PATTERN CRIMINAL JURY INSTRUCTIONS

**Report of the Subcommittee on Pattern Jury Instructions,
Committee on the Operation of the Jury System,
Judicial Conference of the United States**

**Hon. Thomas A. Flannery
Hon. William J. Bauer
Hon. Howard C. Bratton
Hon. Wm. Terrell Hodges
Hon. Prentice H. Marshall**

Incorporating Instructions and Appendixes from the 1982 Report of the Federal Judicial Center Committee to Study Criminal Jury Instructions

**Federal Judicial Center
1987**

This publication contains pattern jury instructions developed by the two committees shown above. The instructions and the points of view that they reflect are those of the committees; the appendixes, prepared by Center staff, were approved by the Federal Judicial Center Committee for inclusion in its report. It should be noted that on matters of policy the Center speaks only through its Board.

Cite as Federal Judicial Center, Pattern Criminal Jury Instructions (1987).

FJC-R-87-7

TABLE OF CONTENTS

C. The Charge

Role of judge and jury; what is evidence; matters not to be considered; evidence admitted for a limited purpose, etc.

Note: Other instructions to the effect that evidence should be considered for limited purposes have been grouped elsewhere. They are as follows:

B. Offenses Under Titles Other Than Title 18

Appendixes

INTRODUCTION

In 1982, the Federal Judicial Center published a collection of pattern criminal jury instructions developed by a Judicial Center committee. The committee was chaired by Judge Prentice H. Marshall of the Northern District of Illinois. In his introduction to the committee's instructions, Judge Marshall suggested that their distinguishing characteristic was their comprehensibility to laymen. He expressed the committee's belief "that comparison of these pattern instructions with others in common use will reveal that a substantial simplification of vocabulary and syntax has been achieved."

The Marshall Committee instructions were prepared at a time when the fate of the proposed Criminal Code revision was unclear. They therefore dealt only with matters not likely to be changed by the enactment of a new code. Specifically, they did not include instructions on the elements of particular offenses.

The present group, a subcommittee of the Judicial Conference's Committee on the Operation of the Jury System, was appointed by Chief Justice Burger to carry on the Marshall Committee's work. The subcommittee was charged with considering the need to develop instructions in other areas, "giving special emphasis to their comprehensibility to laymen."

In this collection, we offer 59 new criminal jury instructions, almost all of them dealing with particular offenses. The collection also includes reprints of the original Marshall Committee instructions, and there is a common table of contents. Except for the instruction on insanity, which we have revised to reflect the enactment of 18 U.S.C. § 17, we have not revised either the original Marshall Committee instructions or the commentary that accompanied them.

In accordance with our mandate, we have focused on the task of drafting instructions that are both clear and accurate. We have made a particular effort to develop clear statements of the state of mind that is necessary for a finding of guilt. Following the leadership of the Ninth Circuit's Committee on Model Jury Instructions, we have abjured the terms "specific intent," "general intent," and "willfully."[1] Indeed, we have gone a step further and avoided the

1. *See* Committee on Model Jury Instructions, Ninth Circuit, Manual of Model Jury Instructions for the Ninth Circuit §§ 5.06, 5.07 (1985 ed.). Use of "specific

word "knowingly," a term that is a persistent source of ambiguity in statutes as well as jury instructions.[2] We have tried our best to make it clear what it is that a defendant must intend or know to be guilty of an offense. While we have no doubt fallen short of perfection, we believe that in this respect, at least, we have advanced the state of the art.

The subcommittee has followed the Marshall Committee's precedent of drafting instructions that are intended to be tailored to the particular case. We believe the judge should instruct the jury on the law applicable to the case, but only on that law. If the allegation is that the defendant forged a document by making it from scratch, it can only confuse a jury to instruct in terms of making or altering. We recognize, of course, that tailoring puts a burden on the district judge, but we believe it is a burden that should be accepted.

It follows from what has been said that the subcommittee recommends that trial judges not read criminal statutes to juries. First, the statutes often contain ambiguities—particularly in the language about mens rea—whose resolution is a function for the court. Second, the statutes are often drafted to cover a great variety of circumstances, most of which are irrelevant in a particular case. It may sometimes be necessary to discuss statutory language with a jury, particularly if it is used in the indictment. But we believe that reading the statute is more often harmful than helpful.

Professor Paul Marcus, reporter to the Marshall Committee, played the same role for us at the beginning of our labors. After his appointment as Dean of the University of Arizona Law School, he was joined as coreporter by Professor Thomas A. Mauet of that institution, who has in fact carried the laboring oar. Professor Thomas B. Littlewood, Head of the Department of Journalism at the University of Illinois, served again as the journalist adviser. Anthony Partridge of the Federal Judicial Center has also provided support.

The instructions were reviewed in draft by the members of the Committee on the Operation of the Jury System, by a number of other district judges, and by a number of members of the bar, including both federal prosecutors and defense lawyers. We are grateful to all of them. Their comments were carefully considered,

---

intent" and "general intent" in jury instructions was criticized in Liparota v. United States, 471 U.S. 419, 433 n.16 (1985).

2. LaFave and Scott observed some years ago that it is often unclear how far down the sentence the word "knowingly" is intended to travel. W. LaFave & A. Scott, Jr., Handbook on Criminal Law 193 (1972). This observation was cited in Liparota v. United States, 471 U.S. 419, 424 n.7 (1985), a case in which the Court split on that issue.

many of them were accepted, and we are sure that our product is the better for their participation. It is our hope that, with their assistance, we have produced a set of instructions that are consistent with circuit law in all circuits except as noted in the accompanying commentary. Obviously, individual judges should make their own determinations about this, particularly in the light of evolving interpretations of many of the statutes involved.

We hope that our fellow judges, as well as members of the bar, will find that these instructions facilitate the task of empowering jurors to render verdicts in accordance with the law.

Thomas A. Flannery, Chairman
Judge, United States District Court for the
District of Columbia

INTRODUCTION TO THE 1982 REPORT

The criminal jury instructions contained in this book were prepared under the auspices of the Federal Judicial Center's Committee to Study Criminal Jury Instructions, consisting of Judge Thomas A. Flannery of the District Court for the District of Columbia, Judge Patrick E. Higginbotham of the District Court for the Northern District of Texas, and the undersigned. The instructions were prepared in the context of uncertainty about the fate of the proposed revision of the Criminal Code, and therefore are limited to matters unlikely to be changed by the enactment of a new code. Thus, the instructions do not include the definitions or elements of commonly prosecuted crimes and touch only briefly on frequently encountered defenses. For those subjects we refer the bench and bar to their present practice or the efforts of others.

The distinguishing feature of these instructions, we believe, is their comprehensibility to laymen. How much attention jurors give to even the most lucid instructions is a question that may never be answered. But surely we judges have an obligation to communicate as well as we know how.

The importance of communicating well with lay jurors is widely acknowledged by drafters of pattern instructions. It is nevertheless clear that most pattern instructions do not do it very well. It is all too easy for the lawyers and judges who engage in the drafting process to forget how much of their vocabulary and language style was acquired in law school. The principal barrier to effective communication is probably not the inherent complexity of the subject matter, but our inability to put ourselves in the position of those not legally trained.

Our committee has tried to overcome this obstacle by including in our deliberations a distinguished journalist who is not legally trained and by following some drafting rules derived from research on juror understanding of instructions. We believe that comparison of these pattern instructions with others in common use will reveal that a substantial simplification of vocabulary and syntax has been achieved. That impression is borne out by standard tests for measuring the difficulty of written material, as is illustrated in appendix B.

The drafting rules we have tried to follow are set forth in appendix A, and we commend them to our fellow judges for guidance in fashioning instructions for situations that are not adequately covered here.

Another possible problem of communication is worthy of comment. It is that an opportunity for confusion may be created when different judges give different instructions on the same subject to jurors drawn from the same pool. Our instruction on reasonable doubt, for example, takes note of the fact that some of the jurors may have previously served in civil cases, and points out that the standard of proof in criminal cases is more exacting. It does not take note of the possibility that some of the jurors were previously exposed to a different definition of "reasonable doubt," and explain how the jurors are to deal with the apparent conflict. This kind of problem may deserve more attention than it has traditionally received. Perhaps there are some instructions on which an entire district court should agree to take a common approach.

Following an idea developed in the pattern instructions of the Fifth Circuit District Judges Association, the instructions in this book are presented in a sequence that approximates the likely sequence in which they would be delivered. Some variation from case to case must of course be anticipated, but this organization will generally enable the judge to scan the table of contents, select the instructions relevant to the particular case, and then use them without the necessity of flipping back and forth. We have not adopted the further innovation of the Fifth Circuit instructions, that of having forms that can be assembled with little or no retyping into a complete set of instructions suitable for sending to the jury. It is our view that instructions should often contain references to the subject matter of the evidence and the names of the parties and witnesses, and we have made no effort to produce instructions that can be used without being tailored to fit the particular case.

The view that instructions should be tailored also explains our decision to use the masculine singular pronoun and singular verbs in the pattern instructions. We contemplate that, when the instructions are delivered to the jury, each pronoun will be masculine or feminine, and each pronoun and verb singular or plural, as the circumstances of the particular case demand. We did not think it necessary to set forth all the possible variants each time a pronoun or verb is used.

The principal burden of draftsmanship has been borne by our reporter, Professor Paul Marcus, Professor of Law, University of Illinois at Urbana-Champaign. Our journalist adviser was Professor

Thomas B. Littlewood, Head of the Department of Journalism at the same institution. Allan Lind and Anthony Partridge of the Federal Judicial Center provided guidance derived from the psycholinguistic research, reviewed and criticized the several drafts, and participated in all of the committee's meetings. Each of these four people has made an important contribution to the final product, and we are grateful to them for it.

The instructions were reviewed in draft by an experienced trial judge from each circuit with a view to ensuring that conflict with circuit law had successfully been avoided. While we assume that district judges who use the instructions will exercise their own judgment, we believe that the instructions should be acceptable in all circuits except as noted in the commentary accompanying particular instructions. For this review of the draft instructions, we are indebted to Judges John J. McNaught (D. Mass.), Jacob Mishler (E.D.N.Y.), Frederick B. Lacey (D.N.J.), Walter E. Hoffman (E.D. Va.), William K. Thomas (N.D. Ohio), Hubert L. Will (N.D. Ill.), Warren K. Urbom (D. Neb.), Donald S. Voorhees (W.D. Wash.), Wesley E. Brown (D. Kan.), and Wm. Terrell Hodges (M.D. Fla.). This group offered many helpful suggestions. They are, of course, not to be held responsible for any deficiencies that remain.

Finally, I must acknowledge that we have freely taken ideas from existing pattern instructions used in federal district courts. Naturally, we hope we have improved on them. But we are fully cognizant of the extent to which our work has depended on the work of others. Our debt to the authors of the following instructions is a substantial one:

Devitt & Blackmar, *Federal Jury Practice and Instructions* (3d ed. 1977).

Committee on Pattern Jury Instructions, Fifth Circuit District Judges Association, *Pattern Jury Instructions (Criminal Cases)* (1978).

Seventh Circuit Judicial Conference Committee on Jury Instructions, *Manual on Jury Instructions in Federal Criminal Cases*, 33 F.R.D. 523–614 (1963).

Committee on Federal Criminal Jury Instructions of the Seventh Circuit, *Federal Criminal Jury Instructions* (1980).

Criminal Jury Instructions Committee, Young Lawyers Section, D.C. Bar Association, *Criminal Jury Instructions, District of Columbia* (3d ed. 1978).

We hope that our colleagues on the district bench and the practicing bar will find these instructions helpful.

Prentice H. Marshall, Chairman
Judge, United States District Court for the
Northern District of Illinois

1. Standard Preliminary Instruction Before Trial

Members of the Jury:

Before we begin the trial, I would like to tell you about what will be happening. I want to describe how the trial will be conducted and explain what we will be doing—you, the lawyers for both sides, and I. At the end of the trial I will give you more detailed guidance on how you are to go about reaching your decision. But now I simply want to explain how the trial will proceed.

This criminal case has been brought by the United States government. I will sometimes refer to the government as the prosecution. The government is represented at this trial by an assistant United States attorney, _____. The defendant, _____, is represented by his lawyer, _____. (*Alternative:* The defendant, _____, has decided to represent himself and not use the services of a lawyer. He has a perfect right to do this. His decision has no bearing on whether he is guilty or not guilty, and it should have no effect on your consideration of the case.)

The defendant has been charged by the government with violation of a federal law. He is charged with [*e.g.:* having intentionally sold heroin]. The charge against the defendant is contained in the indictment. The indictment is simply the description of the charge made by the government against the defendant; it is not evidence of anything. The defendant pleaded not guilty to the charge and denies committing the offense. He is presumed innocent and may not be found guilty by you unless all twelve of you unanimously find that the government has proved his guilt beyond a reasonable doubt. (*Addition for multidefendant cases:* The defendants are being tried together because the government has charged that they worked together to commit the crime of _____. But you will have to give separate consideration to the case against each defend-

ant. Each is entitled to your separate consideration. Do not think of them as a group.)

The first step in the trial will be the opening statements. The government in its opening statement will tell you about the evidence which it intends to put before you, so that you will have an idea of what the government's case is going to be.

Just as the indictment is not evidence, neither is the opening statement evidence. Its purpose is only to help you understand what the evidence will be and what the government will try to prove.

[1]After the government's opening statement, the defendant's attorney will make an opening statement. At this point in the trial, no evidence has been offered by either side.

Next the government will offer evidence that it says will support the charges against the defendant. The government's evidence in this case will consist of the testimony of witnesses as well as documents and exhibits. Some of you have probably heard the terms "circumstantial evidence" and "direct evidence." Do not be concerned with these terms. You are to consider all the evidence given in this trial.

After the government's evidence, the defendant's lawyer may (make an opening statement and) present evidence in the defendant's behalf, but he is not required to do so. I remind you that the defendant is presumed innocent and the government must prove the guilt of the defendant beyond a reasonable doubt. The defendant does not have to prove his innocence.

[Insert Instruction 2 here if material on questioning by jurors is desired.]

After you have heard all the evidence on both sides, the government and the defense will each be given time for their final arguments. I just told you that the opening statements by the lawyers

---

1. This paragraph should be omitted if the defense reserves its statement until later. The trial judge should resolve this matter with counsel prior to the giving of the instruction.

are not evidence. The same applies to the closing arguments. They are not evidence either. In their closing arguments the lawyers for the government and the defendant will be attempting to summarize their cases and help you understand the evidence that was presented.

The final part of the trial occurs when I instruct you about the rules of law which you are to use in reaching your verdict. After hearing my instructions, you will leave the courtroom together to make your decision. Your deliberations will be secret. You will never have to explain your verdict to anyone.

[Insert Instruction 3 here if material on note-taking by jurors is desired.]

Now that I have described the trial itself, let me explain the jobs that you and I are to perform during the trial. I will decide which rules of law apply to this case. I will decide this in response to questions raised by the attorneys as we go along and also in the final instructions given to you after the evidence and arguments are completed. You will decide whether the government has proved, beyond a reasonable doubt, that the defendant has committed the crime of _____. You must base that decision only on the evidence in the case and my instructions about the law.[2]

[Insert discussion of the elements of the offense here if they are to be set out for the jury in the preliminary instruction.]

[Insert Instruction 4 here if a statement that the jury should not consider punishment is desired.]

During the course of the trial, you should not talk with any witness, or with the defendant, or with any of the lawyers in the case. Please don't talk with them about any subject at all. In addition, during the course of the trial you should not talk about the trial with anyone else—not your family, not your friends, not the people you work with. Also, you should not discuss this case among your-

2. If the judge wishes to discuss considerations in evaluating witnesses' testimony in the preliminary instruction as well as in the closing charge, this would be an appropriate place to do so. Instruction 23 can be adapted for this purpose.

selves until I have instructed you on the law and you have gone to the jury room to make your decision at the end of the trial. It is important that you wait until all the evidence is received and you have heard my instructions on rules of law before you deliberate among yourselves. Let me add that during the course of the trial you will receive all the evidence you properly may consider to decide the case. Because of this, you should not attempt to gather any information on your own which you think might be helpful. Do not engage in any outside reading on this case, do not attempt to visit any places mentioned in the case, and do not in any other way try to learn about the case outside the courtroom.

Now that the trial has begun you must not read about it in the newspapers or watch or listen to television or radio reports of what is happening here.

The reason for these rules, as I am certain you will understand, is that your decision in this case must be made solely on the evidence presented at the trial.

At times during the trial, a lawyer may make an objection to a question asked by another lawyer, or to an answer by a witness. This simply means that the lawyer is requesting that I make a decision on a particular rule of law. Do not draw any conclusion from such objections or from my rulings on the objections. These only relate to the legal questions that I must determine and should not influence your thinking. If I sustain an objection to a question, the witness may not answer it. Do not attempt to guess what answer might have been given had I allowed the question to be answered. Similarly, if I tell you not to consider a particular statement, you should put that statement out of your mind, and you may not refer to that statement in your later deliberations.

During the course of the trial I may ask a question of a witness. If I do, that does not indicate I have any opinion about the facts in the case.

Finally, let me clarify something you may wonder about later. During the course of the trial I may have to interrupt the proceedings to confer with the attorneys about the rules of law which should apply here. Sometimes we will talk here, at the bench. But some of these conferences may take time. So, as a convenience to you, I will excuse you from the courtroom. I will try to avoid such interruptions as much as possible, but please be patient even if the trial seems to be moving slowly because conferences often save time for all of us.

Thank you for your attention.

Commentary

Unlike most of the other instructions, this one is lengthy, containing a number of different concepts. While the length of it subjects it to some question, the committee was persuaded by Judge Prettyman's argument that such an instruction is necessary at the commencement of the trial. Prettyman, *Jury Instructions—First or Last?,* 46 A.B.A. J. 1066 (1960).

Some portions of this instruction can appropriately be included in instructions given to the entire voir dire panel. In that event, the judge should consider whether repetition in this preliminary instruction is necessary.

Throughout this instruction, the presumption of innocence element is stressed. The committee believes that it is important to plant the presumption in the jurors' minds so that there will be no confusion during the course of the trial.

Unlike some pattern instructions, this instruction does not suggest that the statute or indictment in the case actually be read to the jury. The committee believes that such a standard practice is often confusing to the jury and the purpose for it can be achieved if the judge gives a succinct description of the crime charged.

The committee believes that the fullest possible disclosure of the elements of the offense and any defenses will assist the jury in understanding the evidence. The committee recognizes, however, that detailing the elements is not always practicable before trial. It is important that counsel be consulted before the specific elements are discussed with the jury.

Finally, the instruction does not refer to the possibility that sequestration of the jury will be necessary (whether during the course of the trial or the deliberations). In cases in which sequestration is likely, the committee believes that reference to this prob-

lem should be made to the entire jury panel when other standard matters (length of the trial, courtroom hours, and so on) are discussed.

2. Questioning of Witnesses by Jurors

(Optional Addition to Preliminary Instruction)

Alternative A

The only persons who may ask questions of witnesses are the lawyers and myself. You are not permitted to ask questions of witnesses.

Alternative B

Generally only the lawyers and I ask questions of witnesses. If you feel that an important question has not been asked, you may put the question in writing and have it handed to me. I will then decide if the question is a proper one. If it is, I will ask the question of the witness.

Commentary

A judge can take one of three alternatives regarding questions by jurors: say nothing about questions, give an instruction forbidding such questions, or give an instruction allowing them.

Alternative B, which permits only written questions by jurors, is intended to reduce the risk of an objectionable question being communicated to other members of the jury and to enable trial judges to deal with objectionable questions out of the presence of the jury.

3. Note-Taking by Jurors

(Optional Addition to Preliminary Instruction)

Alternative A

You may not take notes during the course of the trial. There are several reasons for this. It is difficult to take notes and, at the same time, pay attention to what a witness is saying. Furthermore, in a group the size of yours certain persons will take better notes than others and there is the risk that the jurors who do not take good notes will depend upon the jurors who do take good notes. The jury system depends upon all twelve jurors paying close attention and arriving at a unanimous decision. I believe that the jury system works better when the jurors do not take notes.

