction, the special verdict form may be edited depending on whether the facts of the case raise the issue of death or serious bodily injury.

Committee Commentary 14.07C
(current through May 1, 2025)

Aside from the requirement that the jury unanimously agree on all facts that are elements of the offense, *see* Richardson v. United States, 526 U.S. 813, 817 (1999), the jury must also unanimously agree beyond a reasonable doubt on any fact (other than a prior conviction) that increases the statutory maximum or triggers a mandatory minimum penalty. Alleyne v. United States, 133 S.Ct. 2151 (2013); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); *see also* Jones v. United States, 526 U.S. 227 (1999).

Title 21 U.S.C. § 841(a)(1) provides that except as authorized by that subchapter, "[I]t shall be unlawful for any person knowingly or intentionally-- (1) to . . . manufacture, distribute, or dispense . . . a controlled substance . . . ." See Instructions 14.02A and 14.03A. Subparagraphs § 841(b)(1)(A) - (C) and (b)(1)(E)(i) & (ii) impose increased maximum sentences and/or mandatory minimum sentences on a defendant who unlawfully distributes or dispenses or manufactures particular controlled substances when ๑death or serious bodily injury results from the use of such substance.๕ This instruction, 14.07C Unanimity Required – Determining Whether Death or Serious Bodily Injury Resulted for Distributing/Dispensing or Manufacturing (§ 841), is designed for the cases where jury unanimity is required on the resulting death or serious bodily injury. The instruction explains the elements to the jury, and a special verdict form follows to allow the jury to record its decisions on the question.

This distribution/dispensing and manufacturing offense with the death-or-injury sentence enhancement applies only to a limited subset of controlled substances and can also require minimum amounts. See § 841(b)(1)(A)-(C), (b)(1)(E)(i) & (ii).

The list of elements in paragraph (2) is adapted from Burrage v. United States, 134 S. Ct. 881, 887 (2014).

Paragraph (2)(A) covers the injury-or-death-results and the but-for causation element required by the statute and Burrage v. United States, 134 S. Ct. 881, 887-888, 892 (2014). *Burrage* is discussed in detail below. This paragraph refers to "that same" drug distributed by the defendant to require that the drug distributed by the defendant was the same one that caused the victim's death or injury. *See* United States v. Davis, 970 F.3d 650, 656 (6th Cir. 2020) ("[T]he drugs supporting a defendant's § 841(a) conviction must be the same drugs that caused death."); *see also* United States v. Ewing, 749 F. App'x 317, 328-30 (6th Cir. 2018) (unpublished) (vacating distribution conviction with the death-or-injury sentence enhancement due to insufficient evidence that the victim's death resulted from the same drug that defendant distributed to him).

The death-or-injury sentence enhancement does not require the defendant to have a culpable mental state regarding the death or serious bodily injury. United States v. Williams, 998 F.3d 716 (6th Cir. 2021). In *Williams*, the defendant argued that the district court should have told the jury that it could not convict him of the enhancement unless it found that he had some sort of culpable mental state regarding the victim's death and serious bodily injury. *Id.* at 733. On plain error review, the court rejected that argument, stating the government need not demonstrate foreseeability to apply the death-or-injury enhancement, and that at any rate the defendant was not prejudiced by the omission of a mental state because the manufacture of drugs laced with fentanyl, a highly lethal drug, established foreseeability. *Id.* at 734.

Bracketed paragraph (2)(B) covers the "distribution-chain rule" announced in United States v. Hamm, 952 F.3d 728, 747 note 11 (6th Cir. 2020). The *Hamm* court held that while conspiracy liability based on *Pinkerton* could be used to impose liability for the substantive offense of regular distribution, (see Inst. 14.02A Distribution of a Controlled Substance and Inst. 3.10 Pinkerton Liability for Substantive Offenses Committed by Others), *Pinkerton* liability could not be used to impose the death-or-injury sentence enhancement covered by this instruction. *Hamm* at 741 and 744, *citing* United States v. Swiney, 203 F.3d 397, 406 (6th Cir. 2000). Instead, imposing the sentence enhancement was covered by a "narrower rule." *Hamm* at 744. That rule is that the sentence enhancement "applies only to defendants who were part of the distribution chain that placed the drugs into the hands of the overdose victim . . . ." *Id.* Paragraph (2)(B) states this requirement.

On the other hand, if the defendant's liability for distribution is based on his own actions and not on his status as a conspirator under *Pinkerton*, the narrower distribution-chain rule of *Hamm/Swiney* does not apply. United States v. Davis, 970 F.3d 650, 657 (6th Cir. 2020). The *Davis* court affirmed a conviction for the death-or-injury sentence enhancement and stated that the *Hamm/Swiney* rule was "irrelevant" because defendant was not charged with conspiracy nor was his liability for distribution based on a conspiracy theory. The court explained:

> Neither [the *Hamm* or *Swiney*] decision applies here. Davis was not charged with a conspiracy under § 846. Nor was he held liable for his § 841(a) offense on a conspiracy theory. And nothing in *Swiney* or *Hamm* suggests that those decisions apply to a case involving a substantive charge under § 841(a) not predicated on a conspiracy. The decisions are thus irrelevant here because [Davis] "is not being held responsible for someone else's actions based on his status as a co-conspirator, but is being punished for

his own actions."

Davis, id. (quoting United States v. Atkins, 289 F. App'x 872, 877 (6th Cir. 2008); *and citing* United States v. Carbajal, 290 F.3d 277, 284-285 (5th Cir. 2002) and United States v. Soler, 275 F.3d 146, 152 (1st Cir. 2002)). Thus paragraph (2)(B) is bracketed: If the defendant's liability for the offense of distributing a controlled substance is based on being part of a conspiracy under *Pinkerton*, the court should use paragraph (2)(B), but if the defendant's liability for distribution is based on his own actions, the court may omit paragraph (2)(B) based on *Davis*.

A more recent case, United States v. Williams, 998 F.3d 716 (6th Cir. 2021) is difficult to reconcile with *Davis*. In *Williams*, the defendant's conviction for distribution with the death-or-serious-bodily-injury enhancement was not based on conspiracy but was based on aiding and abetting under 18 U.S.C. § 2. *See Williams* at 727 (defendants Bradley, Barrett and Williams were charged with, *inter alia*, "eight counts of distribution of a substance containing a detectible amount of fentanyl, the use of which resulted in serious bodily injury or death, under 21 U.S.C. §§ 841(a)(1), (b)(1)(C) and 18 U.S.C. § 2."). The court affirmed the convictions and stated:

> To prove that Bradley was liable for the death of others, moreover, the government cannot rely on *Pinkerton* liability, and must show that he was in the chain of distribution that caused the victim's death or injury (*citing Hamm* at 741). The government did so here. It presented testimonial evidence from toxicology experts that indicated that the counterfeit pills containing fentanyl were the cause of the overdoses and demonstrated that Bradley was a manufacturer of this highly lethal drug. Because the government properly situated Bradley in the chain of distribution, the § 841(b)(1)(C) enhancement was properly applied to him (*citing Hamm* at 747).

This language in *Williams* suggests that the distribution chain rule applies not just to cases based on conspiracy but to cases based on aiding and abetting as well.

In U.S. v. Sadler, 24 F.4th 515 (6th Cir. 2022), cert. denied, 2022 WL 4653329, defendants Tempo and Sadler were convicted of drug offenses and the death-or-serious-bodily-injury enhancement. Neither defendant objected to the enhancement, so the court applied plain error review. Because defendant Tempo's underlying drug conviction was based on one of three possible theories (he personally committed the crime; he aided and abetted the crime; or Pinkerton liability), the court held that the jury could have found that Tempo was a principal and/or an aider and abettor, so omitting the chain of distribution instruction did not substantially affect the defendant's rights and did not warrant remand. *Sadler*, 24 F.4th at 563. In contrast, defendant Sadler's underlying drug conviction was based only on conspiracy liability under § 846, so omitting the chain of distribution instruction did substantially affect his rights. The court vacated Sadler's sentence and remanded for a new trial on the sole question of whether he was within the chain of distribution. *Sadler*, 24 F.4th at 561-562, 564.

The Sixth Circuit has stated that district courts should consider using special verdict forms or more specific instructions to make clear to juries the distinction between substantive offenses and the death-or-injury enhancement, and the differing applicability of *Pinkerton* to each. See United States v. Hamm, 952 F.3d 728, 747 note 10 (6th Cir. 2020).

Paragraph (3)(A), which defines but-for causation, is based on the instruction approved in United States v. Volkman, 797 F.3d 377 (6th Cir. 2015). The court described the *Volkman* instruction as "properly [given]" and stated that it "clearly informed" the jury of the but-for standard. *Volkman* at 392 & note 2.

Bracketed paragraph (3)(B), which defines "serious bodily injury" is based on § 802(11).

In *Burrage*, the Court discussed two causation standards. *Burrage* at 890. The first is the but-for standard the Court adopted and that appears in paragraph (2)(A) of the instruction. *Burrage* at 887-889. Discussing this but-for standard, the Sixth Circuit explained:

> The Government was not required to prove, however, that oxycodone was [the victim]'s *only* cause of death. On the contrary, but-for causation exists where a particular controlled substance—here, oxycodone—combines with other factors—here, *inter alia,* diazepam and alprazolmam—to result in death. *Burrage,* 134 S.Ct. at 888. The Government presented sufficient oxycodone-specific evidence for a rational jury to find that, without the incremental effect of the oxycodone, [the victim] would not have died. *Id.*

United States v. Volkman, 797 F.3d at 395 (6th Cir. 2015).

The second causation standard the Court mentioned in *Burrage* is that the victim's use of the drug distributed by the defendant was an independently sufficient cause of the victim's death or injury. *Burrage* at 890 & 892. The Court defined this as a situation "when multiple sufficient causes independently, but concurrently, produce a result." *Id.* at 890. The Court continued:

> To illustrate, if A stabs B, inflicting a fatal wound; while at the same moment X, acting independently, shoots B in the head ... also inflicting [a fatal] wound; and B dies from the combined effects of the two wounds, A will generally be liable for homicide even though his conduct was not a but-for cause of B's death (since B would have died from X's actions in any event).

Burrage at 890 (cleaned up). The Court also described this as a situation "where each of two causes is independently effective." *Burrage* at 890. After identifying this standard, the *Burrage* Court did not accept or reject it because there was no evidence in that case that the victim's heroin use was an independently sufficient cause of his death. *Id.* Panels of the Sixth Circuit have applied this causation standard and found the evidence sufficient in United States v. Allen, 761 Fed. Appx. 447, 450-451 (6th Cir. 2017) (unpublished) and United States v. Ewing, 749 F. App'x 317, 327-28 (6th Cir. 2018) (unpublished). In *Ewing*, the panel concluded that the government presented sufficient evidence to support causation "either as an independent and sufficient cause or as a but-for cause." *Id*.

The government's proof of but-for causation does not require evidence from blood toxicology tests. United States v. Sadler, 24 F.4th 515, 546 (6th Cir. 2022), cert. denied, 2022 WL 4653329.

The offense of simple distribution covered in Inst. 14.02A is a lesser included offense of distribution when death or serious bodily injury results covered in Inst. 14.07C. *See Burrage* at 887 & note 3.

Form 14.07C
Special Verdict Form for § 841 Distributing/Dispensing or Manufacturing
when Death or Serious Bodily Results

We, the jury, unanimously find the following:

COUNT ____

Question 1. With respect to the charge in count ____ of the indictment for [*insert § 841 offense of [distributing/dispensing] [manufacturing]] the controlled substance*], we find the defendant [*insert name*]:

Guilty _____ Not Guilty _____

If you answered guilty in response to Question 1, proceed to Questions 1(a) and 1(b) below.

If you answered not guilty in response to Question 1, skip Questions 1(a) and 1(b) and proceed to [*next count or signature line*].

Question 1(a). With respect to the charge in Count ____ of the indictment, did the defendant's [distributing/dispensing] [manufacturing] of the controlled substance result in death?

Yes _____

No _____

If you answered No in response to Question 1(a), proceed to Question 1(b).

If you answered Yes in response to Question 1(a), skip Question 1(b) and proceed to [*next count or signature line*].

Question 1(b). With respect to the charge in count ____ of the indictment, did the defendant's [distributing/dispensing] [manufacturing] of the controlled substance result in serious bodily injury?

Yes _____

No _____

Proceed to [*next count or signature line*].

Chapter 15.00

IDENTITY AND ACCESS DEVICE CRIMES

Table of Instructions

Introduction to Identity and Access Device Crimes Instructions
(current through May 1, 2025)

This chapter provides instructions for crimes established in three statutes on identity fraud and theft and access device fraud. The statutes are 18 U.S.C. §§ 1028, 1028A, and 1029. Section 1028 Fraud and Related Activity in Connection with Identification Documents, Authentication Features, and Information was enacted in 1982 and amended in 1986, 1988, 1990, 1994, 1996, 1998, 2000, 2003, 2004, 2005, and 2006. Section 1028A Aggravated Identity Theft was adopted in 2004. Finally, § 1029 Fraud and Related Activity in Connection with Access Devices was adopted in 1984 and amended in 1986, 1990, 1994, 1996, 1998, 2001 and 2002.

The pattern instructions cover the following:

15.01 Fraud and Related Activity in Connection with Identification Documents, Authentication Features, and Information (18 U.S.C. § 1028(a)(1) (producing an identification document, authentication feature, or false identification document))

15.02 Fraud and Related Activity in Connection with Identification Documents, Authentication Features, and Information (18 U.S.C. § 1028(a)(3) (possessing with intent to use unlawfully or transfer unlawfully five or more identification documents, authentication features, or false identification documents))

15.03 Fraud and Related Activity in Connection with Identification Documents, Authentication Features, and Information (18 U.S.C. § 1028(a)(6) (possessing an identification document or authentication feature which was stolen or produced without lawful authority))

15.04 Aggravated Identity Theft (18 U.S.C. § 1028A(a)(1))

15.05 Fraud and Related Activity in Connection with Access Devices (18 U.S.C. § 1029(a)(2) (trafficking in or using one or more unauthorized access devices during a one-year period))

The first three instructions, 15.01, 15.02 and 15.03, focus on § 1028, specifically on subsections 1028(a)(1), (a)(3), and (a)(6), respectively. If the indictment charges any other subsections of § 1028(a), the instructions may be modified. The fourth instruction, 15.04, focuses on subsection 1028A(a)(1); if the indictment charges the terrorism offense in subsection (a)(2), the instruction may be modified. The last instruction, 15.05, focuses on subsection 1029(a)(2), and again, if the indictment charges any of the other subsections of § 1029(a), the instruction may be modified.

For the crimes covered by the first three instructions – those focusing on § 1028 – inchoate liability is authorized in the statute. *See* § 1028(f); *see also* United States v. O'Brien, 951 F.2d 350 (6th Cir. 1991) (unpublished) (affirming conviction for attempted production of false identification documents under § 1028(a)(1)). If an attempt or conspiracy to violate § 1028

is charged, these elements instructions may be combined with those from Chapter 3 Conspiracy or Chapter 5 Attempts. For the crime covered by Instruction 15.05 – a crime focused on § 1029 – inchoate liability is also authorized by statute, *see* § 1029(b). As above, if an attempt or conspiracy to violate § 1029 is charged, Instruction 15.05 may be combined with instructions from earlier chapters on attempt and conspiracy.

15.01 Fraud and Related Activity in Connection with Identification Documents, Authentication Features, and Information (18 U.S.C. § 1028(a)(1) (producing an identification document, authentication feature, or false identification document))

(1) Count ___ of the indictment charges the defendant with violating federal law by knowingly and without lawful authority producing an [identification document] [authentication feature] [false identification document] under certain circumstances.

For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant knowingly produced an [identification document] [authentication feature] [false identification document].

(B) Second: That the defendant produced the [identification document] [authentication feature] [false identification document] without lawful authority.

(C) Third: That the defendant produced the [identification document] [authentication feature] [false identification document] under the following circumstance *[insert at least one from three options below]*.

(i) [The [identification document] [authentication feature] [false identification document] was or appeared to be issued by or under the authority of [the United States] [a sponsoring entity of an event designated as a special event of national significance.]]

(ii) [The production was in or affected interstate [foreign] commerce.]

(iii) [The [identification document] [false identification document] was transported in the mail in the course of the prohibited production.]

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "produced" means made or manufactured and includes altering, authenticating, or assembling.

(B) The term "[identification document] [authentication feature] [false identification document]" is defined as follows. *[Insert definition(s) from three options below as appropriate.]*

(i) [The term "identification document" means a document made or issued by or under the authority of
- [the United States Government]
- [a State]
- [a political subdivision of a State]
- [a sponsoring entity of an event designated as a special event of national

significance]
– [a foreign government]
– [a political subdivision of a foreign government]
– [an international governmental organization]
– [an international quasi-government organization]
which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.]

(ii) [The term "authentication feature" means any
– [hologram]
– [watermark]
– [certification symbol]
– [code]
– [image]
– [sequence of numbers or letters]
– [other feature]
that is used by the issuing authority on an
– [identification document]
– [document-making implement]
– [means of identification]
to determine if the document is counterfeit, altered, or otherwise falsified.]

(iii) [The term "false identification document" means a document of a type intended or commonly accepted for the purposes of identification of individuals that
– [is not issued by or under the authority of a governmental entity]
– [was issued under the authority of a governmental entity but was subsequently altered for purposes of deceit]
and appears to be issued by or under the authority of
– [the United States Government]
– [a State]
– [a political subdivision of a State]
– [a sponsoring entity of an event designated by the President as a special event of national significance]
– [a foreign government]
– [a political subdivision of a foreign government]
– [an international governmental organization]
– [an international quasi-governmental organization].]

(C) An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason. [The government is not required to prove that the defendant knew that his actions violated any particular provision of law, or even knew that his actions violated the law at all. Ignorance of the law is not a defense to this crime.]

(D) The phrase "was in or affected interstate [foreign] commerce" means that the prohibited production had at least a minimal connection with interstate [foreign] commerce. This means that the document's [feature's] production had some effect upon interstate [foreign] commerce. For instance, a showing that a document [feature] at some time traveled or was transferred electronically [across a state line] [in interstate commerce] [in foreign commerce] would be sufficient.

(i) The phrase "interstate commerce" means commerce between any combination of states, territories, and possessions of the United States, including the District of Columbia. [The phrase "foreign commerce" means commerce between any state, territory or possession of the United States and a foreign country.] [The term "commerce" includes, among other things, travel, trade, transportation and communication.]

(ii) Producing a document [feature] which the defendant intended to be distributed or used in interstate [foreign] commerce would meet this minimal connection requirement. The government is not required to prove that the defendant was aware of a future effect upon interstate [foreign] commerce, but only that the scheme, if completed, would have had such results.

(iii) [The government need not prove that [the prohibited production was contemporaneous with the movement in or effect upon interstate [foreign] commerce] [the prohibited production itself affected interstate [foreign] commerce] [the defendant had knowledge of the interstate [foreign] commerce connection].]

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

Use Note

In paragraph (1)(C)(ii) and the paragraphs under (2)(D) on the effect on commerce, the instruction presumes that the commerce involved is interstate commerce; the bracketed term "foreign" should be substituted if warranted by the facts.

If multiple options are provided for meeting the jurisdictional element under paragraph (1)(C), the court may want to give a specific unanimity instruction. See the Commentary to Inst. 8.03 Unanimous Verdict.

In paragraph (2)(C), the bracketed sentences stating that the government need not prove knowledge of the law should be used only if relevant.

Paragraph (2)(D)(iii) lists items the government need not prove to establish an effect on commerce and should be used only if relevant.

Subsection 1028(d) provides definitions for many terms beyond those included in the instruction.

Brackets indicate options for the court.

Italics indicate notes to the court.

Committee Commentary Instruction 15.01
(current through May 1, 2025)

Title 18 U.S.C. § 1028(a)(1) provides: "Whoever, in a circumstance described in subsection (c) of this section-- (1) knowingly and without lawful authority produces an identification document, authentication feature, or a false identification document . . . shall be punished . . . ."

The list of elements in paragraph (1) is derived from the statute, § 1028(a)(1). The specific language in paragraphs (1)(A) and (1)(B) is based on § 1028(a)(1). The language in paragraph (1)(C) is based on § 1028(c).

In the paragraphs under (1)(C), the circumstances listed provide the federal jurisdictional base for the offense. See United States v. Gros, 824 F.2d 1487, 1495 (6th Cir. 1987) (approving a jury instruction which referred to the content of current § 1028(c)(1) and (c)(3)(A) as "jurisdictional requirements"). The three options listed in paragraph (1)(C) are drawn from the options listed in § 1028(c) but include only the options relevant to the specific crime of producing an identification document or feature under subsection (a)(1). In paragraph (1)(C)(ii) which refers to an effect on commerce, the instruction presumes that the commerce involved is interstate commerce, and the bracketed term "foreign" should be substituted if warranted by the facts. Only one of these circumstances listed in paragraph (1)(C) must be met. *See Gros*, 824 F.2d at 1494 (approving instructions in § 1028(a)(3) case which required only one jurisdictional requirement from § 1028(c) to be met).

The jurisdictional option in paragraph (1)(C)(iii) is not available in prosecutions based on producing an authentication feature. This is because the statute plainly provides this jurisdictional option for cases based on "identification documents" and "false identification documents," but omits the term "authentication feature." See § 1028(c)(3)(B). Under this statutory language, the jurisdictional option in paragraph (1)(C)(iii) is only available for prosecutions based on identification documents and false identification documents.

The language of paragraph (2)(A) defining the term "produced" as made or manufactured is based on the Random House Dictionary, 2010. The language regarding alter, authenticate, or assemble is taken from § 1028(d)(9), which states that the term produce "includes" alter, authenticate, or assemble.

The language of paragraph (2)(B) defining the terms identification document, authentication feature, and false identification document is based on subsections 1028(d)(3), (d)

(1), and (d)(4), respectively. Some of the options within each definition were bracketed to limit unnecessary words and allow the court to tailor the instruction to the facts of the case.

The definition of "knowingly" in paragraph (2)(C) is based on United States v. Svoboda, 633 F.3d 479 (6th Cir. 2011), in which the court found no error in the instructions defining "knowingly" in a prosecution for possessing an unlawfully produced identification document under § 1028(a)(6) (see Inst. 15.03). The first sentence is drawn verbatim from the instruction used in *Svoboda, supra* at 485. The two sentences stating that the defendant need not have knowledge of the law are also drawn from *Svoboda*, but are included in brackets for use only when relevant in the particular case.

The definition of "was in or affected interstate commerce" in paragraphs (2)(D)(i), (ii), and (iii) is based on the statute, § 1028(c)(3)(A), and the instructions approved in *Gros*, 824 F.2d at 1494-95. The terms transfer and possession were deleted as irrelevant to this instruction on production. The option of "[across a state line]" was added as a plain-English way to describe a document traveling in interstate commerce, and the instruction substitutes the word "connection" for "nexus." Generally, duplicative words were omitted, the language was simplified, and the concepts were divided into subparagraphs. The definition presumes that the commerce involved is "interstate" commerce, and the bracketed term "foreign" should be substituted if warranted by the facts. Paragraph (2)(D)(iii) lists items the government need not prove and should be used only if relevant in the case.

The good-faith defense (see Instruction 10.04) is not available to a defendant charged with a violation of § 1028(a)(1) who claims he relied on a legal interpretation of a layman. *Svoboda, supra* at 484.

15.02 Fraud and Related Activity in Connection with Identification Documents, Authentication Features, and Information (18 U.S.C. § 1028(a)(3) (possessing with intent to use or transfer unlawfully five or more identification documents, authentication features, or false identification documents))

(1) Count ___ of the indictment charges the defendant with violating federal law by knowingly possessing, with the intent to use or transfer unlawfully, five or more [identification documents] [authentication features] [false identification documents].

For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant possessed five or more [identification documents] [authentication features] [false identification documents].

(B) Second: That the defendant knowingly possessed the [identification documents] [authentication features] [false identification documents] with intent to use or transfer them unlawfully.

(C) Third: That the defendant possessed the [identification documents] [authentication features] [false identification documents] under the following circumstances [*insert at least one from three options below]*.

(i) [The [identification document] [authentication feature] [false identification document] was or appeared to be issued by or under the authority of the United States or a sponsoring entity of an event designated as a special event of national significance.]

(ii) [The possession was in or affected interstate [foreign] commerce.]

(iii) [The [identification document] [false identification document] was transported in the mail in the course of the prohibited possession.]

(2) Now I will give you more detailed instructions on some of these terms.

(A) [*Insert applicable definition of possession from Instructions 2.10, 2.10A, and 2.11 here or as a separate instruction*].

(B) The term "[identification document] [authentication feature] [false identification document]" is defined as follows. *[Insert definition(s) from three options below as appropriate.]*

(i) [The term "identification document" means a document made or issued by or under the authority of

– [the United States Government]
– [a State]

– [a political subdivision of a State]
– [a sponsoring entity of an event designated as a special event of national significance]
– [a foreign government]
– [a political subdivision of a foreign government]
– [an international governmental organization]
– [an international quasi-government organization]
which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.]

(ii) [The term "authentication feature" means any
– [hologram]
– [watermark]
– [certification symbol]
– [code]
– [image]
– [sequence of numbers or letters]
– [other feature]
that is used by the issuing authority on an
– [identification document]
– [document-making implement]
– [means of identification]
to determine if the document is counterfeit, altered, or otherwise falsified.]

(iii) [The term "false identification document" means a document of a type intended or commonly accepted for the purposes of identification of individuals that
– [is not issued by or under the authority of a governmental entity]
– [was issued under the authority of a governmental entity but was subsequently altered for purposes of deceit]
and appears to be issued by or under the authority of
– [the United States Government]
– [a State]
– [a political subdivision of a State]
– [a sponsoring entity of an event designated by the President as a special event of national significance]
– [a foreign government]
– [a political subdivision of a foreign government]
– [an international governmental organization]
– [an international quasi-governmental organization].]

(C) An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

(D) [The term "transfer" includes selecting an [identification document] [false

identification document] [authentication feature] and placing or directing the placement of such document on an online location where it is available to others.]

(E) The phrase "was in or affected interstate [foreign] commerce" means that the prohibited possession had at least a minimal connection with interstate [foreign] commerce. This means that the document's [feature's] possession had some effect upon interstate [foreign] commerce. For instance, a showing that a document [feature] at some time traveled or was transferred electronically [across a state line] [in interstate commerce] [in foreign commerce] would be sufficient.

(i) The phrase "interstate commerce" means commerce between any combination of states, territories, and possessions of the United States, including the District of Columbia. [The phrase "foreign commerce" means commerce between any state, territory or possession of the United States and a foreign country.] [The term "commerce" includes, among other things, travel, trade, transportation and communication.]

(ii) Possessing a document [feature] which the defendant intended to be distributed or used in interstate [foreign] commerce would meet this minimal connection requirement. The government is not required to prove that the defendant was aware of a future effect upon interstate [foreign] commerce, but only that the scheme, if completed, would have had such results.

(iii) [The government need not prove that [the prohibited possession was contemporaneous with the movement in or effect upon interstate [foreign] commerce] [the prohibited possession itself affected interstate [foreign] commerce] [the defendant had knowledge of the interstate [foreign] commerce connection].]

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

Use Note

This instruction does not include language from § 1028(a)(3) that if the prosecution is based on possession of identification documents, the identification documents must be "other than those lawfully for the use of the possessor." If the prosecution is based on possession of identification documents and the issue of whether they were issued lawfully for the use of the possessor is raised, this phrase should be added to paragraph (1)(A).

In paragraph (1)(C)(ii) and the paragraphs under (2)(E) on the effect on commerce, the instruction presumes that the commerce involved is interstate commerce, and the bracketed term "foreign" should be substituted if warranted by the facts.

The jurisdictional option in paragraph (1)(C)(iii) is not available in prosecutions based on

possessing an authentication feature. This is because the statute plainly provides this jurisdictional option for cases based on "identification documents" and "false identification documents," but omits the term "authentication feature." See § 1028(c)(3)(B). Under this statutory language, the jurisdictional option in paragraph (1)(C)(iii) is only available for prosecutions based on identification documents and false identification documents.

If multiple options are provided for meeting the jurisdictional element under paragraph (1)(C), the court may want to give a specific unanimity instruction. See the Commentary to Inst. 8.03 Unanimous Verdict.

Paragraph (2)(E)(iii) lists items the government need not prove to establish an effect on commerce and should be used only if relevant.

Subsection 1028(d) provides definitions for many terms beyond those included in the instruction.

Brackets indicate options for the court.

Italics indicate notes to the court.

Committee Commentary Instruction 15.02
(current through May 1, 2025)

Title 18 U.S.C. § 1028(a)(3) provides: "Whoever, in a circumstance described in subsection (c) of this section-- (3) knowingly possesses with intent to use unlawfully or transfer unlawfully five or more identification documents (other than those issued lawfully for the use of the possessor), authentication features, or false identification documents . . . shall be punished . . . ."

The list of elements in paragraph (1) is derived from the statute, § 1028(a)(3) and United States v. Gros, 824 F.2d 1487 (6th Cir. 1987). The specific language in paragraphs 1(A) and 1(B) is based on § 1028(a)(1). The language in paragraph (1)(C) is based on § 1028(c). In *Gros*, the Sixth Circuit affirmed instructions for a § 1028(a)(3) conviction. The instructions basically provided that the elements were as follows: the prohibited document or feature, the jurisdictional element, the defendant's possession of five or more prohibited documents or features, and that defendant's possession of them was knowing and with the intent to use unlawfully. *Id.* at 1495. These elements appear in paragraph (1) in different order.