You will notice that we do have an official court reporter making a record of the trial. However, we will not have typewritten transcripts of this record available for use in reaching your decision in this case.

Alternative B

If you want to take notes during the course of the trial you may do so. However, it is difficult to take detailed notes and pay attention to what the witnesses are saying at the same time. If you do take notes, be sure that your taking of notes does not interfere with your listening to and considering all the evidence. Also, if you take notes, do not discuss them with anyone before you begin your deliberations. Do not take the notes with you at the end of the day. Be sure to leave them in the jury room.

If you choose not to take notes, remember it is your own individual responsibility to listen carefully to the evidence. You cannot give this responsibility to someone who is taking notes. We depend

on the judgment of all members of the jury; you must all remember the evidence in this case.

You will notice that we do have an official court reporter making a record of the trial. However, we will not have typewritten transcripts of this record available for use in reaching your decision in this case.

Commentary

The taking of notes by jurors appears to be a discretionary practice with the trial judge. Thus, two alternatives are offered.

The instruction permitting note-taking is drafted on the assumption that the jurors will be permitted to take their notes into the jury room and rely on them during deliberations. The committee believes that it is not desirable to allow note-taking and then not allow jurors to use the notes during deliberations. If the note-taking jurors will not be permitted to take their notes into the jury room, however, that should be made clear at the outset.

4. Jury Not to Consider Punishment

(Optional Addition to Preliminary Instruction)

If you find the defendant guilty, it will then be my job to decide what punishment should be imposed. In considering the evidence and arguments that will be given during the trial, you should not guess about the punishment. It should not enter into your consideration or discussions at any time.

Commentary

In cases in which a punishment instruction will be given, it would normally be given at the end of the trial. Because of the possibility that in some serious cases the trial judge might wish to give the instruction twice, particularly in those jurisdictions in which jurors in state cases actually do consider punishment, the punishment instruction is included here with the preliminary instruction.

5. Cautionary Instruction, First Recess

We are about to take our first break during the trial and I want to remind you of a few things that are especially important. Until the trial is completed, you are not to discuss this case with anyone, whether members of your family, people involved in the trial, or anyone else; that includes your fellow jurors. If anyone approaches you and tries to discuss the trial with you, please let me know about it immediately. Also, you must not read or listen to any news reports of the trial. Finally, remember that you must not talk about anything with any person who is involved in the trial—even something that has nothing to do with the trial.

If you need to speak with me about anything, simply give a note to the marshal to give to me.

I may not repeat these things to you before every break that we take, but keep them in mind throughout the trial.

6. Discharge of Defense Counsel During Trial

Even though _____ was at first represented by a lawyer, he has decided to continue this trial representing himself and not use the services of a lawyer. He has a perfect right to do that. His decision has no bearing on whether he is guilty or not guilty, and it should have no effect on your consideration of the case.

7. Judicial Notice

Even though no evidence has been introduced about it, I have decided to accept as proved the fact that [*e.g.:* the city of San Francisco is north of the city of Los Angeles]. I believe that this fact is of such common knowledge [or alternative justification per rule 201(b)(2) of the Federal Rules of Evidence] that it would be a waste of our time to hear evidence about it. Thus, you may treat it as proved, even though no evidence was brought out on the point. Of course, with this fact, as with any fact, you will have to make the final decision and you are not required to agree with me.

Commentary

The committee recommends that the instruction regarding judicial notice be given at the time notice is taken.

Rule 201(g) of the Federal Rules of Evidence creates a difficult dilemma for trial judges. At the threshold, the trial judge must determine that a fact is sufficiently undisputed to be judicially noticed. Yet, the judge must then advise the jurors that they can disagree with his or her conclusion.

8. Summaries of Records as Evidence

Commentary

The committee recommends that no instruction be given because it is now clear that under rule 1006 of the Federal Rules of Evidence the summary itself is evidence. *See* United States v. Smyth, 556 F.2d 1179, 1184 (5th Cir. 1977).

9. Standard Introduction to the Charge

Members of the Jury:

You will soon leave the courtroom and begin discussing this case in the jury room.

As I told you earlier, the government has accused the defendant, _____, of committing the crime of _____. But this is only a charge. In order for you to find him guilty, you must be convinced, beyond a reasonable doubt, that he committed this crime as charged. If you are not convinced beyond a reasonable doubt that he committed this crime as charged, you must find him not guilty.

During the course of the trial you received all the evidence you may properly consider to decide the case. Your decision in this case must be made solely on the evidence presented at the trial. Do not be concerned about whether evidence is "direct evidence" or "circumstantial evidence." You should consider all the evidence that was presented to you.

At times during the trial you saw lawyers make objections to questions asked by other lawyers, and to answers by witnesses. This simply meant that the lawyers were requesting that I make a decision on a particular rule of law. Do not draw any conclusion from such objections or from my rulings on the objections. These only related to the legal questions that I had to determine and should not influence your thinking. When I sustained an objection to a question, the witness was not allowed to answer it. Do not attempt to guess what answer might have been given had I allowed the question to be answered. Similarly, when I told you not to consider a particular statement, you were told to put that statement out of your mind, and you may not refer to that statement in your deliberations.

Sometimes in the trial I have asked questions of witnesses. When I asked questions, that did not indicate I had any opinion about the facts in the case.

It is my job to decide what rules of law apply to the case. I have explained some of these rules to you in the course of the trial, and I will explain others of them to you before you go to the jury room. This is my job; it is not the job of the lawyers. So, while the lawyers may have commented during the trial on some of these rules, you are to be guided only by what I say about them. You must follow all of the rules as I explain them to you. You may not follow some and ignore others. Even if you disagree or don't understand the reasons for some of the rules, you are bound to follow them.

If you decide that the government has proved beyond a reasonable doubt that _____ is guilty of the crime as charged, it will also be my job to decide what the punishment will be. You should not try to guess what the punishment might be. It should not enter into your consideration or discussions at any time.

The decision you reach in the jury room, whether guilty or not guilty, must be unanimous. You must all agree. Your deliberations will be secret. You will never have to explain your verdict to anyone.

10. Jury's Duty to Deliberate

It is your duty, as jurors, to talk with one another and to deliberate in the jury room. You should try to reach an agreement if you can. Each of you must decide the case for yourself, but only after consideration of the evidence with the other members of the jury. While this is going on, do not hesitate to reexamine your own opinions and change your mind if you are convinced that you are wrong. But do not give up your honest beliefs solely because the others think differently, or merely to get the case over with. In a very real way you are judges, judges of the facts. Your only interest is to determine whether the government has proved the defendant guilty beyond a reasonable doubt.

Commentary

In the discretion of the trial judge, this instruction can be given either as part of the charge or in response to a report of deadlock by a jury.

The old charge based on Allen v. United States, 164 U.S. 492, 501 (1896), has been under increasing attack within recent times. *See* Marcus, *The* Allen *Instruction in Criminal Cases: Is the Dynamite Charge About to be Permanently Defused?*, 43 Mo. L. Rev. 613 (1978). The committee's language is a modification of the language suggested in the commentary to Standard 15-4.4(a) of the American Bar Association's Standards for Criminal Justice (Trial by Jury) (2d ed. 1978).

Judges in the Seventh Circuit are cautioned that the above instruction may not be given to a deadlocked jury in that circuit. The only permissible instruction to a deadlocked jury is the instruction set forth in United States v. Silvern, 484 F.2d 879 (7th Cir. 1973), as modified in 1980 by the Committee on Federal Jury Instructions of the Seventh Circuit. Moreover, that instruction may be given to a deadlocked jury only if it was included verbatim in the original charge. United States v. Brown, 634 F.2d 1069 (7th Cir. 1980).

11. Stipulations of Testimony

While we were hearing evidence you were told that the government and the defendant agreed, or stipulated, that [*e.g.:* if John Smith were called as a witness he would testify that he sold Mrs. Jones a dress on the morning of June 9, 1979]. That would be _____'s testimony if he were called as a witness. You will consider that to be the testimony of _____ as if he were in court and testifying here.

12. Stipulations of Fact

While we were hearing evidence you were told that the government and the defendant agreed, or stipulated, that [*e.g.:* the name of the Cincinnati hotel was "The Plaza"]. This means simply that they both accept the fact that [that was the name of the hotel]. There is no disagreement over that, so there was no need for evidence by either side on that point. You must accept that as fact, even though nothing more was said about it one way or the other.

13. Wiretaps, Consensual Recordings: Propriety of Evidence

During this trial, you have heard recordings of conversations [*e.g.:* that the defendant had with Larry Loop, a government agent]. These conversations were legally recorded by the government; they are a proper form of evidence for this trial and may be considered by you, just as any other evidence.

Commentary

The committee thinks it is important to have an instruction allaying the suspicions of jurors with regard to wiretaps and consensual recordings. The instruction should not define the material terms under the United States Code; it should simply inform the jury that the evidence is legitimate.

14. Defendant's Previous Trial: Jury Not to Consider

During the course of this trial, you have heard that the defendant was on trial before. That is true. The defendant and the government are entitled, however, to have you decide this case entirely on the evidence that has come before you in this trial. You should not consider the fact of a previous trial in any way when you decide whether the government has proved, beyond a reasonable doubt, that the defendant committed the crime.

Commentary

The committee recommends that this instruction not be given unless specifically requested by the defense.

15. Defendant's Photographs, "Mug Shots": No Inference to Be Drawn from Police Possession

You will recall that one of the witnesses in this trial, _____, testified that [*e.g.:* he viewed a photograph of the defendant which was shown to him by the police]. The police collect pictures of many people from many different sources and for many different purposes. The fact that the police had the defendant's picture does not mean that he committed this or any other crime.

Commentary

The committee recommends that this instruction not be given unless specifically requested by the defense.

16. Dismissal of Some of Charges Against Defendant: Jury Not to Consider Certain Evidence

At the beginning of the trial I told you that the defendant had been accused of _____ different crimes: [Brief descriptions]. In the meantime, I disposed of one of these charges, the one having to do with _____. The charge of _____ is no longer of concern to you. Therefore, the only crime that the defendant is charged with is _____.

The following evidence is no longer in this case: [Describe evidence]. You should not consider any of this evidence when you decide whether the government has proved, beyond a reasonable doubt, that the defendant committed the crime of _____.

Commentary

The committee recommends that the jury be advised, to the extent practicable, specifically which evidence it should not consider.

17. Disposition of Charges Against Codefendant: Jury Not to Consider Certain Evidence

At the beginning of the trial you were told that both defendants, _____ and _____, were accused of committing the crime of _____. The charge against one of the defendants, _____, has been disposed of, and he will no longer be part of this trial. The fact that he is no longer part of the trial should not enter your thinking when you are called upon to decide whether the government has proved, beyond a reasonable doubt, that the defendant, _____, committed the crime.

The following evidence is no longer in this case: [Describe evidence]. You should not consider any of this evidence when you decide whether the government has proved, beyond a reasonable doubt, that the defendant, _____, has committed the crime of _____.

Commentary

The committee recommends that the jury be advised, to the extent practicable, specifically which evidence it should not consider.

No reference should be made in this situation to a plea of guilty by the codefendant (if that is the basis for disposition of the charge, as opposed to a dismissal for lack of evidence). If the jury should become aware of the plea it should be strongly instructed that it is not to consider or discuss the plea in deciding the case of the remaining defendant or defendants.

18. Evidence Admitted for a Limited Purpose: Jury to Limit Its Consideration

Several times during the trial I told you that certain evidence was allowed into this trial for a particular and limited purpose. [Describe evidence.] When you consider that evidence, you must limit your consideration to that purpose.

Commentary

This instruction contemplates that the court gave limiting instructions when the evidence was received. The committee recommends that the jury be informed specifically which evidence was so admitted and what limitations were imposed. See Instruction 19 for an example dealing with one type of limited evidence.

19. Evidence Applicable to Only One Defendant: Jury to Limit Its Consideration

As you know, there are _____ defendants on trial here: [Give names]. They are being tried together because the government has charged that they worked together to commit the crime of [*e.g.:* importing heroin]. Nevertheless, each defendant is entitled to have his case decided just on the evidence which applies to him. Some of the evidence in this case was limited to one of the defendants and cannot be considered in the cases of the others. That was a legal decision made by me. The testimony you heard that [brief description] should be considered only in the case of the defendant, _____, and not in the cases of the others. What that means is that you may consider this testimony in the case of _____, but you may not consider it in any way when you are deciding whether the government has proved, beyond a reasonable doubt, that the other defendants, [give names], committed the crime of _____.

Commentary

In even the most straightforward cases involving only two defendants, the problem which this instruction addresses can create great difficulties for both the court and the jury. The judge should make an effort to give this type of instruction each time limited evidence is admitted. Moreover, in such a case, the judge might consider marshaling evidence at the end of the trial, thereby identifying the limited evidence available against the defendants. *Cf.* United States v. Kelly, 349 F.2d 720, 757 (2d Cir. 1965); United States v. Kahaner, 317 F.2d 459, 479 n.12 (2d Cir. 1963).

20. Jury to Consider Only This Defendant, Not Whether Others Have Committed Crimes

As I explained to you earlier, the defendant, _____, is on trial here because the government has charged that he [brief description of the crime]. The only question you must answer is whether the government proved, beyond a reasonable doubt, that he committed this crime. It is not up to you to decide whether any other person is guilty of any crime. The question of the possible guilt of others should not enter your thinking when you decide whether the government has proved beyond a reasonable doubt that the defendant committed the crime.

Commentary

This instruction should not be given in cases in which the allegation is one of vicarious liability, such as conspiracy or aiding and abetting. In those cases the jury may be required to decide (at least as a preliminary matter) whether other persons are guilty of a crime. The instruction may require some modification in cases in which an alibi or a mistake in identification is raised.

21. Definition of Reasonable Doubt

As I have said many times, the government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Commentary

The circuit courts are divided on the question whether a reasonable doubt instruction should be given. Because of the important, yet somewhat vague, underlying principles involved in this concept, some courts think no instruction could convey the broad sense of the term. *See* United States v. Larson, 581 F.2d 664, 669 (7th Cir. 1978). In other courts, however, because of the central importance of the phrase, it could well be reversible error to fail to give an instruction, particularly if requested by counsel. *See* Friedman v. United States, 381 F.2d 155, 160 (8th Cir. 1967).

The committee has attempted to give a relatively short instruction highlighting the importance of the concept. *See* Tsoumas v. New Hampshire, 611 F.2d 412 (1st Cir. 1980); Reeves v. Reed, 596 F.2d 628 (4th Cir. 1979).

The committee recognizes that many appellate opinions lend strong support to the standard formulation that a reasonable doubt is a doubt that would cause a person to hesitate to act in the most important of one's own affairs. *E.g.*, United States v. Morris, 647 F.2d 568, 571-72 (5th Cir. 1981); United States v. Fallen, 498 F.2d 172, 177 (8th Cir. 1974); United States v. Stubin, 446 F.2d 457, 465 (3d Cir. 1971). Judges are cautioned that the committee's instruc-

tion may not be acceptable in some circuits. Nevertheless, the committee has rejected the standard formulation because the analogy it uses seems misplaced. In the decisions people make in the most important of their own affairs, resolution of conflicts about past events does not usually play a major role. Indeed, decisions we make in the most important affairs of our lives—choosing a spouse, a job, a place to live, and the like—generally involve a very heavy element of uncertainty and risk-taking. They are wholly unlike the decisions jurors ought to make in criminal cases.

22. Defendant's Election Not to Testify (or Offer Evidence): Jury Not to Consider

Remember that a defendant has an absolute right not to testify (offer evidence). The fact that _____ did not testify (offer any evidence) should not be considered by you in any way or even discussed in your deliberations. I remind you 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 not guilty.

Commentary

While it may be permissible to give this instruction over the defendant's objection, the committee recommends that the instruction not be given unless requested by the defendant. If there is more than one nontestifying defendant and the instruction is requested by some but not all such defendants, it should be given in general terms without the use of the defendants' names.

23. General Considerations in Evaluating Witnesses' Testimony

As I have just reminded you, it is your job to decide if the government has proved the guilt of the defendant beyond a reasonable doubt. An important part of that job will be making judgments about the testimony of the several (many) witnesses (—including the defendant—) who testified in this case. You should decide whether you believe what each person had to say, and how important that testimony was. In making that decision I suggest that you ask yourself a few questions: Did the person impress you as honest? Did he or she have any particular reason not to tell the truth? Did he or she have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did he or she appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses? These are a few of the considerations that will help you determine the accuracy of what each witness said.

In making up your mind and reaching a verdict, do not make any decisions simply because there were more witnesses on one side than on the other. Do not reach a conclusion on a particular point just because there were more witnesses testifying for one side on that point. Your job is to think about the testimony of each witness you heard and decide how much you believe of what he or she had to say.

24. Testimony of Accomplice or Other Witness Testifying in Exchange for Immunity or Reduced Criminal Liability: Cautionary Instruction

You have heard the testimony of _____. He is providing evidence for the government in exchange for a promise from the government that [*e.g.:* he will not be prosecuted for the things he is testifying about; the prosecution will recommend lenient treatment in his own case]. He told the government what he would testify to in exchange for this promise.

The government may present the testimony of someone who has been promised favorable treatment in his own case in exchange for his testimony. Some people in this position are entirely truthful when testifying. Still, you should consider the testimony of _____ with more caution than the testimony of other witnesses. He may have had reason to make up stories or exaggerate what others did because he wanted to strike a good bargain with the government about his own case. In deciding whether you believe _____'s testimony, you should keep these comments in mind.

Commentary

The committee believes that it is important to draw attention to the testimony of witnesses who are testifying in exchange for immunity or other benefits, and that some explanation should be given to the jury of the reason that statements by such witnesses are subject to suspicion.

There is no separate instruction for accomplice witnesses. In light of the prevalence of plea bargaining and immunity, they are generally testifying after having struck a deal with the government and are adequately covered by this instruction.

The instruction does not use the terms "accomplice" or "immunity." It was considered preferable to avoid the use of these legal terms. If the lawyers have used the terms, however, it may be desirable to define them when this instruction is given. The end of the first paragraph of the instruction would be an appropriate place.

25. Testimony of Paid Informer: Cautionary Instruction

You have heard the testimony of _____. He has an arrangement with the government under which he gets paid for providing information about criminal activity. The government may present the testimony of such a person. Some people who get paid for providing information about criminal activity are entirely truthful when testifying. Still, you should consider the testimony of _____ with more caution than the testimony of other witnesses. Since he may believe that he will continue to be paid only if he produces evidence of criminal conduct, he may have reason to make up stories or to exaggerate what others did. In deciding whether you believe _____'s testimony, you should keep these comments in mind.

Commentary

The committee believes that it is important to draw attention to the testimony of informers, and that some explanation should be given to the jury of the reason that statements by these witnesses are subject to suspicion.

The term "informer" is not used in the instruction. It was considered preferable to avoid it. If the lawyers have used the term, however, it may be desirable to define it when giving this instruction. This could be done by adding the phrase, "who is called an informer," at the end of the third sentence.

26. Testimony of a Police Officer or Government Agent

Commentary

The committee believes that Instruction 23, General Considerations in Evaluating Witnesses' Testimony, adequately covers cases in which the credibility of an agent witness is called into question based upon his position, and the committee recommends that no special instruction be given.

27. Testimony of Expert Witness

During the trial you heard the testimony of _____, who was described to us as an expert in _____. This witness was permitted to testify even though he did not actually witness any of the events involved in this trial.

A person's training and experience may make him or her a true expert in a technical field. The law allows that person to state an opinion here about matters in that particular field. Merely because _____ has expressed an opinion does not mean, however, that you must accept this opinion. The same as with any other witness, it is up to you to decide whether you believe his testimony and choose to rely upon it. Part of that decision will depend on your judgment about whether his background of training and experience is sufficient for him to give the expert opinion that you heard. You must also decide whether his opinions were based on sound reasons, judgment, and information.

28. Testimony of a Child: Cautionary Instruction

You have heard the testimony of _____, and you may be wondering whether his young age should make any difference. What you must determine, as with any witness, is whether that testimony is believable. Did he understand the questions? Does he have a good memory? Is he telling the truth?