The instructions do not include language from § 1028(a)(3) that if the prosecution is based on possession of identification documents, the identification documents must be "other than those lawfully for the use of the possessor." If the prosecution is based on possession of identification documents and the issue of whether they were issued lawfully for the use of the possessor is raised, the court should add this phrase to paragraph (1)(A).

In the paragraphs under (1)(C), the circumstances listed provide the federal jurisdictional

base for the offense. *See Gros*, 824 F.2d at 1495 (referring to the content of current § 1028(c)(1) and (c)(3)(A) as "jurisdictional requirements"). The three options listed in paragraph (1)(C) are drawn from the options listed in § 1028(c) but include only the options relevant to the specific crime of possessing an identification document or feature under subsection (a)(3). In paragraph (1)(C)(ii), which refers to an effect on commerce, the instruction presumes that the commerce involved is interstate commerce, and the bracketed term "foreign" should be substituted if warranted by the facts. Only one of these circumstances listed in paragraph (1)(C) must be met. *See Gros*, 824 F.2d at 1494 (approving instructions in § 1028(a)(3) case which required only one jurisdictional requirement from § 1028(c) to be met).

The jurisdictional option in paragraph (1)(C)(iii) is limited in one way that the other jurisdictional options are not and should be used with caution. The option in that paragraph is not available in prosecutions based on possessing an authentication feature. This is because the statute plainly authorizes this jurisdictional option for cases based on "identification documents" and "false identification documents," but omits the term "authentication feature." See § 1028(c)(3)(B). Under this statutory language, the jurisdictional option in paragraph (1)(C)(iii) is only available for prosecutions based on identification documents and false identification documents.

The definition in (2)(A) of "possess" is a cross-reference to other pattern instructions which define that term in federal crimes generally based on Supreme Court and Sixth Circuit cases. See Instructions 2.10, 2.10A, and 2.11

The language of paragraph (2)(B) defining the terms "identification document," "authentication feature," and "false identification document" is based on subsections 1028(d)(3), (d)(1), and (d)(4), respectively. Some of the options within each definition were bracketed to limit unnecessary words and to allow the court to tailor the instruction to the facts of the case.

The definition of "knowingly" in paragraph (2)(C) is based on United States v. Svoboda, 633 F.3d 479 (6th Cir. 2011), in which the court found no error in the instructions defining "knowingly" in a prosecution for possessing an unlawfully produced identification document under § 1028(a)(6) (see Inst. 15.03). The definition is drawn verbatim from the instruction used in *Svoboda, supra* at 485.

The definition of "transfer" in paragraph (2)(D) is based on § 1028(d)(10). This subsection defining "transfer" does not mention authentication features, but authentication features are one of the items covered by the crime, see § 1028(a)(3), and are covered in this instruction. The committee assumed that the omission of "authentication feature" from the definition of transfer was inadvertent, so we included the term "authentication feature" in the definition of transfer in paragraph (2)(D) of the instruction.

The definition of "was in or affected interstate commerce" in paragraph (2)(E) is based on the statute, § 1028(c)(3)(A), and the instructions approved in *Gros*, 824 F.2d at 1494-95. The terms transfer and production were deleted as irrelevant to this instruction on possession. The option of "[across a state line]" was added as a plain-English way to describe a document traveling in interstate commerce, and the instruction substitutes the word "connection" for "nexus." Generally, duplicative words were omitted, the language was simplified, and the

concepts were divided into subparagraphs. The definition presumes that the commerce involved is "interstate" commerce, and the bracketed term "foreign" should be substituted if warranted by the facts. Paragraph (2)(F)(iii) lists items the government need not prove and should be used only if relevant in the case.

The good-faith defense (see Instruction 10.04) is not available to a defendant charged with a violation of § 1028(a)(3) who claims he relied on a legal interpretation of a layman. *Svoboda, supra* at 484.

15.03 Fraud and Related Activity in Connection with Identification Documents, Authentication Features, and Information (18 U.S.C. § 1028(a)(6) (possessing an identification document or authentication feature which was stolen or produced without lawful authority))

(1) Count ___ of the indictment charges the defendant with violating federal law by knowingly possessing an [identification document or authentication feature] of the United States that was [stolen or produced without lawful authority], knowing that the [document] [feature] was [stolen or produced without lawful authority].

For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant knowingly possessed an [identification document or authentication feature] that was [stolen or produced without lawful authority]

(B) Second: That the defendant knew that the [identification document or authentication feature] was [stolen or produced without lawful authority].

(C) Third: That the [identification document] [authentication feature] was or appeared to be issued by or under the authority of the United States or a sponsoring entity of an event designated as a special event of national significance.]

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "[identification document] [authentication feature]" is defined as follows. *[Insert definition(s) from two options below as appropriate.]*

(i) [The term "identification document" means a document made or issued by or under the authority of

– [the United States Government]
– [a State]
– [a political subdivision of a State]
– [a sponsoring entity of an event designated as a special event of national significance]
– [a foreign government]
– [a political subdivision of a foreign government]
– [an international governmental organization]
– [an international quasi-government organization]

which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.]

(ii) [The term "authentication feature" means any

– [hologram]
– [watermark]

– [certification symbol]
– [code]
– [image]
– [sequence of numbers or letters]
– [other feature]

that is used by the issuing authority on an

– [identification document]
– [document-making implement]
– [means of identification]

to determine if the document is counterfeit, altered, or otherwise falsified.]

(B) [*Insert applicable definition of possession from Instructions 2.10, 2.10A, and 2.11 here or as a separate instruction*].

(C) An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

(D) The term "produced" means made or manufactured and includes altering, authenticating, or assembling.

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

Use Note

Subsection 1028(d) provides definitions for many terms beyond those included in the instruction.

Brackets indicate options for the court.

Italics indicate notes to the court.

Committee Commentary Instruction 15.03
(current through May 1, 2025)

Title 18 U.S.C. § 1028(a)(6) provides: "Whoever, in a circumstance described in subsection (c) of this section-- . . . (6) knowingly possesses an identification document or authentication feature that is or appears to be an identification document or authentication feature of the United States or a sponsoring entity of an event designated as a special event of national significance which is stolen or produced without lawfully authority knowing that such document or feature was stolen or produced without such authority . . . shall be punished . . . ."

The list of elements in paragraph (1) is derived from the statute, § 1028(a)(6); United States v. Svoboda, 633 F.3d 479 (6th Cir. 2011); and United States v. Gros, 824 F.2d 1487 (6th

Cir. 1987). The specific language in paragraphs (1)(A) and (1)(B) is based on § 1028(a)(6). The language in paragraph (1)(C) is based on § 1028(a)(6) and (c)(1). In *Svoboda, supra*, the court approved an instruction for § 1028(a)(6) requiring that the government prove that "'the defendant knowingly possessed an identification document or authentication feature that is or appears to be an identification document or authentication feature of the United States with knowledge that it was produced without lawful authority.'" Similarly, in United States v. Gros, 824 F.2d 1487 (6th Cir. 1987), the court approved instructions for § 1028(a)(6) stating that the government had to prove that (1) the defendant knowingly possessed identification documents that appeared to be identification documents of the United States and (2) that the defendant had knowledge that the above-described documents were stolen or produced without the authority of the United States. *Id.* at 1492. The instruction includes these elements but divides them into three parts.

The elements for this crime listed in paragraph (1) do not include a jurisdictional base because it is unnecessary. The statute lists three ways to establish jurisdiction in subsection (c). The jurisdictional option in subsection (c)(1) will automatically be established by proof of the other elements of the crime under subsection (a)(6). This is because subsections (a)(6) and (c)(1) have identical language. The law is clear that only one of the three jurisdictional circumstances listed in subsection (c) of the statute must be met, *see Gros*, 824 F.2d at 1494 (approving instructions in § 1028(a)(3) case which required only one jurisdictional requirement from § 1028(c) to be met). Because the elements under subsection (a)(6) will inevitably establish the jurisdictional base from subsection (c)(1), it is unnecessary to include those provisions again in the instruction.

The language of paragraph (2)(A) defining the terms "identification document" and "authentication feature" is based on §§ 1028(d)(3) and (d)(1), respectively. Some of the options within each definition were bracketed to limit unnecessary words and to allow the court to tailor the instruction to the facts of the case.

The definition in paragraph (2)(B) of "possess" is a cross-reference to other pattern instructions which define the term possess in federal crimes generally based on Supreme Court and Sixth Circuit cases. See Instructions 2.10, 2.10A, and 2.11

The definition of knowingly in paragraph (2)(C) is based on *Svoboda, supra*, in which the court found no error in the instructions defining "knowingly" in a prosecution under § 1028(a)(6). The definition is drawn verbatim from the instruction used in *Svoboda, supra* at 485.

The definition in paragraph (2)(D) of "produced" as made or manufactur**ed** is based on the Random House Dictionary, 2010. The language on alter, authenticate, or assemble is taken from § 1028(d)(9), which states that the term produce "includes" alter, authenticate, or assemble.

The good-faith defense (see Instruction 10.04) is not available to a defendant charged with a violation of § 1028(a)(6) who claims he relied on a legal interpretation of a layman. *Svoboda, supra* at 484.

15.04 Aggravated Identity Theft (18 U.S.C. § 1028A(a)(1))

(1) Count _____ of the indictment charges the defendant with [transferring] [possessing] [using] a means of identification of another person during and in relation to a felony violation listed in the statute.

For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant committed the felony violation of [*include name of felony and citation*] charged in Count _____ . The violation charged in count ____ is a felony violation listed in the statute.

(B) Second: That the defendant knowingly [transferred] [possessed] [used] a means of identification of another person without lawful authority.

(C) Third: That the defendant knew the means of identification belonged to another person.

(D) Fourth: That the [transfer] [possession] [use] was during and in relation to the felony of [*include name of felony and citation*] charged in Count ____.

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "means of identification" is defined as any name or number that may be used to identify a specific individual, including any

– [name]
– [social security number]
– [date of birth]
– [official government-issued driver's license or identification number]
– [alien registration number]
– [government passport number]
– [employer or taxpayer identification number]
– [unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation]
– [unique electronic identification number, address, or routing code] or
– [telecommunication identifying information or access device].

(B) The term "[transfer] [possess] [use]" is defined as follows. *[Insert definition(s) from three options below as appropriate.]*

(i) [The term "transfer" includes selecting an [identification document] [false identification document] and placing or directing the placement of such document on an online location where it is available to others.]

(ii) [*Insert applicable definition of possession from Instructions 2.10, 2.10A, and*

2.11 here or as a separate instruction.]

(iii) [The term "use" means active employment of the means of identification during and in relation to the crime charged in Count ____ . "Active employment" includes activities such as displaying or bartering. "Use" also includes a person's reference to a means of identification in his possession for the purpose of helping to commit the crime charged in Count _____ .]

(C) An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason. [The government is not required to prove that the defendant knew that his actions violated any particular provision of law, or even knew that his actions violated the law at all. Ignorance of the law is not a defense to this crime.]

[(D) The phrase "without lawful authority" does not require that the defendant stole the means of identification information from another person but includes the defendant obtaining that information from another person with that person's permission or consent.]
(E) The [transfer] [possession] [use] of a means of identification is "during and in relation to" the felony of [*include name of felony and citation*] charged in Count _____ if the [transfer] [possession] [use] of the means of identification was at the crux of the underlying felony. Stated another way, the [transfer] [possession] [use] must have been a key mover in the criminality. [In cases where the underlying crime involves fraud or deceit, the means of identification must have been [transferred] [possessed] [used] in a manner that is fraudulent or deceptive.]

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

Use Note

If the predicate felony violation is not charged in the same indictment, the court must instruct the jury on its duty to find the elements of the predicate felony violation beyond a reasonable doubt.

This instruction assumes that the defendant is charged in the same indictment with both the predicate felony violation and the aggravated identity crime; if these crimes are not charged in the same indictment, this instruction must be modified.

In paragraph (1)(A), the felony violation identified as the predicate for the aggravated identity crime must appear on the list of felony violations in § 1028A(c). The court must confirm that the predicate felony violation is on the list of felony violations in the statute.

In paragraph (1)(B), insert the appropriate verb or verbs implicated by the facts of the case from the three options of transfer, possess or use. In paragraph (2)(B), insert the appropriate definitions to correspond with the verb(s) used in paragraph (1)(B).

In paragraph (2)(C), the bracketed sentences stating that the government need not prove knowledge of the law should be used only if relevant.

Bracketed paragraph (2)(D) should be used only if relevant.

18 U.S.C. § 1028(d) provides definitions for many terms used in § 1028A.

Brackets indicate options for the court. Brackets with italics are notes to the court.

Committee Commentary Instruction 15.04
(current through May 1, 2025)

Title 18 U.S.C. § 1028A(a)(1) states: "Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years." This section establishes a mandatory consecutive penalty enhancement of two years in addition to any term of imprisonment for the underlying offense. See Section-by-section analysis and discussion of H.R. 1731, H.R. Rep. No.108-528 at page 785-86 (June 8, 2004).

This instruction assumes that the defendant is charged in the same indictment with both the underlying felony violation and the aggravated identity crime, and that the evidence of both is sufficient. The Committee used this approach because the predicate felony violation and the aggravated identity crime will usually be charged in the same indictment. *See, e.g.,* United States v. White, 296 F. App'x 483 (6th Cir. 2008) (unpublished). No authority from the Supreme Court addresses whether these specific crimes must be charged in the same indictment. A panel of the Sixth Circuit has noted that both offenses need not be charged in the same indictment. United States v. Jacobs, 545 F. App'x 365, 366-67 (6th Cir. 2013) (unpublished), *citing* United States v. Jenkins-Watts, 574 F.3d 950, 970 (8th Cir. 2009). So if the underlying felony violation and the aggravated identity crime are not charged in the same indictment, this instruction should be modified. Moreover, if the predicate felony violation is not charged in the same indictment, the court must instruct the jury on its duty to find the elements of the predicate felony violation beyond a reasonable doubt. *Jacobs, id.* Requiring the jury to find the elements of the underlying felony violation is additionally important because the penalty enhancement for aggravated identity theft does not include its own jurisdictional base, but rather depends on the jurisdictional base established in the underlying felony violation.

The list of four elements in paragraph (1) is supported by United States v. Gandy, 926 F.3d 248, 258 (6th Cir. 2019) (*citing* Inst. 15.04 with approval); *see also* United States v.Vance, 956 F.3d 846, 857 (6th Cir. 2020) (identifying the same factors in two elements).

The predicate felony violation identified in paragraph (1)(A) must be on the list of qualifying felony violations in § 1028A(c). The court must confirm that the felony violation involved in the case is one of the qualifying felony violations listed in the statute. As noted

above, based on Sixth Circuit case law for an analogous firearms crime, the court must instruct the jury on the elements of the underlying felony violation. United States v. Kuehne, 547 F.3d 667 at 680-81 (6th Cir. 2008) (holding in § 924(c) case, failure to separately instruct jury regarding elements of underlying drug trafficking crime was error but harmless).

The language in paragraph (1)(B) requiring that the transfer, possession, or use be without lawful authority is drawn verbatim from the statute; *see also Gandy, supra*.

The language of paragraph (1)(C) requiring the defendant to know that the identification belonged to another person is based on Flores-Figueroa v. United States, 129 S.Ct. 1886, 1894 (2009). In *Flores-Figueroa*, the Court stated that for the aggravated identity crime in § 1028A(1), based on "ordinary English grammar, it seems natural to read the statute's word 'knowingly' as applying to all the subsequently listed elements of the crime." *Id*. at 1890 (*citing* United States v. X-Citement Video, Inc., 513 U.S. 64, 79 (1994)). The Court further noted that the statute is designed to deal with identity theft and that in other theft statutes, Congress required the offender to know that the item he took actually belonged to a different person. *Id.* at 1893. The Sixth Circuit quoted paragraph (1)(C) with approval in *Gandy, supra*. The *Gandy* court also concluded that the convictions were adequately supported by circumstantial evidence that the defendants knew the identifications belonged to real people. *Gandy, supra* at 259 ("In sum, the government put forth circumstantial evidence from which the jury could have concluded beyond a reasonable doubt that [defendants] knew that they were using the names and personal identifying information of real people.").

In paragraphs (1)(A), (1)(D), and (2)(E), the language requiring the identification of the underlying felony violation by name and citation is based on United States v. Nicolescu, 17 F.4th 706 (6th Cir. 2021).

In paragraph (2)(A), the definition of "means of identification" is based on § 1028(d)(7). That subsection states:

> (7) the term "means of identification" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any--
>
> (A) name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;
>
> (B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
>
> (C) unique electronic identification number, address, or routing code; or
>
> (D) telecommunication identifying information or access device (as defined in section 1029(e)) . . . .

The definition in paragraph (2)(A) incorporates this exact statutory language except that it omits the prefatory phrase "alone or in conjunction with any other information" as unnecessary and it omits the parenthetical cite at the end. If the issue of whether the means of identification was used alone or along with other information is raised by the facts of the case, this phrase may be

reinserted.

In paragraph (2)(B)(i), the language stating that transfer includes selecting and placing an item on an online location is based on § 1028(d)(10). The Committee put options in the definition into brackets to minimize unnecessary words and facilitate tailoring the instruction to fit the case. The options (identification document and false identification document) are not defined in the instruction but definitions are available in § 1028(d)(3) and (d)(4), respectively.

The definition of "possess" in paragraph (2)(B)(ii) is a cross-reference to other pattern instructions which define that term in federal crimes generally based on Supreme Court and Sixth Circuit cases. See Instructions 2.10, 2.10A, and 2.11.

In paragraph (2)(B)(iii), the definition of "use" is adapted from Supreme Court and Sixth Circuit case law defining that term in the context of the firearms crime of using or carrying a firearm during and in relation to a predicate crime under § 924(c). See Bailey v. United States, 516 U.S. 137 (1995) and United States v. Combs, 369 F.3d 925, 932 (6th Cir. 2004) (*quoting Bailey*'s definition of use). In *Bailey*, the Court held that under § 924(c)(1), use of a firearm "requires evidence sufficient to show an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." *Bailey*, 516 U.S. at 143 (emphasis in original). The Court explained further:

> To illustrate the activities that fall within the definition of "use" provided here, we briefly describe some of the activities that fall within "active employment" for a firearm, and those that do not.
>
> The active-employment understanding of "use" certainly includes brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm. . . . [E]ven an offender's reference to a firearm in his possession could satisfy § 924(c)(1). Thus, a reference to a firearm calculated to bring about a change in the circumstances of the predicate offense is a "use," just as the silent but obvious and forceful presence of a gun on a table can be a "use."
>
> * * *
>
> A possibly more difficult question arises where an offender conceals a gun nearby to be at the ready for an imminent confrontation [citation omitted]. . . . In our view, "use" cannot extend to encompass this action. If the gun is not disclosed or mentioned by the offender, it is not actively employed, and it is not "used." . . . Placement for later active use does not constitute "use."

Bailey, 516 U.S. at 148-49. The language in the definition stating that the use of the means of identification must be "for the purpose of helping to commit the crime charged in Count ___" is a plain English version of the standard "calculated to bring about a change in the circumstances of the predicate offense" articulated in *Bailey* and quoted *supra*.

In United States v. Miller, 734 F.3d 530 (6th Cir. 2013), the court resolved a statutory interpretation question on the breadth of the term "use" when applied only to another person's

name under § 1028A(a)(1). Based on the context of that particular statute, the court concluded the term was ambiguous and so applied the rule of lenity to adopt the narrower interpretation. Thus when the defendant used the name of another person to falsely state that person did something he did not do, but the defendant did not pass himself off as that person, the defendant did not "use" the name of another person as that term is defined in § 1028A(a)(1).

In United States v. Medlock, 792 F.3d 700 (6th Cir. 2015), the court again found that "use" was not met. The defendants submitted claims for reimbursement to Medicare for transporting patients. The court held that the defendants did not "use" the names and Medicare identification numbers of the particular patients on the claims because the defendants really did transport those patients; what they lied about was their eligibility for reimbursement. *Id.* at 706, 708, 712. In support of this limited definition of use, the court quoted the definition of use in Instruction 15.04(2)(B)(iii). *See Medlock*, 792 F.3d at 706 ("In addition, the Sixth Circuit's Pattern Jury instructions seem to contemplate a narrow reading of 'use' in § 1028A.").

In United States v. White, 846 F.3d 170 (6th Cir. 2017), the court distinguished *Miller* and *Medlock* and held that "use" was met. The defendant was a travel agent who manufactured fake military identification cards and sent them to airlines to get lower airfares for her non-military-member clients. *Id.* at 172. The court explained, "White did more than simply lie about whether her clients were eligible for military discounts. . . . . The distinction in this case . . . arises from White's actions in creating false military identification cards and attempting to pass them off as her clients' own personal means of identification." *White*, 846 F.3d at 177.

In the absence of authority under § 1028A, the definition of knowingly in paragraph (2)(C) is based on United States v. Svoboda, 633 F.3d 479 (6th Cir. 2011), in which the court found no error in instructions defining "knowingly" in a prosecution under § 1028(a)(6) (see Inst. 15.03). The first sentence is drawn verbatim from the instruction used in *Svoboda, supra* at 485. The two sentences stating that the defendant need not have knowledge of the law are also drawn from *Svoboda*, but are included in brackets for use only when relevant in the particular case.

In paragraph (2)(D), the definition of "without lawful authority" is based on United States v. Lumbard, 706 F.3d 716, 723-25 (6th Cir. 2013). In an unpublished opinion, a panel found no abuse of discretion when the trial court instructed that, "If the defendant obtained someone else's means of identification and used it for some unlawful purpose, the defendant has acted 'without lawful authority.' " United States v. Rosenbaum, 628 Fed. Appx. 923, 932-933 (6th Cir. 2015) (unpublished).

The definition of "during and in relation to" in paragraph (2)(E) is drawn from Dubin v. United States, 143 S. Ct. 1557 (2023). In *Dubin*, the Court held that "§ 1028A(a)(1) is violated when the defendant's misuse of another person's means of identification is at the crux of what makes the underlying offense criminal, rather than merely an ancillary feature of a billing method." *Id.* at 1563. The Court stated that being "at the crux of the criminality" requires more than a causal relationship, such as facilitation of the offense or being a but-for cause of its success. *Id.* at 1573. Instead, with underlying fraud or deceit crimes like the one in this case (health care fraud, § 1347), the means of identification specifically must be used in a manner that is fraudulent or deceptive. *Id.* at 1568. Noting the Sixth Circuit's reasoning in United States v.

Michael, 882 F.3d 624 (6th Cir. 2018), the Court explained, "When a means of identification is used deceptively, this deception goes to 'who' is involved, rather than just 'how' or 'when' services were provided." *Id.* The Court rejected the government's reading that any time another person's means of identification was employed in a way that facilitated a crime, the statute covered it.

The case law provides some examples. In *Dubin*, when the defendant overbilled Medicaid for psychological testing performed by the company he helped manage, the Court concluded that "use" was not met because the use of the patient's name was not at the crux of what made the underlying overbilling fraudulent. The crux of the fraud was a misrepresentation about the qualifications of petitioner's employee, and the patient's name was only an ancillary feature of the billing method employed. *Id.* at 1573-1574. The Court drew on the Sixth Circuit's analysis in *Michael*. There, the court held that § 1028A could apply to a case in which a pharmacist falsely used the name and prescriber doctor and the name and date of birth of a patient to submit claims for insurance reimbursement for medication that the doctor had not prescribed and the patient had not requested be submitted. 882 F.3d at 628 (distinguishing United States v. Medlock, 792 F.3d 700 (6th Cir. 2015) (where named patients actually received ambulance services but the defendants mischaracterized the nature of services)).

The extent of the *Dubin* holding is somewhat uncertain. As quoted in the first paragraph of the commentary, the statute prohibits conduct with three verbs: transfer, possess, and use. The *Dubin* case involved "use" and so clearly applies to that verb, but the opinion leaves some uncertainty on whether and how it applies to "transfer" and "possession." These two verbs may constitute open questions, but the Committee decided at this point that it was best to assume *Dubin* applied to all three verbs. Whether this assumption is correct can only be resolved with the development of more case law.

The good-faith defense (see Instruction 10.04) is not available to a defendant charged with a violation of § 1028(a)(6) who claims he relied on a legal interpretation of a layman. *Svoboda, supra* at 484.

15.05 Fraud and Related Activity in Connection with Access Devices (18 U.S.C. § 1029(a)(2) (trafficking in or using one or more unauthorized access devices during a one-year period))

(1) Count ___ of the indictment charges the defendant with violating federal law by knowingly trafficking in or using one or more unauthorized access devices with intent to defraud during a one-year period and thereby obtaining anything of value totaling $1,000 or more.

For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant knowingly [trafficked in] [used] one or more unauthorized access devices during any one-year period.

(B) Second: That the defendant thereby obtained things of value totaling $1,000 or more during that one-year period.

(C) Third: That the defendant acted with intent to defraud.

(D) Fourth: That the offense affected interstate [foreign] commerce.

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "access device" means any
-[credit card]
-[card]
-[plate]
-[code]
-[account number]
-[electronic serial number]
-[mobile identification number]
-[personal identification number]
-[telecommunications service, equipment or instrument identifier]
-[other means of account access used to obtain money or any other thing of value or used to initiate a transfer of funds].

(B) An access device is "unauthorized" if it is lost, stolen, expired, revoked, canceled, or obtained with intent to defraud.

(C) [The term "traffics in" means to transfer, or otherwise dispose of, to another, or to obtain control of, with intent to transfer or dispose of.]

(D) An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

(E) To act with "intent to defraud" means to act with intent to deceive or cheat for the purpose of obtaining anything of value.

(F) The phrase "affected interstate [foreign] commerce" means that the prohibited [trafficking] [use] had at least a minimal connection with interstate [foreign] commerce. This means that the [trafficking in] [use of] the unauthorized access device had some effect upon interstate [foreign] commerce. It would also be sufficient if banking channels were used for authorizing approval of charges to the access devices.

(i) The phrase "interstate [foreign] commerce" means commerce between any combination of states, territories, and possessions of the United States, including the District of Columbia. [The phrase "foreign commerce" means commerce between any state, territory or possession of the United States and a foreign country.] [The term "commerce" includes, among other things, travel, trade, transportation and communication.]

(ii) [Trafficking in] [Using] an access device which the defendant intended to be distributed or used in interstate [foreign] commerce would meet this minimal connection requirement. The government is not required to prove that the defendant was aware of a future effect upon interstate [foreign] commerce, but only that the scheme, if completed, would have had such results.

(iii) [The government need not prove that [the prohibited [trafficking] [use] was contemporaneous with the effect upon interstate [foreign] commerce.] [the prohibited [trafficking] [use] itself affected interstate [foreign] commerce.] [the defendant had knowledge of the interstate commerce connection.]]

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

Use Note

Paragraph (2)(F)(iii) lists items the government need not prove to establish an effect on commerce and should be used only if relevant.

Brackets indicate options for the court.

Italics indicate notes to the court.

Committee Commentary Instruction 15.05
(current through May 1, 2025)

Title 18 U.S.C. § 1029(a)(2) provides: "Whoever-- . . . (2) knowingly and with intent to defraud traffics in or uses one or more unauthorized access devices during any one year period, and by such conduct obtains anything of value aggregating $1,000 or more during that period . . .

shall, if the offense affects interstate or foreign commerce, be punished . . . ."

The list of elements in paragraph (1) is based on United States v Tunning, 69 F.3d 107, 112 (6th Cir. 1995). In *Tunning*, the court listed the elements of § 1029(a)(2) as follows: "(1) the intent to defraud; (2) the knowing use of or trafficking in an unauthorized access device; (3) to obtain things of value in the aggregate of $1,000 or more within a one-year period; and (4) an effect on interstate or foreign commerce." *Id.* In the instruction, the four elements are listed in a different order.

The definition of "access device" in paragraph (2)(A) is mostly drawn from the definition in the statute, see § 1029(e)(1). The exception is the term credit card; inclusion of that term is based on *Tunning, supra*, where the prosecution involved an American Express card and the court repeatedly referred to the § 1029 crime as credit card fraud.

The definition of "unauthorized" in paragraph (2)(B) comes from § 1029(e)(3). In *Tunning*, the Sixth Circuit held that the credit card, which the defendant obtained by using someone else's name, did not qualify as unauthorized for the offense of trafficking in or using under § 1029(a)(2). *Tunning*, 69 F.3d at 113. The court explained that the card was not lost, stolen, expired, revoked or canceled, and therefore, "the only way that the government could establish that the American Express card was 'unauthorized' was by showing that Tunning had 'obtained [it] with intent to defraud.'" *Id.* The court then found that the government's proof offered at the defendant's Alford-type guilty plea hearing was insufficient to find that Tunning had intent to defraud and therefore the factual basis for finding the credit card was unauthorized was insufficient for § 1029(a)(2). The conviction was vacated. *Id.* at 114.

The definition in paragraph (2)(C) of the term "traffics in" comes from the statute, § 1029(e)(5). The definition is in brackets because it should only be given if the offense identified in paragraph (1) was based on trafficking in as opposed to using the access device.

In the absence of authority under § 1029(a)(2), the definition of knowingly in paragraph (2)(D) is based on United States v. Svoboda, 633 F.3d 479 (6th Cir. 2011), in which the court found no error in instructions defining "knowingly" in a prosecution under § 1028(a)(6) (see Inst. 15.03). The definition is drawn verbatim from the instruction used in *Svoboda, supra* at 485.