Because young children may not fully understand what is happening here, it is up to you to decide whether _____ understood the seriousness of his appearance as a witness at this criminal trial. In addition, young children may be influenced by the way that questions are asked. It is up to you to decide whether _____ understood the questions asked of him. Keep this in mind when you consider _____'s testimony.

Commentary

This instruction is somewhat shorter than the standard child's testimony instruction. The committee believes that it is sufficient to call to the jury's attention the basic difficulties with the testimony of a child, specifically stressing the kinds of issues which may arise in connection with such testimony.

29. Impeachment by Prior Perjury

It has been shown that _____, one of the witnesses for the (government) (defense), lied under oath on an earlier occasion. (*Add if necessary:* A person who lies when he was sworn to tell the truth is guilty of perjury.)

Whether _____ is telling the truth in this trial is for you to decide. But the fact that he lied under oath on an earlier occasion should make you cautious about believing him now.

Commentary

This instruction will rarely be used, for it will be appropriate only when there is proof, through either a perjury conviction or an admission by the witness, that the witness intentionally lied under oath. *See* Fed. R. Evid. 608(b), 609.

30. Impeachment by Prior Conviction (Witness Other Than Defendant)

You have been told that the witness _____ was convicted in 19__ of [*e.g.:* armed robbery]. This conviction has been brought to your attention only because you may wish to consider it when you decide, as with any witness, whether you believe his testimony.

Commentary

Some instructions combine in a single charge the question of prior felony convictions for defendants and witnesses. The committee thought it would be clearer for the jury if these instructions were separated. The instruction about defendants' prior convictions is No. 41.

31. Impeachment by Evidence of Untruthful Character

You have heard the testimony of _____, who was a witness in the (government's) (defense) case. You also heard testimony from others concerning (their opinion about whether he is a truthful person) (his reputation, in the community where he lives, for telling the truth.) It is up to you to decide from what you heard here whether _____ was telling the truth in this trial. In deciding this, you should bear in mind the testimony concerning his (reputation for) truthfulness.

Commentary

The committee believes that this instruction will seldom be needed; argument by counsel should adequately cover the point.

Under rule 608(a) of the Federal Rules of Evidence, a witness may give his opinion of the character of the other witness for truthfulness, and not only state the reputation.

32. Impeachment by Prior Inconsistent Statements, Not Under Oath

You will recall that _____ testified during the trial [description, if needed]. You will also recall that it was brought out that before this trial he made statements about this matter. These earlier statements were brought to your attention to help you decide if you believe _____'s testimony. You cannot use these earlier statements as evidence in this case. However, if _____ said something different about this matter earlier, and the two stories were conflicting, then there may be reason for you to doubt _____'s testimony here. That's up to you to decide.

Commentary

The instruction deals with the situation in which there is no dispute about whether the witness made the earlier statement. If he denies making it, the jury must be instructed to decide if he made the statement.

The instruction does not deal with the situation in which the witness is impeached by omission. The committee thinks this matter is better handled through argument of counsel.

This instruction must be given if requested by the party opposing the impeachment.

33. Impeachment by Prior Inconsistent Statements, Under Oath

You will recall that _____ testified in the (government's) (defense) case during the trial. You will also recall that it was brought out that before this trial he made statements concerning the subject matter of this trial. Even though these statements were not made in this courtroom they were made under oath at [*e.g.:* another trial]. Because of this, you may consider these statements as if they were made at this trial and rely on them as much, or as little, as you think proper.

Commentary

The committee does not see the necessity of giving this instruction unless the jury has been instructed about impeachment by prior inconsistent statements that were not under oath (Instruction 32).

This instruction is for use only when the prior statement that is inconsistent with statements made at trial was given under oath at a previous trial, hearing, or other proceeding, or in a deposition. *See* Fed. R. Evid. 801(d)(1)(A). If these standards are not met, only Instruction 32 should be given.

34. Use of Witness's Prior Consistent Statements

_____ testified in the (government's) (defense) case during the trial. You will recall that it was brought out that before this trial he made statements which were the same as, or similar to, what he said in the courtroom. These earlier statements were brought to your attention to help you decide whether you believe _____'s testimony. If _____ said essentially the same thing on more than one occasion it may be reason for you to believe _____'s testimony.

Commentary

As with prior inconsistent statements under oath, prior consistent statements can be offered as substantive evidence under rule 801(d)(1)(B) of the Federal Rules of Evidence. Unlike prior inconsistent statements, the prior consistent statement need not be made under oath or at a previous trial, hearing, or other proceeding. Any prior consistent statement may be offered as substantive evidence under rule 801(d)(1)(B) provided it is offered to rebut a charge of recent fabrication or improper influence or motive.

Even though these statements come in as substantive evidence, to avoid confusion the committee thought it would be best to instruct the jury in terms of using the prior consistent evidence to bolster the in-court testimony.

The committee recommends that this instruction not be routinely given and that the subject generally be left to argument of counsel.

35. Identification Testimony

The government must prove, beyond a reasonable doubt, that the crime charged in this case was actually committed. But more than that, the government must also prove, beyond a reasonable doubt, that the defendant, _____, committed that crime. Therefore, the identification of ___(D)___ by ___(W)___ as [brief description of the details of the identification] is a necessary [1](important) part of the government's case. As with any other witness, you must first decide whether ___(W)___ is telling the truth as he understands it. But you must do more than that. You must also decide how accurate the identification was, whether the witness saw what he thought he saw.

You should consider

[the testimony that the witness did not know the defendant before the crime took place].

[whether the witness had a good opportunity to see the person].

[whether the witness seemed as though he was paying careful attention to what was going on].

[whether the description given by the witness was close to the way the defendant actually looked].

[how much time had passed between the crime and the first identification by the witness].

[whether, at the time of the first identification by the witness, the conditions were such that the witness was likely to make a mistake, that is, the witness was not asked to pick out the person he saw from a group of people].

[that (whether), at an earlier time, the witness failed to identify the defendant].

---

1. Alternative language for cases in which there is significant corroborative evidence.

[that (whether), at an earlier time, the witness changed his mind regarding the identification].

[whether the witness seemed certain at the time of the first identification and again when he testified here in court].

If you are not convinced beyond a reasonable doubt that it was the defendant who committed the crime, you must find him not guilty.

Commentary

Concern had been expressed about the identification of the defendant by only one witness when there is no independent corroboration. *See* United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972); United States v. Smith, 563 F.2d 1361, 1364–66 (9th Cir. 1977) (concurring opinion). In cases where such an identification will be determinative, a careful detailed instruction should be given to the jury to minimize any chance of misidentification.

36. Defendant's Confession

You heard testimony that the defendant made a statement to [*e.g.:* the FBI] concerning the crime that is charged in this case. When you consider this testimony, you should ask yourselves these questions:

First, did the defendant say the things the witness told you the defendant said? To answer this question you must decide if the witness is honest, has a good memory, and whether he accurately understood the defendant.

Second, if the defendant, _____, did make the statement, was it correct? Here you must consider all of the circumstances under which the statement was made, including the defendant's personal characteristics, and ask yourselves whether a statement made under these circumstances is one you can rely on.

After you have answered these questions, you may rely on the testimony about the statement as much, or as little, as you think proper.

Commentary

The committee concluded that it is not necessary to instruct the jury about the factors enumerated in 18 U.S.C. § 3501(b).

The term "confession" is not used in the instruction, for fear that the term itself carries such strong connotations that the rest of the instruction would carry somewhat less force.

37. Confession of One Defendant in Multidefendant Trial

(To follow Instruction 36 immediately)

However, you may consider the statement of _____ only in the case against him and not in the case against the others. What that means is that you may consider this statement against _____, and rely on it as much or as little as you think proper, but you may not consider or discuss it in any way when you are deciding whether the government has proved, beyond a reasonable doubt, that the other defendants, [give names], committed the crime of _____. Please remember that.

Commentary

The standard codefendant confession instruction is likely not as important as it once was due to the *Bruton* rule. Bruton v. United States, 391 U.S. 123 (1968). It is important to have such an instruction for situations in which exceptions to the *Bruton* rule apply, such as with redacted statements.

This instruction should not, of course, be used in connection with coconspirator declarations admitted under rule 801(d)(2)(E) of the Federal Rules of Evidence.

38. Falsus In Uno

Commentary

The committee recommends that no instruction be given.

39. Inference from Fact That Witness Not Called

You will remember that _____ said that [name of missing witness] was [*e.g.:* present when the crime is supposed to have been committed]. [Name of missing witness] was also described as being [*e.g.:* well known to] the government (defendant). This may have caused you to wonder why _____ was not called as a witness to answer questions in this trial. If you believe that the testimony of _____ would have been important, and if you also believe that the government (defendant) could have brought him to court to testify in this trial, then you may consider its (his) failure to do so when you decide whether the government has proved, beyond a reasonable doubt, that the defendant committed the crime. In other words, you may conclude that the government (defense) did not call _____ as a witness because his testimony would have hurt the government (defense) case.

Commentary

The committee recommends that this instruction not be routinely given and that the subject generally be left to argument by counsel. If the district judge uses this instruction, it should not be used against the defendant who offers no evidence in his defense. The jury is consistently instructed that the burden is on the government and the defendant is under no obligation to prove his innocence. The use of the instruction in this situation would severely undercut this view.

The committee deleted the standard language that the witness be "peculiarly" available to one of the parties. It was thought that such language would be confusing to the jury.

40. Defendant's Testimony: Effect of Stake in the Outcome

The defendant, _____, testified in his own behalf. You may be wondering if the personal stake that he has in the outcome of this trial should cause you to consider his testimony any differently from that of other witnesses. It is proper for you to consider his personal stake in the outcome of the trial when you decide whether or not you believe his testimony. But remember that the defendant is presumed innocent unless the government proves, beyond a reasonable doubt, that he is guilty. The fact that he has been charged with the crime of _____ is no reason by itself for you not to believe what he said.

Commentary

In some circuits it is error to give this instruction over the defendant's objection. This accords with the view that "the testimony of the accused should not be 'singled out' in the court's charge." United States v. Bear Killer, 534 F.2d 1253, 1260 (8th Cir. 1976). In other circuits, it has been held proper to give the instruction at the request of the prosecution. *E.g.*, United States v. Hill, 470 F.2d 361, 363–65 (D.C. Cir. 1972).

41. Defendant's Testimony: Impeachment by Prior Conviction

You have been told that the defendant, _____, was found guilty in 19__ of [*e.g.:* bank robbery]. This conviction has been brought to your attention only because you may wish to consider it when you decide, as with any witness, how much you will believe of his testimony in this trial. The fact that the defendant was found guilty of another crime does not mean that he committed this crime, and you must not use his guilt for the crime of _____ as proof of the crime charged in this case. You may find him guilty of this crime only if the government has proved beyond a reasonable doubt that he committed it.

Commentary

For impeachment by prior conviction of a witness other than the defendant, see Instruction 30.

42. Defendant's Testimony: Impeachment by Otherwise Inadmissible Statement

(Harris v. New York)

You will recall that the defendant, _____, testified during the trial on his own behalf. You will also recall that it was brought out that he was questioned at an earlier time and made certain statements. These earlier statements by _____ were brought to your attention only to help you decide if you believe what he has testified to here in court. If he said something different earlier, and the two stories were conflicting, then it will be up to you to decide if what he said here in court was true. You should not, however, consider what was said earlier as proof or evidence of the defendant's guilt. The government must use other evidence to prove, beyond a reasonable doubt, that the defendant committed the crime.

Commentary

This instruction deals with the *Harris* rule, which allows an unlawfully obtained statement to be used for impeachment purposes. Harris v. New York, 401 U.S. 222 (1971). The trial judge should stress that the government cannot use the prior statement to prove the defendant's guilt; it can only use it to impeach. Of course, the statement can only be used if the defendant takes the stand and testifies contrary to the prior statement.

43. Defendant's Incriminating Actions After the Crime

_____ testified that, after the crime was supposed to have been committed, the defendant, _____, [brief description of behavior]. If you believe that the defendant [same brief description], you should keep that in mind when deciding whether the government has proved beyond a reasonable doubt that he committed the crime. On the one hand, you may think that what he did at that time indicated that he knew he was guilty and was attempting to avoid punishment. On the other hand, it is sometimes true that an innocent person will [same brief description] in order to avoid being arrested and charged with a crime.

Commentary

This instruction should not be given in most cases. Generally, argument of counsel would sufficiently explain the issues.

44. Defendant's False Exculpatory Statement

You have heard testimony that the defendant [*e.g.:* after being arrested by the police, denied that he was acquainted with the victim]. You have also heard testimony that his statement to the police was false and misleading. If you believe that what _____ said to the police was false and that he knew it was false, you should keep that in mind when you decide whether the government has proved, beyond a reasonable doubt, that he committed the crime. Although someone suspected of a crime is not required at any time to answer questions, if he made a statement that he knew was false, that may indicate to you that he was guilty of the crime and was attempting to avoid punishment. It is sometimes true, however, that an innocent person may make a false and misleading statement in order to avoid being arrested and accused of a crime.

Commentary

As with the previous instruction, related to incriminating actions of the defendant after the crime, the committee believes this instruction should not be given in most cases, and that the matter should be left to argument of counsel.

45. Defendant's Failure to Respond to Accusatory Statements

You recall the testimony of ___(W)___, who said [*e.g.:* that while walking with the defendant after the robbery was supposed to have taken place he asked the defendant "Why did you rob the post office?"]. ___(W)___ testified that after he said this to ___(D)___, ___(D)___ said nothing in response. If you believe ___(W)___'s testimony you should keep that in mind when deciding whether the government has proved, beyond a reasonable doubt, that the defendant committed the crime. On the one hand, you may think that the defendant's silence indicated that he knew he was guilty and would not deny the charge. On the other hand, it is sometimes true that an innocent person will not respond to such statements.

Commentary

As with the previous two instructions, the committee believes that this instruction should not normally be given, and that the matter should be left to argument of counsel.

If the accusation (or question) came from a government officer when the defendant was in custody, the silence cannot be used at trial under Doyle v. Ohio, 426 U.S. 610 (1976).

46. Separate Consideration of Multiple Counts and/or Multiple Defendants

Alternative A: Multiple Counts, One Defendant

You will recall that I explained to you earlier that the defendant, _____, has been charged with _____ different crimes: [List them]. Each of these is a separate crime, and you should consider each one separately and return a separate verdict for each.

Alternative B: Multiple Defendants, One Count

As you know, _____ defendants are on trial here: [Name them]. All [number] have been accused of committing the crime of _____. You must give separate consideration to the evidence about each defendant. Each is entitled to your separate consideration. Do not think of them as a group. You must return a separate verdict for each defendant.

Alternative C: Multiple Defendants, Multiple Counts

As you know, _____ defendants are on trial here: [Name them]. Because some of the charges in this case have been made against some of the defendants and not against others, I want to tell you once again which individuals were charged with which crimes: [*E.g.:* Ralph Rich has been charged with conspiracy and possession, Patty Poor has been charged with conspiracy and distribution.] It is important that you give separate consideration to the evidence against and in behalf of each individual defendant. I also remind you that you must consider separately each crime charged against each individual defendant.

47. "On or About": Required Proof

The government has charged that on or about [*e.g.:* June 5, 1978, William Smith robbed the Main Street Bank]. The government does not have to prove that the crime was committed on that exact date, [repeat date], so long as the government proves beyond a reasonable doubt that the defendant committed the crime on a date near [repeat date].

Commentary

This instruction should not be given: (1) when there is a statute of limitations issue; (2) when the date is an essential element of the offense so that the defendant was misled by the date set out in the indictment; or (3) when the defendant's alibi defense is necessarily linked to the date in the indictment.

47A. Aiding and Abetting

I have just told you about the crime of [*e.g.:* bank robbery]. For you to find someone guilty of [bank robbery], it is not necessary that you find that he actually [robbed the bank] himself. It is enough if he intentionally helped someone else [rob the bank].

To find _____ guilty of [bank robbery], therefore, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ helped [name of principal] commit [bank robbery].

Second, that _____ intended to help [name of principal] commit the [robbery].

Commentary

Aiding and abetting is not a substantive crime, but is a method of making a codefendant equally culpable where another defendant actually carried out the substantive offense. When a codefendant did not participate in the actual commission of the crime, the indictment will usually refer to 18 U.S.C. § 2 as a companion to the substantive offense in the same count. Where the government's proof supports it, the aiding and abetting instruction should be given.

Aiding and abetting requires proof that the defendant provided aid and that he intentionally helped another actually commit a crime. United States v. Phillips, 664 F.2d 971, 1010 (5th Cir. Unit B Dec. 1981), *cert. denied,* 457 U.S. 1136 (1982). While a high level of activity need not be shown, there must be some intentional active assistance, as distinguished from a mere presence at the scene of the crime or simple knowledge that a crime is being committed. United States v. Campbell, 702 F.2d 262, 265 (D.C. Cir. 1983); United States v. Beck, 615 F.2d 441, 448–49 (7th Cir. 1980); Pinkney v. United States, 380 F.2d 882, 886 (5th Cir. 1967), *cert. denied,* 390 U.S. 908 (1968).

47B. Definition of Possession

You should find that the defendant had possession of the [*e.g.:* heroin] if he had control of it, even though it was physically [*e.g.:* in the closet]. If two or more people had control of it together, they had possession of it jointly. But it is not enough that the defendant may have known about the [heroin]; the defendant possessed the [heroin] only if he had control of it, either alone or together with someone else.

Commentary

This instruction is intended to be used only where there is evidence supporting a finding of constructive possession. The committee does not believe that any instruction is necessary where the evidence is of actual possession.

48. Lesser Included Offenses

We have just talked about what the government has to prove for you to convict _____ of [greater crime, *e.g.:* committing a bank robbery in which someone was exposed to risk of death by the use of a dangerous weapon]. Your first task is to decide whether the government has proved, beyond a reasonable doubt, that _____ committed that crime. If your verdict on that is guilty, you are finished. But if your verdict is not guilty, or if you are unable to reach a verdict, you should go on to consider whether he is guilty of [lesser crime, *e.g.:* simple bank robbery]. You should find the defendant guilty of [lesser crime] if the government has proved, beyond a reasonable doubt, that the defendant did everything we discussed before except that it didn't prove that he [describe missing element, *e.g.:* exposed someone to risk of death by use of a dangerous weapon].

To put it another way, the defendant is guilty of [lesser crime] if the following things are proved beyond a reasonable doubt: [List elements]. He is guilty of [greater crime] if it is proved beyond a reasonable doubt that he did all those things and, in addition [describe missing element]. If your verdict is that the defendant is guilty of [greater crime], you need go no further. But if your verdict on that crime is not guilty, or if you are unable to reach a verdict on it, you should consider whether the defendant has been proved guilty of [lesser crime].

Of course, if the government has not proved beyond a reasonable doubt that the defendant committed [lesser crime], your verdict must be not guilty of all of the charges.

49. Inconsistent Offenses

The government charged the defendant, _____, with two separate crimes, [*e.g.:* theft of the United States mails and receiving stolen property]. If you find that the government has proved, beyond a reasonable doubt, that the defendant committed the crime of [theft of the United States mails], you should not reach a verdict concerning [receiving stolen property]. If, however, you find the defendant not guilty of [theft of the United States mails], you should then consider whether the government has proved, beyond a reasonable doubt, that the defendant committed the crime of [receiving stolen property].

50. Evidence of Other Crimes, Wrongs, or Acts of Defendant to Show Intent, Knowledge, etc.

As you know, the defendant, _____, is on trial here for [*e.g.:* knowingly sending gambling materials in interstate commerce]. In order for you to find the defendant guilty of this crime, the government must prove each of the following elements of the crime beyond a reasonable doubt. [First, the defendant sent gambling materials. Second, the defendant sent those materials in interstate commerce. Third, the defendant knew that these were gambling materials he was sending.]