The definition in paragraph (2)(E) of "intent to defraud" is based on two cases. The language on "to deceive or cheat" comes from United States v. Frost, 125 F.3d 346, 371 (6th Cir. 1997) (construing mail fraud, § 1341). The language on "for the purpose of obtaining property" is based on United States v. Williams, 1992 U.S. App. Lexis 29350 (6th Cir. 1992) (unpublished). In *Williams*, the panel found that an intent to defraud under § 1029(a)(2) was established at the defendant's guilty plea hearing based on the defendant's admission that he "switched around" social security numbers and submitted them to lenders to obtain property in the form of credit. *Id.* at *7-*9.

The definition of "affected interstate [foreign] commerce" in the paragraphs under (2)(F) is based on the instructions approved under § 1028 in United States v. Gros, 824 F.2d 1487,

1494-95 (6th Cir. 1987) with some modifications. The terms "production, transfer, and possession" were replaced with terms relevant to this instruction, "traffics in or uses." Generally, duplicative words were omitted, the language was simplified, and the concepts were reordered. The definition presumes that the commerce affected is interstate commerce, and the bracketed term "foreign" should be substituted if warranted by the facts. For plain English, the instruction substitutes the word "connection" for "nexus." The statement that an effect on commerce is established by using banking channels for authorizing approval of charges to an access device is based on United States v. Scartz, 838 F.2d 876, 879 (6th Cir. 1988). Paragraph (2)(D)(iii) lists items the government need not prove and should be used only if relevant.

Generally, the Sixth Circuit has addressed the effect on interstate commerce under § 1029 in two cases. In United States v. Scartz, 838 F.2d 876, 879 (6th Cir. 1988), the court held that under § 1029(a)(1), "inasmuch as banking channels were used for gaining authorization approval of the charges on the cards, interstate commerce was affected." *Id.* In addition, a panel of the Sixth Circuit has held that under § 1029(a)(3), the government proved a sufficient effect on interstate commerce where the credit card numbers were valid numbers with foreign banks and banks located throughout the United States. *See* United States v. Drummond, 255 F. App'x 60, 64-65 (6th Cir. 2007) (unpublished). This last method of affecting interstate commerce is not included in the text of the instruction, so if this method is relevant, the instruction may be modified.

Chapter 16.00

CHILD EXPLOITATION OFFENSES

Table of Instructions

Introduction to Child Exploitation Elements Instructions
(current through May 1, 2025)

Chapter 16 includes elements instructions for selected child exploitation offenses based on the frequency of prosecution in the Sixth Circuit.

Instructions 16.05 and 16.06 are so similar to Instructions 16.07 and 16.08, respectively, as to warrant comment. Instructions 16.05 and 16.06 are based on § 2252(a), which prohibits various activities involving the *visual depiction of a minor engaging in sexually explicit conduct*. This subsection, enacted in 1990, requires that an actual minor be depicted in the material. In contrast, Instructions 16.07 and 16.08 are based on § 2252A(a), which prohibits various activities involving *child pornography*. This subsection, enacted in 1996, defines child pornography to include not just material that depicts actual minors but also to include images that are indistinguishable from that of a minor engaging in sexually explicit conduct and images that have been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct. Thus the definition of *child pornography* is broader than the definition of a *visual depiction of a minor engaging in sexually explicit conduct*, and Instructions 16.07 and 16.08 are commensurately broader than Instructions 16.05 and 16.06. In particular, Instruction 16.05 and Instruction 16.07, which both cover the conduct of *receiving* or *distributing* prohibited material, differ because Instruction 16.05 applies only to visual depictions of actual minors while Instruction 16.07 applies to the broader category of child pornography. Similarly, Instruction 16.06 and Instruction 16.08, which both cover the conduct of *possessing* or *accessing with intent to view* prohibited material, differ because Instruction 16.06 applies only to visual depictions of actual minors while Instruction 16.08 applies to the broader category of child pornography.

The instructions use either the term "minor" or "person under 18" based on the term used in the statute.

In Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), the Court held that the Child Pornography Prevention Act of 1996 was overbroad and unconstitutional under the First Amendment. Specifically, the Court struck down two provisions that dealt with a type of child pornography that included digitally-created images, often called virtual child pornography. *Ashcroft,* 535 U.S. at 256-57. In 2003, Congress responded by amending the statute.

Based on Gonzales v. Raich, 545 U.S. 1 (2005), the Sixth Circuit has rejected as-applied commerce clause challenges to child exploitation convictions. *See* United States v. Bowers, 594 F.3d 522 (6th Cir. 2010) (§§ 2251(a) and 2252(a)(4)(B)); United States v. Chambers, 441 F.3d 438 (6th Cir. 2006) (§§ 2252(a)(1), 2252(a)(4)(B), and 2423(a)).

16.01 SEXUAL EXPLOITATION OF CHILDREN: USING A MINOR TO ENGAGE IN SEXUALLY EXPLICIT CONDUCT TO PRODUCE A VISUAL DEPICTION (Production, 18 U.S.C. § 2251(a))

(1) Count ____ of the indictment charges the defendant with using a minor to engage in sexually explicit conduct to produce a visual depiction. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant [employed] [used] [persuaded] [induced] [enticed] [coerced] a minor to [engage in] [assist another person to engage in] sexually explicit conduct for the purpose of producing a visual depiction of that conduct.

(B) Second: [*insert at least one from three options below*].

[(i) That the defendant [knew] [had reason to know] that the visual depiction would be [*insert at least one from two options below*]

–[[transported] [transmitted] using any means or facility of interstate [foreign] commerce].

–[mailed].

[or]

[(ii) That the visual depiction was produced or transmitted using materials that were mailed, shipped, or transported in or affecting interstate [foreign] commerce by any means, including computer.]

[or]

[(iii) That the visual depiction was [*insert at least one from two options below*]

– [[transported] [transmitted] using any means or facility of interstate [foreign] commerce or in or affecting interstate [foreign] commerce]

– [mailed].

(2) Now I will give you more detailed instructions on some of these terms.

(A) [A defendant "uses" a minor if he photographs the minor engaging in sexually explicit conduct.]

(B) The term "minor" means any person under the age of 18 years. [It is not necessary that the government prove that the defendant knew the person depicted [to be depicted] was a minor.]

(C) The term "for the purpose of" means that the defendant acted with the intent to create visual depictions of sexually explicit conduct, and that the defendant knew the character and content of the visual depictions.

(D) The term "sexually explicit conduct" means actual or simulated [*insert one or more from five options below*]

[(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex];
[(ii) bestiality];
[(iii) masturbation];
[(iv) sadistic or masochistic abuse];
[(v) lascivious exhibition of the genitals or pubic area of a person. In deciding whether an exhibition is lascivious, you may consider these six factors: (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. This list is not exhaustive, and an image need not satisfy any single factor to be deemed lascivious. Instead, you must determine whether the visual depiction is lascivious based on its overall content. It is for you to decide the weight or lack of weight to be given any of these factors.]

[(E) The term "producing" means not only producing but also making, creating, directing, manufacturing, issuing, publishing, or advertising.]

[(F) The term "visual depiction" includes [*insert one or more from three options below*]:

– [undeveloped film and videotape].
– [data stored on computer disk or by electronic means which is capable of conversion into a visual image].
– [data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format]].

[(G) The term "in interstate commerce" means the [visual depiction] [production or transmission materials] crossed [would cross] a state line.]

[(H) The term "means or facility of interstate commerce" includes the internet or the telephone.]

[(I) The phrase "affecting" interstate [foreign] commerce means having at least a minimal effect upon interstate [foreign] commerce.]

[(J) The term "computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar

device.]

(3) [It is not necessary that the government prove [that the defendant took the picture[s]]; [that the defendant knew of the interstate or foreign nature of the materials used to produce the visual depictions].

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

Use Note

This instruction assumes that the charge is based on the defendant acting for the purpose of "producing any visual depiction" of the conduct. If the charge is based on the defendant acting for the purpose of "transmitting a live visual depiction" of the conduct, this instruction should be modified.

Bracketed paragraphs (2)(G), (2)(H), and (2)(I), which give definitions for jurisdictional terms, should be given only if the specific term is used in the jurisdictional option selected in paragraph (1)(B).

If interstate commerce is an issue in the case, a more detailed definition of that term may be required. See, e.g., Inst. 15.05(2)(F)(i).

Bracketed paragraph (2)(J), the definition of computer, should be given only if that term is used under paragraph (1)(B) or (2)(F).

Brackets indicate options for the court. Bracketed italics are notes to the court.

Committee Commentary
(current through May 1, 2025)

This instruction is based on § 2251(a), which provides:

> § 2251. Sexual exploitation of children
> (a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was

produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

The basic conduct covered by this instruction is producing a visual image of a minor engaging in sexually explicit conduct.

The title of this instruction is drawn from § 2251(a) and United States v. Hart, 635 F.3d 850, 857 (6th Cir. 2011).

Viewed as a whole, this instruction "accurately states the law" and is not confusing, misleading, or prejudicial. United States v. Frei, 995 F.3d 561, 565 (6th Cir. 2021).

Paragraph (1), which describes the offense in two elements, is supported by *Frei, supra*; United States v. Lively, 852 F.3d 549, 565 (6th Cir.), cert. denied, 138 S. Ct. 366 (2017) (approving instructions identifying the same two elements) and United States v. Ogden, 685 F.3d 600, 605 (6th Cir. 2012) ("All the government needed to prove for the [§ 2251(a)] charge was that [the defendant] induced the victim to engage in conduct to produce at least one explicit image.")

In paragraph (1)(A), the mens rea element requiring the defendant to act "for the purpose of producing" a visual depiction is based on the language of § 2251(a). This mens rea is defined further in paragraph (2)(C) of the instruction, and case law on that element is discussed in connection with that definition below.

The government need only prove that the person in the visual depiction was a minor at the time; the government need not prove that the defendant knew the victim's age. See United States v. Humphrey, 608 F.3d 955, 962 (6th Cir. 2010) ("[K]nowledge of the victim's age is neither an element of the offense nor textually available as an affirmative defense."); United States v. X-Citement Video, 513 U.S. 64, 76 (1994) (quoting S. Conf. Rep. No. 96-601, p. 2 (1977)) ("§ 2251(a) [reflects] an intent that it is not a necessary element of a prosecution that the defendant knew the actual age of the child.").

Paragraph (1)(B) states the jurisdictional basis. The three options are drawn from § 2251(a). In United States v. Tidwell, 1990 U.S. App. LEXIS 19798, at *6 (6th Cir. 1990) (unpublished), the panel held that if the jurisdictional basis for the action is mailing or transporting the visual depiction in interstate or foreign commerce, the defendant need not have personally done the conduct. The panel stated, "[T]he United States is not *required* by the statute to prove that *either* of these defendants actually mailed or transported the materials; the United States need only prove that *someone* actually transported or mailed the material, *or* that the defendants knew or should have known that such mailing or transportation would occur." In addition, in proving the jurisdictional basis for § 2251(a), the government need not prove that the defendant's individual conduct substantially affected interstate commerce because the class of activities regulated is within Congress's power. United States v. Bowers, 594 F.3d 522, 529 (6th

Cir. 2010) (*citing* Gonzales v. Raich, 545 U.S. 1, 23 (2005)). *See also* United States v. Corp, 668 F.3d 379, 385 & n.1 (6th Cir. 2012) (holding that defendant's unconditional guilty plea to § 2251(a) count waived his Commerce Clause challenge but stating that the challenge would fail on the merits, *citing Bowers*).

In United States v. Lively, 852 F.3d 549, 561 (6th Cir.), cert. denied, 138 S. Ct. 366 (2017), the court described the relationship required between the first and second elements: "[T]o violate § 2251(a), a defendant must sexually exploit a minor for the purpose of producing a visual depiction of this exploitation, and *that same visual depiction* must be produced using materials that have an interstate-commerce nexus."

In paragraph (2)(A), the definition of "uses" is based on United States v. Wright, 774 F.3d 1085, 1089 (6th Cir. 2014) (stating that the "use" element is satisfied if a minor is photographed in order to create pornography). In paragraph (2)(B), the definition of "minor" is from § 2256(1). As noted above, the government need not prove that defendant knew the person depicted or to be depicted was a minor, *see Humphrey, supra*.

In paragraph (2)(C), the definition of "for the purpose of" requires that the defendant "acted with the intent to create visual depictions of sexually explicit conduct, and that the defendant knew the character and content of the visual depictions." The court quoted and approved this definition in United States v. Frei, 995 F.3d 561, 565-66 (6th Cir. 2021) (describing paragraph (2)(C) as "soundly based on the law."). The court noted that this offense does not require the defendant to sexually engage with the minor for the *sole* purpose of producing visual depictions, and further noted that the pattern instruction allowed the defendant to argue that he did not have sex with the minor for the sole purpose of creating the visual depictions but rather simply for the purpose of having sex. *Frei* at 566-67. The court also rejected the defendant's proposed addition to this paragraph because depending on its interpretation, the addition was either substantially covered by Inst. 16.01 or was not an accurate statement of the law. *Frei* at 567.

In paragraph (2)(D), the definition of sexually explicit conduct is from § 2256(2). For the definition in (2)(D)(v) of "lascivious exhibition of the genitals or pubic area," the court identified the six listed factors in United States v. Brown, 579 F.3d 672, 680 (6th Cir. 2009); *see also* United States v. Daniels, 653 F.3d 399, 407 (6th Cir. 2011). Including these six factors in the jury instruction is proper. United States v. Guy, 2017 WL 4023085, 9-10 (6th Cir. 2017) (unpublished). Image manipulation, e.g., cropping and brightening of the images, was found sufficient to render an image "lascivious" in United States v. Stewart, 729 F.3d 517, 527-28 (6th Cir. 2013).

In bracketed paragraph (2)(E), the definition of "producing" is from § 2256(3). The words "making" and "creating" were added to the definition based on *Wright*, 774 F.3d at 1092, *quoting* United States v. Fadl, 498 F.3d 862, 866-67 (8th Cir. 2007). In *Lively*, 852 F.3d at 559-60, the Sixth Circuit concluded that the definition of "producing" included copying digital images to a computer hard drive. In paragraph (2)(F), the definition of visual depiction is from § 2256(5). For defining whether a visual depiction qualifies as sexually explicit conduct, size and image quality are not relevant. United States v. Daniels, 653 F.3d 399, 408 (6th Cir. 2011). In

paragraph (2)(H), the definition of "means or facility of interstate commerce" as including the internet and the telephone is based on United States v. Fuller, 77 F. App'x 371, 378-79 (6th Cir. 2003) (unpublished). If the evidence supports a different facility of interstate commerce, such as an interstate private delivery service, the instruction should be modified. In paragraph (2)(J), the bracketed definition of computer is based on 18 U.S.C § 2256(6) and 18 U.S.C. § 1030(e)(1).

Paragraph (3) lists some but not all items the government is not required to prove. The government need not prove that the defendant took the pictures, *see Daniels* at 408. The government need not prove that the defendant knew of the interstate or foreign nature of the materials used to establish the jurisdictional hook. United States v. Lively, 852 F.3d 549, 563 (6th Cir.), cert. denied, 138 S. Ct. 366 (2017). In addition, the court has said that in proving interstate commerce, the government need not prove that the defendant acted for a commercial purpose. *Bowers* at 529. These provisions should be used only if relevant.

In an unpublished opinion, a panel approved an instruction stating that the government need not prove that the defendant intended to share the visual depiction with others. United States v. Sibley, 681 F. App'x. 457, 461 (6th Cir. 2017) (unpublished). That panel also approved an instruction stating that a minor may not legally consent to being sexually exploited. *Sibley*, 681 F. App'x. at 459 & 461.

This statute also criminalizes attempts and conspiracies. *See* § 2251(e); *see also* United States v. Hart, 635 F.3d 850, 857 (6th Cir. 2011) ("A person violates 18 U.S.C. § 2251 if he or she attempts to persuade a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct."). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 2251(e) do not require an overt act, *see* Whitfield v. United States, 543 U.S. 209, 213-14 (2005) (holding that when Congress omits an explicit reference to an overt act in a conspiracy statute, it dispenses with that requirement), so Instruction 3.01A Conspiracy to Commit an Offense–Basic Elements should be modified to omit paragraph (2)(C). All other references to overt acts should be deleted as well.

16.02 SEXUAL EXPLOITATION OF CHILDREN: TRANSPORTING A MINOR TO ENGAGE IN SEXUALLY EXPLICIT CONDUCT TO PRODUCE A VISUAL DEPICTION (Production, 18 U.S.C. § 2251(a))

(1) Count ____ of the indictment charges the defendant with transporting a minor with the intent that the minor engage in sexually explicit conduct to produce a visual depiction. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant transported a minor in or affecting interstate [foreign] commerce.

(B) Second: That the defendant acted with the intent that the minor engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct.

(C) Third: [*insert at least one from three options below*].

[(i) That the defendant [knew] [had reason to know] that the visual depiction would be [*insert at least one from two options below*]
–[[transported] [transmitted] using any means or facility of interstate [foreign] commerce].
–[mailed].

[or]

[(ii) That the visual depiction was produced or transmitted using materials that were mailed, shipped, or transported in or affecting interstate [foreign] commerce by any means, including computer.]

[or]

[(iii) That the visual depiction was [*insert at least one from two options below*]
– [[transported] [transmitted] using any means or facility of interstate [foreign] commerce or in or affecting interstate [foreign] commerce]
– [mailed].

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "minor" means any person under the age of 18 years.

(B) The term "sexually explicit conduct" means actual or simulated [*insert one or more from five options below*]
[(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex];
[(ii) bestiality];
[(iii) masturbation];

[(iv) sadistic or masochistic abuse];
[(v) lascivious exhibition of the genitals or pubic area of a person. In deciding whether an exhibition is lascivious, you may consider these six factors: (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. This list is not exhaustive, and an image need not satisfy any single factor to be deemed lascivious. Instead, you must determine whether the visual depiction is lascivious based on its overall content. It is for you to decide the weight or lack of weight to be given any of these factors.]

(C) The term "producing" means not only producing but also making, creating, directing, manufacturing, issuing, publishing, or advertising.

[(D) The term "visual depiction" includes [*insert one or more from three options below*]:
– [undeveloped film and videotape].
– [data stored on computer disk or by electronic means which is capable of conversion into a visual image].
– [data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format]].

[(E) The term "in interstate commerce" means the [minor] [visual depiction] [production or transmission materials] crossed [would cross] a state line.]

[(F) The term "means or facility of interstate commerce" includes the internet or the telephone.]

[(G) The phrase "affecting" interstate [foreign] commerce means having at least a minimal effect upon interstate [foreign] commerce.]

[(H) The term "computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.]

(3) [It is not necessary that the government prove that the defendant [knew the person transported [to be transported] was a minor] [took the picture[s]].

(4) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these

elements, then you must find the defendant not guilty of this charge.

Use Note

This instruction assumes that the charge is based on the defendant acting for the purpose of "producing any visual depiction" of the conduct. If the charge is based on the defendant acting for the purpose of "transmitting a live visual depiction" of the conduct, this instruction should be modified.

Bracketed paragraphs (2)(E), (2)(F), and (2)(G), which give definitions for jurisdictional terms, should be given only if the specific term is used in the jurisdictional option selected.

If interstate commerce is an issue in the case, a more detailed definition of that term may be required. See, e.g., Inst. 15.05(2)(F)(i).

Bracketed paragraph (2)(H), the definition of computer, should be given only if that term is used to define visual depiction under paragraph (2)(D).

Brackets indicate options for the court. Bracketed italics are notes to the court.

Committee Commentary
(current through May 1, 2025)

This instruction is based on § 2251(a), which is quoted below. The basic conduct covered by this instruction is transporting a minor to produce a visual image of the minor engaging in sexually explicit conduct.

The title of this instruction is drawn from § 2251(a).

Paragraph (1), which states the elements, is based on § 2251(a).

The government need only prove that the person in the visual depiction was a minor at the time; the government need not prove that the defendant knew the victim's age. See United States v. Humphrey, 608 F.3d 955, 962 (6th Cir. 2010) ("[K]nowledge of the victim's age is neither an element of the offense nor textually available as an affirmative defense."); United States v. X-Citement Video, 513 U.S. 64, 76 (1994) (quoting S. Conf. Rep. No. 96-601, p. 2 (1977)) ("§ 2251(a) [reflects] an intent that it is not a necessary element of a prosecution that the defendant knew the actual age of the child.").

In identifying the elements of the crime of transporting a minor, paragraphs (1)(A) and (1)(C) both include jurisdictional language, *i.e.*, language on proof related to intestate commerce. These two paragraphs are based on language in the statute that refers to interstate commerce in two distinct entries in the statute. The two entries in the statute are underlined below:

(a) Any person who employs, uses, persuades, induces, entices, or coerces any

> minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

In paragraph (1)(C), the three options are drawn from § 2251(a). In United States v. Tidwell, 1990 U.S. App. LEXIS 19798, at *6 (6th Cir. 1990) (unpublished), the panel held that if the jurisdictional basis for the action is mailing or transporting the visual depiction in interstate or foreign commerce, the defendant need not have personally done the conduct. The panel stated, "[T]he United States is not *required* by the statute to prove that *either* of these defendants actually mailed or transported the materials; the United States need only prove that *someone* actually transported or mailed the material, *or* that the defendants knew or should have known that such mailing or transportation would occur." In addition, in proving the jurisdictional basis for § 2251(a), the government need not prove that the defendant's individual conduct substantially affected interstate commerce because the class of activities regulated is within Congress's power. United States v. Bowers, 594 F.3d 522, 529 (6th Cir. 2010) (*citing* Gonzales v. Raich, 545 U.S. 1, 23 (2005)). *See also* United States v. Corp, 668 F.3d 379, 385 & n.1 (6th Cir. 2012) (holding that defendant's unconditional guilty plea to § 2251(a) count waived his Commerce Clause challenge but stating that the challenge would fail on the merits, *citing Bowers*).

The definitions in paragraph (2) are generally drawn from the statute. In paragraph (2)(A), the definition of minor is from § 2256(1). In paragraph (2)(B), the definition of sexually explicit conduct is from § 2256(2). For the definition in (2)(B)(v) of "lascivious exhibition of the genitals or pubic area," the court identified the six listed factors in United States v. Brown, 579 F.3d 672, 680 (6th Cir. 2009); *see also* United States v. Daniels, 653 F.3d 399, 407 (6th Cir. 2011). Including these six factors in the jury instruction is proper. United States v. Guy, 2017 WL 4023085, 9-10 (6th Cir. 2017) (unpublished). Image manipulation, e.g., cropping and brightening of the images, was found sufficient to render an image "lascivious" in United States v. Stewart, 729 F.3d 517, 527-28 (6th Cir. 2013).

In paragraph (2)(C), the definition of producing is from § 2256(3). In United States v. Lively, 852 F.3d 549, 559-60 (6th Cir.), cert. denied, 138 S. Ct. 366 (2017), the Sixth Circuit concluded that the definition of "producing" included copying digital images to a computer hard drive. In paragraph (2)(D), the definition of visual depiction is from § 2256(5). For defining whether a visual depiction qualifies as sexually explicit conduct, size and image quality are not

relevant. United States v. Daniels, 653 F.3d 399, 408 (6th Cir. 2011). In paragraph (2)(F), the definition of "means or facility of interstate commerce" as including the internet and the telephone is based on United States v. Fuller, 77 F.App'x 371, 378-79 (6th Cir. 2003) (unpublished). If the evidence supports a different facility of interstate commerce, such as an interstate private delivery service, the instruction should be modified. In paragraph (2)(H), the bracketed definition of computer is based on 18 U.S.C § 2256(6) and 18 U.S.C. § 1030(e)(1).

Paragraph (3) lists two but not all items the government is not required to prove. The government need not prove that defendant knew the person transported or to be transported was a minor, *see Humphrey, supra*; that the defendant took the pictures, *see Daniels* at 408. In addition, the court has said that in proving interstate commerce, the government need not prove that the defendant acted for a commercial purpose. *Bowers* at 529. These provisions should be used only if relevant.

This statute also criminalizes attempts and conspiracies. *See* § 2251(e); *see also* United States v. Hart, 635 F.3d 850, 857 (6th Cir. 2011) ("A person violates 18 U.S.C. § 2251 if he or she attempts to persuade a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct."). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 2251(e) do not require an overt act, *see* Whitfield v. United States, 543 U.S. 209, 213-14 (2005) (holding that when Congress omits an explicit reference to an overt act in a conspiracy statute, it dispenses with that requirement), so Instruction 3.01A Conspiracy to Commit an Offense–Basic Elements should be modified to omit paragraph (2)(C). All other references to overt acts should be deleted as well.

16.03 SEXUAL EXPLOITATION OF CHILDREN: PERMITTING A MINOR TO ENGAGE IN SEXUALLY EXPLICIT CONDUCT TO PRODUCE A VISUAL DEPICTION (Production, 18 U.S.C. § 2251(b))

(1) Count ____ of the indictment charges the defendant with permitting a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant was the [parent] [legal guardian] [person with custody or control] of a minor.

(B) Second: That the defendant permitted the minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct.

(C) Third: That the defendant knowingly permitted the minor to engage in such conduct.

(D) Fourth: [*insert at least one from three options below*].

[(i) That the defendant [knew] [had reason to know] that the visual depiction would be [*insert at least one from two options below*]
– [[transported] [transmitted] using any means or facility of interstate [foreign] commerce].
– [mailed].

[(ii) That the visual depiction was produced or transmitted using materials that were mailed, shipped, or transported in or affecting interstate [foreign] commerce by any means, including computer.]

[(iii) That the visual depiction was [*insert at least one from two options below*]
– [[transported] [transmitted] using any means or facility of interstate [foreign] commerce or in or affecting interstate [foreign] commerce]
– [mailed].

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "minor" means any person under the age of 18 years.

[(B) The term "custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained.]

(C) The term "sexually explicit conduct" means actual or simulated [*insert one or more from five options below*]
[(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex];

[(ii) bestiality];
[(iii) masturbation];
[(iv) sadistic or masochistic abuse];
[(v) lascivious exhibition of the genitals or pubic area of a person. In deciding whether an exhibition is lascivious, you may consider these six factors: (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. This list is not exhaustive, and an image need not satisfy any single factor to be deemed lascivious. Instead, you must determine whether the visual depiction is lascivious based on its overall content. It is for you to decide the weight or lack of weight to be given any of these factors.]

(D) The term "producing" means producing, directing, manufacturing, issuing, publishing, or advertising.

(E) The term "visual depiction" includes [*insert one or more from three options below*]:
– [undeveloped film and videotape].
– [data stored on computer disk or by electronic means which is capable of conversion into a visual image].
– [data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format].

[(F) The term "in interstate commerce" means the [visual depiction] [production or transmission materials] crossed [would cross] a state line.]

[(G) The term "means or facility of interstate commerce" includes the internet or the telephone.]

[(H) The phrase "affecting interstate [foreign] commerce" means having at least a minimal effect upon interstate [foreign] commerce.]

[(I) The term "computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.]

(3) [It is not necessary that the government prove that the defendant [took the picture[s]].

(4) If you are convinced that the government has proved all of these elements, say so by

returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

This instruction assumes that the charge is based on the defendant acting for the purpose of "producing any visual depiction" of the conduct. If the charge is based on the defendant acting for the purpose of "transmitting a live visual depiction" of the conduct, this instruction should be modified.

Bracketed paragraph (2)(B), the definition of custody and control, should be given only if that term is used in paragraph (1)(A).

Bracketed paragraphs (2)(F), (2)(G), and (2)(H), which give definitions for jurisdictional terms, should be given only if the specific term is used in the jurisdictional option selected in paragraph (1)(D).

If interstate commerce is an issue in the case, a more detailed definition of that term may be required. See, e.g., Inst. 15.05(2)(F)(i).

Bracketed paragraph (2)(I), the definition of computer, should be given only if that term is used under paragraph (1)(D)(ii) or paragraph (2)(E).

Brackets indicate options for the court. Bracketed italics are notes to the court.

Committee Commentary
(current through May 1, 2025)

This instruction is based on § 2251(b), which provides:

§ 2251. Sexual exploitation of children
. . .
(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct shall be punished as provided under subsection (e) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

The basic conduct covered by this instruction is permitting a minor to engage in sexually explicit conduct to produce a visual image.

The title of the instruction is drawn from § 2251(b).

The list of elements in paragraph (1) is derived from § 2251(b) with slight adjustments to the language for consistency. *See also* United States v. Lawrence, 391 F. App'x 480, 483 (6th Cir. 2010) (unpublished).

Paragraph (1)(D) states the jurisdictional basis. The three options are drawn from § 2251(b). Two cases decided under § 2251(a) (see Inst. 16.01) are helpful. In United States v. Tidwell, 1990 U.S. App. LEXIS 19798, at *6 (6th Cir. 1990) (unpublished), the panel held that if the jurisdictional basis for the action is mailing or transporting the visual depiction in interstate or foreign commerce, the defendant need not have personally done that conduct. The panel stated, "[T]he United States is not *required* by the statute to prove that *either* of these defendants actually mailed or transported the materials; the United States need only prove that *someone* actually transported or mailed the material, *or* that the defendants knew or should have known that such mailing or transportation would occur." In addition, in proving the jurisdictional basis for § 2251(a), the court has held that the government need not prove that the defendant's individual conduct substantially affected interstate commerce because the class of activities regulated is within Congress's power. United States v. Bowers, 594 F.3d 522, 529 (6th Cir. 2010) (citing Gonzales v. Raich, 545 U.S. 1, 23 (2005)) *See also* United States v. Corp, 668 F.3d 379, 385 & n.1 (6th Cir. 2012) (holding that defendant's unconditional guilty plea to § 2251(a) count waived his Commerce Clause challenge but stating that the challenge would fail on the merits, *citing Bowers*).