As I said, one of the things the government must prove beyond a reasonable doubt is that the defendant [knew that these were gambling materials]. You have heard testimony indicating that [on prior occasions the defendant sent gambling materials between two states]. That testimony is not evidence that [the defendant sent gambling materials in interstate commerce] on this particular occasion. The government must prove that from *other* evidence beyond a reasonable doubt. But if you conclude on the basis of other evidence that [the defendant did send gambling materials in interstate commerce as charged], you may consider the testimony about prior occasions in deciding whether [he knew that these were gambling materials].

I remind you that the defendant is on trial here only for [description of charge that distinguishes it from the earlier acts]. Do not convict him if the government has failed to prove this charge beyond a reasonable doubt.

Commentary

The committee concluded that the best way to limit the confusion occasioned by evidence admitted under rule 404(b) of the Federal Rules of Evidence is to outline with clarity the elements of the offense and describe the testimony. The jury would then be told that after it has found the other elements beyond a reasonable

doubt, the jury could look to the evidence to prove the remaining element.

To minimize this problem, some judges will not permit evidence of the other acts of the defendant to be introduced in the government's case in chief, but only in rebuttal if the defendant denies intent, knowledge, etc.

51. Evidence of Defendant's Good Character

You have heard the testimony of _____, who said that the defendant, _____, (has a good reputation for [*e.g.:* honesty] in the community where he lives and works) (in his opinion, is an [honest] person). Along with all the other evidence you have heard, you may take into consideration what you believe about the defendant's [honesty] when you decide whether the government has proved, beyond a reasonable doubt, that the defendant committed the crime. Evidence of the defendant's [honesty] alone may create a reasonable doubt whether the government proved that the defendant committed the crime.

Commentary

It is not clear that the final sentence is legally required but the committee felt such a reference was appropriate.

Under rule 405 of the Federal Rules of Evidence, a witness may give his opinion about a character trait of the defendant, and not only state the reputation.

52. Cross-Examination of Defendant's Character Witness: Jury to Limit Consideration of Information

After ___(W)___ testified about [*e.g.:* the defendant's reputation for honesty; his opinion of the defendant's honesty], _____, the government attorney, asked ___(W)___ some questions about whether ___(W)___ knew that ___(D)___ had been [*e.g.:* convicted of fraud on an earlier occasion]. These questions were asked of ___(W)___ only to help you decide if he really knew about the defendant's [*e.g.:* reputation for honesty; honesty].

The possibility that the defendant may have [*e.g.:* committed other crimes] is not evidence that he committed the crime of _____. I remind you that the government must prove that the defendant committed *this* crime, and must prove it beyond a reasonable doubt.

53. Alibi

In the indictment the government has charged that [*e.g.:* on June 5, 1978, William Smith robbed the Main Street Bank in downtown Omaha. Two witnesses, Joe Jones and Sally Smith, testified that on June 5, 1978, they spent the entire day with the defendant, _____, in Tulsa]. You may or may not believe the evidence that the defendant was [in Tulsa] when the crime was committed. But if you have a reasonable doubt whether the defendant [describe government charge, as above], you must find the defendant not guilty.

54. Entrapment

The defendant in this case, _____, is on trial for _____. You have heard evidence [*e.g.:* that government agents persuaded the defendant to sell the drugs and he had never previously sold drugs]. To consider that evidence, you need to understand a legal term that we call "entrapment." Even though _____ may have [sold the drugs], as charged by the government, if it was the result of entrapment then you must find him not guilty. Government agents entrapped _____ if three things occurred:

First, the idea for committing the crime came from the government agents and not from _____, the person accused of the crime.

Second, the government agents then persuaded or talked _____ into committing the crime. Simply giving _____ the opportunity to commit the crime is not the same as persuading him to commit the crime.

And third, the defendant was not ready and willing to commit the crime before the government agents spoke with him. Consider all of the facts when you decide whether the defendant would have been ready and willing to commit the crime without the actions of the government agents.

On the issue of entrapment, as on other issues, the government must convince you beyond a reasonable doubt that the defendant was not entrapped by government agents.

Commentary

The term "predisposition" has been avoided here, as it appears to have little meaning for the layperson.

55. Insanity

If you conclude that the government has proved beyond a reasonable doubt that _____ committed the crime as charged, you must then consider whether he should be found "not guilty only by reason of insanity."

_____ was insane only if, as a result of a severe mental disease or defect, he could not understand that what he did was wrong.

On this issue, it is the defendant who must prove his insanity. You should render a verdict of "not guilty only by reason of insanity" if you are persuaded by evidence that you find clear and convincing that _____ was insane when the crime was committed.

Remember, then, that there are three possible verdicts in this case: guilty, not guilty, and not guilty only by reason of insanity.

Commentary

Pub. L. No. 98-473, § 402, 98 Stat. 1837, 2057 (1984), added § 20 to title 18 of the United States Code, redefining the insanity defense and reallocating the burden of proof. This provision was redesignated as § 17 by Pub. L. No. 99-646, § 34, 100 Stat. 3592, 3599 (1986).

Although § 17 refers to the defendant's inability to appreciate the nature and quality of his acts as well as his inability to appreciate their wrongfulness, the committee believes that it will rarely be appropriate to instruct on inability to appreciate the nature and quality. For most offenses, such inability would be inconsistent with the mens rea requirement.

56. Duress

The defendant, _____, offered evidence to show that at the time the crime was committed, he was [*e.g.:* ordered by a man with a gun to rob the bank].

Under the law, _____ is not guilty of a crime if he participated in the [describe offense] only because he believed, and had good reason to believe, that he would be seriously harmed if he did not participate and had no other way of escaping serious harm. And on this issue, just as on all others, the burden is on the government to prove the defendant's guilt beyond a reasonable doubt. To find _____ guilty, therefore, you must conclude beyond a reasonable doubt that when he participated in the [describe offense], he did not have a reasonable belief that such participation was the only way he could save himself from serious harm.

57. Availability of Exhibits During Deliberations

Alternative A

During the trial several items were received into evidence as exhibits. These exhibits will be sent into the jury room with you when you begin to deliberate. Examine the exhibits if you think it would help you in your deliberations.

Alternative B

During the trial several items were received into evidence as exhibits. You will not be taking the exhibits into the jury room with you at the start, because I am not sure you will need them. If, after you have begun your discussions of the case, you think it would be helpful to have any of the exhibits with you in the jury room, have the foreperson send me a note asking for them.

Commentary

If the judge wishes to instruct the jurors that they may ask to have portions of the transcript read back to them, this would be an appropriate place to so inform them.

58. Selection of Foreperson; Communication with the Judge; Verdict Forms

When you go to the jury room to begin considering the evidence in this case I suggest that you first select one of the members of the jury to act as your foreperson. This person will help to guide your discussions in the jury room. Once you are there, if you need to communicate with me, the foreperson will send a written message to me. However, don't tell me how you stand as to your verdict—for instance, if you are split 6-6 or 8-4, don't tell me that in your note.

As I have mentioned several times, the decision you reach must be unanimous; you must all agree.

I want to read to you now what is called the verdict form. This is simply the written notice of the decision that you reach in this case. [Read the verdict form.]

When you have reached a decision, have the foreperson sign (each of you should sign) the verdict form, put the date on it, and return it to me. (*Add for multicount or multidefendant trials:* If you are able to reach a unanimous decision on only one or on only some of the (charges) (defendants), fill in those verdict forms only and return them to me.)

59. Return to Deliberations After Polling

I have (The clerk has) just called the names of the members of the jury, asking each of you whether the decision read to me was the decision reached by each and every one of you. It is apparent that the decision in this case may not be unanimous, that one or more of you may not have agreed with that decision. Please return to the jury room, talk with one another, and try to deliberate there. Try to reach an agreement if you can. Do not hesitate to re-examine your own opinions and change your mind, but do not give up your honest beliefs just because others disagree with you or just to get the case over with.

60. 18 U.S.C. § 111: Assaulting a Federal Officer

The defendant, _____, is accused of [*e.g.:* threatening FBI Special Agent Jones with a knife]. It is against federal law to assault [an FBI agent] [1](by threatening him with a deadly or dangerous weapon). For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that [Jones] was [an FBI agent]. [2]It does not matter whether _____ knew [Jones] was [an FBI agent].

Second, that _____ intentionally [threatened Jones with a knife].

Third, that when _____ did this, [Jones] was doing his job as [an FBI agent]. (*Alternative:* when _____ did this, it was because of something that [Jones] had done as [an FBI agent].)

[1]Fourth, that this [knife] could cause death or great physical harm.

Commentary

Section 111 uses the language "Whoever forcibly assaults . . . any person designated [as a federal officer] in section 1114." There is no language explicitly requiring that the defendant have known that the person assaulted was a federal officer. United States v. Feola, 420 U.S. 671 (1975), expressly held that the "federal officer" requirement is only jurisdictional and that scienter here is not a necessary element under § 111. "All the statute requires is an intent to assault, not an intent to assault a federal officer." *Id.* at 684.

The identity of the officer may be at issue in some self-defense cases. For example, in United States v. Young, 464 F.2d 160, 163–64 (5th Cir. 1972), the conviction was reversed for failure to instruct the jury that it could not convict if it found that the defendant

1. Include where the defendant is charged under § 111's deadly or dangerous weapon subsection. If an instruction on a lesser included offense is needed, see Instruction 48. If a gun is used, whether loaded or unloaded, it is apparently a deadly or dangerous weapon as a matter of law. *See* McLaughlin v. United States, 106 S. Ct. 1677 (1986).

2. This sentence should be omitted when self-defense and no knowledge are raised as a defense.

acted out of a reasonable belief that FBI agents were strangers who intended to harm the defendant. *See also* United States v. Danehy, 680 F.2d 1311, 1314-15 (11th Cir. 1982) (reversing for the same reason). These cases, of course, simply state the basic rule that the use of force is not a crime when it is based upon a reasonable belief of a legitimate self-defense claim.

61. 18 U.S.C. § 242: Deprivation of Rights Under Color of Law

The defendant, _____, is accused of [*e.g.:* hitting Frank Jones, an inmate at the Stateville Correctional facility]. It is against federal law for a [*e.g.:* state correctional officer] to violate someone else's rights while carrying out his official duties. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ [hit Frank Jones when Jones was in the Stateville Correctional facility].

Second, that when _____ did this, he intentionally deprived [Jones] of his right [*e.g.:* to be free from cruel and unusual punishment].

Third, that _____ was acting as a [state correctional officer] and abused or exceeded his authority when the incident happened.

[1]Fourth, that [Jones] died as a result of the [assault].

Commentary

The principally litigated issue in § 242 involves how the jury should be instructed on the scienter element. Section 242 states in part, "Whoever . . . willfully subjects any inhabitant . . . to the deprivation of any rights." The leading case, Screws v. United States, 325 U.S. 91, 101-07 (1945), held that the term "willfully" in the statute meant a purposeful deprivation of a federal constitutional right, and that failure to instruct accordingly was reversible error. Later cases have made clear that "willfully" must refer to the deprivation of constitutional rights and not merely to wrongful acts or general bad purposes. *See, e.g.,* United States v. Harrison, 671 F.2d 1159, 1161-62 (8th Cir.), *cert. denied,* 459 U.S. 847 (1982); United States v. Stokes, 506 F.2d 771, 776-77 (5th Cir. 1975); Pullen v. United States, 164 F.2d 756, 759-60 (5th Cir. 1947); United States v. Shafer, 384 F. Supp. 496, 499-503 (N.D. Ohio 1974).

Under § 242's express language, a "deprivation of rights" is a broad concept, encompassing any federal constitutional right, in-

1. Include where the defendant is charged with causing the victim's death.

cluding statutory implementations of such rights and decisions interpreting them. Screws v. United States, 325 U.S. at 104; United States v. Stokes, 506 F.2d at 774–75.

These instructions do not use the statutory term "under color of law." Instead, the defendant's official position is specifically referred to. Where a private citizen is charged as a participant with a public official, the jury must be specifically instructed. *See* United States v. Price, 383 U.S. 787, 794–96 (1966).

62. 18 U.S.C. § 371: Conspiracy

The defendants, _____, _____, and _____, are accused of conspiring to [*e.g.:* sell forged government bonds]. It is against federal law to agree with someone to commit the crime of [selling forged government bonds], even if that crime is never actually committed.

For you to find any of the defendants guilty of the crime of conspiracy, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that [*e.g.:* during the summer of 1985], an agreement existed between at least two people to commit a federal crime. This does not have to be a formal agreement or plan in which everyone who was involved sat down together and worked out all the details. It is enough that the government prove beyond a reasonable doubt that there was a common understanding among those who were involved to commit the crime of [selling forged government bonds]. So the first thing that must be shown is the existence of an agreement.

Second, the government must prove that the defendant intentionally joined in this agreement. Again, it is not necessary to find that he agreed specifically to all the details of the crime. You must consider each defendant separately. (*Add if appropriate:* Even if any defendant was not part of the agreement at the very start, he can be found guilty of conspiracy if the government proves that he intentionally joined the agreement later.) So the second thing that must be shown is that the defendant was a part of the conspiracy.

[1]Third, the government must show that one of the persons involved in the conspiracy did something for the purpose of carrying out the conspiracy. This something is referred to as an overt act. The government must show that one of the persons involved in the conspiracy did one of the overt acts in order to carry out the con-

1. This material should be omitted if no overt act is required (*e.g.*, 18 U.S.C. § 286, 21 U.S.C. § 846).

spiracy. You will receive a copy of the indictment, which describes the charged overt acts.[2]

In summary, for any defendant to be convicted of the crime of conspiracy, the government must prove three (two) things beyond a reasonable doubt: First, that [during the summer of 1985], there was an agreement to commit the crime of [selling forged government bonds]; second, that the defendant intentionally joined in that agreement; [1]and third, that one of the persons involved in the conspiracy did one of the overt acts charged.

Commentary

Three main goals have influenced the drafting of this instruction (as well as others): to make the charge as straightforward and comprehensible as possible, to tailor the charge to the facts of the case, and to avoid giving the jurors information they do not need to know. As a consequence, this basic conspiracy instruction is stripped of references to such usual points as mere presence, lawful versus unlawful overt acts, and crimes committed in furtherance of the conspiracy. In appropriate cases, further instructions may be necessary.

This beginning conspiracy instruction is designed only to inform the jurors that the government must demonstrate that the defendants purposefully became members of an unlawful conspiracy and—where needed—some conspirator committed an act in furtherance of the pact. *See* Blumenthal v. United States, 332 U.S. 539, 556–57 (1947) (all details need not be known); United States v. Albert, 675 F.2d 712, 715–16 (5th Cir. 1982) (common plan requirement); United States v. Velez, 652 F.2d 258, 261–62 (2d Cir. 1981) (willful membership); United States v. Solis, 612 F.2d 930, 934 (5th Cir. 1980) (criminal intent element).

Formerly, conspiracy instructions advised jurors that they could consider only the acts and statements of each individual conspirator. This statement made sense when the jurisprudence permitted a jury to consider the admissibility of coconspirator acts and declarations. *See* United States v. Apollo, 476 F.2d 156, 163 (5th Cir. 1973), *overruled by* United States v. James, 590 F.2d 575, 577–78 (5th Cir.) (en banc), *cert. denied,* 442 U.S. 917 (1979). Today, however, most courts find that the trial judge determines whether suf-

2. The trial judge may wish to read the overt acts if the indictment is not given to the jury.

ficient independent evidence has been offered to show that a statement was made by a conspirator during the course and in furtherance of the conspiracy. *See* Fed. R. Evid. 104, 801(d)(2)(E). At that point the jurors can consider all such statements and circumstantial evidence against the defendant. United States v. Santiago, 582 F.2d 1128, 1130-36 (7th Cir. 1978).

63. Withdrawal from Conspiracy

You have heard evidence that _____ withdrew from the conspiracy charged in the indictment before any overt act was committed.[1]

To withdraw from the conspiracy, _____ must have done something to interfere with the successful completion of [*e.g.:* the bank robbery] before any overt act was committed. So you may find _____ guilty only if the government has proved beyond a reasonable doubt that he was a member of the conspiracy at the time an overt act was committed.

Commentary

Withdrawal is a defense to a conspiracy charge under certain circumstances. If a conspiracy has been formed, a defendant can withdraw only if he does so before an overt act has been committed; once any such overt act is committed, the crime of conspiracy is complete and the defendant cannot withdraw. United States v. Nicoll, 664 F.2d 1308, 1315–16 (5th Cir.), *cert. denied,* 457 U.S. 1118 (1982).

While case law on withdrawal is clear where an overt act is required (such as 18 U.S.C. § 371), there is little case law dealing with conspiracies where no overt act is required (such as 21 U.S.C. § 846). Since in the latter situation the crime is complete when the defendant joins a conspiracy, the concept of withdrawal would appear to be inapplicable.

The requirement that the defendant do "something to interfere" with the completion of the conspiracy is used in this instruction because more than mere failure to continue participating in the conspiracy is necessary. "Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators" may evidence withdrawal. United States v. United States Gypsum Co., 438 U.S. 422, 464–65 (1978). So may "the making of a clean breast to the authorities." United States v. Borelli, 336 F.2d 376, 388 (2d Cir. 1964), *cert. denied,* 379 U.S. 960 (1965).

The statute of limitations has traditionally been viewed as an affirmative defense to any criminal charge. The statute of limita-

1. In the statute of limitations situation, the particular overt act at issue must be explained to the jury.

tions begins to run as to a withdrawing conspirator on the date of an effective withdrawal. If the defendant withdraws from a conspiracy that is completed, because an overt act has already been committed or none is required, he is not bound by any later acts of his coconspirators for statute of limitations purposes. However, the defendant is still responsible for the earlier agreement and for any overt acts he or his coconspirators committed before the withdrawal date for purposes of the statute of limitations.

Traditionally, the burden of proving withdrawal has been placed on the defendant, since this was viewed as an affirmative defense. In United States v. Read, 658 F.2d 1225, 1232–36 (7th Cir. 1981), however, the Seventh Circuit held that where a defendant raises withdrawal as an issue, the prosecution has the burden of disproving it. This is because all elements of a conspiracy, including participation within the limitations period, must be proved beyond a reasonable doubt, and because withdrawal is not a true affirmative defense. *See also* United States v. Greichunos, 572 F. Supp. 220, 226–27 (N.D. Ill. 1983).

64. Multiple Conspiracies (Various Principal Offenses)

The defendant, _____, is accused of agreeing with _____ and _____ to commit the crime of [describe crime]. For you to find _____ guilty of the crime of conspiracy, you must be convinced beyond a reasonable doubt that he intentionally joined in that agreement to commit [describe crime]. It is not enough for you to believe that _____ agreed with other persons to commit some other crime. If you are not convinced beyond a reasonable doubt that _____ became a part of the agreement to commit the crime of [describe crime], you must find _____ not guilty.

Commentary

This instruction deals with one type of multiple conspiracy problem, agreements to commit various crimes.

65. 18 U.S.C. § 471: Counterfeiting

The defendant, _____, is accused of making counterfeit money. It is against federal law to make counterfeit money. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ counterfeited [*e.g.:* Federal Reserve notes].

Second, that _____ did so with intent to defraud, that is, intending that someone would be cheated. (*Add if appropriate:* It does not matter whether anyone was actually defrauded.)

Commentary

Under § 471 a defendant must falsely make, forge, counterfeit, or alter any "obligation or other security of the United States," which is comprehensively defined by 18 U.S.C. § 8. Whether the obligation or security involved falls within § 8 is a question of law. United States v. Anzalone, 626 F.2d 239, 242 (2d Cir. 1980). Almost all cases involve money.

Section 471 governs making counterfeit securities and obligations. Fraudulent endorsements are covered by 18 U.S.C. § 495, the forgery section. Prussian v. United States, 282 U.S. 675, 677-80 (1931).

66. 18 U.S.C. § 472: Passing Counterfeit Obligations or Securities

The defendant, _____, is accused of passing counterfeit money. It is against federal law to use counterfeit money to attempt to buy anything. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ offered [*e.g.:* Ace Television] counterfeit money to buy [a television set].

Second, that _____ did so with intent to defraud, that is, intending that [Ace Television] would be cheated. (*Add if appropriate:* It does not matter whether anyone was actually defrauded.)