The definitions in paragraph (2) are primarily drawn from the statute. In paragraph (2)(A), the definition of "minor" is from § 2256(1). In paragraph (2)(B), the definition of "custody or control" is from § 2256(7). In paragraph (2)(C), the definition of "sexually explicit conduct" is from § 2256(2). For the definition in (2)(B)(v) of "lascivious exhibition of the genitals or pubic area," the court identified the six listed factors in United States v. Brown, 579 F.3d 672, 680 (6th Cir. 2009); *see also* United States v. Daniels, 653 F.3d 399, 407 (6th Cir. 2011). Including these six factors in the jury instruction is proper. United States v. Guy, 2017 WL 4023085, 9-10 (6th Cir. 2017) (unpublished). Image manipulation, e.g., cropping and brightening of the images, was found sufficient to render an image "lascivious" in United States v. Stewart, 729 F.3d 517, 527-28 (6th Cir. 2013).

In paragraph (2)(D), the definition of producing is from § 2256(3). In paragraph (2)(E), the definition of visual depiction is from § 2256(5). For defining whether a visual depiction qualifies as sexually explicit conduct, size and image quality are not relevant. United States v. Daniels, 653 F.3d 399, 408 (6th Cir. 2011). In paragraph (2)(G), the definition of "means or facility of interstate commerce" as including the internet or the telephone is based on United States v. Fuller, 77 F. App'x 371, 378-79 (6th Cir. 2003) (unpublished). If the evidence supports a different facility of interstate commerce, such as an interstate private delivery service, the instruction should be modified. In paragraph (2)(I), the bracketed definition of computer is

based on 18 U.S.C § 2256(6) and 18 U.S.C. § 1030(e)(1).

Paragraph (3) lists one but not all items the government is not required to prove. The government need not prove that defendant took the pictures, *see Daniels* at 408. In addition, the court has said that in proving interstate commerce, the government need not prove that the defendant acted for a commercial purpose. *Bowers* at 529. These provisions should be used only if relevant.

This statute also criminalizes attempts and conspiracies. *See* § 2251(e); *see also* United States v. Hart, 635 F.3d 850, 857 (6th Cir. 2011) ("A person violates 18 U.S.C. § 2251 if he or she attempts to persuade a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct."). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 2251(e) do not require an overt act, *see* Whitfield v. United States, 543 U.S. 209, 213-14 (2005) (holding that when Congress omits an explicit reference to an overt act in a conspiracy statute, it dispenses with that requirement), so Instruction 3.01A Conspiracy to Commit an Offense–Basic Elements should be modified to omit paragraph (2)(C). All other references to overt acts should be deleted as well.

16.04 MATERIAL INVOLVING THE SEXUAL EXPLOITATION OF MINORS: TRANSPORTING OR SHIPPING A VISUAL DEPICTION (18 U.S.C. § 2252(a)(1))

(1) Count ____ of the indictment charges the defendant with [transporting] [shipping] a visual depiction of a minor engaged in sexually explicit conduct. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant knowingly [transported] [shipped] a visual depiction.

(B) Second: That the production of the visual depiction involved the use of a minor engaging in sexually explicit conduct.

(C) Third: That the visual depiction was of a minor engaging in sexually explicit conduct.

(D) Fourth: That the defendant knew that the visual depiction was of a minor engaging in sexually explicit conduct.

(E) Fifth: That the defendant [transported] [shipped] the visual depiction [*insert at least one from two options below*]

--[using any means or facility of interstate [foreign] commerce]
--[using any means in or affecting interstate [foreign] commerce, including by computer or mails.]

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "visual depiction" includes [*insert one or more from three options below*]:

--[undeveloped film and videotape].
--[data stored on computer disk or by electronic means which is capable of conversion into a visual image].
--[data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format].

(B) The term "minor" means any person under the age of 18 years.

(C) The term "sexually explicit conduct" means actual or simulated [*insert one or more from five options below*]

[(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex];
[(ii) bestiality];
[(iii) masturbation];
[(iv) sadistic or masochistic abuse];
[(v) lascivious exhibition of the genitals or pubic area of a person. In deciding whether an exhibition is lascivious, you may consider these six factors: (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e., in

a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. This list is not exhaustive, and an image need not satisfy any single factor to be deemed lascivious. Instead, you must determine whether the visual depiction is lascivious based on its overall content. It is for you to decide the weight or lack of weight to be given any of these factors.]

[(D) The term "computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.]

[(E) The term "in interstate commerce" means the [visual depiction] [production or transmission materials] crossed [would cross] a state line.]

[(F) The term "means or facility of interstate commerce" includes the internet or the telephone.]

[(G) The phrase "affecting" interstate [foreign] commerce means having at least a minimal effect upon interstate [foreign] commerce.]

[(3) The government is not required to prove that [the defendant knew that a means or facility of interstate commerce would be used when he [transported] [shipped] the images] [the defendant was involved in any way in the production of the visual depiction].

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

Use Note

Bracketed paragraph (2)(D), the definition of computer, should be given only if that term is used in either paragraph (1)(E) or (2)(A).

Bracketed paragraphs (2)(E), (2)(F), and (2)(G), which give definitions for jurisdictional terms, should be given only if the specific term is used in the jurisdictional option selected in paragraph (1)(E).

If interstate commerce is an issue in the case, a more detailed definition of that term may be required. See, e.g., Inst. 15.05(2)(F)(i).

If the first bracketed option in paragraph (3) is used, it should be tailored to fit the particular jurisdictional element charged.

Brackets indicate options for the court. Bracketed italics are notes to the court.

Committee Commentary
(current through May 1, 2025)

This instruction is based on § 2252(a)(1), which provides:

> § 2252. Certain activities relating to material involving the sexual exploitation of minors
> (a) Any person who–
> (1) knowingly transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mails, any visual depiction, if--
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
> (B) such visual depiction is of such conduct;
> . . . shall be punished . . . .

In paragraph (1), the elements in paragraphs (A) and (E) are drawn from the statute and United States v. Chambers, 441 F.3d 438, 449 (6th Cir. 2006).

The elements in paragraphs (1)(B) and (1)(C) (that the visual depiction involved the use of a minor engaging in sexually explicit conduct) respond to Ashcroft v. Free Speech Coalition, 535 U.S. 234, 250-55 (2002), where the Supreme Court held based on the First Amendment that a defendant cannot be convicted for the creation of computer-generated images. In United States v. Farrelly, 389 F.3d 649 (6th Cir. 2004), the court affirmed a conviction against an *Ashcroft* challenge in part because the trial court gave an instruction requiring the jury to find that the minor was a real person rather than a computer-created representation of a person. *Id.* at 653. The court further stated that the question of whether the images were virtual or real was a question of fact that the government had the burden of proving, but that *Ashcroft* did not impose any special or heightened evidentiary burden for the government's proof. *Id.* at 653-54. The *Farrelly* court cited with approval United States v. Fuller, 77 F. App'x 371, 380 (6th Cir. 2003) (unpublished) (evidence sufficient where no contrary evidence was offered to show that visual depictions were virtual or computer-generated and jury viewed the images in question). *See also* United States v. Halter, 259 F. App'x 738, 741 (6th Cir. 2008) (unpublished) (jury can distinguish images of actual children from simulated children).

The element in paragraph (1)(D) (that the defendant knew the visual depiction involved a minor engaging in sexually explicit conduct) is based on United States v. X-Citement Video, 513 U.S. 64, 78 (1994), in which the Court held that the scienter requirement of knowingly "extends both to the sexually explicit nature of the material and to the age of the performers."

In paragraph (1)(E), the interstate commerce element is drawn from § 2252(a)(1).

As for the definitions in paragraph (2), the definition of "visual depiction" in paragraph (2)(A) is from 18 U.S.C. § 2256(5). For defining whether a visual depiction qualifies as sexually explicit conduct, size and image quality are not relevant. United States v. Daniels, 653 F.3d 399, 408 (6th Cir. 2011). In paragraph (2)(B), the definition of "minor" is from § 2256(1). In paragraph (2)(C), the definition of "sexually explicit conduct" is from § 2256(2). To define the phrase "sadistic or masochistic abuse" in subparagraph (2)(C)(iv), the Sixth Circuit has held that the term "sadistic" in the context of child pornography "involves the depiction of a sexual act that is 'likely to cause pain in one so young.'" United States v. Fuller, 77 F. App'x 371, 384 (6th Cir. 2003) (unpublished) (*quoting* United States v. Lyckman, 235 F.3d 234, 238-39 (5th Cir. 2000)). For the definition in (2)(C)(v) of "lascivious exhibition of the genitals or pubic area," the court identified the six listed factors in United States v. Brown, 579 F.3d 672, 680 (6th Cir. 2009); *see also* United States v. Daniels, 653 F.3d 399, 407 (6th Cir. 2011). Including these six factors in the jury instruction is proper. United States v. Guy, 2017 WL 4023085, 9-10 (6th Cir. 2017) (unpublished). Image manipulation, e.g., cropping and brightening of the images, was found sufficient to render an image "lascivious" in United States v. Stewart, 729 F.3d 517, 527-28 (6th Cir. 2013).

In paragraph (2)(D), the bracketed definition of computer is based on 18 U.S.C § 2256(6) and 18 U.S.C. § 1030(e)(1). In paragraph (2)(F), the definition of "means or facility of interstate commerce" as including the internet and the telephone is based on United States v. Fuller, 77 F. App'x 371, 378-79 (6th Cir. 2003) (unpublished).

Regarding the mens rea, the statute requires that the defendant "knowingly" transport or ship the visual depiction as listed in paragraph (1)(A). As noted above, the Supreme Court held in *X-Citement Video* that the mens rea of knowingly extends also to the sexually explicit nature of the material and to the age of the performers, as reflected in paragraph (1)(D). As to the jurisdictional bases in paragraph (1)(E), no mens rea is required. The Sixth Circuit explained:

> The scienter requirement, however, does not extend to the fact that the materials which were knowingly shipped, traveled through interstate or foreign commerce. That is, the government is not required to prove that the defendant knew that channels of interstate commerce would be utilized when he shipped the images; rather, that fact in the statute is "jurisdictional." See United States v. Feola, 420 U.S. 671, 676-77, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1975).

United States v. Chambers, 441 F.3d 438, 450 (6th Cir. 2006).

Paragraph (3), which lists items the government need not prove, is based on *Chambers*, *id*. (government need not prove that the defendant knew the channels of interstate commerce would be utilized when he shipped the images); and United States v. Fuller, 77 F. App'x 371, 380 n.10 (6th Cir. 2003) (unpublished) (government need not prove that the defendant was involved in any way in the production of the visual depiction).

This statute also criminalizes attempts and conspiracies. *See* § 2252(b)(1) and (2). If the

charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 2252(b) do not require an overt act, *see* Whitfield v. United States, 543 U.S. 209, 213-14 (2005) (holding that when Congress omits an explicit reference to an overt act in a conspiracy statute, it dispenses with that requirement), so Instruction 3.01A Conspiracy to Commit an Offense–Basic Elements should be modified to omit paragraph (2)(C). All other references to overt acts should be deleted as well.

16.05 MATERIAL INVOLVING THE SEXUAL EXPLOITATION OF MINORS: RECEIVING, DISTRIBUTING, OR REPRODUCING FOR DISTRIBUTION A VISUAL DEPICTION (18 U.S.C. § 2252(a)(2))

(1) Count ____ of the indictment charges the defendant with [receiving] [distributing] [reproducing for distribution] a visual depiction of a minor engaged in sexually explicit conduct. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant knowingly [received] [distributed] [reproduced for distribution] a visual depiction.

(B) Second: That the production of the visual depiction involved the use of a minor engaging in sexually explicit conduct.

(C) Third: That the visual depiction was of a minor engaging in sexually explicit conduct.

(D) Fourth: That the defendant knew that the visual depiction was of a minor engaging in sexually explicit conduct.

(E) Fifth: That the visual depiction [*insert at least one from two options below*]

[(i) was [received] [distributed]
--[using any means or facility of interstate [foreign] commerce]
--[using the mail]
--[by shipping or transporting in or affecting interstate [foreign] commerce]
--[containing materials that had been mailed, or shipped or transported in interstate commerce, by any means including by computer]

or

[(ii) was reproduced
--[using any means or facility of interstate [foreign] commerce]
--[in or affecting interstate [foreign] commerce by any means including by computer or through the mails]

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "visual depiction" includes [*insert one or more from three options below*]:
--[undeveloped film and videotape].
--[data stored on computer disk or by electronic means which is capable of conversion into a visual image].
--[data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format].

(B) The term "minor" means any person under the age of 18 years.

(C) The term "sexually explicit conduct" means actual or simulated [*insert one or more from five options below*]

[(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex];
[(ii) bestiality];
[(iii) masturbation];
[(iv) sadistic or masochistic abuse];
[(v) lascivious exhibition of the genitals or pubic area of a person. In deciding whether an exhibition is lascivious, you may consider these six factors: (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. This list is not exhaustive, and an image need not satisfy any single factor to be deemed lascivious. Instead, you must determine whether the visual depiction is lascivious based on its overall content. It is for you to decide the weight or lack of weight to be given any of these factors.]

[(D) The term "computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.]

[(E) The term "in interstate commerce" means the [visual depiction] [production or transmission materials] crossed [would cross] a state line.]

[(F) The term "means or facility of interstate commerce" includes the internet or the telephone.]

[(G) The phrase "affecting" interstate [foreign] commerce means having at least a minimal effect upon interstate [foreign] commerce.]

(3) [The government is not required to prove that [the defendant knew that a means or facility of interstate commerce [had been] [would be] used when he [received] [distributed] [reproduced] the images] [the defendant was involved in any way in the production of the visual depiction].

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

Use Note

Bracketed paragraph (2)(D), the definition of computer, should be given only if that term is used in either paragraph (1)(E) or (2)(A).

Bracketed paragraphs (2)(E), (2)(F), and (2)(G), which give definitions for jurisdictional terms, should be given only if that term is used in the jurisdictional option selected for paragraph (1)(E).

If interstate commerce is an issue in the case, a more detailed definition of that term may be required. See, e.g., Inst. 15.05(2)(F)(i).

If the first bracketed option in paragraph (3) is used, it should be tailored to fit the particular jurisdictional element charged.

Brackets indicate options for the court. Bracketed italics are notes to the court.

Committee Commentary

(current as of May 1, 2025)

This instruction is based on § 2252(a)(2), which provides:

> § 2252. Certain activities relating to material involving the sexual exploitation of minors
>
> (a) Any person who–
>
> (2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or through the mails, if--
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct;
>
> . . . shall be punished . . . .

In paragraph (1), the element in paragraph (A) is drawn from § 2252(a)(2) and United States v. Chambers, 441 F.3d 438, 449 (6th Cir. 2006) (construing § 2252(a)(1) (transporting or shipping) (see Inst. 16.03)). "Knowing distribution" under § 2252(a)(2) is supported by sufficient evidence when the defendant uses file-sharing software to make known child

pornography available to others. United States v. Clark, 24 F.4th 565, 576 (6th Cir. 2022), citing United States v. Moran, 771 F. App'x 594, 598 (6th Cir. 2019) and United States v. Conner, 521 F. App'x 493, 500 (6th Cir. 2013).

The elements in paragraphs (1)(B) and (1)(C) (that the visual depiction involved the use of a minor engaging in sexually explicit conduct) respond to Ashcroft v. Free Speech Coalition, 535 U.S. 234, 250-55 (2002), where the Supreme Court held based on the First Amendment that a defendant cannot be convicted for the creation of computer-generated images. In U.S. v. Farrelly, 389 F.3d 649 (6th Cir. 2004), the court affirmed a conviction against an *Ashcroft* challenge in part because the trial court gave an instruction requiring the jury to find that the minor was a real person rather than a computer-created representation of a person. *Id.* at 653. The court further stated that the question of whether the images were virtual or real was a question of fact that the government had the burden of proving, but that *Ashcroft* did not impose any special or heightened evidentiary burden for the government's proof. *Id.* at 653-54. The *Farrelly* court cited with approval United States v. Fuller, 77 F. App'x 371, 380 (6th Cir. 2003) (unpublished) (evidence sufficient where no contrary evidence was offered to show that visual depictions were virtual or computer-generated and jury viewed the images in question). *See also* United States v. Halter, 259 F. App'x 738, 741 (6th Cir. 2008) (unpublished) (jury can distinguish images of actual children from simulated children).

The element in paragraph (1)(D), that the defendant knew the visual depiction involved a minor engaging in sexually explicit conduct, is based on United States v. X-Citement Video, 513 U.S. 64, 78 (1994), in which the Court held that the scienter requirement of knowingly "extends both to the sexually explicit nature of the material and to the age of the performers."). *See also* United States v. Szymanski, 631 F.3d 794, 799 (6th Cir. 2011) ("[D]efendant convicted of receiving child pornography must have known, not just that he was receiving *something*, but that what he was receiving was child pornography."). The defendant's knowledge is established for purposes of § 2252(a) if "he is aware that his receipt of the illegal images is practically certain to follow from his conduct." United States v. Ogden, 685 F.3d 600, 604 (6th Cir. 2012) (interior quotation marks and citations omitted). The defendant's knowledge that the contents involved the visual depiction of a minor engaging in sexually explicit conduct may be proven by circumstantial evidence. United States v. Hentzen, 638 Fed. Appx. 427, 431-32 (6th Cir. 2015) (unpublished).

In paragraph (1)(E), the interstate commerce element is drawn from § 2252(a)(2). Based on a plain reading of the statute, the child pornography need not cross state lines; it is sufficient that the distribution occurred using a means of interstate commerce. United States v. Clark, 24 F.4th 565, 573 (6th Cir. 2022).

For the definitions in paragraph (2), the definition of "visual depiction" in paragraph (2)(A) is from 18 U.S.C. § 2256(5). For defining whether a visual depiction qualifies as sexually explicit conduct, size and image quality are not relevant. United States v. Daniels, 653 F.3d 399, 408 (6th Cir. 2011). In paragraph (2)(B), the definition of "minor" is from § 2256(1). In paragraph (2)(C), the definition of "sexually explicit conduct" is from § 2256(2). To define the phrase "sadistic or masochistic abuse" in subparagraph (2)(C)(iv), the Sixth Circuit has held that the term "sadistic" in the context of child pornography "involves the depiction of a sexual act

that is 'likely to cause pain in one so young.'" United States v. Fuller, 77 F. App'x 371, 384 (6th Cir. 2003) (unpublished) (*quoting* United States v. Lyckman, 235 F.3d 234, 238-39 (5th Cir. 2000)). For the definition in subparagraph (2)(C)(v) of "lascivious exhibition of the genitals or pubic area," the court identified the six listed factors in United States v. Brown, 579 F.3d 672, 680 (6th Cir. 2009); *see also* United States v. Daniels, 653 F.3d 399, 407 (6th Cir. 2011). Including these six factors in the jury instruction is proper. United States v. Guy, 2017 WL 4023085, 9-10 (6th Cir. 2017) (unpublished). Image manipulation, e.g., cropping and brightening of the images, was found sufficient to render an image "lascivious" in United States v. Stewart, 729 F.3d 517, 527-28 (6th Cir. 2013).

In paragraph (2)(D), the bracketed definition of computer is based on 18 U.S.C § 2256(6) and 18 U.S.C. § 1030(e)(1). In paragraph (2)(F), the definition of "means or facility of interstate commerce" as including the internet is supported by United States v. Clark, 24 F.4th 565, 574 (6th Cir. 2022), and the definition as including the telephone is based on United States v. Fuller, 77 F. App'x 371, 378-79 (6th Cir. 2003) (unpublished).

Regarding the mens rea, the statute requires that the defendant "knowingly" receive, distribute or reproduce for distribution the visual depiction as listed in paragraph (1)(A). As noted above, the Supreme Court held in *X-Citement Video* that the mens rea of knowingly extends also to the sexually explicit nature of the material and to the age of the performers, as reflected in paragraph (1)(D). *See also Szymanski, quoted supra*. As to the jurisdictional bases in paragraph (1)(E), no mens rea is required. As the Sixth Circuit explained in the context of § 2252(a)(1) (shipping) (see Inst. 16.03):

> The scienter requirement, however, does not extend to the fact that the materials which were knowingly shipped, traveled through interstate or foreign commerce. That is, the government is not required to prove that the defendant knew that channels of interstate commerce would be utilized when he shipped the images; rather, that fact in the statute is "jurisdictional." See United States v. Feola, 420 U.S. 671, 676-77, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1975).

United States v. Chambers, 441 F.3d 438, 450 (6th Cir. 2006).

Paragraph (3), which lists items the government need not prove, is based on *Chambers*, *id.* (government need not prove that the defendant knew the channels of interstate commerce would be utilized when he shipped the images); and United States v. Fuller, 77 F. App'x 371, 380 n.10 (6th Cir. 2003) (unpublished) (government need not prove that the defendant was involved in any way in the production of the visual depiction).

This statute also criminalizes attempts and conspiracies. *See* § 2252(b)(1) and (2). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 2252(b) do not require an overt act, *see* Whitfield v. United States, 543 U.S. 209, 213-14 (2005) (holding that when Congress omits an explicit reference to an overt act in a conspiracy statute, it dispenses with that requirement), so Instruction 3.01A Conspiracy to Commit an

Offense–Basic Elements should be modified to omit paragraph (2)(C). All other references to overt acts should be deleted as well.

16.06 MATERIAL INVOLVING THE SEXUAL EXPLOITATION OF MINORS: POSSESSING A VISUAL DEPICTION (18 U.S.C. § 2252(a)(4)(B))

(1) Count ____ of the indictment charges the defendant with possessing a visual depiction of a minor engaged in sexually explicit conduct. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant knowingly possessed one or more [books] [magazines] [periodicals] [films] [video tapes] [other matter] containing a visual depiction.

(B) Second: That the production of the visual depiction involved the use of a minor engaging in sexually explicit conduct.

(C) Third: That the visual depiction was of a minor engaging in sexually explicit conduct.

(D) Fourth: That the defendant knew the visual depiction involved a minor engaging in sexually explicit conduct.

(E) Fourth: That the visual depictions [*insert at least one from the three options below*]
--[had been mailed].
--[had been [shipped] [transported] using any means or facility of interstate commerce or in or affecting interstate [foreign] commerce].
--[were produced using material that had been mailed, shipped or transported in interstate [foreign] commerce by any means including computer].

(2) Now I will give you more detailed instructions on some of these terms.

(A) [*Insert applicable definition of possession from Instructions 2.10, 2.10A, and 2.11 here or as a separate instruction*].

(B) The term "visual depiction" includes [*insert one or more from three options below*]:
--[undeveloped film and videotape].
--[data stored on computer disk or by electronic means which is capable of conversion into a visual image].
--[data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format].

(C) The term "minor" means any person under the age of 18 years.

(D) The term "sexually explicit conduct" means actual or simulated [*insert one or more from five options below*]
[(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex];
[(ii) bestiality];

[(iii) masturbation];
[(iv) sadistic or masochistic abuse];
[(v) lascivious exhibition of the genitals or pubic area of a person. In deciding whether an exhibition is lascivious, you may consider these six factors: (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. This list is not exhaustive, and an image need not satisfy any single factor to be deemed lascivious. Instead, you must determine whether the visual depiction is lascivious based on its overall content. It is for you to decide the weight or lack of weight to be given any of these factors.]

[(E) The term "computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.]

[(F) The term "in interstate commerce" means the [visual depiction] [production or transmission materials] crossed [would cross] a state line.]

[(G) The term "means or facility of interstate commerce" includes the internet or the telephone.]

[(H) The phrase "affecting" interstate [foreign] commerce means having at least a minimal effect upon interstate [foreign] commerce.]

[(3) The government is not required to prove that [the defendant knew that a means or facility of interstate commerce [had been] [would be] used when he possessed the images] [the defendant was involved in any way in the production of the visual depiction] [the defendant viewed the visual depictions] [the defendant's individual conduct substantially affected interstate commerce].

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

Use Note

This instruction assumes that the conduct charged is possessing a visual depiction. If the conduct charged is accessing with intent to view, the instruction should be modified.

Bracketed paragraph (2)(E), the definition of computer, should be given only if that term is used in either paragraph (1)(E) or (2)(B).

Bracketed paragraphs (2)(E), (2)(F), and (2)(G), which give definitions for jurisdictional terms, should be given only if the specific term is used in the jurisdictional option selected for paragraph (1)(E).

If interstate commerce is an issue in the case, a more detailed definition of that term may be required. See, e.g., Inst. 15.05(2)(F)(i).

If the first bracketed option in paragraph (3) is used, it should be tailored to fit the particular jurisdictional element charged.

Brackets indicate options for the court. Bracketed italics are notes to the court.

Committee Commentary
(Current through May 1, 2025)

This instruction is based on § 2252(a)(4)(B), which provides:

> § 2252. Certain activities relating to material involving the sexual exploitation of minors
>
> (a) Any person who–
> (4) . . .
> (B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if--
> (i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
> (ii) such visual depiction is of such conduct; . . .
> shall be punished . . . .

In paragraph (1), the element in paragraph (A) is drawn from § 2252(a)(4)(B), United States v. Wise, 278 F. App'x 552, 560 (6th Cir. 2008) (unpublished), and United States v. Chambers, 441 F.3d 438, 449 (6th Cir. 2006) (construing § 2252(a)(1) (transporting or shipping) (see Inst. 16.03)). In paragraph (1)(A), the term "other matter" includes electronic storage media, *see Wise, supra*.

The elements in paragraphs (1)(B) and (1)(C) (that the production of the visual depiction involved the use of a minor engaging in sexually explicit conduct) respond to Ashcroft v. Free Speech Coalition, 535 U.S. 234, 250-55 (2002), where the Supreme Court held based on the First Amendment that a defendant cannot be convicted for the creation of computer-generated images. In U.S. v. Farrelly, 389 F.3d 649 (6th Cir. 2004), the court affirmed a conviction against an *Ashcroft* challenge in part because the trial court gave an instruction requiring the jury to find that the minor was a real person rather than a computer-created representation of a person. *Id.* at 653. The court further stated that the question of whether the images were virtual or real was a question of fact that the government had the burden of proving, but that *Ashcroft* did not impose any special or heightened evidentiary burden for the government's proof. *Id.* at 653-54. The *Farrelly* court cited with approval United States v. Fuller, 77 F. App'x 371, 380 (6th Cir. 2003) (unpublished) (evidence sufficient where no contrary evidence was offered to show that visual depictions were virtual or computer-generated and jury viewed the images in question). *See also* United States v. Halter, 259 F. App'x 738, 741 (6th Cir. 2008) (unpublished) (jury can distinguish images of actual children from simulated children).

The element in paragraph (1)(D), that the defendant knew the visual depiction involved a minor engaging in sexually explicit conduct, is based on United States v. X-Citement Video, 513 U.S. 64, 78 (1994), in which the Court held that the scienter requirement of knowingly "extends both to the sexually explicit nature of the material and to the age of the performers."). However, this element may be called into question by United States v. Szymanski, 631 F.3d 794, 800 (6th Cir. 2011) (stating in dicta that the possession offense of § 2252(a)(4)(B) lacks the knowing scienter requirement included in the receipt offense of § 2252(a)(2)) (*citing* United States v. Malik, 385 F.3d 758, 760 (7th Cir. 2004)). The defendant's knowledge that the contents involved the visual depiction of a minor engaging in sexually explicit conduct may be proven by circumstantial evidence. United States v. Hentzen, 638 Fed. Appx. 427, 431-32 (6th Cir. 2015) (unpublished).

In paragraph (1)(E), the jurisdictional element is based on the statute and on *Wise, supra, citing Chambers, supra* at 451.

For the definitions in paragraph (2), the definition of "visual depiction" in paragraph (2)(B) is from 18 U.S.C. § 2256(5). For defining whether a visual depiction qualifies as sexually explicit conduct, size and image quality are not relevant. United States v. Daniels, 653 F.3d 399, 408 (6th Cir. 2011). In paragraph (2)(C), the definition of "minor" is from § 2256(1). In paragraph (2)(C), the definition of "sexually explicit conduct" is from § 2256(2). To define the phrase "sadistic or masochistic abuse" in subparagraph (2)(D)(iv), the Sixth Circuit has held that the term "sadistic" in the context of child pornography "involves the depiction of a sexual act that is 'likely to cause pain in one so young.'" United States v. Fuller, 77 F. App'x 371, 384 (6th Cir. 2003) (unpublished) (*quoting* United States v. Lyckman, 235 F.3d 234, 238-39 (5th Cir. 2000)). For the definition in subparagraph (2)(D)(v) of "lascivious exhibition of the genitals or pubic area," the court identified the six listed factors in United States v. Brown, 579 F.3d 672, 680 (6th Cir. 2009); *see also* United States v. Daniels, 653 F.3d 399, 407 (6th Cir. 2011). Including these six factors in the jury instruction is proper. United States v. Guy, 2017 WL 4023085, 9-10 (6th Cir. 2017) (unpublished). Image manipulation, e.g., cropping and brightening of the images, was found sufficient to render an image "lascivious" in United States

v. Stewart, 729 F.3d 517, 527-28 (6th Cir. 2013).

In paragraph (2)(E), the bracketed definition of computer is based on 18 U.S.C § 2256(6) and 18 U.S.C. § 1030(e)(1). In paragraph (2)(G), the definition of "means or facility of interstate commerce" as including the internet and the telephone is based on United States v. Fuller, 77 F. App'x 371, 378-79 (6th Cir. 2003) (unpublished).

Regarding the mens rea, the statute requires that the defendant "knowingly" possess the visual depiction as listed in paragraph (1)(A). As noted above, the Supreme Court held in *X-Citement Video* that the mens rea of knowingly extends also to the sexually explicit nature of the material and to the age of the performers, as reflected in paragraph (1)(D). As to the jurisdictional bases in paragraph (1)(E), no mens rea is required. As the Sixth Circuit explained in the context of § 2252(a)(1) (shipping) (see Inst. 16.04):

> The scienter requirement, however, does not extend to the fact that the materials which were knowingly shipped, traveled through interstate or foreign commerce. That is, the government is not required to prove that the defendant knew that channels of interstate commerce would be utilized when he shipped the images; rather, that fact in the statute is "jurisdictional." See United States v. Feola, 420 U.S. 671, 676-77, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1975).

United States v. Chambers, 441 F.3d 438, 450 (6th Cir. 2006).

Paragraph (3), which lists items the government need not prove, is based on *Chambers*, *id.* (government need not prove that the defendant knew the channels of interstate commerce would be utilized when he shipped the images); United States v. Fuller, 77 F. App'x 371, 380 n.10 (6th Cir. 2003) (unpublished) (government need not prove that the defendant was involved in any way in the production of the visual depiction); United States v. Edmiston, 324 F. App'x 496, 498 (6th Cir. 2009) (unpublished) ("actually viewing the materials is not an element of the crime"); and United States v. Bowers, 594 F.3d 522, 529-30 (6th Cir. 2010) (*citing* Gonzales v. Raich, 545 U.S. 1, 23 (2005)) (in proving the jurisdictional basis for § 2252(a)(4)(B), the government need not prove that the defendant's individual conduct substantially affected interstate commerce because the class of activities regulated is within Congress's power). These provisions should be used only if relevant.

This statute also criminalizes attempts and conspiracies. *See* § 2252(b)(1) and (2). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 2252(b) do not require an overt act, *see* Whitfield v. United States, 543 U.S. 209, 213-14 (2005) (holding that when Congress omits an explicit reference to an overt act in a conspiracy statute, it dispenses with that requirement), so Instruction 3.01A Conspiracy to Commit an Offense–Basic Elements should be modified to omit paragraph (2)(C). All other references to overt acts should be deleted as well.

The statute includes an affirmative defense in subsection 2252(c) which provides:

(c) Affirmative defense. It shall be an affirmative defense to a charge of violating paragraph (4) of subsection (a) that the defendant--

(1) possessed less than three matters containing any visual depiction proscribed by that paragraph; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any visual depiction or copy thereof--

(A) took reasonable steps to destroy each such visual depiction; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

This defense should be included in the instructions if raised by the defendant.

16.07 RECEIVING OR DISTRIBUTING CHILD PORNOGRAPHY (18 U.S.C. § 2252A(a)(2))

(1) Count ____ of the indictment charges the defendant with [receiving] [distributing] any [child pornography] [material that contained child pornography]. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant knowingly [received] [distributed] any [child pornography] [material that contained child pornography].

(B) Second: That the defendant knew that the material [was] [contained] child pornography.

(C) Third: That the [child pornography] [material that contained child pornography] was *[insert at least one from the two options below.]*

[(i) mailed.]

[(ii) using any means or facility of interstate [foreign] commerce, shipped or transported in or affecting interstate [foreign] commerce by any means, including by computer.]

(2) Now I will give you some more detailed instructions on some of these terms.

(A) The term "child pornography" means any visual depiction, including any [photograph] [film] [video] [picture] [computer or computer-generated image or picture] whether [made] [produced] by [electronic] [mechanical] [other means] of sexually explicit conduct where *[insert one or both from the options below]*

[(i) The production of such visual depiction involved the use of a minor engaging in sexually explicit conduct.]

[(ii) The visual depiction had been [created] [adapted] [modified] to appear that an identifiable minor was engaging in sexually explicit conduct.]

(B) The term "visual depiction" includes [*insert one or more from three options below*]:
--[undeveloped film and videotape].
--[data stored on computer disk or by electronic means which is capable of conversion into a visual image].
--[data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format].

(C) The term "sexually explicit conduct" means actual or simulated [*insert one or more from five options below*]
--[(i) sexual intercourse, including genital-genital, oral-genital, anal-genital,

or oral-anal, whether between persons of the same or opposite sex];
--[(ii) bestiality];
--[(iii) masturbation];
--[(iv) sadistic or masochistic abuse];
--[(v) lascivious exhibition of the genitals or pubic area of a person.

In deciding whether an exhibition is lascivious, you may consider these six factors: (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. This list is not exhaustive, and an image need not satisfy any single factor to be deemed lascivious. Instead, you must determine whether the visual depiction is lascivious based on its overall content. It is for you to decide the weight or lack of weight to be given any of these factors.]

[(D) The term "computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.]

[(E) The term "in interstate commerce" means the [child pornography] [material that contained child pornography] crossed [would cross] a state line.]

[(F) The term "means or facility of interstate commerce" includes the internet or the telephone.]

[(G) The phrase "affecting interstate [foreign] commerce" means having at least a minimal effect upon interstate [foreign] commerce.]

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

Use Note

Bracketed paragraph (2)(D), the definition of computer, should be given only if that term is used under paragraph (1)(C)(ii) or (2)(A).

Bracketed paragraphs (2)(E), (2)(F), and (2)(G), which give definitions for jurisdictional

terms, should be given only if the specific term is used in the jurisdictional option selected in paragraph (1)(C).

If interstate commerce is an issue in the case, a more detailed definition of that term may be required. See, e.g., Inst. 15.05(2)(F)(i).

Brackets indicate options for the court. Bracketed italics are notes to the court.

Committee Commentary
(current as of May 1, 2025)

This instruction is based on § 2252A(a)(2), which provides:

> § 2252A. Certain activities relating to material constituting or containing child pornography
>
> (a) Any person who– . . .
> (2) knowingly receives or distributes–
> (A) any child pornography that has been mailed, or using any means or facility of interstate or foreign commerce shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; or
> (B) any material that contains child pornography that has been mailed, or using any means or facility of interstate or foreign commerce shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; . . . shall be punished . . . .

In paragraph (1), the elements listed in paragraphs (A) and (C) are based on the statute, § 2252A(a)(2)(A) and (B). The element in paragraph (1)(B), that the defendant knew that the pornographic images were of children, is based on United States v. Stout, 509 F.3d 796, 799 (6th Cir. 2007) (*citing* United States v. X-Citement Video, Inc., 513 U.S. 64 (1994)).

In paragraph (2), the definitions are drawn primarily from a statute, § 2256. The definition of child pornography in paragraph (2)(A) is based on § 2256(8), and the subparagraphs (i) and (ii) are based on statutory subsections (8)(A) and (8)(C), respectively. Subsection 2256(8)(B) is not included as an option because subsections (8)(A) and (8)(C) will cover most of the prosecutions and because the constitutionality of subsection (8)(B) has not been addressed. See Eighth Circuit Instruction 6.18.2252 Notes on Use No. 6. The definition of visual depiction in paragraph (2)(B) is based on § 2256(5). In paragraph (2)(C), the definition of sexually explicit conduct is from § 2256(2). For the definition in (2)(C)(v) of "lascivious exhibition of the genitals or pubic area," the court identified the six listed factors in United States v. Brown, 579 F.3d 672, 680 (6th Cir. 2009); *see also* United States v. Daniels, 653 F.3d 399, 407 (6th Cir. 2011). Including these six factors in the jury instruction is proper. United States v. Guy, 2017 WL 4023085, 9-10 (6th Cir. 2017) (unpublished). Image manipulation, e.g., cropping and brightening of the images, was found sufficient to render an image "lascivious" in United States v. Stewart, 729 F.3d 517, 527-28 (6th Cir. 2013).

The definition of computer in paragraph (2)(D) is based on § 2256(6), which refers to 18 U.S.C. § 1030(e)(1). In paragraph (2)(F), the definition of "means or facility of interstate commerce" as including the internet or the telephone is based on United States v. Fuller, 77 F.App'x 371, 378-79 (6th Cir. 2003) (unpublished). If the evidence supports a different facility of interstate commerce, such as an interstate private delivery service, the instruction should be modified. Other definitions may be required depending on the definition of child pornography used; these additional definitions are provided in § 2256.

The Sixth Circuit has not identified any facts that the government need not prove to convict a defendant of receiving or distributing child pornography under § 2252A(a)(2). However, under the analogous statute prohibiting receiving or distributing visual depictions of a minor engaging in sexually explicit conduct, § 2252(a)(2), the court has identified some facts the government need not prove. These facts are collected and discussed in Instruction 16.05(3) and the accompanying commentary.

The term "any" in paragraphs (1) and (1)(A) is drawn from the statute, § 2252A(a)(2)(A) and (B). In the context of § 2252(a)(2) (see Inst. 16.04), the Sixth Circuit defined that term as one or some, regardless of sort, quantity, or number, and so concluded that "any" includes a single instance. *See* United States v. Moore, 916 F.2d 1131, 1137 n.12 (6th Cir. 1990). The instruction does not include this definition of "any" for the routine case, but it may be added if the issue is raised by the facts.

Convictions for both "knowingly receiving child pornography, 18 U.S.C. §§ 2252A(a)(2)(A), and knowingly possessing the same child pornography, 18 U.S.C. §§ 2252A(a)(5)(B)" violate the Double Jeopardy Clause. United States v. Ehle, 640 F.3d 689, 694-95 (6th Cir. 2011) (internal quotation marks omitted). The court reasoned that "possessing child pornography is a lesser-included offense of receiving the same child pornography, meaning the two statutes proscribe the same offense." *Id.* at 695 (internal quotations omitted) (*citing* Rutledge v. United States, 517 U.S. 292, 297 (1996)).

This statute also criminalizes attempts and conspiracies. *See* § 2252A(b)(1); *see also* United States v. Studabaker, 578 F.3d 423 (6th Cir. 2009) ("This indictment included three charges: (1) that Studabaker attempted to and did knowingly receive images of child pornography shipped and transported in interstate and foreign commerce."). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 2252A(b) do not require an overt act, *see* Whitfield v. United States, 543 U.S. 209, 213-14 (2005) (holding that when Congress omits an explicit reference to an overt act in a conspiracy statute, it dispenses with that requirement), so Instruction 3.01A Conspiracy to Commit an Offense–Basic Elements should be modified to omit paragraph (2)(C). All other references to overt acts should be deleted as well.

The statute includes affirmative defenses in subsections 2252A(c) and (d) as follows:

(c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)

(A), (4), or (5) of subsection (a) that--

(1)

(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and

(B) each such person was an adult at the time the material was produced; or

(2) the alleged child pornography was not produced using any actual minor or minors.

No affirmative defense under subsection (c)(2) shall be available in any prosecution that involves child pornography as described in section 2256(8)(C). A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 14 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other specialized testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting such defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice.

(d) Affirmative defense. It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant--

(1) possessed less than three images of child pornography; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof--

(A) took reasonable steps to destroy each such image; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

These affirmative defenses should be included in the instructions if raised by the defendant.

16.08 POSSESSING OR ACCESSING CHILD PORNOGRAPHY (18 U.S.C. § 2252A(a)(5))

(1) Count ____ of the indictment charges the defendant with [possessing] [accessing] any [child pornography] [material that contained child pornography]. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant knowingly [possessed] [accessed with intent to view] any [book] [magazine] [periodical] [film] [videotape] [computer disk] [material] that contained an image of child pornography.

(B) Second: That the defendant knew that the material [was] [contained] child pornography.

(C) Third: *[insert one or both from two options below]*

[(i) The [possession] [accessing with intent to view] was *[insert at least one from three options below]*

–[in the special maritime and territorial jurisdiction of the United States.]
–[on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government.]
–[in the Indian country.]

[(ii) The image of child pornography was *[insert at least one from three options below]*

–[mailed.]
–[[shipped] [transported] using any means or facility of interstate [foreign] commerce or in or affecting interstate [foreign] commerce by any means, including by computer.]
–[produced using materials that had been mailed, or shipped or transported in or affecting interstate [foreign] commerce by any means, including by computer.]]

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "child pornography" means any visual depiction, including any [photograph] [film] [video] [picture] [computer or computer-generated image or picture] whether [made] [produced] by [electronic] [mechanical] [other means] of sexually explicit conduct where *[insert at least one from the two options below]*

[(i) The production of such visual depiction involved the use of a minor engaging in sexually explicit conduct.]

[(ii) The visual depiction had been [created] [adapted] [modified] to appear that an identifiable minor was engaging in sexually explicit conduct.]

(B) The term "visual depiction" includes [*insert one or more from three options below*]:

--[undeveloped film and videotape].

--[data stored on computer disk or by electronic means which is capable of conversion into a visual image].

--[data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format].

(C) The term "sexually explicit conduct" means actual or simulated [*insert one or more from five options below*]

--[(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex];

--[(ii) bestiality];

--[(iii) masturbation];

--[(iv) sadistic or masochistic abuse];

--[(v) lascivious exhibition of the genitals or pubic area of a person.

In deciding whether an exhibition is lascivious, you may consider these six factors: (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. This list is not exhaustive, and an image need not satisfy any single factor to be deemed lascivious. Instead, you must determine whether the visual depiction is lascivious based on its overall content. It is for you to decide the weight or lack of weight to be given any of these factors.]

[(D) The term "computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.]

[(E) The term "in interstate commerce" means the [material that contained] child pornography crossed [would cross] a state line.]

[(F) The term "means or facility of interstate commerce" includes the internet or the telephone.]

[(G) The phrase "affecting interstate [foreign] commerce" means having at least a minimal effect upon interstate [foreign] commerce.]

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

Use Note

Bracketed paragraph (2)(D), the definition of computer, should be given only if that term is used in the instruction.

Bracketed paragraphs (2)(E), (2)(F), and (2)(G), which give definitions for jurisdictional terms, should be given only if the specific term is used in the jurisdictional option selected in paragraph (1)(C).

If interstate commerce is an issue in the case, a more detailed definition of that term may be required. See, e.g., Inst. 15.05(2)(F)(i).

Brackets indicate options for the court. Bracketed italics are notes to the court.

Committee Commentary
(current through May 1, 2025)

This instruction is based on § 2252A(a)(5), which provides:

> § 2252A. Certain activities relating to material constituting or containing child pornography
> (a) Any person who– . . .
> (5) either--
> (A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or
> (B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; . . . shall be punished . . . .

In paragraph (1), the elements listed in paragraphs (A) and (C) are based on the statute, § 2252A(a)(5)(A) and (B). The element in paragraph (1)(B), that the defendant knew that the pornographic images were of children, is based on United States v. Stout, 509 F.3d 796, 799 (6th

Cir. 2007) (*citing* United States v. X-Citement Video, Inc., 513 U.S. 64 (1994)). If the term "Indian country" in paragraph (1)(C)(i) is used, the definition may be found in 18 U.S.C. § 1151.

In paragraph (2), the definitions are drawn primarily from a statute, § 2256. The definition of child pornography in paragraph (2)(A) is based on § 2256(8), and subparagraphs (i) and (ii) are based on statutory subsections (8)(A) and (8)(C), respectively. Subsection 2256(8)(B) is not included as an option because subsections (8)(A) and (8)(C) will cover most of the prosecutions and because the constitutionality of subsection (8)(B) has not been addressed. See Eighth Circuit Instruction 6.18.2252 Notes on Use No. 6. The definition of visual depiction in paragraph (2)(B) is based on § 2256(5). In paragraph (2)(C), the definition of sexually explicit conduct is from § 2256(2). For the definition in (2)(C)(v) of "lascivious exhibition of the genitals or pubic area," the court identified the six listed factors in United States v. Brown, 579 F.3d 672, 680 (6th Cir. 2009); *see also* United States v. Daniels, 653 F.3d 399, 407 (6th Cir. 2011). Including these six factors in the jury instruction is proper. United States v. Guy, 2017 WL 4023085, 9-10 (6th Cir. 2017) (unpublished). Image manipulation, e.g., cropping and brightening of the images, was found sufficient to render an image "lascivious" in United States v. Stewart, 729 F.3d 517, 527-28 (6th Cir. 2013).

The definition of computer in paragraph (2)(D) is based on § 2256(6), which refers to 18 U.S.C. § 1030(e)(1). In paragraph (2)(F), the definition of "means or facility of interstate commerce" as including the internet or the telephone is based on United States v. Fuller, 77 F. App'x 371, 378-79 (6th Cir. 2003) (unpublished). If the evidence supports a different facility of interstate commerce, such as an interstate private delivery service, the instruction should be modified. Other definitions may be required depending on the definition of child pornography used; additional definitions are provided in § 2256.

The Sixth Circuit has not identified any facts that the government need not prove to convict a defendant of possessing child pornography under § 2252A(a)(5). However, under the analogous statute prohibiting possessing visual depictions of a minor engaging in sexually explicit conduct, § 2252(a)(4)(B), the court has identified some facts the government need not prove. These facts are collected and discussed in Instruction 16.06(3) and the accompanying commentary.

The term "any" in paragraphs (1) and (1)(A) is drawn from the statute, § 2252A(a)(5)(A) and (B). In the context of § 2252(a)(2) (see Inst. 16.04), the Sixth Circuit defined that term as one or some, regardless of sort, quantity, or number, and so concluded that "any" includes a single instance. *See* United States v. Moore, 916 F.2d 1131, 1137 n.12 (6th Cir. 1990). The instruction does not include this definition of "any" for the routine case, but it may be added if the issue is raised by the facts.

Convictions for both "knowingly receiving child pornography, 18 U.S.C. §§ 2252A(a)(2)(A), and knowingly possessing the same child pornography, 18 U.S.C. §§ 2252A(a)(5)(B)" violate the Double Jeopardy Clause. United States v. Ehle, 640 F.3d 689, 694-95 (6th Cir. 2011) (internal quotation marks omitted). The court reasoned that "possessing child pornography is a lesser-included offense of receiving the same child pornography, meaning the two statutes proscribe the same offense." *Id.* at 695 (internal quotations omitted) (*citing* Rutledge v. United

States, 517 U.S. 292, 297 (1996)).

This statute also criminalizes attempts and conspiracies. *See* § 2252A(b)(2). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 2252A(b) do not require an overt act, *see* Whitfield v. United States, 543 U.S. 209, 213-14 (2005) (holding that when Congress omits an explicit reference to an overt act in a conspiracy statute, it dispenses with that requirement), so Instruction 3.01A Conspiracy to Commit an Offense–Basic Elements should be modified to omit paragraph (2)(C). All other references to overt acts should be deleted as well.

The statute includes affirmative defenses in subsections 2252A(c) and (d) as follows:

(c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that--
(1)
(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and
(B) each such person was an adult at the time the material was produced; or
(2) the alleged child pornography was not produced using any actual minor or minors.

No affirmative defense under subsection (c)(2) shall be available in any prosecution that involves child pornography as described in section 2256(8)(C). A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 14 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other specialized testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting such defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice.

(d) Affirmative defense. It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant--
(1) possessed less than three images of child pornography; and
(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof--
(A) took reasonable steps to destroy each such image; or
(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

These affirmative defenses should be included in the instructions if raised by the defendant.

16.09 COERCION AND ENTICEMENT: PERSUADING A MINOR TO ENGAGE IN PROSTITUTION OR UNLAWFUL SEXUAL ACTIVITY (18 U.S.C. § 2422(b))

(1) Count ____ of the indictment charges the defendant with persuading a minor to engage in [prostitution] [unlawful sexual activity]. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant knowingly [persuaded] [induced] [enticed] [coerced] an individual under the age of 18 to engage in [prostitution] [unlawful sexual activity].

(B) Second: That the defendant used [the mail] [a means or facility of interstate [foreign] commerce] to do so.

(C) Third: That the defendant knew the individual was under the age of 18.

(2) Now I will give you more detailed instructions on some of these terms.

(A) [*Insert definition for the term(s) used at the end of paragraph (1)(A)*]

--["Prostitution" means knowingly engaging in or offering to engage in a sexual act in exchange for money or other valuable consideration.]

--["Unlawful sexual activity" includes _____ [*describe underlying criminal offense*].]

(B) "Using a means or facility of interstate commerce" includes using the internet or the telephone.

(3) [It is not necessary that the government prove that the sexual activity occurred.]

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

Use Note

If the indictment charges unlawful sexual activity under paragraph (2)(A) and that offense has an age standard of less than 18 years, substitute the younger age or age range in paragraphs (1)(A) and (1)(C).

If the government alleges jurisdiction under the special maritime and territorial jurisdiction of the United States under § 2422(b), paragraph (1)(B) should be modified.

If the charge is based on an attempted violation of § 2422(b), an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. Attempt

liability is discussed further in the commentary below.

If interstate commerce is an issue in the case, a more detailed definition of that term may be required. See, e.g., Inst. 15.05(2)(F)(i).

Brackets indicate options for the court. Bracketed italics are notes to the court.

Committee Commentary
(current through May 1, 2025)

This instruction is based on § 2422(b), which provides:

> § 2422. Coercion and enticement
> . . .
> (b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

A panel of the Sixth Circuit has stated, "[V]iewed as a whole, [Instruction 16.09] . . . 'adequately informed the jury of the relevant considerations and provided a basis in law for aiding the jury in reaching its decision.'" United States v. Fox, 600 Fed. Appx. 414, 420 (6th Cir. 2015) (unpublished) (citing United States v. Edington, 526 Fed. Appx. 584, 589-90 (6th Cir. 2013)).

In paragraph (1), the elements are based on § 2422(b) and United States v. Hart, 635 F.3d 850, 855 (6th Cir. 2011). For paragraph (1)(B), which states the jurisdictional requirement, the statute also covers situations when the defendant acted within the special maritime and territorial jurisdiction of the United States. See § 2422(b). If the government alleges this jurisdictional basis, paragraph (1)(B) should be modified. Element (1)(C), that the defendant knew the victim was under 18, is based on United States v. X-Citement Video, 513 U.S. 64, 78 (1994), in which the Court held that the scienter requirement of knowingly in § 2252(a) extended both to the sexually explicit nature of the material and to the age of the performers.

In paragraph (2)(A), the definition of prostitution is drawn from Seventh Circuit Pattern Criminal Instruction 18 U.S.C. § 2422(b) Enticement of a Minor – Elements, Committee Comment (2012 ed.). The definition of unlawful sexual activity is based on the statute; s*ee also* United States v. Hart, 635 F.3d 850, 855 (6th Cir. 2011). "Unlawful sexual activity" includes the production of child pornography as defined in subsection 2256(8), see § 2427. In paragraph (2)(B), the definition of using a means or facility of interstate commerce as including the internet or the telephone is based on United States v. Fuller, 77 F. App'x. 371, 378-79 (6th Cir. 2003) (unpublished).

Paragraph (3), which states that the government need not prove that the sexual act occurred, is based on United States v. Fuller, 77 F. App'x 371, 378 (6th Cir. 2003) (unpublished). This provision should be used only if relevant.

"Grooming" is a term courts use "to describe a variety of behaviors that appear calculated to prepare a child for a future sexual relationship." United States v. Fox, 600 Fed. Appx. 414, 419 (6th Cir. 2015) (unpublished) (citations omitted). Grooming is not an element of child enticement under § 2422(b), *id*., and does not appear in the text of Instruction 16.09. In *Fox*, the trial judge instructed the jury that grooming was:

> the deliberate actions taken by a defendant to expose a child to sexual activity and [t]he ultimate goal of grooming is the formation of an emotional connection with the child and the reduction of the child['s] inhibitions in order to prepare the child for sexual activity.

600 Fed. Appx. at 420 (quotation marks omitted). On appeal, the panel found: "Given that 'grooming' encompasses a wide swath of behavior and courts have not settled on a single definition of the term, the district court acted within its discretion" in giving this instruction. *Fox*, 600 Fed. Appx. at 420.

An augmented unanimity instruction on the underlying unlawful sexual activity is not required. The court explained:

> Because 18 U.S.C. § 2422(b) criminalizes persuasion and the attempt to persuade, the government is not required to prove that the defendant completed or attempted to complete any specific chargeable offense. The government need only prove, and the jury unanimously agree, that the defendant attempted to persuade a minor to engage in sexual activity that would have been chargeable as a crime if it had been completed. . . . There is no requirement under 18 U.S.C. § 2422(b) that they had to unanimously agree on the specific type of unlawful sexual activity that he would have engaged in.

United States v. Hart, 635 F.3d 850, 855-56 (6th Cir. 2011).

This statute also makes it a crime to attempt to violate § 2422(b). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on attempt, the government need not prove that the defendant intended to actually engage in sexual activity but only that the defendant intended to persuade the minor to do so. *See* United States v. Hughes, 632 F.3d 956, 961 (6th Cir. 2011) (*citing* United States v. Bailey, 228 F.3d 637, 639 (6th Cir. 2000)). *See also* United States v. Fuller, 77 F. App'x 371, 378 (6th Cir. 2003) (unpublished) (discussing the addition of attempt language to the statute in 1998). Similarly, if the charge is based on attempt, the government need not prove that the individual the defendant attempted to entice was actually under the age of 18. *See* United States v. Hart, 635 F.3d 850, 855 (6th Cir. 2011) (stating that the defendant had to believe the victim was less than 18); *see also Fuller* at 378 (citations omitted):

> [A] defendant may be charged with knowingly attempting to persuade, induce, entice, or coerce a minor to engage in sexual activity even though he is mistaken

> as to the true age of the person with whom he admittedly communicated. Several courts have specifically held that a defendant may be convicted of attempted persuasion or enticement of a minor even though the defendant had been communicating with an adult FBI agent posing as a minor.

In United States v. Roman, 795 F.3d 511 (6th Cir. 2015), the court construed attempt liability under § 2422(b) to cover situations where the defendant communicated only with an adult intermediary and not with a minor child "if the defendant's communications with that intermediary are intended to persuade, induce, entice or coerce the minor child's assent to engage in prohibited sexual activity." *Id.* at 516. The court explained, "We recognize that it is not sufficient to allege or prove that a defendant intended to persuade an adult intermediary to cause a child to engage in sexual activity. The gravamen of the attempt offense under § 2422(b) is the intention to achieve the minor's assent." *Id.* at 512. *See also* United States v. Vinton, 946 F.3d 847, 853 (6th Cir. 2020) (government need not prove that the defendant used the adult intermediary to convey the defendant's own enticing messages to the minor if the defendant relies on the expertise of the adult intermediary in determining how best to entice the minor; "Whether the defendant aims to achieve a minor's assent by contacting the minor directly, by sending the minor enticing messages through an adult intermediary, or by enlisting an adult intermediary to persuade the minor, the defendant has the same intent to gain the minor's assent. And that intent is criminalized under § 2422(b).").

16.10 TRANSPORTING A MINOR WITH INTENT THAT THE MINOR ENGAGE IN CRIMINAL SEXUAL ACTIVITY (18 U.S.C. § 2423(a))

(1) Count ____ of the indictment charges the defendant with knowingly transporting a minor with intent that the minor engage in criminal sexual activity. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant knowingly transported an individual.

(B) Second: That the individual transported was under 18 years of age.

(C) Third: That the defendant intended the individual to engage in [prostitution] [criminal sexual activity].

(D) Fourth: That the transportation was in interstate [foreign] commerce.

(2) Now I will give you more detailed instructions on some of these terms.

(A) [*Insert definition for the term(s) used in paragraph (1)(C)*]

--["Prostitution" means knowingly engaging in or offering to engage in a sexual act in exchange for money or other valuable consideration.]

--["Criminal sexual activity" includes _____ [*describe underlying criminal offense*].]

[(B) The term "in interstate commerce" means the defendant transported the individual across a state line.]

[(3) The government is not required to prove the defendant knew that the person transported was a minor.]

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

Use Note

Paragraph (1)(D) covers one option on jurisdiction, but the statute includes as well transportation in any "commonwealth, territory, or possession of the United States . . . ." The instruction does not include this as an option for the usual case, but the court should include it if appropriate on the facts.

Brackets indicate options for the court. Bracketed italics are notes to the court.

Committee Commentary
(current through May 1, 2025)

This instruction covers the offense of transporting a minor with intent that the minor engage in criminal sexual activity. That offense is defined in 18 U.S.C. § 2423(a), which provides:

> (a) Transportation with intent to engage in criminal sexual activity. A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life.

The elements of the crime identified in paragraph (1) are based on this statute. *See also* United States v. Chambers, 441 F.3d 438, 450 (6th Cir. 2006) (listing the elements of § 2423(a) as applicable to the facts of that particular case).

In paragraph (2)(A), the definition of prostitution is drawn from Seventh Circuit Pattern Criminal Instruction 18 U.S.C. § 2423(a) Transportation of Minors with Intent to Engage in Criminal Sexual Activity – Elements, Committee Comment (2012 ed.). The definition of criminal sexual activity is based on the statute; s*ee also* United States v. Wise, 278 F. App'x 552, 559-60 (6th Cir. 2008) (unpublished) (referring to "sexual activity . . . for which any person could be charged with a crime").

Paragraph (3), stating that the government need not prove that the defendant knew the person transported was a minor, is based on United States v. Daniels, 653 F.3d 399, 409-10 (6th Cir. 2011) ("[T]he context of § 2423(a) dictates that the government did not need to prove that [defendant] knew SD was a minor."). This provision should be used only if relevant.