Commentary

Case law holds that the defendant must have knowledge that the obligation he is passing is counterfeit. *E.g.,* United States v. De Filippis, 637 F.2d 1370, 1373 (9th Cir. 1981); United States v. Slone, 601 F.2d 800, 803 (5th Cir. 1979); *see also* United States v. Combs, 672 F.2d 574, 575 n.1 (6th Cir.) (similar rule in possession case), *cert. denied,* 458 U.S. 1111 (1982). Intent to defraud or cheat subsumes the element of knowledge.

67. 18 U.S.C. § 495: Forgery

The defendant, _____, is accused of [*e.g.:* forging the signature of Betty Jones on a United States government check]. It is against federal law to forge someone else's signature on [a United States government check]. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ [wrote the signature of Betty Jones on the check [1]without her permission].

Second, that he did so for the purpose of receiving money when he knew he had no right to have it. (*Add if appropriate:* It does not matter whether _____ actually received any money.)

Commentary

While § 495 does not explicitly require a finding of intent for a forgery conviction (compare with the portion of the section discussing uttering), the courts consistently mandate the intent element. *See, e.g.,* United States v. Jones, 648 F.2d 215, 217 (5th Cir. Unit B June 1981) (per curiam); United States v. Hester, 598 F.2d 247, 248–49 (D.C. Cir. 1979).

1. Include the reference to absence of permission only if permission is an issue.

68. 18 U.S.C. § 545: Smuggling

The defendant, _____, is accused of smuggling [describe merchandise] into the United States. It is against federal law to smuggle [describe merchandise] into the United States. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ brought [describe merchandise] into the United States.

Second, that _____ knew the [describe merchandise] should have been reported to customs authorities as required by law.

Third, that _____, intending to avoid the United States customs laws, did not report the [describe merchandise] to the customs authorities.

Commentary

The first and second paragraphs of § 545 involve essentially the same elements and have been incorporated in one instruction.

In line with current authority, there is no instruction on § 545's statutory presumption of knowledge and intent to defraud from the mere fact of unexplained possession of undeclared goods. Presumption instructions are generally disapproved. *See generally* Devitt & Blackmar § 15.03, notes (1977 & Supp. 1986). The statutory presumption in § 545 has been held unconstitutional. United States v. Kenaan, 496 F.2d 181, 183–84 (1st Cir. 1974).

The phrase "intent to defraud the United States" in the first paragraph of § 545 means intent to avoid and defeat the United States customs laws. United States v. Boggus, 411 F.2d 110, 113 (9th Cir.), *cert. denied,* 396 U.S. 919 (1969).

69. 18 U.S.C. § 641: Theft of Government Propert

The defendant, _____, is accused of stealing [*e.g.:* U.S. Army typewriters]. It is against federal law to steal government property. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ took the [typewriters] without authority to do so.

Second, that the [typewriters] were the property of the United States Government at the time that he took them. (*Add if lack of knowledge is asserted:* It does not matter whether he knew that the [typewriters] belonged to the United States Government, only that he knew they did not belong to him.)

Third, that _____ took the [typewriters] for the purpose of keeping them from their owner when he knew he had no right to do so.

[1]Fourth, that the value of the property was more than $100.

Commentary

Courts that have considered the issue recently have found that the defendant need not know that the property belongs to the government, so long as he knows it is not his. United States v. Baker, 693 F.2d 183, 185–86 (D.C. Cir. 1982); United States v. Speir, 564 F.2d 934, 937–38 (10th Cir. 1977) (en banc), *cert. denied,* 435 U.S. 927 (1978); United States v. Smith, 489 F.2d 1330, 1332–34 (7th Cir. 1973), *cert. denied,* 416 U.S. 994 (1974). Where the indictment refers only to common law embezzlement, the instruction must specify the elements.

This instruction encompasses the common law larceny element of intent to permanently deprive the owner of his property. *See* United States v. Kemble, 197 F.2d 316, 320–22 (3d Cir. 1952) (theft from interstate shipment). This may not be necessary in all circuits. *See* United States v. Waronek, 582 F.2d 1158 (7th Cir. 1978).

---

1. This element should be omitted when a misdemeanor is charged.

70. 18 U.S.C. § 656: Theft or Embezzlement by Bank Officer or Employee

The defendant, _____, is accused of [*e.g.:* embezzling money from the First Bank of Chicago when he was an employee of the bank]. It is against federal law for an employee to embezzle money from a [*e.g.:* federally insured bank]. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ took from [the First Bank of Chicago] money that had come into his possession as an (employee) (officer) of the bank.

Second, that _____ took the money for the purpose of keeping it from the bank when he knew he had no right to do so.

Third, that at that time, [*e.g.:* the deposits of the First Bank of Chicago were insured by the Federal Deposit Insurance Corporation].

[1]Fourth, that the amount of money taken was more than $100.

Commentary

This instruction deals only with embezzlement and does not apply to theft or misapplication.

The principal issue under § 656 involves the required and permissible scope of the scienter element. Section 656 states none. Case law, and existing instructions, have long held that the present section, although omitting the "intent to injure or defraud" language of its predecessor, requires this as an essential element. United States v. Scheper, 520 F.2d 1355, 1357–58 (4th Cir. 1975); United States v. Tidwell, 559 F.2d 262, 265 & n.2 (5th Cir. 1977), *cert. denied,* 435 U.S. 942 (1978); United States v. Docherty, 468 F.2d 989, 994–95 (2d Cir. 1972); Ramirez v. United States, 318 F.2d 155, 157–58 (9th Cir. 1963). The second element of this instruction incorporates the intent to defraud requirement.

This instruction encompasses the common law larceny element of intent to permanently deprive the owner of his property. *See* United States v. Kemble, 197 F.2d 316, 320–22 (3d Cir. 1952) (theft

1. This element should be omitted when a misdemeanor is charged.

from interstate shipment). This may not be necessary in all circuits. *See* United States v. Waronek, 582 F.2d 1158 (7th Cir. 1978).

71. 18 U.S.C. § 659: Theft from Interstate Shipment

The defendant, _____, is accused of [*e.g.:* stealing 60 cases of whiskey from a train traveling between Pittsburgh, Pennsylvania, and Cleveland, Ohio]. It is against federal law to steal goods that are being shipped from one state to another. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ took the [cases of whiskey] from a [railroad car].

Second, that _____ took the [whiskey] for the purpose of keeping it from its owner when he knew he had no right to do so.

Third, that when _____ took the [whiskey], it was being shipped from [Pennsylvania] to [Ohio].[1] (*Add if appropriate:* It does not matter whether the defendant knew the property was being shipped from one state to another state.)

[2]Fourth, that the value of the property was more than $100.

Commentary

This instruction encompasses the common law larceny element of intent to permanently deprive the owner of his property. *See* United States v. Kemble, 197 F.2d 316, 320-22 (3d Cir. 1952). This may not be necessary in all circuits. *See* United States v. Waronek, 582 F.2d 1158 (7th Cir. 1978).

---

1. Further definition of "being shipped" may be needed in cases in which property is taken either very early or very late in the shipping process. *See* United States v. Bizanowicz, 745 F.2d 120, 122-23 (1st Cir. 1984).

2. This element should be omitted when a misdemeanor is charged.

72. 18 U.S.C. § 659: Possession of Goods Stolen from Interstate Shipment

The defendant, _____, is accused of [*e.g.:* possessing 60 cases of whiskey that he knew were stolen and that had been taken from a train traveling between Columbia, Missouri, and Topeka, Kansas]. It is against federal law to possess goods that were stolen when they were being shipped from one state to another. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of the following things beyond a reasonable doubt:

First, that _____ had the [cases of whiskey] in his possession.

Second, that the [whiskey] was stolen from [a train] while it was being shipped from [Missouri] to [Kansas].[1]

Third, that _____ knew that the [whiskey] was stolen. (*Add if appropriate:* It does not matter whether he knew it was being shipped from one state to another state when it was stolen.)

[2]Fourth, that the value of the property was more than $100.

Commentary

Where the charge is possession of stolen goods, § 659 requires knowledge that goods possessed were stolen. Not required is knowledge that the stolen goods were part of an interstate shipment. United States v. Polesti, 489 F.2d 822, 824 (7th Cir. 1973), *cert. denied,* 420 U.S. 990 (1975).

If constructive possession is an issue, see Instruction 47B.

---

1. Further definition of "being shipped" may be needed in cases in which property is taken either very early or very late in the shipping process. *See* United States v. Bizanowicz, 745 F.2d 120, 122-23 (1st Cir. 1984).

2. This element should be omitted when a misdemeanor is charged.

73. 18 U.S.C. § 751(a): Escape

The defendant, _____, is accused of [*e.g.:* attempting to escape from the Metropolitan Correctional Center in New York]. It is against federal law to (attempt to) escape from federal custody. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that on [date], _____ was in federal custody at [the Metropolitan Correctional Center in New York].

Second, that he was in custody because [*e.g.:* he had been arrested for the crime of bank robbery].

Third, that _____ left (attempted to leave) [the Metropolitan Correctional Center] without permission.

Fourth, that _____ knew he did not have permission to leave.

Commentary

In United States v. Bailey, 444 U.S. 394 (1980), the Court held that "the prosecution fulfills its burden under § 751(a) if it demonstrates that an escapee knew his actions would result in his leaving physical confinement without permission." 444 U.S. at 408.

Several circuits have held that § 751(a) requires proof not only of the fact of custody, but also of the nature of the custody, since the statute provides for dual penalties. *See* United States v. Edrington, 726 F.2d 1029, 1031 (5th Cir. 1984); United States v. Richardson, 687 F.2d 952, 954–55 (7th Cir. 1982). The present instruction includes this necessary element.

The principal issue in cases actually tried under § 751(a) is the defense of necessity. On this issue, see United States v. Bailey, 444 U.S. 394, 409–11 (1980); United States v. McCue, 643 F.2d 394, 395–96 (6th Cir.), *cert. denied,* 451 U.S. 992 (1981).

74. 18 U.S.C. § 752(a): Instigating or Assisting Escape

The defendant, _____, is accused of [*e.g.:* helping John Doe escape from the Metropolitan Correctional Center in New York]. It is against federal law to help someone else (attempt to) escape from federal custody. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that on [date], [John Doe] was in federal custody at [the Metropolitan Correctional Center in New York].

Second, that he was in custody because [*e.g.:* he had been arrested for the crime of bank robbery].

Third, that he left (attempted to leave) [the Metropolitan Correctional Center] without permission.

Fourth, that he knew he did not have permission to leave.

Fifth, that _____ knew that [Doe] was (escaping) (attempting to escape) and intentionally helped him do so.

Commentary

See Commentary to Instruction 73.

75. 18 U.S.C. § 871: Threats Against the President

The defendant, _____, is accused of [*e.g.:* making a threat to kill the President of the United States]. It is against federal law to threaten [to kill the President]. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ (said) (wrote) the words that threatened to [kill] the [President].

Second, that _____ (said) (wrote) the words intending them to be taken as a serious threat and not merely as a joke or exaggeration. It is not necessary that he intended to carry out the threat.

Commentary

This instruction may not be adequate in all circuits. See the discussion below.

Issues involving § 871 center on two points: what constitutes a "threat," and the meaning of "knowingly and willfully" in the context of this statutory provision.

While § 871 contains only the term "threat," both the Devitt & Blackmar and Fifth Circuit instructions contain the term "true threat," reflecting the Supreme Court's holding in Watts v. United States, 394 U.S. 705 (1969) (per curiam). In discussing constitutionally protected speech, the Court there held that a threat must be a "true threat" as distinguished from other statements such as "political hyperbole," which is often "vituperative, abusive, and inexact." *Id.* at 708. Whether the threat is a serious one, as opposed to a hyperbole or jest, may depend on the context and the circumstances under which it was made.

The more difficult, and hence more commonly litigated, issue involves the meaning of "knowingly and willfully." The Supreme Court in *Watts* observed, without deciding the issue, that "[t]he judges in the Court of Appeals differed over whether or not the 'willfulness' requirement of the statute implied that a defendant must have intended to carry out his 'threat'." The Court then expressed its "grave doubts" that willfulness required merely an "apparent determination" to carry out the threat, but did not discuss the issue further. *Id.* at 707–08. In Rogers v. United States, 422 U.S. 35 (1975), the Court granted certiorari to resolve apparent conflicts between the circuits as to the elements of a § 871 offense, but ultimately decided the case on procedural grounds.

In United States v. Patillo, 438 F.2d 13 (4th Cir. 1971) (en banc), the Fourth Circuit held that a threat is covered by the statute either if it is made with an intent to carry it out or if it is made with an intent "to disrupt presidential activity." *Id.* at 15–16. The court stated that the latter intent could be found from the nature of the publication of the threat, the question being whether the defendant could reasonably anticipate that the threat would be transmitted to law enforcement officers and others charged with presidential security. *Id.* at 16. Under this interpretation, the statute applies to any threat that is intended to be carried out, but a threat not intended to be carried out is covered only if made in circumstances in which it is likely to be communicated to those charged with protecting the President.

Other circuits that have considered the matter have rejected the *Patillo* view, holding that any "true threat"—a threat not intended as a joke or exaggeration—is punishable. United States v. Merrill, 746 F.2d 458, 462–63 (9th Cir. 1984), *cert. denied,* 469 U.S. 1165 (1985); United States v. Rogers, 488 F.2d 512, 514 (5th Cir. 1974) (threat by intoxicated defendant), *reversed on other grounds,* 422 U.S. 35 (1975); United States v. Hart, 457 F.2d 1087, 1090 (10th Cir.) (threat made to Secret Service agent, but *Patillo* specifically rejected), *cert. denied,* 409 U.S. 861 (1972). *But see* United States v. Lincoln, 462 F.2d 1368, 1368–69 (6th Cir.) (per curiam) (distinguishing *Patillo* on the facts), *cert. denied,* 409 U.S. 952 (1972).

The ultimate issue, therefore, is what view of the statute correctly espouses legislative intent, admittedly sketchy, without running afoul of First Amendment considerations. The present instruction takes the view that the First Amendment concerns are abated by the requirement that the threat be intended "to be taken as a serious threat and not merely as a joke or exaggeration."

76. 18 U.S.C. § 876: Mailing Threatening Communications

The defendant, _____, is accused of [*e.g.:* mailing a threatening letter to Judge John Doe in New York City]. It is against federal law to mail a threatening letter. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ mailed a letter (arranged to have a letter mailed), addressed to [Judge John Doe], containing a threat to (kidnap) (injure) [name person].

(*For offense charged under third paragraph of § 876:* Second, that _____ intended the threat to be taken seriously and not merely as a joke or exaggeration. It is not necessary that he intended to carry out the threat.)

(*For offense charged under second paragraph of § 876:* Second, that _____ mailed the letter (arranged to have the letter mailed) with the intention of extorting money (or other things of value) from another person. Extorting means getting money (or something else of value) by threatening to harm someone unless it is paid.)

Commentary

Section 876 involves four separate situations: ransom letters (paragraph 1), extortion letters (paragraph 2), threatening letters (paragraph 3), and extortion letters involving threats to property or reputation (paragraph 4). Of these, only threatening letters and extortion are commonly alleged.

Most instructions generally characterize the threatening letters paragraph of § 876 as having two elements: (1) that the defendant knowingly caused the letter to be forwarded by the United States mail, United States v. Lincoln, 589 F.2d 379, 381 (8th Cir. 1979) (per curiam); United States v. De Shazo, 565 F.2d 893, 894–95 (5th Cir.) (per curiam), *cert. denied,* 435 U.S. 953 (1978); United States v. Sirhan, 504 F.2d 818, 819 (9th Cir. 1974) (per curiam); and (2) that the letter contained a threat. It is not necessary that the defendant have the ability to carry out the threat. Martin v. United States, 691 F.2d 1235, 1240 (8th Cir. 1982), *cert. denied,* 459 U.S. 1211 (1983); *id.* at 1241–42 (concurring opinion).

It is unclear whether, under the threatening letters paragraph, the Fourth Circuit would follow United States v. Patillo, 438 F.2d 13 (4th Cir. 1971) (en banc), interpreting 18 U.S.C. § 871. See Commentary to Instruction 75.

Where an extortionate letter is charged, § 876 expressly requires an intent to extort money or other thing of value. The definition of extortion in the present instruction should adequately cover the common situations.

77. 18 U.S.C. § 911: Misrepresentation of Citizenship

The defendant, _____, is accused of [*e.g.:* falsely claiming to be a United States citizen on a Maine liquor license application]. It is against federal law to falsely claim to be a United States citizen. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ [filed a Maine liquor license application] on which he stated he was a citizen of the United States.

Second, that _____ was not a citizen of the United States at that time.

Third, that _____ knew he was not a citizen and deliberately made this false statement.

78. 18 U.S.C. § 922(a)(1): Dealing in Firearms Without a License

The defendant, _____, is accused of [*e.g.:* engaging in the business of dealing in firearms without having a dealer's license]. It is against federal law to be in the business of [dealing in firearms] without a proper federal license. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ was in the business of [dealing in guns] on [date]. By "business" I mean he was engaged in the activity of buying and selling [guns] from time to time and that his main reason for doing so was to make money.

Second, that _____ was not licensed under federal law to [deal in guns] at that time.

Commentary

18 U.S.C. § 921(a)(21)(C), as added by Pub. L. No. 99-308, 100 Stat. 449, 450 (1986), effective November 15, 1986, defines "engaged in business" as "a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms," and contains an explicit exclusion for hobbyists. Section 921(a)(22), added by Pub L. No. 99-308 and amended by Pub. L. No. 99-360, 100 Stat. 776 (1986), states that the phrase "with the principal objective of livelihood and profit" means that the "intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain . . . ," except that proof of a profit motive is not required if a person "engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism." The first element of the present instruction seeks to capture these definitions in language that will be adequate for most cases.

The 1986 amendments overrule cases holding that a profit motive is not required for a person to be in the "business of dealing in" firearms. *E.g.*, United States v. Swinton, 521 F.2d 1255, 1258–59 (10th Cir. 1975), *cert. denied*, 424 U.S. 918 (1976).

Case law has made clear that specific intent to violate the law need not be alleged or proved under § 922(a)(1). United States v.

Miller, 644 F.2d 1241, 1245 (8th Cir.), *cert. denied,* 454 U.S. 850 (1981); United States v. Huffman, 518 F.2d 80, 81 (4th Cir.) (per curiam); *cert. denied,* 423 U.S. 864 (1975); United States v. Ruisi, 460 F.2d 153, 156 (2d Cir.), *cert. denied,* 409 U.S. 914 (1972).

79. 18 U.S.C. § 922(a)(6): False Statement to a Firearms Dealer

The defendant, _____, is accused of [*e.g.:* falsely stating to a licensed firearms dealer, from whom he bought a firearm, that he had never been convicted of a felony]. It is against federal law to make false statements to a [firearms dealer] in order to buy a [firearm]. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of the following things beyond a reasonable doubt:

First, that _____ made a false statement (furnished false identification) while acquiring (attempting to acquire) a [firearm] from [name of dealer], a [licensed dealer].

Second, that _____ knew the statement (identification) was false.

Third, that the statement (identification) was intended or likely to deceive [name of dealer].

(*Add if appropriate:* If you find that the government has proved these things, you do not need to consider whether the false statement was a material false statement, even though that language is used in the indictment. That is not a question you need to be concerned about.)

Commentary

Judges in the Ninth and Tenth Circuits are cautioned that materiality may be a jury issue in these circuits and that an instruction on materiality may be needed. Both circuits have held materiality to be a jury issue under 18 U.S.C. § 1001 (false statements to federal agencies). United States v. Irwin, 654 F.2d 671, 677 n.8 (10th Cir. 1981), *cert. denied,* 455 U.S. 1016 (1982); United States v. Valdez, 594 F.2d 725, 729 (9th Cir. 1979). In the Ninth Circuit, materiality is apparently also a jury issue under 18 U.S.C. § 1341 (mail fraud). *See* United States v. Halbert, 712 F.2d 388, 390 (9th Cir. 1983) (holding that a jury was correctly instructed), *cert. denied,* 465 U.S. 1005 (1984). But both circuits treat materiality as an issue for the court under 18 U.S.C. § 1623 (false statement before grand jury) and 26 U.S.C. § 7206(1) (false statement on tax return). United

States v. Larranaga, 787 F.2d 489, 494 (10th Cir. 1986); United States v. Prantil, 764 F.2d 548, 557 (9th Cir. 1985); United States v. Flake, 746 F.2d 535, 537–38 (9th Cir. 1984), *cert. denied,* 469 U.S. 1225 (1985); United States v. Strand, 617 F.2d 571, 573–75 (10th Cir.), *cert. denied,* 449 U.S. 841 (1980).