This statute also makes it a crime to attempt or conspire to violate § 2423(a). *See* § 2423(e). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 2423(e) do not require an overt act, *see* Whitfield v. United States, 543 U.S. 209, 213-14 (2005) (holding that when Congress omits an explicit reference to an overt act in a conspiracy statute, it dispenses with that requirement), so Instruction 3.01A Conspiracy to Commit an Offense–Basic Elements should be modified to omit paragraph (2)(C). All other references to overt acts should be deleted as well.

16.11 TRAVELING WITH INTENT TO ENGAGE IN ILLICIT SEXUAL CONDUCT (18 U.S.C. § 2423(b))

(1) Count ____ of the indictment charges the defendant with traveling with intent to engage in illicit sexual conduct. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant traveled [in interstate commerce] [into the United States].

(B) Second: That the defendant did so with intent to engage in illicit sexual conduct.

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "illicit sexual conduct" includes

[(1) a sexual act with a person under 18 years of age that would consist of [*describe crime from 18 U.S.C. §§ 2241, 2242, 2243, or 2244 alleged in the indictment*].]

or

[(2) any commercial sex act with a person under 18 years of age. A commercial sex act is any sex act for which anything of value is given to or received by any person.]

[(B) The term "in interstate commerce" means the defendant traveled across a state line.]

[(3) The government is not required to prove that the defendant took any steps to entice, coerce, or persuade the person under 18 years of age to engage in sexual conduct.]

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

Use Notes

Paragraph (1)(A) covers two options on the defendant's travel, but the statute includes as well a third option stating that the defendant is a "United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce." The instruction omits this third option because it arises infrequently, but the court should include it if appropriate in the case.

Paragraph (2)(A)(1), which provides the first definition for illicit sexual conduct, uses the term "a sexual act." The instruction does not define this term, but if the issue is raised in the

case, the court should use the definition in 18 U.S.C. § 2246(2).

Brackets indicate options for the court. Bracketed italics are notes to the court.

Committee Commentary
(current through May 1, 2025)

This instruction covers the offense of traveling with intent to engage in illicit sexual conduct. That offense is defined in 18 U.S.C. § 2423(b), which provides:

> (b) Travel with intent to engage in illicit sexual conduct. A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

The two elements of the crime identified in paragraph (1) are based on the statute, and they adopt the court's approach in United States v. DeCarlo, 434 F.3d 447, 456 (6th Cir. 2006). In *DeCarlo*, the court described the crime using two elements and a multi-part definition of illicit sexual conduct.

In paragraph (1)(A), the language requiring the defendant to travel "in interstate commerce" or "into the United States" is based on the statute, § 2423(b), quoted above. The statute includes as a third option that the defendant is a "United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce." The instruction omits this third option because it arises infrequently, but the court should include it if the issue is raised in the case.

In the introductory language of paragraph (1) and in paragraph (1)(B), the instruction uses the phrase "with intent to" rather than the statutory phrase "for the purpose of" based on United States v. Hughes, 632 F.3d 956, 961 (6th Cir. 2011) (explaining that § 2423(b) requires "an intent to" engage in sexual conduct) and *DeCarlo, supra at* 456 (explaining that under § 2423(b), the government had to prove that the defendant "intended to engage" in illicit sexual conduct).

In paragraph (2)(A), the two definitions of illicit sexual conduct are drawn from § 2423(f), which provides:

> (f) Definition. As used in this section, the term "illicit sexual conduct" means (1) a sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States; or (2) any commercial sex act (as defined in section 1591) with a person under 18 years of age.

The options for defining illicit sexual conduct in paragraphs (2)(A)(1) and (2)(A)(2) are based on

subsections (f)(1) and (f)(2), respectively.

For the first definition of illicit sexual conduct, paragraph (2)(A)(1) uses the term "sexual act." As quoted above, § 2423(f)(1) refers to the definition of "sexual act" in § 2246. Subsection 2246(2) provides:

> (2) the term "sexual act" means--
> (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
> (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
> (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
> (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person . . . .

The instruction does not include these definitions of sexual act for the usual case, but the court should include a definition if the issue is raised by the facts.

Subsection 2423(f)(1) provides that to qualify as illicit sexual conduct, the sexual act must be an act "that would be in violation of chapter 109A . . . ." Chapter 109A Sexual Abuse includes four statutes defining offenses, 18 U.S.C. §§ 2241, 2242, 2243, and 2244. In paragraph (2)(A)(1), the instruction indicates in an italicized note to the court that it should describe how the defendant's conduct alleged in the indictment would consist of a violation of §§ 2241 to 2244. *See, e.g., Wise, supra at* 559 (stating the evidence was sufficient because the defendant's conduct would have violated § 2243(a)).

For the second definition of illicit sexual conduct, which is based on § 2423(f)(2), paragraph (2)(A)(2) uses the term "commercial sex act" and defines it as "any sex act, on account of which anything of value is given to or received by any person." *See* § 1591(e)(3).

For paragraph (3), which provides that the government need not prove that the defendant took any steps to entice, coerce, or persuade the minor to engage in sexual conduct, see United States v. Hughes, 632 F.3d 956, 961 (6th Cir. 2011) (stating that § 2423(b) requires the defendant to travel with the intent to engage in sexual conduct, but does not require an element of enticement or coercion). *Cf*. Inst. 16.09 Coercion and Enticement: Persuading a Minor to Engage in Prostitution or Unlawful Sexual Activity (18 U.S.C. § 2422(b)) (providing that the defendant must persuade, induce, entice, or coerce a minor to engage in sexual activity). The provision in paragraph (3) should be used only if relevant.

This statute also makes it a crime to attempt or conspire to violate § 2423(b). *See* § 2423(e). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an

instruction may be compiled using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 2423(e) do not require an overt act, *see* Whitfield v. United States, 543 U.S. 209, 213-14 (2005) (holding that when Congress omits an explicit reference to an overt act in a conspiracy statute, it dispenses with that requirement), so Instruction 3.01A Conspiracy to Commit an Offense–Basic Elements should be modified to omit paragraph (2)(C). All other references to overt acts should be deleted as well.

> Section 2423(g) provides as follows:
>
> (g) Defense. In a prosecution under this section based on illicit sexual conduct as defined in subsection (f)(2), it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the person with whom the defendant engaged in the commercial sex act had attained the age of 18 years.

The text of the instruction does not refer to this defense, but if the prosecution is based on the definition of illicit sexual conduct involving a commercial sex act as defined in paragraph (2)(A)(2), and the defense is raised in the case, the court should include an instruction on the defense. In that case, the court may also include a definition of the term preponderance, *see, e.g.*, Inst. 6.05(4).

16.12 SEX TRAFFICKING (18 U.S.C. § 1591(a)(1))

(1) Count ____ of the indictment charges the defendant with sex trafficking [of children] [by force, fraud or coercion]. For you to find the defendant guilty of this offense, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant knowingly [recruited] [enticed] [harbored] [transported] [provided] [obtained] [maintained] [patronized] [solicited] [*insert name of person as identified in the indictment*].

(B) Second, that the defendant [knew] [recklessly disregarded] the fact that [*insert at least one of the two options below*]

(i) [[force] [threats of force] [fraud] [coercion] would be used to cause [*insert name of person as identified in the indictment*] to engage in a commercial sex act]

or

(ii) [[*insert name of person as identified in the indictment*] was under 18 years old and would be caused to engage in a commercial sex act]. [If you find that the defendant had a reasonable opportunity to observe [*insert name of person as identified in the indictment*], the government need not prove that the defendant knew or recklessly disregarded the fact that [*insert name of person as identified in the indictment*] was under the age of 18.]

(C) Third, that the offense was [in] [affected] interstate [foreign] commerce.

(2) Now I will give you more detailed instructions on some of these terms.

[(A) The term "coercion" means [*insert one or more from three options below*]

– [threats of harm to or physical restraint against any person]

– [any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person]

– [the abuse or threatened abuse of law or the legal process].]

[(B) The term "serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.]

[(C) The term "abuse or threatened abuse of law or legal process" means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.]

[(D) The term "commercial sex act" means any sex act, on account of which anything of value is given to or received by any person.]

[(E) The phrase "the offense was in interstate [foreign] commerce" means that the offense involved the crossing of a state [national] line.

[(F) The phrase "the offense affected interstate [foreign] commerce" means that the prohibited [recruiting] [enticing] [harboring] [transporting] [providing] [obtaining] [maintaining] [patronizing] [soliciting] of [*insert name of person as identified in the indictment*] had at least a minimal connection with interstate [foreign] commerce. This means that the [recruiting] [enticing] [harboring] [transporting] [providing] [obtaining] [maintaining] [patronizing] [soliciting] of [*insert name of person as identified in the indictment*] had some effect upon interstate [foreign] commerce.]

[(G) The phrase "interstate commerce" means commerce between any combination of states, territories, and possessions of the United States, including the District of Columbia. [The phrase "foreign commerce" means commerce between any state, territory or possession of the United States and a foreign country.] [The term "commerce" includes, among other things, travel, trade, transportation and communication.]]

[(3) To establish that the offense was in or affected interstate commerce, the government need not prove that [[*insert name of person identified in the indictment*] was transported across a state line] [the idea of sex trafficking was formed in one state and then carried out in a different state].]

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

Use Note

Sex trafficking based on advertising: In 2015, Congress added several terms to the statute as ways to violate § 1591(a). These are included in this instruction with one exception. When Congress added the term "advertises," it limited the mental state required for the conduct of advertising to "knowingly." In other words, the mental state of reckless disregard that is generally sufficient for the elements in paragraphs (1)(B)(i) and (1)(B)(ii) (that defendant used force/coercion or that the victim was a minor), is not sufficient when the conduct is advertising. Because of this different mental state, the conduct of advertising has been omitted from this instruction. If the prosecution is based on the conduct of advertising, an instruction should be

compiled using the mental state of knowingly.

Paragraph (1)(A) omits the statutory language "by any means" for the usual case but it may be added if relevant.

Paragraph (1)(B) omits the statutory language "or any combination of such means" for the usual case but it may be added if relevant.

Paragraph (1)(C) assumes that jurisdiction is based on the phrase "in or affecting interstate or foreign commerce." If jurisdiction is based on the "special maritime and territorial jurisdiction of the United States," the instruction may be modified.

In paragraph (2), the bracketed definitions should be used only if relevant.

Bracketed paragraphs (2)(B) and (2)(C), which provide the statutory definitions for the terms "serious harm" and "abuse or threatened abuse of the law or legal process" respectively, should be tailored to fit the fact of the case.

In paragraph (3), the bracketed items that the government need not prove should be used only if relevant.

Brackets indicate options for the court. Bracketed italics are notes to the court.

Committee Commentary
(current through May 1, 2025)

This instruction covers the offense of sex trafficking of children or by force, fraud or coercion. That offense is defined in 18 U.S.C. § 1591(a)(1) and (c), which provide:

§ 1591. Sex trafficking of children or by force, fraud, or coercion

(a) Whoever knowingly--

> (1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person
> . . .
> knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished . . . .

(c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.

The elements of the crime identified in paragraph (1) are based on § 1591(a)(1) and (c).

The bracketed conduct terms in paragraph (1)(A) include all the terms listed in the statute except "advertises." When Congress added the term "advertises" to the statute in 2015, it limited the mental state required for the conduct of advertising to "knowingly." In other words, the mental state of reckless disregard that is generally sufficient for the elements in paragraphs (1)(B)(i) and (1)(B)(ii) (that defendant used force/coercion or that the victim was a minor), is not sufficient when the conduct is advertising. Because of this different mental state, the conduct of advertising has been omitted from paragraph (1)(A) of this instruction. If the prosecution is based on the conduct of advertising, an instruction should be compiled using the mental state of knowingly.

These mental states do not require that the defendant be certain as to the future act. *See* United States v. Tutstone, 525 F. App'x 298, 304-05 (6th Cir. 2013) (unpublished) (*quoting* United States v. Todd, 627 F.3d 329, 334 (9th Cir. 2010)).

Paragraphs (1)(B)(i) and (ii), *i.e.*, that the defendant used force/coercion or that the victim was a minor, are alternatives; the government need not prove both. United States v. Mack, 808 F.3d 1074, 1081 (6th Cir. 2015); *see also* United States v. Jackson, 622 F. App'x 526, 527-28 (6th Cir. 2015) (unpublished).

The Sixth Circuit held the evidence was sufficient that the defendant used force or the threat of force where he choked the victims, struck them, and screamed at them. United States v. Mack, 808 F.3d 1074, 1082-83 (6th Cir. 2015).

The Sixth Circuit held that the phrase in § 1591(a)(1) that the victim "will be caused" to engage in a commercial sex act was not unconstitutionally vague as applied in United States v. Kettles, 970 F.3d 637, 649-50 (6th Cir. 2020).

The Sixth Circuit held the evidence was sufficient that the defendant knew or recklessly disregarded the fact that the victims were minors where defendant received a text message and other comments indicating the victims were minors. United States v. Mack, 808 F.3d 1074, 1081 (6th Cir. 2015). In United States v. Jackson, 622 F. App'x 526, 528-29 (6th Cir. 2017) (unpublished), the panel concluded that the evidence was sufficient that defendant recklessly disregarded the victims' age; that defendant's initial belief that victims were of age did not warrant reversal when they later encountered reasons to doubt that belief; and that the standard of reckless disregard entitled juries to consider many different types of facts, including "the victim's appearance or behavior, information from the victim, or others, and circumstances of which a defendant was aware, such as the victim's grade level in school, or activities in which the victim engaged." *Jackson*, 622 F. App'x at 529 (interior quotation marks omitted); see also

United States v. Davis, 2017 WL 4403315 (6th Cir. 2017) (unpublished) (reasonable opportunity to observe).

In paragraph (1)(B)(ii), the bracketed provision stating that the government need not prove the defendant's knowledge or reckless disregard of the minor's age if the defendant had a reasonable opportunity to observe the minor is based on § 1591(c).

In paragraph (1)(C), the language requiring that "the offense" was in or affected interstate or foreign commerce is based on United States v. Flint, 2008 U.S. Dist. LEXIS 86765 at 3 (E.D. Mich. 2008), *aff'd*, 394 F. App'x 273 (6th Cir. 2010).

In paragraph (2)(A), the definition of "coercion" is drawn verbatim from § 1591(e)(2). The Sixth Circuit has held that the evidence of coercion was sufficient where the victims had a previously existing addiction and the defendant supplied or withheld drugs. United States v. Mack, 808 F.3d 1074, 1081-82 (6th Cir. 2015). One definition of coercion uses the term "serious harm," which is defined in paragraph (2)(B) based on § 1591(e)(4). In *Mack*, the court further concluded that, based on the evidence in that case, "serious harm" was established by the withdrawal symptoms the victims suffered. 808 F.3d at 1082 note 5. Another definition of coercion uses the term "abuse or threatened abuse of law or the legal process," which is defined in paragraph (2)(C) based on § 1591(e)(1). In paragraph (2)(D), the term "commercial sex act" is defined based on § 1591(e)(3).

In paragraphs (2)(E) and (2)(F), the definitions of "in" or "affected" commerce presumes that the commerce involved is "interstate" commerce, and the bracketed term "foreign" should be substituted or added if warranted by the facts.

In paragraph (2)(F), the definition of affected interstate commerce as requiring "at least a minimal connection" with interstate commerce is drawn from the instructions approved in United States v. Gros, 824 F.2d 1487, 1494 (6th Cir. 1987) in the context of the offense of possessing five or more false identification documents under § 1028(a)(3). To use plain English, the instruction substitutes the word "connection" for "nexus" and substitutes "at least" for "no more than." *See also* United States v. Willoughby, 742 F.3d 229, 240 (6th Cir. 2014) (stating in § 1591(a) case that phrase "affecting commerce" indicates Congress' intent to regulate to the outer limits of its authority under the commerce clause).

The Sixth Circuit has decided one case on whether the government presented sufficient evidence of an effect on commerce under § 1591. In *Willoughby*, an effect on commerce was established by (1) the defendant's purchase for the victim of clothes and condoms manufactured out-of-state; (2) the defendant's use of a Chinese-made cell phone in furtherance of sex-trafficking; and (3) Congress' conclusion that in the aggregate, sex-trafficking substantially affects interstate and foreign commerce, *see* 22 U.S.C. § 7101(b)(12). The court also noted parenthetically that Congress has the power to regulate the instrumentalities of commerce, and a cell phone is such an instrumentality. *Willoughby,* 742 F.3d at 240.

In addition, panels of the Sixth Circuit have twice concluded that the government proved a sufficient effect on commerce under § 1591. *See* United States v. Tutstone, 525 F. App'x 298,

303 (6th Cir. 2013) (unpublished) (effect sufficient where defendant used cell phone involving parts and towers manufactured internationally; cell phone calls may have been routed across state lines; call data were routed to a billing gateway in another state; and any calls that were wire-tapped were routed across state lines to Quantico, Virginia) and United States v. Flint, 394 F. App'x 273, 277 (6th Cir. 2010) (unpublished) (effect sufficient where defendant drove victim from Ohio to Michigan to engage in prostitution; in Michigan, the victim did engage in prostitution, the defendant purchased drugs, clothing, hair extensions and fake nails for the victim, and the defendant rented a hotel room that served out-of-state travelers).

Paragraph (3) lists some items the government need not prove to establish jurisdiction based on commerce. These are based on United States v. Flint, 394 F. App'x 273, 277 and 278 (6th Cir. 2010) (unpublished).

It is also a crime to attempt or conspire to violate § 1591. *See* 18 U.S.C. §§ 1594(a) (attempt) and 1594(c) (conspiracy). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 1594(c) do not require an overt act, *see* Whitfield v. United States, 543 U.S. 209, 213-14 (2005) (holding that when Congress omits an explicit reference to an overt act in a conspiracy statute, it dispenses with that requirement), so Instruction 3.01A Conspiracy to Commit an Offense–Basic Elements should be modified to omit paragraph (2)(C). All other references to overt acts should be deleted as well.

The punishment for this crime is a mandatory minimum term of 10 years in prison. See § 1591(b)(2). This mandatory minimum is increased to 15 years if the defendant used force, fraud or coercion, or if the victim was under 14 years old. See § 1591(b)(1). Any fact that triggers a mandatory minimum penalty constitutes an element of the offense and must be submitted to the jury and proved beyond a reasonable doubt. Alleyne v. United States, 133 S. Ct. 2151 (2013). In this situation, the Committee recommends that the court give an instruction like Instruction 14.07(A) or (B) and use a special verdict form like those following Instructions 14.07(A) and (B).

Chapter 17.00

Hobbs Act Offenses

Introduction

(current through May 1, 2025)

The pattern instructions cover the Hobbs Act offenses with three elements instructions:

Instruction 17.01 Hobbs Act - Extortion by Force, Violence, or Fear (18 U.S.C. § 1951(a))
Instruction 17.02 Hobbs Act - Extortion Under Color of Official Right (18 U.S.C. § 1951(a))
Instruction 17.03 Hobbs Act - Robbery (18 U.S.C. § 1951(a))

The first two instructions cover extortion as defined in § 1951(b)(2): extortion by force, violence, or fear; and extortion under color of official right. Extortion requires the consent of the victim. Ocasio v. United States, 136 S. Ct. 1423, 1435 (2016); United States v. Gooch, 850 F.3d 285, 291 (6th Cir. 2017). As a general matter, Instruction 17.01 Extortion by Force, Violence, or Fear applies when the defendant obtains property from another with consent but the defendant induced the consent through force, violence, or fear. Instruction 17.02 Extortion Under Color of Official Right applies to cases involving bribery of and kickbacks to a public official.

The third instruction, Instruction 17.03 Robbery, covers the offense of robbery defined in § 1951(b)(1). This instruction generally applies when the defendant takes property from or in the presence of the victim and against the victim's will through force, violence, or fear. See United States v. Gooch, 850 F.3d 285, 291 (6th Cir. 2017).

The Hobbs Act also criminalizes committing or threatening physical violence to any person or property in furtherance of a plan to do anything in violation of the Hobbs Act. Section 1951(a). This statutory language is not frequently used, and the Committee did not draft an instruction to cover it, but the pattern instructions can be modified.

17.01 Hobbs Act - Extortion by Force, Violence, or Fear (18 U.S.C. § 1951)

(1) Count ___ of the indictment charges the defendant with extortion by force, violence, or fear. For you to find the defendant guilty of this offense, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant obtained property, that he was not lawfully entitled to, from another person with that person's consent.

(B) Second, that the defendant used [actual or threatened] force, violence, or fear [of economic harm] to obtain the property with that person's consent.

(C) Third, that the defendant knowingly obtained the property in this way.

(D) Fourth, that as a result, interstate commerce was affected in any way or degree.

(2) Now I will give you more detailed instructions on some of these terms.

(A) "Property" means money or other tangible or intangible things of value that can be transferred.

(B) An act is done "knowingly" if it is done voluntarily, and not because of mistake or some other innocent reason.

(C) Conduct affects interstate commerce if it in any way interferes with or changes the movement of goods, merchandise, money, or other property in commerce between different states. Any effect at all on commerce is enough.

[(1) This includes obtaining money that belonged to a business [entity] which customarily purchased goods from outside the State of _____ , [or] [that engaged in business outside the State of _____] if defendant's conduct made that money unavailable to the business [entity] for the purchase of such goods [or] [the conducting of such business.]]

[(2) The defendant attempted to affect interstate commerce if 1) he obtained money that was provided by a law enforcement agency as part of an investigation, and 2) the money appeared to belong to [*identify business or entity*], and 3) the business or entity appeared to customarily purchase goods from outside the State of ____ , [or] [engaged in business outside the State of __].]

[(3) It is not necessary for you to find that there was an actual effect on interstate commerce.]

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

Use Note

The Hobbs Act also criminalizes attempts and conspiracies to commit extortion. If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled using the instructions in Chapter 3 Conspiracy with one caveat on the overt act element described in the commentary below.

For paragraph (1)(D), the full statutory language on commerce is "obstructs, delays, or affects," but the instruction deletes the two words "obstructs, delays" as unnecessary subcategories of "affecting" commerce.

If the case involves the defendant acting to obtain property for a third person, the instruction should be modified.

Brackets indicate options for the court; bracketed italics are notes to the court.

Committee Commentary

(current as of May 1, 2025)

Title 18 U.S.C. § 1951 provides:

> § 1951. Interference with commerce by threats or violence
>
> > (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do . . . shall be fined under this title or imprisoned not more than twenty years, or both.
> >
> > (b) As used in this section--
> > . . . .
> >
> > (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear . . . .

In paragraph (1), the elements are based on the statute, 18 U.S.C. § 1951(a) and (b)(2). Case law defining the elements is limited. *See* Stirone v. United States, 361 U.S. 212, 218 (1960) ("Here, . . . there are two essential elements of a Hobbs Act crime: interference with commerce and extortion."); United States v. Turner, 272 F.3d 380, 384 (6th Cir. 2001) ("In order to prevail under a Hobbs Act violation, the Government must prove two elements: 1) interference with interstate commerce, which is a jurisdictional issue; and, 2) the substantive criminal act,

which in the instant case is [a conspiracy to commit] robbery.") (citations omitted); and United States v. Ostrander, 411 F.3d 684, 691 (6th Cir. 2005) (unpublished appendix) ("Thus, to prevail under the [Hobbs] Act, the Government must prove two elements: (1) interference with interstate commerce (2) in the course of a substantive criminal act.").

In paragraph (1)(A), the requirement that defendant "obtained" property is based on the statute and Scheidler v. National Organization for Women, Inc., 537 U.S. 393, 404 (2003). The offense requires not only that the victim be deprived of property but also that the defendant acquire property. *Id*. The phrase that the defendant was "not lawfully entitled to" the property is based on the word "wrongful" in § 1951(b)(2). "Wrongful" means that the defendant had no lawful claim to the property. United States v. Enmons, 93 S.Ct. 1007, 1009-10 (1973).

In paragraph (1)(B), the bracketed phrase "of economic harm" modifies the term "fear" for use in appropriate cases. The term "fear" includes fear of economic loss or damage as well as fear of physical harm. United States v. Kelley, 461 F.3d 817, 826 (6th Cir. 2006) (*quoting* United States v. Williams, 952 F.2d 1504, 1514 (6th Cir. 1991)); United States v. Collins, 78 F.3d 1021, 1030 (6th Cir. 1996). Under the fear-of-economic-harm theory, a private citizen can commit extortion by leading the victim to believe that the perpetrator can exercise his or her power to the victim's economic detriment. United States v. Kelley, 461 F.3d 817, 826 (6th Cir. 2006) (*citing* United States v. Williams, 952 F.2d 1504, 1514 (6th Cir. 1991) ("[T]he fear of economic harm may arise independently of any action by the defendant . . . [i]t is enough if the fear exists and the defendant intentionally exploits it")). Fear of purely emotional harm is not enough to satisfy the Hobbs Act. Heinrich v. Waiting Angels Adoption Servs., Inc., 668 F.3d 393, 408 (6th Cir. 2012). The phrase "of economic harm" is in brackets to indicate that it should only be used if relevant.

In paragraphs (1)(A) and (1)(B), clarity may be enhanced by using the names of the defendant and victim in the case.

For the mens rea of extortion by force, violence, or fear, paragraph (1)(C) requires the defendant to act "knowingly." The statute does not include a mens rea, and no case law on the mens rea for this type of extortion exists in the Supreme Court. *Cf*. United States v. Evans, 112 S. Ct. 1881, 1889 (1992) (adopting mens rea of knowingly for extortion under color of official right). In the Sixth Circuit, some authority supports the term "specific intent." *See* United States v. Dabish, 708 F.2d 240, 242 (6th Cir. 1983) (referring to extortion by force, violence, or fear as a "specific intent" crime while resolving a question on Rule 404(b) evidence). Later case law supports the mens rea of knowledge. *See* United States v. Carmichael, 232 F.3d 510, 522 (6th Cir. 2000) (rejecting the term "specific intent," stating that defendant need not intend to violate the law, and affirming jury instruction requiring defendant to have mens rea of knowledge for extortion under the Hobbs Act). The Committee chose the mens rea term "knowingly" based on *Evans* and *Carmichael*. *See also* Seventh Circuit Pattern Criminal Instruction 18 U.S.C. § 1951 EXTORTION – NON-ROBBERY – ELEMENTS and Eleventh Circuit Pattern Criminal Instruction 70.1 Interference with Commerce by Extortion Hobbs Act: Racketeering (Force or Threats of Force) (both adopting the term "knowingly" for extortion by force, violence, or fear).

The defendant need not have created the fear in the victim's mind as long as the

defendant intended to exploit the fear. United States v. Williams, 952 F.2d 1504, 1514-15 (6th Cir. 1991); *see also* United States v. Kelley, 461 F.3d 817, 826 (6th Cir. 2006) (quoting *Williams*).

Paragraph (1)(D) states the jurisdictional requirement that interstate commerce was affected in any way or degree. The language is drawn from the statute.

In paragraph (2)(A), property is defined as "money or other tangible or intangible things of value that can be transferred." *See* Scheidler v. National Organization for Women, Inc., 537 U.S. 393, 404 (2003) and Sekhar v. United States, 133 S. Ct. 2720, 2725 (2013). Extortion requires not only that the victim be deprived of property but also that the defendant obtain or acquire property. *Scheidler, supra*. Thus, "The property extorted must be *transferable*–that is, capable of passing from one person to another." *Sekhar, supra*.

The definition of "knowingly" in paragraph (2)(B) ("An act is done knowingly if it is done voluntarily, and not because of mistake or some other innocent reason.") is based on United States v. Carmichael, 232 F.3d 510, 522 (6th Cir. 2000) and United States v. Honeycutt, 816 F.3d 362, 375 (6th Cir. 2016), reversed on other grounds, 137 S. Ct. 1626 (2017). In *Carmichael,* the Sixth Circuit held that the government need not prove that the defendant intended to violate the law. The court then endorsed an instruction using the mens rea of knowingly. Generally, the term "knowingly" requires knowledge of the acts that constituted the offense but not knowledge that those acts were illegal. *See, e.g.,* United States v. Honeycutt, 816 F.3d 362, 375 (6th Cir. 2016), reversed on other grounds, 137 S. Ct. 1626 (2017), stating:

> As the Supreme Court has stated, "unless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the acts that constitute the offense." Dixon v. United States, 548 U.S. 1, 5 (2006). "Knowingly" does not require knowledge that the facts underlying the criminal violation were unlawful. See id. (contrasting "knowingly" with "willfully," the latter of which "requires a defendant to have 'acted with knowledge that his conduct was unlawful'" (quoting Bryan v. United States, 524 U.S. 184, 193 (1998))).

Another definition of knowingly may be found in Arthur Andersen v. United States, 125 S. Ct. 2129, 2135-36 (2005) (ǫ'[K]nowledge' and 'knowingly' are normally associated with awareness, understanding, or consciousness.") (citations omitted) (construing term "knowingly" in 18 U.S.C. § 1512).

Paragraph (2)(C) includes definitions on the jurisdictional element of affecting commerce. The statute provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery . . . or attempts or conspires so to do . . . shall be fined under this title or imprisoned . . . .

18 U.S.C. § 1951(a). The statute then defines "commerce" as:

> commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

18 U.S.C. § 1951(b)(3).

Paragraph (2)(C) provides a basic definition of affecting commerce applicable in most cases. This basic definition presumes that the interstate commerce element is based on the defendant targeting a business that is engaged in or affects interstate commerce. *See* United States v. Wang, 222 F.3d 234, 240 (6th Cir. 2000) (anticipating that the overwhelming majority of Hobbs Act cases will continue to involve victims which are businesses directly engaged in interstate commerce). When the victim of the robbery is a business entity engaged in or affecting interstate commerce, the defendant's activities need only have a *de minimis* impact, and this remains true even in the wake of United States v. Lopez, 514 U.S. 549 (1995). United States v. Smith, 182 F.3d 452, 456 (6th Cir. 1999). The Supreme Court has characterized the Hobbs Act language defining the required effect on commerce as "unmistakably broad." Taylor v. United States, 136 S. Ct. 2074, 2079 (2016) (*citing* United States v. Culbert, 435 U.S. 371, 373 (1978) and Stirone v. United States, 361 U.S. 212, 215 (1960)). A substantive Hobbs Act violation requires an actual effect on interstate commerce. United States v. DiCarlantonio, 870 F.2d 1058, 1061 (6th Cir. 1989). The effect on commerce may be adverse or beneficial. United States v. Mills, 204 F.3d 669, 673 (6th Cir. 2000).

Paragraphs (2)(C)(1) through (2)(C)(3) offer jurisdictional provisions in brackets that may apply in particular cases.

Paragraph (2)(C)(1) provides detail on the "depletion of assets" theory of jurisdiction. It is based on United States v. Turner, 272 F.3d 380 (6th Cir. 2001); United States v. Carmichael, 232 F.3d 510 (6th Cir. 2000); United States v. Wang, 222 F.3d 234 (6th Cir. 2000); and United States v. DiCarlantonio, 870 F.2d 1058 (6th Cir. 1989). This paragraph assumes the defendant targeted a business entity. If the defendant's criminal act is directed not at a business entity but at an individual in a private home, the connection required between the individual and a business engaged in interstate commerce is "of a different order"; the connection must be substantial, not fortuitous or speculative. United States v. Wang, 222 F.3d 234, 238-40 (6th Cir. 2000) (finding no realistic probability that the aggregate of a robbery of citizens in a private residence where $1,200 of the approximately $4,200 taken belonged to a restaurant would substantially affect interstate commerce). *See also* United States v. Turner, 272 F.3d 380, 387-89 (6th Cir. 2001) (holding that government's proof of interstate commerce element was insufficient under any applicable theory because government did not show that the victim was a business engaged in or affecting interstate commerce, did not show a connection between individual victim and a business engaged in interstate commerce, and did not offer evidence explaining how robbing an individual of large sum would have affected interstate commerce). If the targeted victim is an individual person, the instruction should be modified to reflect the opinions in *Wang* and *Turner*,

supra. *Cf.* Taylor v. United States, 136 S. Ct. 2074, 2081 (2016) (holding that jurisdiction is established for Hobbs Act robbery if the targeted victim is an individual drug dealer whom the defendant targeted for the purpose of stealing drugs or drug proceeds).

Paragraph (2)(C)(2) applies if the charge is attempt based on an undercover investigation. *See* United States v. DiCarlantonio, 870 F.2d 1058, 1060-1062 (6th Cir. 1989) (reversing substantive Hobbs Act conviction for insufficient effect on commerce where bribe money was provided by the government but noting that no barrier exists for attempt charges); United States v. Peete, 919 F.2d 1168, 1175 (6th Cir. 1990) (citing *DiCarlantonio* and reiterating possibility of attempt liability based on undercover investigation using government funds).

Paragraph (2)(C)(3), providing that an actual effect on commerce is not required, applies in attempt and conspiracy cases. *See* United States v. Turner, 272 F.3d 380, 384 (6th Cir. 2001) ("When a conspiracy is charged under the Hobbs Act, the government need only prove that the scheme would have affected interstate commerce had it been carried out.") (*citing* United States v. DiCarlantonio, 870 F.2d 1058, 1061 (6th Cir. 1989)); United States v. Peete, 919 F.2d 1168, 1174 (6th Cir. 1990) ("There is no requirement [for an attempt charge] that there be an actual effect on interstate commerce—only a *realistic probability* that an extortion will have an effect on interstate commerce.").

Extortion by force, violence, or fear must be induced, unlike extortion under color of official right. *See* Evans v. United States, 112 S. Ct. 1881, 1888 (1992); *see also* United States v. Jenkins, 902 F.2d 459, 466-67 (6th Cir. 1990).

The Hobbs Act also criminalizes attempts and conspiracies to commit extortion. See § 1951(a). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies to commit Hobbs Act offenses do not require an overt act. United States v. Hills, 27 F.4th 1155, 1190 (6th Cir. 2022), *quoting* United States v. Rogers, 769 F.3d 372, 382 (6th Cir. 2014). Thus if the charge is based on a Hobbs Act conspiracy, Instruction 3.01A Conspiracy to Commit an Offense–Basic Elements should be modified to omit paragraph (2)(C). All other references to overt acts should be deleted as well.

See also Ocasio v. United States, 136 S. Ct. 1423 (2016) (conspiracy to extort under color of official right does not require agreement to obtain property from someone outside the conspiracy; rather, the defendant may be held liable based on an agreement to obtain money from one of the conspirators).

17.02 Hobbs Act - Extortion Under Color of Official Right (18 U.S.C. § 1951)

(1) Count ____ of the indictment charges the defendant with extortion under color of official right. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant was a public official.

(B) Second, that the defendant obtained [accepted] [took] [received] property, that he was not lawfully entitled to, from another person with that person's consent.

(C) Third, that the defendant knew the property was being obtained [accepted] [taken] [received] in exchange for an official act.

(D) Fourth, that as a result, interstate commerce was affected in any way or degree.

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "public official" means a person with a formal employment relationship with government.

(B) The term "property" means money or other tangible or intangible things of value that can be transferred.

(C) The phrase "the defendant knew the property was being obtained [accepted] [taken] [received] in exchange for an official act" may include the conduct of taking a [bribe] [kickback] [or both].

[(1) Efforts to buy favor or generalized good will do not necessarily amount to bribery; bribery does not include gifts given in the hope that at some unknown, unspecified time, a public official might act favorably in the giver's interests.]

[(2) Gifts exchanged solely to cultivate friendship are not bribes; things of value given in friendship and without expectation of anything in return are not bribes.]

[(3) It is not a defense to bribery that the public official would have done the official act anyway, even without the receipt of the property.]

(D) The term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

(1) This definition of official act has two parts.

(a) First, the evidence must show a question, matter, cause, suit,

proceeding or controversy that may at any time be pending or may by law be brought before a public official.

A "question, matter, cause, suit, proceeding or controversy" must involve a formal exercise of governmental power, and it must be something specific and focused.

(b) Second, the government must prove that the public official made a decision or took an action on that question or matter, or agreed to do so. The decision or action may include using an official position to exert pressure on another official to perform an official act. Actual authority over the end result is not controlling.

(2) Under this definition, some acts do not count as "official acts." Setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an ཞofficial act.རྎ

(3) The defendant need not have a direct role in the official act; an indirect role is sufficient.

(E) Conduct affects interstate commerce if it in any way interferes with or changes the movement of goods, merchandise, money, or other property in commerce between different states. Any effect at all on commerce is enough.

[(1) This includes obtaining money that belonged to a business [entity] which customarily purchased goods from outside the State of _____ , [or] [that engaged in business outside the State of _____] if defendant's conduct made that money unavailable to the business [entity] for the purchase of such goods [or] [the conducting of such business.]]

[(2) The defendant attempted to affect interstate commerce if 1) he obtained money that was provided by a law enforcement agency as part of an investigation, and 2) the money appeared to belong to [identify business or entity], and 3) the business or entity appeared to customarily purchase goods from outside the State of ____ , [or] [engaged in business outside the State of __].]

[(3) It is not necessary for you to find that there was an actual effect on interstate commerce.]

[(3) The government need not prove [*insert options from below as appropriate*]].

[(A) that the bribery agreement was explicit or stated in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods. A bribery agreement is satisfied by something short of a formalized and thoroughly articulated contractual arrangement.]

[(B) that the public official ultimately performed the official act.]

[(C) which payments controlled particular official acts or that each payment was tied to a specific official act; rather, it is sufficient if the public official understood that he was expected to exercise some influence on the payor's behalf as opportunities arose.]

[(D) that the property was exchanged only for an official act. Because people rarely act for a single purpose, if you find that the property was exchanged at least in part for an official act, then it makes no difference that the defendant may have also had another separate lawful purpose for exchanging the property.]

[(E) that the defendant had the actual power to effectuate the end for which he accepted or induced payment; it is sufficient that the defendant exploited a reasonable belief that he had the power to do so.]

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

Use Note

The instruction assumes that the defendant is a public official. A private person cannot be convicted of substantive extortion under color of official right. United States v. Collins, 78 F.3d 1021, 1031 (6th Cir. 1996). However, private persons can be convicted of color-of-official-right extortion if they conspire with or aid and abet a public official. United States v. Saadey, 393 F.3d 669, 675 (6th Cir. 2005). If the defendant is a private person, the instruction can be modified to include theories of conspiracy or aiding and abetting.

The instruction assumes that the prosecution involves a substantive Hobbs Act violation, i.e., that the defendant public official actually obtained property in exchange for an official act. Hobbs Act extortion under color of official right also covers situations where the property was not exchanged for an official act but the defendant agreed to the exchange or solicited the exchange. See 18 U.S.C. § 1951 (covering attempt and conspiracy). If the prosecution is based on attempt or conspiracy, the instruction should be modified.

For paragraph (1)(D), the full statutory language on commerce is "obstructs, delays, or affects," but the instruction deletes the two words "obstructs, delays" as unnecessary subcategories of "affecting" commerce.

Brackets indicate options for the court; bracketed italics are notes to the court.

Committee Commentary

(current as of May 1, 2025)

Title 18 U.S.C. § 1951 provides:

§ 1951. Interference with commerce by threats or violence

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do . . . shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section--
>
> . . . .
>
> (2) The term "extortion" means the obtaining of property, from another, with his consent, . . . under color of official right.

The offense of extortion under color of official right applies to cases involving bribery of a public official. McDonnell v. United States, 136 S. Ct. 2355, 2365 (2016) (*citing* United States v. Evans, 504 U.S. 255, 260 (1992)). The offense is complete when "a public official has obtained a payment to which he is not entitled, knowing that the payment was made in return for official acts." *Evans*, 504 U.S. at 268.

In paragraph (1), the elements are based on the statute and *Evans*. Paragraphs (A) and (C) (that defendant was a public official and knew the property was being obtained in exchange for an official act) are based on *Evans, id*. Paragraphs (B) and (D) (that the defendant obtained property that he was not lawfully entitled to from another person with that person's consent and that commerce was affected) are based on the statute. Paragraph (1)(B) uses the term "obtain" as the default position based on the statute and then offers three plainer English options in brackets based on other circuits' pattern instructions.

In paragraph (2)(A), the definition of public official was approved in United States v. Hills, 27 F.4th 1155, 1175 note 8 (6th Cir. 2022). The definition of public official is not limited to elected public officials, nor is it limited to federal public officials. *Hills*, 27 F.4th at 1175. *See also* United States v. Gray, 790 F.2d 1290, 1295 (6th Cir. 1986) (*citing* United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982)).

In paragraph (2)(B), the definition of property is based on Scheidler v. National Organization of Women, Inc., 123 S. Ct. 1057, 1065 (2003) and Sekhar v. United States, 133 S. Ct. 2720, 2725-26 (2013). To qualify as extortion, the defendant must obtain property from a victim; the offense requires not only that the victim be deprived of property but also that the defendant acquire property. *Scheidler*, 123 S. Ct. at 1065. Thus, "The property extorted must be *transferable*–that is, capable of passing from one person to another." *Sekhar*, 133 S. Ct. at 2725.

The instruction assumes that the property being obtained by the public official was not a campaign contribution. If the property was a campaign contribution, the government must prove

that "the payments [were] made in return for an explicit promise or understanding by the official to perform or not to perform an official act." McCormick v. United States, 500 U.S. 257, 273 (1991). In that situation, the instruction should be amended to require an explicit quid pro quo.

In paragraph (2)(C), the instruction states that the phrase "the defendant knew the property was being given in exchange for an official act" may include the conduct of taking a bribe or kickback or both. The reference to taking a bribe is based on McDonnell v. United States, 136 S. Ct. at 2365 (2016) (*citing* United States v. Evans, 504 U.S. 255, 260, 269 (1992)). The Sixth Circuit has long recognized that extortion under color of official right includes bribery of public officials. *See, e.g*., United States v. Harding, 563 F.2d 299, 305, 307 (6th Cir. 1977); United States v. Butler, 618 F.2d 411, 419 (6th Cir. 1980). The reference to kickbacks is based on Ocasio v. United States, 136 S. Ct. 1423, 1427 (2016) (affirming conviction for extortion under color of official right where defendant participated in a "kickback scheme") and United States v. Kelley, 461 F.3d 817, 820 (6th Cir. 2006) (describing defendant's conduct as receiving "kickbacks" and affirming conviction for Hobbs Act extortion). *See also* Skilling v. United States, 130 S. Ct. 2896, 2931 (holding that bribes and kickbacks constitute honest services fraud under 18 U.S.C. § 1346).

Paragraphs (2)(C)(1), (2), and (3) include bracketed options on the definition of bribery that may be used if relevant. Subparagraphs (1) and (2), excluding gifts for generalized good will and gifts given solely for friendship, are based on United States v. Dimora, 750 F.3d 619, 625 (6th Cir. 2014). Subparagraph (3), stating that it is not a defense to bribery that the defendant would have done the official act anyway without the receipt of property, is based on United States v. Brewster, 408 U.S. 501, 527 (1972) ("Inquiry into the [defendant's] legislative performance itself is not necessary; evidence of the [defendant's] knowledge of the alleged briber's illicit reasons for paying the money is sufficient to carry the case to the jury."). *See also* United States v. Evans, 504 U.S. at 268 (stating that fulfillment of the quid pro quo is not an element of bribery under Hobbs Act); United States v. Abbey, 560 F.3d 513, 518 (6th Cir. 2009) ("The public official need not even have any intention of actually exerting his influence on the payor's behalf because fulfillment of the quid pro quo is not an element of the offense.") (internal quotation omitted).

In paragraph (2)(D), the definition of official act was approved by the court in United States v. Hills, 27 F.4th 1155, 1190 (6th Cir. 2022) ("The 'official act' instruction stated the law with substantial accuracy consistent with *McDonnell* and *Dimora*, and was not confusing, misleading, and prejudicial.[5]). The definition is based primarily on McDonnell v. United States, 136 S. Ct. 2355, 2367 (2016) and Dimora v. United States, 973 F.3d 496, 503 (6th Cir. 2020). As the *Hills* court explained, in *Dimora*, the court described "three clarifying instructions" required in the wake of *McDonnell* to prevent a jury from convicting the defendant for lawful conduct. *See Hills*, *supra* at 1189. The definition of official act in subparagraphs (2)(D)(1)(a) and (2)(D)(2) includes these three clarifying instructions.

In addition, two sentences in paragraph (2)(D) defining official act are based on the earlier Dimora case, United States v. Dimora, 750 F.3d 619, 627 (6th Cir. 2014). These two sentences are the last sentence in subparagraph (2)(D)(1)(b) ("Actual authority over the end result is not controlling.") and the sentence in subparagraph (2)(D)(3) ("The defendant need not

have a direct role in the official act; an indirect role is sufficient."). These two sentences were approved by the court in 2014 in the first *Dimora* case, and as the court did not discuss them in the second *Dimora* case in 2020, they remain instructions approved by the court. *See also* United States v. Lee, 919 F.3d 340, 352 & 354 (6th Cir. 2019) (holding the indictment sufficient and declining to limit the definition of official acts based on "exerting pressure" on a second official to situations where the defendant had "leverage or power" over the second official); United States v. Henderson, 2 F.4th 593 (6th Cir. 2021) (holding that an "official act" was met when a jail guard took a bribe to smuggle in contraband and not report it to the disciplinary board).

In *Hills, supra*, the defendant also challenged the court's decision to give bracketed subparagraph (3)(C), stating that the government need not prove "which payments controlled particular official acts or that each payment was tied to a specific official act; rather, it is sufficient if the public official understood that he was expected to exercise some influence on the payor's behalf as opportunities arose." The court held this instruction was proper because the jury was also instructed, as part of the definition of official act, that "the government must prove the public official made a decision or took an action *on that question or matter or agreed to do so*." *Hills, supra* at 1190 (emphasis in original, *quoting* Inst. 17.02(2)(D)(1)(b)). The court explained that based on this language in the official act definition, the stream-of-benefits or as-opportunities-arise provision in subparagraph (3)(C) was proper and did not permit the jury to convict based "only on an open-ended promise to perform unspecified future acts for the benefit of the payor." *Hills, supra* at 1190. This subparagraph is discussed further below in the commentary.

Paragraph (2)(E) includes definitions on the jurisdictional element of affecting commerce. The statute provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery . . . or attempts or conspires so to do . . . shall be fined under this title or imprisoned . . . .

18 U.S.C. § 1951(a). The statute then defines "commerce" as:

> commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

18 U.S.C. § 1951(b)(3).

Paragraph (2)(E) provides a basic definition of affecting commerce applicable in most cases. The Supreme Court has characterized the Hobbs Act language defining the required effect on commerce as "unmistakably broad." Taylor v. United States, 136 S. Ct. 2074, 2079 (2016) (*citing* United States v. Culbert, 435 U.S. 371, 373 (1978) and Stirone v. United States, 361 U.S. 212, 215 (1960)). *See also* United States v. Carmichael, 232 F.3d 510, 516 (6th Cir. 2000)

(stating that Hobbs Act jurisdiction based on affecting commerce is "extremely broad," and "even a very minimal connection" to interstate commerce is sufficient).

The basic definition in paragraph (2)(E) presumes that the interstate commerce element is based on the defendant targeting a business that is engaged in or affects interstate commerce. *See* United States v. Wang, 222 F.3d 234, 240 (6th Cir. 2000) (anticipating that the overwhelming majority of Hobbs Act cases will continue to involve victims which are businesses directly engaged in interstate commerce). When the victim of the robbery is a business entity engaged in or affecting interstate commerce, the defendant's activities need only have a *de minimis* impact, and this remains true even in the wake of United States v. Lopez, 514 U.S. 549 (1995). United States v. Smith, 182 F.3d 452, 456 (6th Cir. 1999). A substantive Hobbs Act violation requires an actual effect on interstate commerce. United States v. DiCarlantonio, 870 F.2d 1058, 1061 (6th Cir. 1989). The effect on commerce may be adverse or beneficial. United States v. Mills, 204 F.3d 669, 673 (6th Cir. 2000).

Paragraphs (2)(E)(1) through (2)(E)(3) offer jurisdictional provisions in brackets that may apply in particular cases.

Paragraph (2)(E)(1) provides detail on the "depletion of assets" theory of jurisdiction. It is based on United States v. Turner, 272 F.3d 380 (6th Cir. 2001); United States v. Carmichael, 232 F.3d 510 (6th Cir. 2000); United States v. Wang, 222 F.3d 234 (6th Cir. 2000); and United States v. DiCarlantonio, 870 F.2d 1058 (6th Cir. 1989). This paragraph assumes the defendant targeted a business entity. If the defendant's criminal act is directed not at a business entity but at an individual in a private home, the connection required between the individual and a business engaged in interstate commerce is "of a different order"; the connection must be substantial, not fortuitous or speculative. United States v. Wang, 222 F.3d 234, 238-40 (6th Cir. 2000) (finding no realistic probability that the aggregate of a robbery of citizens in a private residence where $1,200 of the approximately $4,200 taken belonged to a restaurant would substantially affect interstate commerce). *See also* United States v. Turner, 272 F.3d 380, 387-89 (6th Cir. 2001) (holding that government's proof of interstate commerce element was insufficient under any applicable theory because government did not show that the victim was a business engaged in or affecting interstate commerce, did not show a connection between individual victim and a business engaged in interstate commerce, and did not offer evidence explaining how robbing an individual of large sum would have affected interstate commerce). If the targeted victim is an individual person, the instruction should be modified to reflect the opinions in *Wang* and *Turner*, *supra*.

Paragraph (2)(E)(2) applies if the charge is attempt based on an undercover investigation. *See* United States v. DiCarlantonio, 870 F.2d 1058, 1060-1062 (6th Cir. 1989) (reversing substantive Hobbs Act conviction for insufficient effect on commerce where bribe money was provided by the government but noting that no barrier exists for attempt charges); United States v. Peete, 919 F.2d 1168, 1175 (6th Cir. 1990) (citing *DiCarlantonio* and reiterating possibility of attempt liability based on undercover investigation using government funds).

Paragraph (2)(E)(3), providing that an actual effect on commerce is not required, applies in attempt and conspiracy cases. *See* United States v. Turner, 272 F.3d 380, 384 (6th Cir. 2001)

("When a conspiracy is charged under the Hobbs Act, the government need only prove that the scheme would have affected interstate commerce had it been carried out.") (*citing* United States v. DiCarlantonio, 870 F.2d 1058, 1061 (6th Cir. 1989)); United States v. Peete, 919 F.2d 1168, 1174 (6th Cir. 1990) ("There is no requirement [for an attempt charge] that there be an actual effect on interstate commerce—only a *realistic probability* that an extortion will have an effect on interstate commerce.").

Paragraph (3) lists some but not all items the government is not required to prove. These provisions are bracketed as options and should be used only if relevant.

Paragraph (3)(A), stating that the government need not prove that the bribery agreement was express, is based on McDonnell v. United States, 136 S. Ct. 2355, 2371 (2016) ("The agreement need not be explicit. . . .") and United States v. Abbey, 560 F.3d 513, 518 (6th Cir. 2009) (*quoting* United States v. Hamilton, 263 F.3d 645, 653 (6th Cir. 2001) and Evans v. United States, 504 U.S. 255, 274 (1992)).

Paragraph (3)(B), stating that the government need not prove that the public official ultimately performed the official act, is based on McDonnell v. United States, 136 S. Ct. 2355, 2370-71 (2016) ("[A] public official is not required to actually make a decision or take an action . . .; it is enough that the official agree to do so.") and Evans v. United States, 504 U.S. 255, 268 (stating that fulfillment of the quid pro quo is not an element of bribery under Hobbs Act).

Paragraph (3)(C), stating that the government need not prove which payments controlled particular official acts, was approved in United States v. Hills, 27 F.4th 1155, 1190 (6th Cir. 2022) based on the presence of limiting language in subparagraph (2)(D)(1)(b) defining "official act." This part of *Hills* is discussed above in the commentary in connection with the definition of official act. *See also* United States v. Terry, 707 F.3d 607, 612, 614 (6th Cir. 2013) (*in part quoting* United States v. Abbey, 560 F.3d 513, 518 (6th Cir. 2009)).

Paragraph (3)(D), stating that the government need not prove the defendant had a single purpose, is based on United States v. Brewster, 408 U.S. 501, 527 ("Inquiry into the [defendant's] legislative performance itself is not necessary; evidence of the [defendant's] knowledge of the alleged briber's illicit reasons for paying the money is sufficient to carry the case to the jury.").

Paragraph (3)(E), stating that the government need not prove that the defendant had actual power, is based on United States v. Bibby, 752 F.2d 1116, 1127 (6th Cir. 1985) and United States v. Harding, 563 F.2d 299, 306-307 (6th Cir. 1977).

The instruction assumes that the prosecution involves a substantive Hobbs Act violation, i.e., that the defendant public official actually obtained property in exchange for an official act. The Hobbs Act also criminalizes attempts and conspiracies to commit extortion. *See* § 1951(a); McDonnell v. United States, 136 S. Ct. 2355, 2365, 2370-71 (2016) (stating that bribery requires defendant to commit *or agree to commit* an official act in exchange for property) (emphasis added); United States v. Kelley, 461 F.3d 817, 826 (6th Cir. 2006) (affirming conviction based on

agreement to commit extortion); United States v. Hamilton, 263 F.3d 645, 653-654 (6th Cir. 2001) (affirming conviction for attempted extortion); United States v. Carmichael, 232 F.3d 510, 519 (6th Cir. 2000) (stating that evidence of attempt to obtain money under color of official right was sufficient); United States v. Peete, 919 F.2d 1168, 1175 (6th Cir. 1990) (stating that attempted violation of Hobbs Act was complete when defendant solicited payment from victim). *See also* United States v. Brewster, 408 U.S. 501, 527 (1972) (construing 18 U.S.C. § 201):

> Although the indictment alleges that the bribe was given for an act that was actually performed, it is, once again, unnecessary to inquire into the act or its motivation. To sustain a conviction it is necessary to show that appellee solicited, received, or agreed to receive, money with knowledge that the donor was paying him compensation for an official act.

If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. *See, e.g.*, United States v. Inman, 39 F.4th 357, 361 (6th Cir. 2022) (stating that for attempted extortion under color of official right, the jury would have to find that defendant intended to commit the underlying crime of extortion and that he did some overt act that was a substantial step towards committing the crime).

If the charge is based on conspiracy, an instruction may be compiled using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies to commit Hobbs Act offenses do not require an overt act. United States v. Hills, 27 F.4th 1155, 1190 (6th Cir. 2022), *quoting* United States v. Rogers, 769 F.3d 372, 382 (6th Cir. 2014). Thus if the charge is based on a Hobbs Act conspiracy, Instruction 3.01A Conspiracy to Commit an Offense–Basic Elements should be modified to omit paragraph (2)(C). All other references to overt acts should be deleted as well.

If the charge is based on conspiracy to extort under color of official right, the conspiratorial agreement need not be to obtain property from someone outside the conspiracy; rather, the defendant may be held liable based on an agreement to obtain money from one of the conspirators. Ocasio v. United States, 136 S. Ct. 1423, 1436 (2016).

17.03 Hobbs Act - Robbery (18 U.S.C. § 1951)

(1) Count ____ charges the defendant with robbery. For you to find the defendant guilty of this offense, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant unlawfully took [personal property] [money] from someone [in the presence of another], against that person's will.

(B) Second, that the defendant did so by actual or threatened force, or violence, or fear of injury [immediately or in the future] to the [*insert one or more options from below as appropriate*]

(1) [person].
(2) [person's property].
(3) [property in the person's custody or possession].
(4) [person or property of a relative or member of the person's family].
(5) [person or property of anyone in his company at the time of the taking].

(C) Third, that the defendant did so knowingly.

(D) Fourth, that as a result, interstate commerce was affected in any way or degree.

(2) Now I will give you more detailed instructions on some of these terms.

(A) An act is done "knowingly" if it is done voluntarily, and not because of mistake or some other innocent reason.

(B) Conduct affects interstate commerce if it in any way interferes with or changes the movement of goods, merchandise, money, or other property in commerce between different states. Any effect at all on commerce is enough.

[(1) This includes obtaining money that belonged to a business [entity] which customarily purchased goods from outside the State of _____ , [or] [that engaged in business outside the State of _____] if defendant's conduct made that money unavailable to the business [entity] for the purchase of such goods [or] [the conducting of such business.]]

[(2) The defendant attempted to affect interstate commerce if 1) he obtained money that was provided by a law enforcement agency as part of an investigation, and 2) the money appeared to belong to [*identify business or entity*], and 3) the business or entity appeared to customarily purchase goods from outside the State of ____ , [or] [engaged in business outside the State of __].]

[(3) It is not necessary for you to find that there was an actual effect on interstate commerce.]

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

Use Note

The Hobbs Act also criminalizes attempts and conspiracies to commit robbery. If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled using the instructions in Chapter 3 Conspiracy with one caveat on the overt act element described in the commentary below.

For paragraph (1)(D), the full statutory language on commerce is "obstructs, delays, or affects," but the instruction deletes the two words "obstructs, delays" as unnecessary subcategories of "affecting" commerce.

Brackets indicate options for the court; bracketed italics are notes to the court.

Committee Commentary
(current as of May 1, 2025)

Title 18 U.S.C. § 1951 provides:

§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do . . . shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section–

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

In paragraph (1), the elements are based on the statute, 18 U.S.C. § 1951(a) and (b)(1). Case law defining the elements is limited. *See* Stirone v. United States, 361 U.S. 212, 218 (1960) ("Here, . . . there are two essential elements of a Hobbs Act crime: interference with commerce and extortion."); United States v. Turner, 272 F.3d 380, 384 (6th Cir. 2001) ("In order

to prevail under a Hobbs Act violation, the Government must prove two elements: 1) interference with interstate commerce, which is a jurisdictional issue; and, 2) the substantive criminal act, which in the instant case is [a conspiracy to commit] robbery.") (citations omitted); and United States v. Ostrander, 411 F.3d 684, 691 (6th Cir. 2005) (unpublished appendix) ("Thus, to prevail under the [Hobbs] Act, the Government must prove two elements: (1) interference with interstate commerce (2) in the course of a substantive criminal act.").

In paragraph (1)(A), the instruction states that the defendant "took" property from the victim. The statute provides that the defendant "took or obtained" the property. The Committee omitted the term "obtain" in the instruction as unnecessary, but it may be included if it is an issue.

In paragraph (1)(B), the instruction provides five options to identify the target of the force, violence, or fear of injury as follows:

(1) [person].
(2) [person's property].
(3) [property in the person's custody or possession].
(4) [person or property of a relative or member of the person's family].
(5) [person or property of anyone in his company at the time of the taking].

These options are a restatement of the statute.

In paragraphs (1)(A) and (1)(B), clarity may be enhanced by using the names of the defendant and victim in the case.