The present instruction reflects the prevailing view that materiality is always to be decided by the court. *See* United States v. Brantley, 786 F.2d 1322, 1327 (7th Cir.) (under 18 U.S.C. § 1001), *cert. denied,* 106 S. Ct. 3284 (1986), and cases cited therein. Evidence bearing solely on materiality should be taken outside of the jury's hearing; the judge should make a finding of materiality on the record.

Section 922(a)(6) expressly requires a "knowing" false statement. The statute only requires proof that the defendant knowingly made a false statement, that he understood the facts, not that he knowingly violated the law. Cody v. United States, 460 F.2d 34, 37–38 (8th Cir.), *cert. denied,* 409 U.S. 1010 (1972); United States v. Beebe, 467 F.2d 222, 226 (10th Cir. 1972), *cert. denied,* 416 U.S. 904 (1974). The "intended or likely to deceive" disjunctive language is supported by current decisions. United States v. Schmitt, 748 F.2d 249, 253–54 (5th Cir. 1984), *cert. denied,* 471 U.S. 1104 (1985); United States v. Harrelson, 705 F.2d 733, 736 (5th Cir. 1983), *cert. denied,* 106 S. Ct. 599 (1985); United States v. Behenna, 552 F.2d 573, 575 (4th Cir. 1977).

80. 18 U.S.C. § 1001: False Statement to a Federal Agency

The defendant, _____, is accused of [*e.g.:* giving false work bills and expense vouchers to the Department of the Army]. It is against federal law to make a false statement (give a false document) to a department or agency of the United States government. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of the following things beyond a reasonable doubt:

First, that _____ made a false statement (gave a false document) to [the Department of the Army].

Second, that he knew the statement (document) was false.

Third, that he made the false statement (gave the false document) for the purpose of misleading the [Department of the Army].

(*Add if appropriate:* If you find that the government has proved these things, you do not need to consider whether the false statement was a material false statement, even though that language is used in the indictment. That is not a question you need to be concerned about.)

Commentary

Judges in the Ninth and Tenth Circuits are cautioned that materiality is a jury issue in those circuits and that an instruction on materiality will be needed. United States v. Irwin, 654 F.2d 671, 677 n.8 (10th Cir. 1981), *cert. denied,* 455 U.S. 1016 (1982); United States v. Valdez, 594 F.2d 725, 729 (9th Cir. 1979). The present instruction reflects the prevailing view that materiality is to be decided by the court. *See* United States v. Brantley, 786 F.2d 1322, 1327 (7th Cir.), *cert. denied,* 106 S. Ct. 3284 (1986), and cases cited therein. Evidence bearing solely on materiality should be taken outside of the jury's hearing; the judge should make the finding of materiality on the record.

Section 1001 requires only knowledge of the statement's falsity; knowledge that the statement involved a matter within the jurisdiction of a federal agency is not required. United States v. Yermian, 468 U.S. 63, 68–75 (1984).

81. 18 U.S.C. § 1005: False Statement in Bank Records

The defendant, _____, is accused of [*e.g.:* accepting a false loan application while he was vice president of the Main Street Bank, and causing a false entry to be made in the bank's books]. It is against federal law to cause a false entry to be made (make a false entry) in the records of a [*e.g.:* federally insured bank] in order to (deceive) (defraud) (injure) the bank. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ was an employee of [the Main Street Bank], which was a [federally insured bank].

Second, that _____ [purposely accepted a false loan application, which resulted in a false entry being made in the books] of [the Main Street Bank].

Third, that _____ did this knowing [that the loan application was false and that it would result in a false entry in the bank's books].

Fourth, that _____ did so intending to (deceive) (defraud) (injure) [the Main Street Bank].

Commentary

Section 1005, unlike § 1001, does not make materiality an element of the crime. The present instruction does not list it as an element, and no case law does, although other pattern instructions do. However, even if materiality is viewed as an element, it is in most circuits a question of law for the court. See Commentary to Instruction 79.

Case law holds that defrauding, injuring, and deceiving are separate acts with their own requirements. *E.g.,* United States v. Docherty, 468 F.2d 989, 995 (2d Cir. 1972). Since it is possible, for example, to intend to deceive without intending to defraud, all three possibilities are included in the instruction.

82. 18 U.S.C. § 1014: False Statement to a Bank

The defendant, _____, is accused of [*e.g.:* falsely stating his assets and liabilities on a loan application to the State Street Bank]. It is against federal law to make a false statement [on a loan application to a federally insured bank]. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that [the State Street Bank] was a bank [whose deposits were insured by the Federal Deposit Insurance Corporation].

Second, that _____ made a false statement to [the State Street Bank], knowing it was false.

Third, that _____ did so for the purpose of [*e.g.:* convincing the bank to give him a loan. (*Add if appropriate:* It does not matter whether the loan was actually made, or whether the bank lost money on the loan.)]

Commentary

Section 1014 does not use the term "material," and it is unclear whether materiality is an element of this offense. If materiality is an element, it may be a jury question in the Ninth and Tenth Circuits. See Commentary to Instruction 79.

Cases supporting the view that materiality is an element include United States v. Thompson, 811 F.2d 841, 843 (5th Cir. 1987); United States v. Whaley, 786 F.2d 1229, 1231–32 (4th Cir. 1986) (materiality held an issue for the court); United States v. Scott, 701 F.2d 1340, 1345 (11th Cir.), *cert. denied,* 464 U.S. 856 (1983) (materiality assumed to be an element); United States v. Kostoff, 585 F.2d 378, 380 (9th Cir. 1978) (per curiam) (materiality assumed to be an element); United States v. Kramer, 500 F.2d 1185, 1187 (10th Cir. 1974) (dictum) (listing materiality as an element). The Second Circuit suggested that materiality is not an element in United States v. Cleary, 565 F.2d 43, 46 (2d Cir. 1977), *cert. denied,* 435 U.S. 915 (1978). The question was explicitly left unresolved in United States v. Norberg, 612 F.2d 1, 1 n.3 (1st Cir. 1979), and United States v. Thurnhuber, 572 F.2d 1307, 1308–09 (9th Cir. 1977).

The statute requires only an intent to influence the bank's action. Not required is an intent to harm the bank or to bring fi-

nancial gain to the defendant. Reliance by the bank is also not a requirement. United States v. Bonnette, 663 F.2d 495, 498 (4th Cir. 1981), *cert. denied,* 445 U.S. 951 (1982); United States v. Madsen, 620 F.2d 233, 234–35 (10th Cir. 1980); United States v. Norberg, 612 F.2d 1, 4–6 (1st Cir. 1979).

83. 18 U.S.C. § 1084: Transmission of Wagering Information

The defendant, _____, is accused of [*e.g.:* using the telephone to send betting information from Atlanta, Georgia, to Seattle, Washington]. It is against federal law to [make telephone calls to another state (receive telephone calls from another state)] in carrying on a betting business. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ was in the betting business. By "betting business," I mean he was prepared on a regular basis to accept bets placed by others—that is, that he was a "bookie."

Second, that _____, as part of that business, purposely used [a telephone] to send (receive) bets (betting information) on [*e.g.:* the football game between the Dallas Cowboys and Oakland Raiders held on October 16, 1983].

Third, that the call was made between [Georgia] and [Washington]. It does not matter whether _____ knew the call was made from one state to another.

Commentary

Judges in the First Circuit are cautioned that in United States v. Southard, 700 F.2d 1, 24-25 (1st Cir.), *cert. denied,* 464 U.S. 823 (1983), the court stated that the defendant's knowledge of the interstate character of the telephone call was an essential element of a § 1084 charge.

This instruction was drafted for the cases involving bookies receiving bets. It must be modified where the defendant is charged with laying off bets to others.

84. 18 U.S.C. § 1201(a)(1): Kidnaping

The defendant, _____, is accused of [*e.g.:* kidnaping John Smith and moving him from Des Moines, Iowa, to Milwaukee, Wisconsin, to get a ransom]. It is against federal law to kidnap someone for [ransom] and move him from one state to another. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ kidnaped [John Smith] against his will for the purpose of obtaining a [ransom].

Second, that _____ intentionally moved [Smith] from [Iowa] to [Wisconsin], but it is not necessary for the government to prove that _____ knew he was crossing a state line.

Commentary

Case law holds that the defendant need only intend to transport the victim, not intend to transport the victim between two states. United States v. Bankston, 603 F.2d 528, 532 (5th Cir. 1979).

The statute proscribes holding for "ransom or reward or otherwise." A profit motive is not required. The Supreme Court has held that the term "otherwise," added by amendment in 1934, means "for any other reason," and has rejected the argument that the purpose for the kidnaping must be an illegal one. United States v. Healy, 376 U.S. 75, 81–83 (1964).

Section 1201(b) creates a statutory presumption of interstate transportation where a victim has been detained over twenty-four hours. The Second Circuit in United States v. Moore, 571 F.2d 76, 83–87 (2d Cir. 1978), held this section unconstitutional on due process grounds and reversed where the jury was so instructed. In light of this case, and the constitutional problems with presumptions in criminal cases generally, no such instruction should be given.

85. 18 U.S.C. § 1341: Mail Fraud

The defendant, _____, is accused of [*e.g.:* planning to get money by giving false information to Sarah Stone and Rubin Ross] and using the mail in connection with this plan. It is against federal law to cheat someone if the mail is used. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ made a plan [*e.g.:* to obtain money based on giving false information about the Apex Corporation to Sarah Stone and Rubin Ross].

Second, that when _____ made the plan, he knew the information he was giving was false.

Third, that _____ mailed something (caused another person to mail something) for the purpose of carrying out this plan.

It does not matter whether this plan succeeded, or whether _____ made money from this plan. Nor does it matter whether the false information was contained in the material that was mailed. However, for you to decide that _____ is guilty, you must find, beyond a reasonable doubt, that _____ made this plan intending to deceive [Stone and Ross] and to make money from the plan and that the mail was used to carry out the plan. Each separate use of the mail during the carrying out of a scheme to defraud is a separate offense.

Commentary

Because of the wide variety of factual patterns to which § 1341 can be applied, this instruction covers only a limited number of cases. The instruction will need to be tailored to deal with the particular fact situations in other cases.

At least in the Ninth and Tenth Circuits, materiality of the false information is an element of the offense. United States v. White, 673 F.2d 299, 302 (10th Cir. 1982); United States v. Halbert, 640 F.2d 1000, 1007–08 (9th Cir. 1981). Judges in these circuits are cautioned that materiality may be a jury issue and that an instruction

on it may be needed. *See* United States v. Halbert, 712 F.2d 388, 390 (9th Cir. 1983) (approving an instruction on materiality), *cert. denied,* 465 U.S. 1005 (1984). *See also* Commentary to Instruction 79.

86. 18 U.S.C. § 1343: Wire Fraud

The defendant, _____, is accused of [*e.g.:* planning to get money by giving false information to Sarah Stone and Rubin Ross] and using the telephone in connection with this plan. It is against federal law to cheat someone if a telephone call is made from one state to another. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ made a plan [*e.g.:* to obtain money based on giving false information about the Apex Corporation to Sarah Stone and Rubin Ross].

Second, that when _____ made the plan, he knew the information he was giving was false.

Third, that _____ made a telephone call (caused another person to use the telephone) from [name state] to [name state] for the purpose of carrying out this plan.

It does not matter whether this plan succeeded, or whether _____ made money from this plan. Nor is it necessary that the false information was given over the telephone. However, for you to decide that _____ is guilty, you must find, beyond a reasonable doubt, that _____ made this plan intending to deceive [Stone and Ross] and to make money from the plan and that a telephone call was made from one state to another to carry out the plan. Each such telephone call made to carry out a scheme to defraud is a separate offense.

Commentary

See the discussion of materiality in the Commentary to Instruction 85.

Section 1343 requires a scheme to defraud and use of an interstate telephone call in furtherance of the scheme. Case law has made clear that neither the victim's loss nor the defendant's gain is a required element. United States v. Condolon, 600 F.2d 7, 8-9 (4th Cir. 1979). There is also no requirement that the intended victim of the scheme to defraud be a recipient of a telephone com-

munication. United States v. Wise, 553 F.2d 1173, 1174 (8th Cir. 1977) (per curiam); United States v. Freeman, 524 F.2d 337, 339 (7th Cir. 1975), *cert. denied,* 424 U.S. 920 (1976). There is no requirement that the defendant have placed the calls himself. United States v. Johnson, 700 F.2d 163, 177 (5th Cir.), *aff'd in pertinent part and rev'd in part,* 718 F.2d 1317 (5th Cir. 1983) (en banc).

Most important, the statute does not require that the defendant knew that an interstate call was made. United States v. Blassingame, 427 F.2d 329, 330-31 (2d Cir. 1970), *cert. denied,* 402 U.S. 945 (1971).

Finally, the interstate telephone call need not actually further the scheme to defraud; the statute only requires that the purpose of the call be to execute the scheme. United States v. Hammond, 598 F.2d 1008, 1010-11 (5th Cir.), *amended on rehearing,* 605 F.2d 862 (1979).

Many cases charge both wire and mail fraud. In such cases, the judge may wish to combine the two charges. However, the interstate requirement applies to wire fraud and not to mail fraud.

87. 18 U.S.C. § 1461: Mailing Obscene Materials

The defendant, _____, is accused of [*e.g.:* using the mail to send obscene photographs]. It is against federal law to use the United States mail to send obscene materials. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ used the mail (caused the mail to be used) to send [photographs].

Second, that _____ knew the general nature of the [photographs].

The third thing the government must prove beyond a reasonable doubt is that the [photographs] were obscene. For you to decide this, there are three questions you must ask yourself. You should find the materials obscene only if your answers to all three questions are yes.

1. Would the average person, applying current community standards and viewing the [photographs] as a whole, find that the [photographs] appeal mainly to a morbid, degrading, or unhealthy interest in sex?

2. Would the average person, applying current community standards and viewing the [photographs] as a whole, find that the [photographs] show or describe sexual conduct in an obviously offensive way?

3. Would a reasonable person, viewing the [photographs] as a whole, find that they lack serious literary, artistic, political, or scientific value?

Commentary

This instruction is principally based on the Supreme Court's decision in Miller v. California, 413 U.S. 15, 24 (1973), as elaborated in Pope v. Illinois, 107 S. Ct. 1918 (1987).

The difficulty with any jury instruction in this area is the complexity of the case law defining "obscenity." Accordingly, the

present instruction is kept as simple as possible under the circumstances by incorporating the basic steps of the Miller obscenity test into the elements instruction itself.

Where the materials are intended to appeal to the prurient interest of members of a clearly defined deviant sexual group, rather than the average public at large, the prurient appeal requirement is met if the materials as a whole in fact appeal to members of that group. Mishkin v. New York, 383 U.S. 502, 508–09 (1966). When evidence supports it, the basic instruction must be modified accordingly.

The requisite level of knowledge necessary is a frequently litigated issue. It is required only that the defendant have "knowledge of the contents" and knowledge of the "character and nature of the materials" he mailed. Hamling v. United States, 418 U.S. 87, 122–24 (1974).

There is no requirement that the defendant knew the materials were obscene. *Id.* at 119–21. Nor is there a requirement that the defendant knew the community standards where the materials were distributed. United States v. Battista, 646 F.2d 237, 242 (6th Cir.), *cert. denied,* 454 U.S. 1046 (1981).

88. 18 U.S.C. § 1462: Interstate Transportation of Obscene Materials

The defendant, _____, is accused of [*e.g.:* transporting obscene photographs on a trucking service from New Hampshire to Vermont]. It is against federal law for someone to [use a trucking service] to ship obscene materials from one state to another. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ used [a trucking service] (caused [a trucking service] to be used) to ship [photographs] from [New Hampshire] to [Vermont].

Second, that _____ knew the general nature of the [photographs].

The third thing the government must prove beyond a reasonable doubt is that the [photographs] were obscene. For you to decide this, there are three questions you must ask yourself. You should find the materials obscene only if your answers to all three questions are yes.

1. Would the average person, applying current community standards and viewing the [photographs] as a whole, find that the [photographs] appeal mainly to a morbid, degrading, or unhealthy interest in sex?

2. Would the average person, applying current community standards and viewing the [photographs] as a whole, find that the [photographs] show or describe sexual conduct in an obviously offensive way?

3. Would a reasonable person, viewing the [photographs] as a whole, find that they lack serious literary, artistic, political, or scientific value?

Commentary

The basis for the obscene materials definition is the *Miller* test, discussed in the Commentary to Instruction 87. The present instruction contains the identical definition.

89. 18 U.S.C. § 1465: Interstate Transportation of Obscene Materials for Sale or Distribution

The defendant, _____, is accused of [*e.g.:* sending obscene photographs from New Hampshire to New York for sale]. It is against federal law to [send] obscene materials from one state to another for sale or distribution. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ [sent photographs (caused photographs to be sent)] from [New Hampshire] to [New York].

Second, that _____ [sent the photographs (caused the photographs to be sent)] for the purpose of selling or distributing them, as opposed to keeping them for his own use.

Third, that _____ knew the general nature of the [photographs].

The fourth thing the government must prove beyond a reasonable doubt is that the [photographs] were obscene. For you to decide this, there are three questions you must ask yourself. You should find the materials obscene only if your answers to all three questions are yes.

1. Would the average person, applying current community standards and viewing the [photographs] as a whole, find that the [photographs] appeal mainly to a morbid, degrading, or unhealthy interest in sex?

2. Would the average person, applying current community standards and viewing the [photographs] as a whole, find that the [photographs] show or describe sexual conduct in an obviously offensive way?

3. Would a reasonable person, viewing the [photographs] as a whole, find that they lack serious literary, artistic, political, or scientific value?

Commentary

The basis for the obscene materials definition is the *Miller* test, discussed in the Commentary to Instruction 87. The present instruction contains the identical definition.

Paragraph 2 of § 1465 creates a rebuttable presumption of a sale or distribution purpose when the transportation involves two or more copies of any publication or article. In United States v. Manarite, 448 F.2d 583, 594 (2d Cir.), *cert. denied,* 404 U.S. 947 (1971), the court observed that the "presumption is clearly valid as applied to this case" (which involved multiple deliveries involving thousands of magazines). In United States v. Knight, 395 F.2d 971, 975 (2d Cir. 1968), *cert. denied,* 395 U.S. 930 (1969), the court rejected a claim that the presumption had been rebutted as a matter of law by defense evidence, but did not address directly any issue of the statute's constitutionality. If a presumption instruction is requested, the following could be given: "If you find that _____ transported two or more copies of this publication, you may, but are not required, to find that he intended to sell or distribute them."

90. 18 U.S.C. § 1503: Tampering with a Juror

The defendant, _____, is accused of [*e.g.:* sending a threatening letter to John Smith, who at the time was a grand juror in the United States District Court for the District of Vermont]. It is against federal law to try to improperly influence a juror in a federal court. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that on [date], [John Smith] was a juror in the United States District Court for the [district].

Second, that _____ tried to influence [Smith] in the performance of his duties as a juror by [sending him a threatening letter].

Third, that _____ did so intending to affect the [grand jury proceedings] at which [Smith] was a juror.

Commentary

In 1982 Congress enacted 18 U.S.C. §§ 1512–1515 and deleted references to witnesses in § 1503. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 4, 98 Stat. 1248, 1249–53. In light of these changes, the present instruction covers only tampering with a juror under amended § 1503. Instruction 91 covers tampering with a witness under the new § 1512(b).

The statutory requirement that the act be done "corruptly" has been held satisfied by a deliberate act to influence a juror. United States v. Ogle, 613 F.2d 233, 238–39 (10th Cir. 1979), *cert. denied,* 449 U.S. 825 (1980); *see* United States v. Haas, 583 F.2d 216, 220 (5th Cir. 1978), *cert. denied,* 440 U.S. 981 (1979). This concept is incorporated into the third element of the present instruction.

91. 18 U.S.C. § 1512(b): Tampering with a Witness

The defendant, _____, is accused of [*e.g.:* threatening Joan Williams, who at the time was scheduled to be a witness in a case before the United States District Court for the District of Vermont, to cause her not to testify]. It is against federal law to [threaten a witness in a case so that he will not testify]. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that [Joan Williams] was [*e.g.:* scheduled to be a witness in the case of Jones v. Smith].

Second, that _____ [threatened] [Williams].

Third, that _____ did so intending to cause [Williams] [not to testify].

Commentary

See Commentary to Instruction 90. This instruction is drafted to cover the usual situation, but there need be no underlying case pending to prosecute under this section. 18 U.S.C. § 1512(d)(1).

92. 18 U.S.C. § 1546: Using a False Visa

The defendant, _____, is accused of [*e.g.:* using a forged visa, knowing it was forged, to enter the United States]. It is against federal law to use a [forged visa] to enter the United States. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ used (attempted to use) a [visa] in order to enter the United States.

Second, that the [visa] was [forged].

Third, that when _____ used this [visa], he knew it was [forged].

93. 18 U.S.C. §§ 1581, 1584: Involuntary Servitude and Peonage

The defendant, _____, is accused of [*e.g.:* intentionally holding John Smith in forced labor]. It is against federal law to hold another person in forced labor against his will. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ held [John Smith] for a period of time in forced labor or service. (*Add if appropriate:* It does not matter if [Smith] freely began to work for _____, or if [Smith] was paid a wage, so long as he was later held against his will.)

Second, that _____ intentionally held [Smith] by using [force, physical violence, threats, intimidation, or other compulsion].

Third, that [Smith] believed he had no realistic way to escape.

[1]Fourth, that _____ kept [Smith] to collect a debt.

Commentary

18 U.S.C. §§ 1581-1584 are implementing statutes intended to eradicate not only the system of slavery prohibited by the Thirteenth Amendment, but also any twentieth century form of compelled servitude. United States v. Booker, 655 F.2d 562, 564-66 (4th Cir. 1981).

The statutory phrase "involuntary servitude" has been defined as occurring if "the defendant has placed [the victim] in such fear of physical harm that the victim is afraid to leave, regardless of the victim's opportunities for escape." United States v. Bibbs, 564 F.2d 1165, 1168 (5th Cir. 1977), *cert. denied,* 435 U.S. 1007 (1978). The Second Circuit, in United States v. Shackney, 333 F.2d 475, 485-87 (2d Cir. 1964), held that the threat to the victim must be sufficient to cause the victim to believe he has no choice but to continue in the service of the master (and concluded that a threat to have the victim deported was not sufficient coercion under § 1584).

The phrase "for any term" in § 1584 has not been defined in case law. The Fifth Circuit instruction defines it as any period "not wholly insubstantial or insignificant."

---

1. Include when a violation of 18 U.S.C. § 1581(a) is charged.

94. 18 U.S.C. § 1623: False Statement Before a Grand Jury

The defendant, _____, is accused of [*e.g.:* saying to the grand jury under oath that he had never received money from John Smith, when he knew what he said was false]. It is against federal law for someone to make a false statement under oath to a grand jury. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ testified under oath before the grand jury of the United States District Court for the [name district].

Second, that during his testimony, _____ gave a false answer to any of the questions as charged in the indictment.

Third, that _____ knew the answer he gave was false. (*Add if appropriate:* If you find that the government has proved these things, you do not need to consider whether the false statement was a material false statement, even though that language is used in the indictment. That is not a question you need to be concerned about.)

Commentary

Materiality is to be decided by the court under § 1623, even in the two circuits that hold materiality to be a jury question under some statutes. United States v. Larranaga, 787 F.2d 489, 494 (10th Cir. 1986); United States v. Prantil, 764 F.2d 548, 557 (9th Cir. 1985). Evidence bearing solely on materiality should be taken outside of the jury's hearing; the judge should make the finding of materiality on the record.

In Bronston v. United States, 409 U.S. 352, 357-62 (1973), the Supreme Court held that a literally true answer, if unresponsive to the question asked, cannot be the basis for a perjury conviction under § 1621, the general perjury statute. The same reasoning would logically apply to § 1623. Where there is an issue whether an answer was literally true, the jury should upon request be instructed that questions must be viewed in context. United States v. Kehoe, 562 F.2d 65, 68 n.2 (1st Cir. 1977).

Where a question is ambiguous and could reasonably be interpreted in two ways, courts have taken two views. Some hold that the defendant's understanding of the question is a jury question; others take the view that an ambiguous question, where the answer to one of the interpretations was truthful, cannot support a perjury conviction. *See* United States v. Bell, 623 F.2d 1132, 1135-36 & n.5 (5th Cir. 1980), for cases on both propositions.

95. 18 U.S.C. § 1702: Obstruction of Correspondence

The defendant, _____, is accused of [*e.g.:* taking a letter addressed to James Hill from the United States mail]. It is against federal law to take United States mail from [*e.g.:* a mailbox] for the purpose of interfering with its proper delivery. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ took a [letter] from a [United States mailbox].

Second, that _____ did so intending to interfere with the proper delivery of that mail.

Third, that when _____ did so, that [letter] had not been actually received by the person to whom the [letter] was addressed.[1]

Commentary

"Delivery" under the statute means actual delivery of the mail into the manual possession of the person to whom the mail is addressed. United States v. Maxwell, 137 F. Supp. 298, 303 (W.D. Mo. 1955), *aff'd,* 235 F.2d 930 (8th Cir.), *cert. denied,* 352 U.S. 943 (1956). Until a letter is physically delivered to the addressee, the protection of the statute continues. In this regard, § 1702 may have a broader reach than § 1708. *See* United States v. Patterson, 664 F.2d 1346 (9th Cir. 1982); United States v. Ashford, 530 F.2d 792, 795–96 (8th Cir. 1976). However, some circuits have given § 1708 a similarly broad reach. United States v. Lavin, 567 F.2d 579, 582–83 (3d Cir. 1977); United States v. Davis, 461 F.2d 83, 89–90 (5th Cir.), *cert. denied,* 409 U.S. 921 (1972).

The intent element is directed only to intentionally preventing or retarding the delivery of the mail to the addressee. Hence, it is unnecessary to show that the defendant intended to misappropriate the contents of the letter, typically checks. United States v. Porter, 581 F.2d 1312, 1313 (8th Cir. 1978) (per curiam).

---

1. In some cases "receiving" may need to be defined, as in situations in which the victim has not yet picked up the mail from his mailbox.

96. 18 U.S.C. § 1703: Delay or Destruction of Mail by Postal Employee

The defendant, _____, is accused of [*e.g.:* unlawfully opening a letter in the United States mail when he was a letter carrier]. It is against federal law for a Postal Service employee to [open a letter] that has been mailed unless he has proper authority to do so. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ deliberately [opened a letter] that had been mailed.

Second, that he knew he did not have authority to do this.

Third, that he was an employee of the United States Postal Service when this happened.

Commentary

Section 1703 has generated little appellate case law. There are few cases on what constitutes "unlawfully," although most cases involve taking letters with checks or money, where the unlawful purpose was readily apparent. This is clearly a question of fact. Williams v. United States, 273 F.2d 469, 470 (10th Cir. 1959) (per curiam). A detention of the mail alone, without proof of an unlawful purpose, such as when a "mail cover" is used, is not violation of the statute. United States v. Costello, 255 F.2d 876, 881–82 (2d Cir.), *cert. denied,* 357 U.S. 937 (1958).

97. 18 U.S.C. § 1708: Theft of Mail

The defendant, _____, is accused of [*e.g.:* stealing mail from a United States mailbox]. It is against federal law to steal mail from [a United States mailbox]. For you to find _____ guilty of this crime, you must be convinced that the government has proved, beyond a reasonable doubt, that _____ intentionally [stole a letter] from a [United States mailbox].

98. 18 U.S.C. § 1708: Unlawful Possession of Stolen Mail

The defendant, _____, is accused of unlawfully possessing stolen mail. It is against federal law to possess [*e.g.:* checks] that have been stolen from the United States mail. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ had [a check] in his possession.

Second, that the [check] had been stolen from a [*e.g.:* United States mailbox].

Third, that _____ knew that the [check] had been stolen, but it does not matter whether he knew it was stolen from the mail.

Commentary

If constructive possession is an issue, see Instruction 47B.

99. 18 U.S.C. § 1709: Theft of Mail by Postal Employee

The defendant, _____, is accused of [*e.g.:* stealing a letter that was in the United States mail, when he was a Postal Service employee]. It is against federal law for a Postal Service employee to steal mail. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ deliberately took a [letter] that had been mailed.

Second, that _____ knew he had no authority to take [the letter].

Third, that _____ was a United States Postal Service employee when he took [the letter].

Commentary

Whether the particular letter or package was "intended to be conveyed by mail" has been the subject of substantial litigation, particularly in the decoy letter and test parcel situations. Courts today use an objective standard: If a reasonable person who saw the letter would think it was intended to be carried in the mail, it falls within the protection of § 1709. United States v. Hergenrader, 529 F.2d 83, 84-85 (8th Cir.), *cert. denied,* 426 U.S. 923 (1976); United States v. Rupert, 510 F. Supp. 821, 822-24 (M.D. Pa. 1981). Hence, § 1709 covers all matters placed in any part of the mail handling process, including decoy and test mail with fictitious addresses. United States v. Rodriguez, 613 F.2d 28 (2d Cir.) (per curiam), *cert. denied,* 446 U.S. 967 (1980); United States v. Kent, 449 F.2d 751, 752 (5th Cir. 1971), *cert. denied,* 405 U.S. 994 (1972).

100. 18 U.S.C. § 1951: Hobbs Act Extortion—Under Color of Official Right

The defendant, _____, is accused of [*e.g.:* using his position as a state liquor control board commissioner to obtain money from tavern owners]. It is against federal law for a public official to use his office to get money from someone else. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of the following things beyond a reasonable doubt:

First, that _____ was a [State of New York Liquor Control Board Commissioner].

Second, that [name of victim] gave [1](was induced to give) _____ money. [1](It is not enough that _____ received a bribe. The government must prove that _____ sought this money.)

Third, that both [name of victim] and _____ understood that the money was given in return for [granting a liquor license].

Fourth, that this money was not lawfully due _____ or [the Liquor Control Board].

Fifth, that this payment of money affected interstate commerce. It does not matter whether _____ knew that the payment of money would affect interstate commerce.

In this case the government argues that [describe theory]. If you find that the government has proved this beyond a reasonable doubt, then the necessary effect on interstate commerce has been shown.

Commentary

The two essential requirements of a Hobbs Act violation are interference with interstate commerce and extortion of property, either through fear or under color of official right. Stirone v. United States, 361 U.S. 212, 218 (1960). If the extortion is under color of official right, there need be no proof of fear, threats, or co-

1. The alternative language in the second element should be used in the Second Circuit.

ercion. United States v. O'Malley, 707 F.2d 1240, 1248-49 (11th Cir. 1983).

Extortion under color of official right occurs when a public official uses his position to induce someone to give him money or property not due him or his office. United States v. Margiotta, 688 F.2d 108, 132-33 (2d Cir. 1982), *cert. denied,* 461 U.S. 913 (1983); United States v. Dozier, 672 F.2d 531, 536-37 (5th Cir.), *cert. denied,* 459 U.S. 943 (1982).

The extorted party must have a reasonable belief that the defendant has official power to do or withhold from doing that which is the reason for the extortion payment. United States v. Brown, 540 F.2d 364, 372 (8th Cir. 1976). The victim's state of mind is therefore an essential element of the crime, and the prosecution must show that the victim made the payment because of the defendant's official position. United States v. Adcock, 558 F.2d 397, 403-04 (8th Cir.), *cert. denied,* 434 U.S. 921 (1977). The motivation for the payment must focus on the defendant's office. United States v. Braasch, 505 F.2d 139, 151 (7th Cir. 1974), *cert. denied,* 421 U.S. 910 (1975).

The Second Circuit has recently added a more express inducement requirement. In United States v. O'Grady, 742 F.2d 682, 687-91 (2d Cir. 1984) (en banc), that circuit held that there must be some proof that a public official did something to induce the payment of money. While this need not be a direct demand, there must be some inducement, however subtle, to distinguish conduct violating the act from conduct that is merely accepting an unsolicited gratuity. A similar conclusion was reached on the basis of somewhat different reasoning in United States v. Aguon, 813 F.2d 1413, 1414-18 (9th Cir. 1987). Several other circuits have rejected the reasoning of *O'Grady* and do not require inducement. See United States v. Spitler, 800 F.2d 1267, 1274-75 (4th Cir. 1986); United States v. Jannotti, 673 F.2d 578, 594-95 (3d Cir.) (en banc), *cert. denied,* 457 U.S. 1106 (1982); United States v. Butler, 618 F.2d 411, 417-19 (6th Cir.), *cert. denied,* 447 U.S. 927 (1980); United States v. Hedman, 630 F.2d 1184, 1195 (7th Cir. 1980), *cert. denied,* 450 U.S. 965 (1981).

Hobbs Act jurisdiction is based on the commerce clause. The "any way or degree" language in the statute requires only that the extortion involved affects interstate commerce to a de minimis degree. United States v. Angelilla, 660 F.2d 23, 35 (2d Cir. 1981), *cert. denied,* 455 U.S. 910 (1982); United States v. Summers, 598 F.2d 450, 454 (5th Cir. 1979). Some cases go so far as to hold that the effect can be a potential one. United States v. Staszcuk, 517 F.2d 53, 59-60 (7th Cir.) (en banc), *cert. denied,* 423 U.S. 837 (1975).

The usual method of showing an effect on commerce in cases involving extortion under color of official right is the "depletion of assets" theory, since the victim's payment of money correspondingly reduces his ability to purchase goods and materials from interstate commerce. United States v. Elders, 569 F.2d 1020, 1025 (7th Cir. 1978).

101. 18 U.S.C. § 1952(a)(3) & (b)(1): Travel Act

The defendant, _____, is accused of [*e.g.:* traveling from Iowa to Minnesota to operate an illegal gambling business]. It is against federal law to travel between states to run a [gambling] business that is illegal under state law. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ traveled (caused someone else to travel) from [Iowa] to [Minnesota] for the purpose of [carrying on an illegal gambling business].

Second, that this [gambling] operation was a regular course of business conduct or transactions that is a violation of [Minnesota] law. Under [Minnesota] law, a [gambling business] is [define state crime].

Third, that _____ knew that the [gambling business] violated the laws of [Minnesota].

Fourth, that after traveling from [Iowa] to [Minnesota], _____ purposely did something to [carry on] this unlawful activity.

Commentary

The nature of the interstate commerce requirement, "use of any facility in interstate commerce," has generated substantial case law. The interstate travel need not be continuous, United States v. Kaiser, 660 F.2d 724, 731 (9th Cir. 1981), *cert. denied,* 455 U.S. 956 (1982), nor need it be in furtherance of the illegal activity, since the language of § 1952 is much broader than the mail fraud statute. United States v. Salsbury, 430 F.2d 1045, 1048 (4th Cir. 1970). The commerce requirement is met if there is some travel in interstate commerce, but this travel need not be substantial or integral to the illegal activity. United States v. Le Faivre, 507 F.2d 1288, 1296–97 (4th Cir. 1974), *cert. denied,* 420 U.S. 1004 (1975). On the other hand, there must be some connection between the travel and the unlawful activity which can be reasonably foreseen. United States v. Barbieri, 614 F.2d 715, 717–18 (10th Cir. 1980). So long as the travel is in part motivated by an illegal purpose, the commerce requirement is met. *Id.*; United States v. Walsh, 700 F.2d 846, 854 (2d Cir.), *cert. denied,* 464 U.S. 825 (1983).

In United States v. Riccardelli, 794 F.2d 829 (2d Cir. 1986), it was held that the interstate commerce element need not be established where the defendant is charged under § 1952 with use of the mail.

Using the telephone to make an interstate call violates the statute. United States v. Garrett, 716 F.2d 257, 265-66 (5th Cir. 1983), *cert. denied,* 466 U.S. 937 (1984); United States v. Pecora, 693 F.2d 421, 423-24 (5th Cir. 1982), *cert. denied,* 462 U.S. 1119 (1983); United States v. Villano, 529 F.2d 1046, 1052 n.6 (10th Cir.), *cert. denied,* 426 U.S. 953 (1976). In addition, the interstate travel need not be by the defendant. The statute is satisfied if the defendant causes someone else to travel interstate or use an interstate facility such as a telephone. United States v. Briggs, 700 F.2d 408, 417 (7th Cir.), *cert. denied,* 462 U.S. 1110 (1983). However, the Supreme Court has held that the statute does not reach mere bettors who travel interstate to place bets. Rewis v. United States, 401 U.S. 808, 811-12 (1971).

Judges in the Sixth Circuit are cautioned that, at least in the aiding and abetting situation, the jury must find that the defendant had knowledge of the interstate travel or communication. *See* United States v. Alsobrook, 620 F.2d 139, 144 (6th Cir.), *cert. denied,* 449 U.S. 843 (1980); *see also* United States v. Gallo, 763 F.2d 1504, 1521 n.25 (6th Cir.) (expressing doubt about the rule), *modified on rehearing sub nom.* United States v. Graewe, 774 F.2d 106 (1985), *cert. denied,* 106 S. Ct. 826, 828, 1200 (1986). Other courts have not required such knowledge. *E.g.,* United States v. Villano, 529 F.2d 1046, 1054 (10th Cir. 1976).

The "business enterprise" language of § 1952(b)(1) does not apply to § 1952(b)(2). Marshall v. United States, 355 F.2d 999, 1002 (9th Cir.), *cert. denied,* 385 U.S. 815 (1966). The enterprise must be engaged in a continuous course of conduct, rather than sporadic casual involvement in the unlawful activity. United States v. Davis, 666 F.2d 195, 199 & n.5 (5th Cir. 1982); United States v. Zizzo, 338 F.2d 577, 580 (7th Cir. 1964), *cert. denied,* 381 U.S. 915 (1965).

The statute requires an intent to commit a violation of state or federal law. Where the indictment charges a violation of state law, the prosecution must show that the defendant intended to violate the state law and that he did or could have violated that law; a defense available under state law may therefore be asserted. United States v. Bertman, 686 F.2d 772, 774 (9th Cir. 1982). The state crime need not actually be fully accomplished, but the defendant must have done or planned something prohibited by state law. United States v. Goldfarb, 643 F.2d 422, 426 (6th Cir.), *cert. denied,* 454 U.S. 827 (1981).

102. 18 U.S.C. § 1953: Interstate Transportation of Betting Materials

The defendant, _____, is accused of [*e.g.:* sending policy slips from Seattle, Washington, to Boston, Massachusetts]. It is against federal law to send [policy slips] to [Massachusetts] from another state, because betting is illegal in [Massachusetts]. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ [sent policy slips (caused policy slips to be sent)] from [Washington] to [Massachusetts].

Second, that the [policy slips] were intended to be used in [a policy game].

Third, that _____ knew the [policy slips] were going to be used in [a policy game].

103. 18 U.S.C. § 1955: Illegal Gambling Business

The defendant, _____, is accused of [*e.g.:* operating a bookmaking business]. It is against federal law to [operate a bookmaking business] that violates [name state] law. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ [conducted] what he knew was a [bookmaking business] in [name state]. Under [name state] law, a [bookmaking business] is [define state crime].

Second, that five or more persons took part in the operation of this business.

Third, that this business (was operating for more than 30 days at the time) (received total bets that amounted to $2,000 or more on any day).

Commentary

Section 1955 has generated a great deal of case law since its enactment as part of the Omnibus Crime Act of 1970. In large part this has been caused by the section's general language, and the circuits have differed in several respects in their interpretation of the statute.