For the mens rea of robbery, the instruction uses the term "knowingly" in paragraph (1)(C). The statute does not include a mens rea, and no case law on the mens rea for robbery exists in the Supreme Court. In the Sixth Circuit, an unpublished opinion uses the term "specific intent." *See* United States v. Cobb, 397 Fed. Appx. 128, 137 (6th Cir. 2010) (unpublished) (referring to Hobbs Act violations as "specific intent" crimes in concluding the indictment was sufficient in a robbery prosecution). *But compare* United States v. Carmichael, 232 F.3d 510, 522 (6th Cir. 2000) (in extortion prosecution, rejecting the term "specific intent," holding that defendant need not intend to violate the law, and affirming a jury instruction requiring defendant to have mens rea of knowledge). The Committee adopted the mens rea of knowingly. *See also* Eighth Circuit Pattern Inst. 6.18.1951A Interference with Commerce by Means of Robbery and Eleventh Circuit Pattern Inst. 70.3 Interference with Commerce by Robbery (both adopting a mens rea of "knowingly").

Paragraph (1)(D) states the jurisdictional requirement that interstate commerce was affected in any way or degree. The language is drawn from the statute.

In paragraph (2)(A), the definition of knowingly ("An act is done knowingly if it is done voluntarily, and not because of mistake or some other innocent reason.") is based on United States v. Carmichael, 232 F.3d 510, 522 (6th Cir. 2000) and United States v. Honeycutt, 816 F.3d 362, 375 (6th Cir. 2016), reversed on other grounds, 137 S. Ct. 1626 (2017). In *Carmichael,* the Sixth Circuit held that for Hobbs Act extortion, the government need not prove that the defendant

intended to violate the law, and then endorsed an instruction using the mens rea of knowingly. Generally, the term "knowingly" requires knowledge of the acts that constituted the offense but not knowledge that those acts were illegal. *See, e.g.,* United States v. Honeycutt, 816 F.3d 362, 375 (6th Cir. 2016), reversed on other grounds, 137 S. Ct. 1626 (2017), stating:

> As the Supreme Court has stated, "unless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the acts that constitute the offense." Dixon v. United States, 548 U.S. 1, 5 (2006). "Knowingly" does not require knowledge that the facts underlying the criminal violation were unlawful. See id. (contrasting "knowingly" with "willfully," the latter of which "requires a defendant to have 'acted with knowledge that his conduct was unlawful'" (quoting Bryan v. United States, 524 U.S. 184, 193 (1998))).

Another definition of knowingly may be found in Arthur Andersen v. United States, 125 S. Ct. 2129, 2135-36 (2005) (ǫ'[K]nowledge' and 'knowingly' are normally associated with awareness, understanding, or consciousness.") (citations omitted) (construing term "knowingly" in 18 U.S.C. § 1512).

Paragraph (2)(B) includes definitions on the jurisdiction element. The statute provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery . . . or attempts or conspires so to do . . . shall be fined under this title or imprisoned . . . .

18 U.S.C. § 1951(a). The statute then defines "commerce" as:

> commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

18 U.S.C. § 1951(b)(3).

Paragraph (2)(B) provides a basic definition of affecting commerce applicable in most cases. This basic definition presumes that the interstate commerce element is based on the defendant targeting a business that is engaged in or affects interstate commerce. *See* United States v. Wang, 222 F.3d 234, 240 (6th Cir. 2000) (anticipating that the overwhelming majority of Hobbs Act cases will continue to involve victims which are businesses directly engaged in interstate commerce). When the victim of the robbery is a business entity engaged in or affecting interstate commerce, the defendant's activities need only have a *de minimis* impact, and this remains true even in the wake of United States v. Lopez, 514 U.S. 549 (1995). United States v. Smith, 182 F.3d 452, 456 (6th Cir. 1999). The Supreme Court has characterized the Hobbs Act language defining the required effect on commerce as "unmistakably broad." Taylor v. United States, 136 S. Ct. 2074, 2079 (2016) (*citing* United States v. Culbert, 435 U.S. 371, 373 (1978)

and Stirone v. United States, 361 U.S. 212, 215 (1960)). A substantive Hobbs Act violation requires an actual effect on interstate commerce. United States v. DiCarlantonio, 870 F.2d 1058, 1061 (6th Cir. 1989). The effect on commerce may be adverse or beneficial. United States v. Mills, 204 F.3d 669, 673 (6th Cir. 2000).

Paragraphs (2)(B)(1) through (2)(B)(3) offer jurisdictional provisions in brackets that may apply in particular cases.

Paragraph (2)(B)(1) provides detail on the "depletion of assets" theory of jurisdiction. It is based on United States v. Turner, 272 F.3d 380 (6th Cir. 2001); United States v. Carmichael, 232 F.3d 510 (6th Cir. 2000); United States v. Wang, 222 F.3d 234 (6th Cir. 2000); and United States v. DiCarlantonio, 870 F.2d 1058 (6th Cir. 1989). This paragraph assumes the defendant targeted a business entity. If the defendant's criminal act is directed not at a business entity but at an individual in a private home, the connection required between the individual and a business engaged in interstate commerce is "of a different order"; the connection must be substantial, not fortuitous or speculative. United States v. Wang, 222 F.3d 234, 238-40 (6th Cir. 2000) (finding no realistic probability that the aggregate of a robbery of citizens in a private residence where $1,200 of the approximately $4,200 taken belonged to a restaurant would substantially affect interstate commerce). *See also* United States v. Turner, 272 F.3d 380, 387-89 (6th Cir. 2001) (holding that government's proof of interstate commerce element was insufficient under any applicable theory because government did not show that the victim was a business engaged in or affecting interstate commerce, did not show a connection between individual victim and a business engaged in interstate commerce, and did not offer evidence explaining how robbing an individual of large sum would have affected interstate commerce). If the targeted victim is an individual person, the instruction should be modified to reflect the opinions in *Wang* and *Turner*, *supra*. If the targeted victim is an individual drug dealer whom the defendant targeted for the purpose of robbing or attempting to rob drugs or drug proceeds, the commerce element is met, even for drugs produced within the state, because the market for illegal drugs is "commerce over which the United States has jurisdiction" as a matter of law. Taylor v. United States, 136 S. Ct. 2074, 2077-78 (2016) (commerce element is satisfied if defendant robbed or attempted to rob drug dealer of drugs or drug proceeds).

Paragraph (2)(B)(2) applies if the charge is attempt based on an undercover investigation. *See* United States v. DiCarlantonio, 870 F.2d 1058, 1060-1062 (6th Cir. 1989) (reversing substantive Hobbs Act conviction for insufficient effect on commerce where bribe money was provided by the government but noting that no barrier exists for attempt charges); United States v. Peete, 919 F.2d 1168, 1175 (6th Cir. 1990) (citing *DiCarlantonio* and reiterating possibility of attempt liability based on undercover investigation using government funds).

Paragraph (2)(B)(3), providing that an actual effect on commerce is not required, applies in attempt and conspiracy cases. *See* United States v. Turner, 272 F.3d 380, 384 (6th Cir. 2001) ("When a conspiracy is charged under the Hobbs Act, the government need only prove that the scheme would have affected interstate commerce had it been carried out.") (*citing* United States v. DiCarlantonio, 870 F.2d 1058, 1061 (6th Cir. 1989)); United States v. Peete, 919 F.2d 1168, 1174 (6th Cir. 1990) ("There is no requirement [for an attempt charge] that there be an actual effect on interstate commerce—only a *realistic probability* that an extortion will have an effect on

interstate commerce.").

Generally, case law on Hobbs Act robbery is minimal. The definition of "robbery" in the statute is quoted above. No case law in the Supreme Court or Sixth Circuit discusses this definition. In the definition of robbery, the statute requires "personal property." The term "personal property" is not defined in the statute, and no case law in the Supreme Court or Sixth Circuit elaborates on the definition of personal property for robbery under § 1951(b)(1). *Cf.* Scheidler v. National Organization of Women, 123 S. Ct. 1057 (2003) and Sekhar v. United States, 133 S. Ct. 2720 (2013) (both discussing the definition of "property" under § 1951(b)(2) for the offense of extortion).

The Hobbs Act also criminalizes attempts and conspiracies to commit robbery. *See* § 1951(a). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies to commit Hobbs Act offenses do not require an overt act. United States v. Hills, 27 F.4th 1155, 1190 (6th Cir. 2022), *quoting* United States v. Rogers, 769 F.3d 372, 382 (6th Cir. 2014). Thus if the charge is based on a Hobbs Act conspiracy, Instruction 3.01A Conspiracy to Commit an Offense–Basic Elements should be modified to omit paragraph (2)(C). All other references to overt acts should be deleted as well.

Chapter 18.00

Transmission of a Threat to Kidnap or Injure

Introduction

The pattern instructions cover the offense codified in 18 U.S.C. § 875(c) with Instruction 18.01 Transmission of a Threat to Kidnap or Injure.

Title 18 U.S.C. § 875 also establishes other offenses under subsections (a), (b), and (d). Based on frequency of prosecution, the pattern instructions do not cover these offenses. The Committee recommends caution in adapting Instruction 18.01 to apply to these subsections.

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

(1) Count ___ of the indictment charges the defendant with transmitting a communication containing a threat to kidnap or injure. For you to find the defendant guilty of this offense, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, the defendant knowingly transmitted a communication; and

(B) Second, the communication contained a threat to [kidnap] [injure] a particular person [a particular group of individuals]; and

(C) Third, the defendant transmitted the communication [for the purpose of making a threat] [knowing the communication would be viewed as a threat]; and

(D) Fourth, the communication was transmitted in interstate [foreign] commerce.

(2) Now I will give you more detailed instructions on some of these terms.

(A) The word "threat" means a statement that is a serious expression of intent to inflict bodily harm on a particular person [a particular group of individuals] that a reasonable observer would perceive to be an authentic threat. [To qualify as a threat, the statement need not be communicated to the targeted individual.]

(B) To transmit something in interstate commerce merely means to send it from a place in one state to a place in another state. [The government need not prove that the defendant knew that the communication would be transmitted across state lines.]

(3) [The government need not prove that the defendant [intended to carry out the threat or was capable of carrying out the threat at the time it was made] [made the targeted individual feel threatened or that the targeted individual knew about the threat against him.]]

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

Use Note

In paragraph (1)(D) on transmission in commerce, the instruction presumes that the commerce involved is "interstate" commerce; the bracketed term "foreign" should be substituted if warranted by the facts. In that case, paragraph (2)(B) defining transmission in commerce should be altered as well, as discussed in the commentary below.

Paragraphs (1)(B) and (2)(A) presume the threat was directed to a particular "person"; the bracketed term "a particular group of individuals" should be substituted if warranted by the facts.

The bracketed provisions stating what the government need not prove in paragraphs (2)(A), (2)(B) and (3) should be used only if relevant.

Brackets indicate options for the court.

Committee Commentary
(current as of May 1, 2025)

Title 18 U.S.C. § 875(c) provides:

> (c) Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.

In paragraph (1), the elements are drawn from the statute and case law. In paragraph (1)(A), the requirement that the defendant transmitted a communication is based on the statute and United States v. Howard, 947 F.3d 936, 946 (6th Cir. 2020) (approving instruction listing as an element transmission in commerce). The mens rea of "knowingly" in paragraph (A) is based on Elonis v. United States, 135 S. Ct. 2001, 2011 (2015) ("The parties agree that a defendant under Section 875(c) must know that he is transmitting a communication."); United States v. Doggart, 906 F.3d 506, 510 (6th Cir. 2018) ("Element one is [met because defendant] knowingly sent a message in interstate commerce . . . ."); and United States v. Jeffries, 692 F.3d 473, 478 (6th Cir. 2012) (stating that defendant must make a "knowing communication"), *abrogated in part by* Elonis v. United States, 135 S. Ct. 2001 (2015).

In paragraph (1)(B), the language requiring the communication to contain a threat to kidnap or injure is based on the statute. *See also* United States v. Howard, 947 F.3d 936, 946 (6th Cir. 2020) (approving instruction listing as an element that the communication contained a true threat to murder a person). The reference to a particular person or a particular group of individuals is based on Virginia v. Black, 538 U.S. 343, 359 (2003) (stating that threats are not protected by the First Amendment "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.").

In paragraph (1)(C), the language requiring the defendant to transmit the communication either for the purpose of making a threat or knowing that the communication would be viewed as a threat, are based on *Elonis, supra* at 2012 ("There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.") and United States v. Howard, 947 F.3d 936, 946 (6th Cir. 2020) (approving instruction listing as an element a mental state of purpose or knowledge).

Paragraph (1)(D), which states the jurisdictional base to require that the communication was transmitted in interstate [foreign] commerce, is from § 875(c); *see also* United States v. Howard, 947 F.3d 936, 946 (6th Cir. 2020) (approving instruction listing as an element transmission in interstate commerce). The instruction presumes that the commerce involved is "interstate" commerce; the bracketed term "foreign" should be substituted if warranted by the facts.

Paragraph (2)(A) defines "threat" as a statement that is a serious expression of intent to inflict bodily harm on a particular person or a particular group that a reasonable observer would perceive to be an authentic threat. This definition is based on case law defining a "true threat" that is not protected by the First Amendment. *See* Counterman v. Colorado, 143 S. Ct. 2106, 2113-2117 (2023) (addressing First Amendment limits in the context of a state "stalking" statute); Virginia v. Black, 538 U.S. 343, 359 (2003); United States v. Watts, 394 U.S. 705, 708 (1969). *See also* United States v. Howard, 947 F.3d 936, 946 (6th Cir. 2020) (approving instruction that jury should consider "whether in light of the context a reasonable person would believe that the statement was a serious expression of an intention to inflict bodily injury"); United States v. Doggart, 906 F.3d 506, 510 (6th Cir. 2018); United States v. Houston, 683 F. App'x 434, 438 (6th Cir. 2017) (unpublished), *citing* United States v. Alkhabaz, 104 F.3d 1492, 1495 (6th Cir. 1997), *abrogated in part by Elonis, supra* and United States v. Jeffries, 692 F.3d 473, 477-478 (6th Cir. 2012), *abrogated in part by Elonis, supra*. The specific words in the first part of the definition ("a serious expression of intent to inflict bodily harm on a particular person [a particular group of individuals])" are drawn from Virginia v. Black, 538 U.S. at 359; the specific words in the second part of the definition ("that a reasonable observer would perceive to be an authentic threat") are drawn from *Doggart*, 906 F.3d at 511 ("The relevant question is whether a reasonable observer would take [the] words to be an authentic threat."). The pattern definition omits the word "true" as unnecessary. *Cf.* Tenth Circuit Pattern Instruction 2.37.1 INTERSTATE TRANSMISSION OF THREATENING COMMUNICATION – 18 U.S.C. § 875(c) (stating in Use Note that the word "true" is omitted to avoid jury confusion).

The bracketed provision at the end of paragraph (2)(A), that the statement need not be communicated to the targeted individual to qualify as a "threat," is based on *Doggart*, 906 F.3d at 511 ("Section 875(c) does not require the defendant to communicate the threat to the victim.").

Paragraph (2)(B) defines the jurisdictional base of transmission in interstate commerce as requiring that the threatening communication be sent from a place in one state to a place in another state. A panel of the Sixth Circuit quoted this instruction and held it was "proper" in United States v. Houston, 683 F. App'x 434, 436, 438 (6th Cir. 2017) (unpublished). *See also* United States v. Houston, 792 F.3d 663, 670 (6th Cir. 2015) (finding sufficient evidence that the threat traveled in interstate commerce where the defendant's call from Tennessee to Tennessee was routed through a server in Louisiana). The bracketed provision in paragraph (2)(B) stating that the government need not prove that the defendant knew that the communication would be transmitted across state lines was also approved by the panel in *Houston,* 683 F. App'x at 438. The pattern instruction omits the word "actually" based on *Houston, id.* ("[W]e hold that the . . . jury instructions were proper because conviction under § 875(c) does not require any showing that [defendant] knew that his communications would be routed across state lines.")

The definition of transmission in commerce in paragraph (2)(B) presumes, consistent with paragraph (1)(C), that the commerce involved is "interstate" commerce. Interstate commerce also includes commerce among territories, possessions, and the District of Columbia, *see* 18 U.S.C. § 10 (defining interstate and foreign commerce). If the case involves territories, possessions or the District of Columbia, the definition of interstate commerce may be modified. If the case involves foreign commerce, and paragraph (1)(C) is modified to use the term "foreign," paragraph (2)(B) defining transmission in commerce may be similarly altered to provide: To transmit something in foreign commerce merely means to send it [from a place in the United States to a place in a foreign country][from a place in a foreign country to a place in the United States].

Paragraph (3) includes two bracketed items that the government need not prove based on United States v. Howard, 947 F.3d 936, 946-947 (6th Cir. 2020) (characterizing the instructions as "proper and certainly not in plain error"). The language in the pattern instruction was adjusted slightly for overall consistency.

In Elonis v. United States, 135 S. Ct. 2001 (2015), the Court held that for conviction under § 875(c), the government must prove the defendant's mental state that the communication contained a threat. *Elonis* at 2011 ("The mental state requirement must therefore apply to the fact that the communication contains a threat."). In defining what mental state was sufficient, the Court noted that generally the mental state must involve "awareness of some wrongdoing." *Elonis* at 2011, quoting Staples v. U.S., 511 U.S. 600, 606-607 (1994). The Court then applied this conclusion by eliminating negligence as an option, *Elonis* at 2011, stating that purposely or knowingly were sufficient, and declining to address recklessness because it had not been briefed. *Elonis* at 2012. As noted above, this is the basis for the mental state of purposely or knowingly required in paragraph (1)(C). In *Elonis*, in addition to declining to address the mens rea of recklessness, the Court also declined to consider any First Amendment limits on prosecutions of § 875(c), see *Elonis* at 2012 ("Given our disposition, it is not necessary to consider any First Amendment issues.").

In 2023, the Court interpreted a state "stalking" statute similar to § 875(c) in that it prohibited repeated communications with another person in ཞེ་a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person ... to suffer serious emotional distress.ཟེ་ Counterman v. Colorado, 143 S. Ct. 2106, 2112 (2023), *quoting* Colo. Rev. Stat. § 18-ཀྲྀ3-ཀྲྀ602(1)(c) (2022). In *Counterman*, the Court did reach questions on the limits of the First Amendment and the mens rea of recklessness, holding that the First Amendment required proof that the defendant had some subjective understanding of the threatening nature of his statements, and that a mental state of recklessness was sufficient to meet this requirement. *Counterman*, 143 S. Ct. at 2111.

In the wake of *Elonis*, the Sixth Circuit or a panel of the court considered the § 875(c) offense in United States v. Howard, 947 F.3d 936 (6th Cir. 2020); United States v. Doggart, 906 F.3d 506 (6th Cir. 2018); United States v. Houston, 792 F.3d 663 (6th Cir. 2015) and United States v. Houston, 683 F. App'x 434 (6th Cir. 2017) (unpublished). In the unpublished *Houston* opinion, the panel relied on two cases decided before *Elonis*, United States v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997) and United States v. Jeffries, 692 F.3d 473 (6th Cir. 2012). *See Houston*,

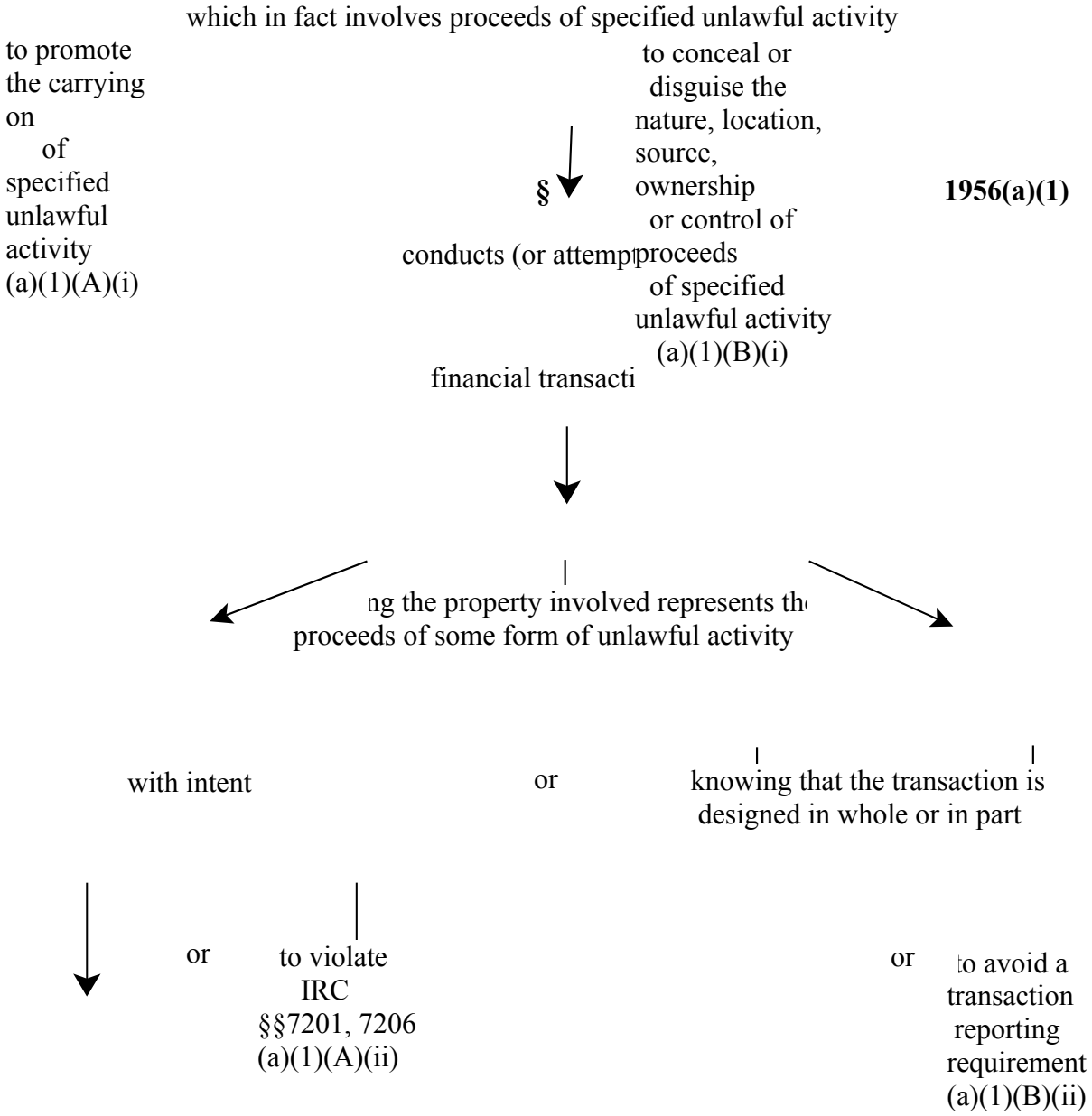
683 F. App'x at 438. In citing these cases, the *Houston* panel characterized them both as "*abrogated in part by Elonis*." *Id.* In addition, in *Doggart*, 906 F.3d at 510 & 512, the court cited *Jeffries* with approval but abrogated an additional part of *Alkhabaz*. The pattern instruction relies on the parts of the *Alkhabaz* and *Jeffries* opinions that continue to be good law after *Elonis* and *Doggart*.

The pattern instruction does not offer a definition of "knowingly." Other Sixth Circuit pattern instructions that offer a definition include Instructions 10.03A and 10.03B on Bank Fraud, both of which provide a definition of "knowingly" in paragraph (2)(C) as follows: "An act is done knowingly if it is done voluntarily and not because of mistake or some other innocent reason." The authority for this definition is described in the Bank Fraud instructions' commentaries. Another possible definition of knowingly is, "An act is done knowingly if it is done with awareness, understanding or consciousness." *See* Arthur Andersen v. United States, 125 S. Ct. 2129, 2135-36 (2005) (ג'[K]nowledge' and 'knowingly' are normally associated with awareness, understanding, or consciousness.") (citations omitted) (construing term "knowingly" in 18 U.S.C. § 1512). The definition of knowingly from *Arthur Andersen* focusing on "awareness" is consistent with the *Elonis* Court's emphasis on awareness, *see Elonis* at 2011 (discussing גthe conventional requirement for criminal conductנ*awareness* of some wrongdoing.ה) (citations omitted) (emphasis in *Elonis*).

List of elements instructions by statutory cite

Appendix

I. Charts of 18 U.S.C. § 1956 Laundering of Monetary Instruments


which in fact involves proceeds of specified unlawful activity
to promote the carrying on of specified unlawful activity (a)(1)(A)(i)
§
to conceal or disguise the nature, location, source, ownership or control of proceeds of specified unlawful activity (a)(1)(B)(i)
1956(a)(1)
conducts (or attempt
financial transacti
ng the property involved represents th
proceeds of some form of unlawful activity
with intent
or
knowing that the transaction is designed in whole or in part
or
to violate IRC §§7201, 7206 (a)(1)(A)(ii)
or
to avoid a transaction reporting requirement (a)(1)(B)(ii)

or or and

§ 1956(a)(2)

transports or transmits or transfers
(or a mpts to)

monetary instrument or funds

a place in the U.S. to or through a pl
de the U.S. or to a place in the U.S. fi
or through a place outside the U.S.

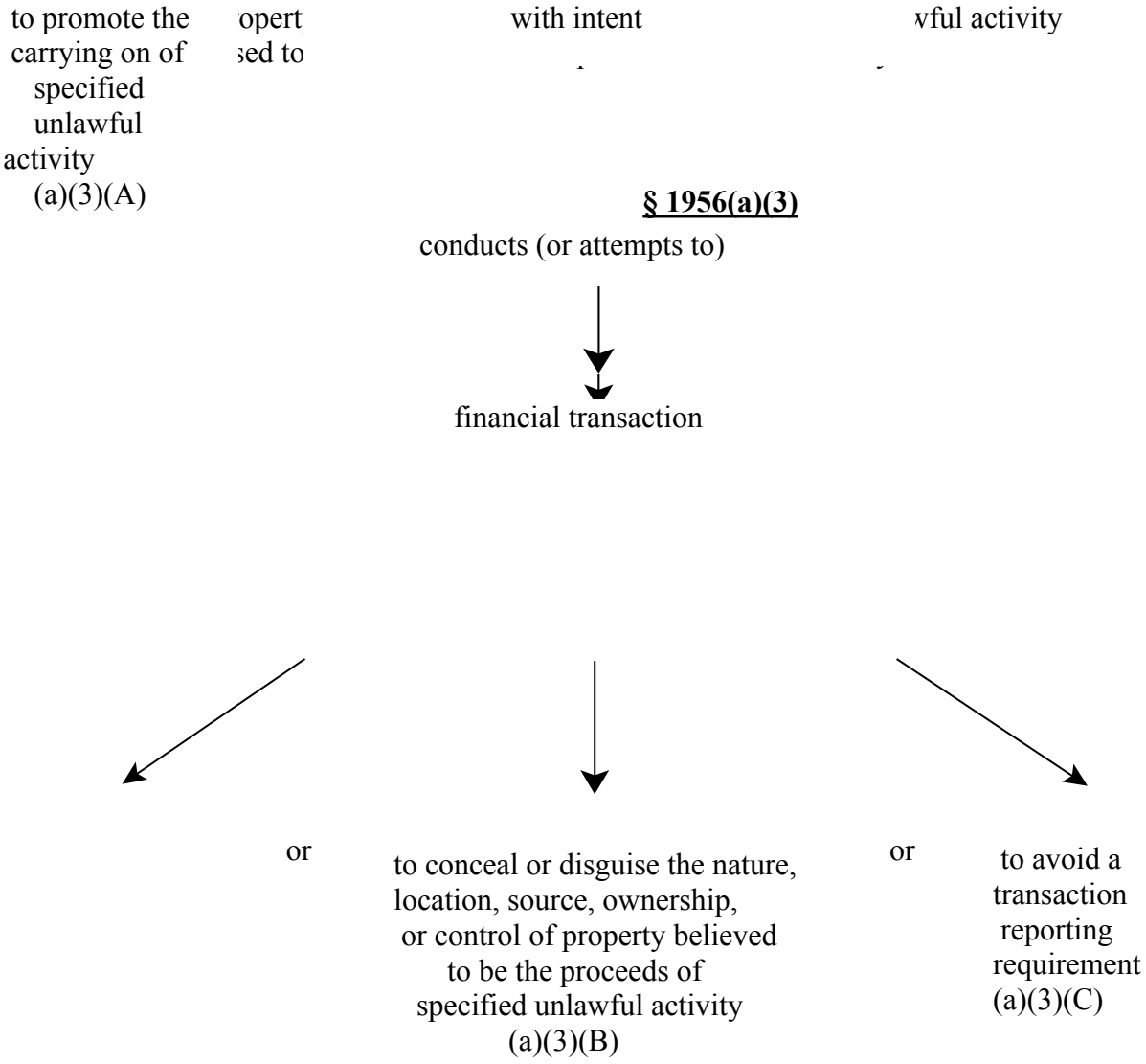
with intent to promote the carrying on
of specified unlawful activity
(a)(2)(A)

knowing that the monetary instrument or
funds involved represent proceeds of
some form of unlawful activity

knowing that such transportation,
transmission or transfer is designed in
whole or part

to conceal or disguise the nature,
location, source, ownership or control
of proceeds of specified
unlawful activity
(A)(2)(B)(i)

to avoid a transaction
reporting requirement
(a)(2)(B)(ii)


to promote the carrying on of specified unlawful activity (a)(3)(A)
opert sed to
with intent
wful activity
§ 1956(a)(3)
conducts (or attempts to)
financial transaction
or
to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity (a)(3)(B)
or
to avoid a transaction reporting requirement (a)(3)(C)