Section 1955 requires that the gambling business be in violation of state law. Intent to violate state law is not necessary. United States v. Hawes, 529 F.2d 472, 481 (5th Cir. 1976). The question of what state law is applicable is a question of law. United States v. Clements, 588 F.2d 1030, 1037 (5th Cir.), *cert. denied,* 440 U.S. 982, 441 U.S. 936 (1979). This instruction takes the view that the jury should not be instructed on matters of law, a position consistent with the other instructions.

The most frequently litigated issue is the definition of the "involves five or more persons" element. This instruction does not define this element, and the judge may need to develop additional language that addresses the particular facts involved. The circuits are in agreement, derived from legislative history, that mere bettors or customers are not included. United States v. Alfonso, 552 F.2d 605, 621 (5th Cir.), *cert. denied,* 434 U.S. 857 (1977); United States v. Smaldone, 485 F.2d 1333, 1351 (10th Cir. 1973), *cert. denied,* 416 U.S. 936 (1974). It is also well established that anyone who works in the gambling business, from owner down to low-level

employees, can be counted in the "five or more" requirement. United States v. Boyd, 566 F.2d 929, 935 (5th Cir. 1978); United States v. Manson, 494 F.2d 804, 807 (7th Cir.), *cert. denied,* 419 U.S. 994 (1974); United States v. Meese, 479 F.2d 41, 43 (8th Cir. 1973).

The requirement of "substantially continuous operation" for over thirty days has also generated some case law. The Seventh Circuit has held that this does not mean daily operation, only such a regular schedule as to remove it from a casual, nonbusiness category. United States v. Nerone, 563 F.2d 836, 843-44 (7th Cir. 1977), *cert. denied,* 435 U.S. 951 (1978). The same five persons need not be involved for thirty days, nor need the defendant be involved for that entire time period. The only requirements are that a gambling business be in substantially continuous operation for over thirty days, that it involve five or more persons during the entire thirty-day period, and that the defendant knowingly was involved. United States v. Gresko, 632 F.2d 1128, 1132-33 (4th Cir. 1980); United States v. Marrifield, 515 F.2d 877, 880-81 (5th Cir.), *cert. denied,* 423 U.S. 1021 (1975).

In the statutory definition of illegal gambling business, the phrase "gross revenue of $2,000" is used. This term is not itself defined, and several different constructions are possible. This instruction refers to "bets" of $2,000.

104. 18 U.S.C. § 1962: RICO

The defendant, _____, is accused of [*e.g.:* being an employee of the ABC Company and helping that company conduct illegal narcotics transactions]. It is against federal law to participate in the operation of an organization by engaging in racketeering activities that violate state or federal law. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ was [employed by the ABC Company].

Second, that _____ committed (helped commit) at least two of the following crimes: [List the alleged predicate offenses]. The two crimes must have been connected to each other by a common scheme or plan, and not been merely separate or disconnected acts. The two crimes must have been committed within ten years of each other. You must unanimously agree on which two crimes the defendant committed (helped commit).

Third, that _____, when committing (helping commit) these two or more crimes, was participating in the operation of [the ABC Company].

Fourth, that [the ABC Company] [*e.g.,* purchased supplies to be delivered from the State of New York to the State of New Jersey].

Commentary

If the predicate offenses are charged separately in the indictment, the elements of those offenses will be the subject of the charges on the separate counts. If the predicate offenses are not charged in the indictment, it may be necessary to instruct the jury on their elements to provide a basis for consideration of the RICO charge.

In Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985), the Supreme Court said in dictum that the predicate acts must be connected in some way to constitute a "pattern of racketeering activity." The Court suggested that the definition of "pattern" in the last sentence of 18 U.S.C. § 3575(e) might be useful in interpreting § 1962. The limited number of appellate decisions since *Sedima* suggest that the second element of the present instruction should be

the subject of considerable caution. This element as drafted would apparently be unacceptable in the Eighth Circuit under Superior Oil Co. v. Fulmer, 785 F.2d 252, 254–57 (8th Cir. 1986) (multiple acts in furtherance of a single scheme do not constitute a pattern). It would apparently be acceptable in the Second Circuit under United States v. Ianniello, 808 F.2d 184 (2d Cir. 1986), *cert. denied,* 107 S. Ct. 3229, 3230 (1987), but probably does not cover every situation that the Second Circuit would regard as constituting a pattern.

105. 18 U.S.C. § 2113(a), (d): Bank Robbery

The defendant, _____, is accused of [*e.g.:* robbing the Main Street Bank]. It is against federal law to rob a [*e.g.:* federally insured bank]. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ intentionally took money that belonged to [the Main Street Bank] (from a bank employee) (from the bank while a bank employee was present).

Second, that _____ used (force) (intimidation) (a threat) when he did so.

Third, that at that time, [*e.g.:* the deposits of the Main Street Bank were insured by the Federal Deposit Insurance Corporation].

[1]Fourth, that _____ (threatened [name of victim] with a dangerous weapon. A dangerous weapon is anything that can inflict serious physical harm on someone else) (threatened [name of victim] with a gun).

Commentary

The federally insured status of the bank is an essential element on which the jury should be instructed. United States v. Brown, 616 F.2d 844, 846 (5th Cir. 1980).

Judges in the Second and District of Columbia Circuits are cautioned that the jury should be instructed that the defendant intended a wrongful taking of the money. United States v. Howard, 506 F.2d 1131, 1133 (2d Cir. 1974); Richardson v. United States, 403 F.2d 574, 575-76 (D.C. Cir. 1968) (street robbery under D.C. Code). Most circuits appear to take the view expressed in United States v. DeLeo, 422 F.2d 487, 490-91 (1st Cir.), *cert. denied,* 397 U.S. 1037 (1970), that wrongful intent to take the money is not a required element under the first paragraph of § 2113. United States v. Lewis, 628 F.2d 1276, 1278-79 (10th Cir. 1980) (*semble*), *cert. denied,* 450 U.S. 924 (1981); United States v. Brown, 547 F.2d 36, 38-39 (3d Cir. 1976), *cert. denied,* 431 U.S. 905 (1977); United States v. Johnston, 543 F.2d 55, 57-58 (8th Cir. 1976); United States v. Klare, 545 F.2d

1. Add this element when the defendant is charged with armed bank robbery under § 2113(d).

93 (9th Cir. 1976), *cert. denied,* 431 U.S. 905 (1977). The present instruction uses the phrase "intentionally took money" as being the most logical definition of and place for the scienter requirement.

The Supreme Court in Simpson v. United States, 435 U.S. 6, 11 n.6 (1978), held that the phrase "by use of a dangerous weapon or device" modifies both the "assault" and "puts in jeopardy" language of § 2113(d). The present instruction is drafted to reflect this holding.

In McLaughlin v. United States, 106 S. Ct. 1677 (1986), the Supreme Court held that an unloaded gun is a dangerous weapon. One of the three reasons given for this conclusion, each of which the Court characterized as "independently sufficient," *id.* at 1678, was that the display of a gun instills fear in the average citizen and creates an immediate danger of a violent response. This rationale would appear to support the conclusion that a fake bomb is a dangerous weapon, a question on which the circuits have been in conflict. *See* Bradley v. United States, 447 F.2d 264, 272-75 (8th Cir. 1971) (actual ability to harm required), *vacated as moot,* 404 U.S. 567 (1972); United States v. Cooper, 462 F.2d 1343 (5th Cir.), *cert. denied,* 409 U.S. 1009 (1972) (apparent ability sufficient); United States v. Beasley, 438 F.2d 1279, 1282-83 (6th Cir.) (apparent ability sufficient), *cert. denied,* 404 U.S. 866 (1971).

Although a gun, loaded or unloaded, is apparently a dangerous weapon as a matter of law under *McLaughlin,* the question whether some other weapon is dangerous is generally a question of fact for the jury. The alternative statements in the fourth element of the present instruction reflect that situation. In a case involving a fake weapon, it may be appropriate to fashion an instruction based on *McLaughlin.*

106. 18 U.S.C. § 2312: Interstate Transportation of a Stolen Vehicle (Dyer Act)

The defendant, _____, is accused of [*e.g.:* driving a stolen car, a 1981 Corvette, (causing a stolen car, a 1981 Corvette, to be driven) from Tucson, Arizona, to Santa Fe, New Mexico, in April 1983]. It is against federal law to drive a car (arrange for a car to be driven) from one state to another knowing that the car is stolen. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ [drove a 1981 Corvette (arranged to have a 1981 Corvette driven)] from [Arizona] to [New Mexico].

Second, that this [car] was stolen. [1](By stolen, I simply mean that the [car] had been taken from its rightful owner beyond any permission given.)

Third, that when _____ drove the [car] from [Arizona] to [New Mexico] (arranged for the [car] to be driven from [Arizona] to [New Mexico]), he knew it was stolen.

It does not matter whether _____ stole the [car] or someone else did. However, for you to find that _____ is guilty of this crime, it must be proved beyond a reasonable doubt that he drove a stolen [car] (arranged for a stolen [car] to be driven) from [Arizona] to [New Mexico], knowing it was stolen.

---

1. For use when it is alleged, as in car rental thefts, that the original possession was lawful and the defendant failed to return the car.

107. 18 U.S.C. § 2313: Receiving a Stolen Vehicle (Dyer Act)

The defendant, _____, is accused of [*e.g.:* possessing a car that he knew had been stolen]. It is against federal law to [possess] a [car] that is known to be stolen if the [car] was moved from one state to another. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that [*e.g.:* a 1980 Ford Mustang] was stolen.

Second, that the [car] was moved from one state to another after it was stolen.

Third, that _____ [had possession of] the [car].

Fourth, that _____ knew the [car] was stolen when he [possessed] it.

Commentary

This instruction reflects the 1984 amendment to § 2313, under which "possession" was added to the enumeration of prohibited activities and the jurisdictional language was broadened to encompass vehicles that may no longer be in the stream of commerce.

If constructive possession is an issue, see Instruction 47B.

108. 18 U.S.C. § 2314: Interstate Transportation of Stolen Goods

The defendant, _____, is accused of [*e.g.:* taking a stolen computer from Tucson, Arizona, to Santa Fe, New Mexico, in April 1983]. It is against federal law to transport goods from one state to another knowing that the goods are stolen. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that [an IBM computer] was stolen.

Second, that _____ [took the computer (arranged for the computer to be taken)] from [Arizona] to [New Mexico].

Third, that when _____ [took the computer (arranged for the computer to be taken)] from [Arizona] to [New Mexico], he knew it was stolen.

Fourth, that the value of the [computer] was $5,000 or more.

It does not matter whether _____ stole the [computer] or someone else did. However, for you to find _____ guilty of this crime, it must be proved beyond a reasonable doubt that he took stolen goods (arranged for stolen goods to be taken) from [Arizona] to [New Mexico], knowing they were stolen.

109. 18 U.S.C. § 2315: Receiving Stolen Goods

The defendant, _____, is accused of [*e.g.:* possessing goods that he knew had been stolen]. It is against federal law to [possess] goods that are known to be stolen, if the goods were moved from one state to another. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that [an IBM computer] was stolen.

Second, that the [computer] was moved from one state to another after it was stolen.

Third, that _____ [had possession of] the [computer].

Fourth, that _____ knew the [computer] was stolen when he [possessed] it.

Fifth, that the value of the [computer] was $5,000 or more.

Commentary

Section 2315 was amended in 1986 to make it parallel to § 2313 as amended in 1984. Pub. L. No. 99-646, § 76, 100 Stat. 3592, 3618 (1986). See Commentary to Instruction 107.

If constructive possession is an issue, see Instruction 47B.

110. 18 U.S.C. § 3146: Bail Jumping

The defendant, _____, is accused of failing to appear in court on a date he was required to be present. It is against federal law to fail to appear in court on a required date. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ was previously charged with [name crime] in this court.

Second, that a judge (magistrate) of the United States District Court issued an order permitting _____ to be out on bail on this charge.

Third, that this order required _____ to appear before a judge (magistrate) in [name city and state] on [name date].

Fourth, that _____ knew that he was required to appear before the judge (magistrate) on that date and purposely failed to do so.

111. 8 U.S.C. § 1326: Illegal Entry by Deported Alien

The defendant, _____, is accused of [*e.g.:* entering the United States after being deported]. It is against federal law to be in the United States after being deported. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ was arrested and deported from the United States.

Second, that at a later time, _____ [entered] the United States without permission of the required authorities.

Third, that _____ was not a citizen of the United States.

[1]Fourth, that _____ knew he was not entitled to [enter] the United States.

Commentary

The circuits are divided on whether § 1326 requires an intent element. The statute itself has no such express requirement. The Seventh Circuit, in United States v. Anton, 683 F.2d 1011, 1016–17 (7th Cir. 1982), reasoned that § 1326 cannot be construed as a strict liability regulatory statute, and held that the government must prove some mental state. The practical effect of this holding was to permit the defense of reasonable mistake, in that the defendant may have reasonably believed he had the consent of the Attorney General to reenter the United States. The Ninth Circuit, in Pena-Cabanillas v. United States, 394 F.2d 785, 788–89 (9th Cir. 1968), held that § 1326 is a strict liability statute and requires no mental element. The Sixth Circuit has concurred with the holding of *Pena-Cabanillas,* finding that the government need not prove that the defendant knew he was not entitled to reenter without permission of the Attorney General. United States v. Hussein, 675 F.2d 114, 115–16 (6th Cir.) (per curiam), *cert. denied,* 459 U.S. 869 (1982).

---

1. For jurisdictions requiring knowledge. See Commentary.

112. 21 U.S.C. § 841(a)(1): Possession of Controlled Substance with Intent to Distribute

The defendant, _____, is accused of [*e.g.:* having stored heroin in his car, intending to deliver it to someone else]. It is against federal law to have [heroin] in your possession with the intention of delivering it to someone else. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ had possession of [heroin].

Second, that _____ knew it was [heroin].

Third, that when _____ had possession of the [heroin], he intended to deliver it to someone else.

It is not necessary for you to be convinced that _____ actually delivered the [heroin] to someone else, or that he made any money out of the transaction. It is enough for the government to prove, beyond a reasonable doubt, that _____ had in his possession what he knew was [heroin] and that he intended to deliver it to someone else.

Commentary

If constructive possession is an issue, see Instruction 47B.

Cases have held that deliberate ignorance of the facts can be sufficient to satisfy the "knowing" requirement. United States v. Jewell, 532 F.2d 697, 698–704 (9th Cir.), *cert. denied,* 426 U.S. 951 (1976); United States v. Dozier, 522 F.2d 224, 226–27 (2d Cir.), *cert. denied,* 423 U.S. 1021 (1975).

113. 26 U.S.C. § 5861(d): Receiving or Possessing an Unregistered Firearm

The defendant, _____, is accused of [*e.g.:* possessing a sawed-off shotgun that was not registered to him]. It is against federal law for someone to possess certain kinds of weapons without registering them. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ knew he had a [gun] in his possession.

Second, that this [gun] was a [shotgun having a barrel of less than eighteen inches in length]. It does not matter whether he knew [the barrel was less than eighteen inches in length].

Third, that this [gun] (was in operating condition) (could readily have been put in operating condition).

Fourth, that this [gun] was not registered to _____ in the National Firearms Registration and Transfer Record. It does not matter whether _____ knew the [gun] had to be registered.

Commentary

Section 5861 requires no specific intent or knowledge that a firearm is unregistered, since this section is essentially a public safety regulatory measure. United States v. Freed, 401 U.S. 601, 607-610 (1971); United States v. Moschetta, 673 F.2d 96, 100 (5th Cir. Unit B 1982).

It is not necessary to prove that the defendant knew the firearm he possessed was in violation of the statute. Sipes v. United States, 321 F.2d 174, 179 (8th Cir.), *cert. denied,* 375 U.S. 913 (1963). The only requirement is that the defendant "knowingly possess" a weapon that he knew was a firearm within the general meaning of the term. United States v. Vasquez, 476 F.2d 730, 731-32 (5th Cir.), *cert. denied,* 414 U.S. 836 (1973). If constructive possession is an issue, see Instruction 47B.

Although the third element is not included in other pattern jury instructions, it is well established that the government must prove that the firearm can be operated or readily restored to operating condition. *E.g.,* United States v. Janik, 723 F.2d 537, 549 (7th Cir. 1983) (dictum); United States v. Priest, 594 F.2d 1383 (10th Cir.),

cert. denied, 444 U.S. 847 (1979); *see* United States v. Seven Miscellaneous Firearms, 503 F. Supp. 565 (D.D.C. 1980) (forfeiture case).

Whether the firearm was a type that should have been registered under the act is a jury question. Bryan v. United States, 373 F.2d 403, 407 (5th Cir. 1967).

114. 26 U.S.C. § 7201: Tax Evasion

The defendant, _____, is accused of [*e.g.:* having evaded his taxes for the year 1982]. It is against federal law to try to evade paying income taxes. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ owed substantially more taxes than he reported on his [1982] income tax return because he [*e.g.:* failed to report income].[1]

Second, that when he filed his [1982] income tax return, _____ knew that he owed substantially more taxes to the government than he reported on that return.

Third, that when _____ filed his [1982] income tax return, he did so with the purpose of evading the payment of taxes to the government.

---

1. The government may need to detail its theory of proof and the jury be instructed on it, at least where a net worth theory is employed. Holland v. United States, 348 U.S. 121, 129 (1954); United States v. Carter, 721 F.2d 1514, 1538-39 (11th Cir.), *cert. denied*, 469 U.S. 819 (1984); United States v. Hall, 650 F.2d 994, 997-98 (9th Cir. 1981) (per curiam); United States v. Tolbert, 367 F.2d 778, 779-81 (7th Cir. 1966); United States v. O'Connor, 237 F.2d 466, 470-71 (2d Cir. 1956); Dupree v. United States, 218 F.2d 781, 783 (5th Cir. 1955).

115. 26 U.S.C. § 7203: Failure to File Income Tax Return

The defendant, _____, is accused of [*e.g.:* failing to file a 1982 income tax return].

It is against federal law to fail to file a required income tax return. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ received income of [state applicable dollar amount] or more between January 1 and December 31 of [1982].

Second, that _____ failed to file an income tax return as required by [April 15, 1983].

Third, that _____ knew he was required to file a return.

Fourth, that _____ failed to file on purpose, and not as a result of carelessness.

Commentary

Willfulness under § 7203 has the same meaning as it does under the felony tax sections. It is a voluntary, intentional violation of a known legal duty. United States v. Bishop, 412 U.S. 346, 360 (1973); Sansone v. United States, 380 U.S. 343 (1965). It does not include an intent to defraud the government. United States v. McCorkle, 511 F.2d 482, 483–85 (7th Cir.) (en banc), *cert. denied,* 423 U.S. 826 (1975). An additional good faith defense instruction need not be given. United States v. Pomponio, 429 U.S. 10, 12–13 (1976).

Circumstances like advice of counsel or work by accountants can negate willfulness. United States v. Civella, 666 F.2d 1122, 1126 (8th Cir. 1981). Belief that a taxpayer need not file if he cannot pay the tax due can also negate willfulness. United States v. Pinner, 561 F.2d 1203, 1206 (5th Cir. 1977).

This instruction uses the term "income" rather than "gross income" to keep the terminology as simple as possible.

116. 26 U.S.C. § 7206(1): False Statement on Income Tax Return

The defendant, _____, is accused of [*e.g.:* falsely stating his gross income on his 1982 income tax return]. It is against federal law to make a false statement on an income tax return. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ signed a [1982] income tax return that contained a written declaration that it was made under penalties of perjury.

Second, that this return stated that [*e.g.:* he received gross income of $20,000 during 1982].[1]

Third, that he purposely made the statement and knew it was false.

(*Add if appropriate:* If you find that the government has proved these things, you do not need to consider whether the false statement was a material false statement, even though that language is used in the indictment. That is not a question you need to be concerned about.)

Commentary

Materiality is to be decided by the court under § 7206(1), even in the two circuits that hold materiality to be a jury question under some statutes. United States v. Flake, 746 F.2d 535, 537–38 (9th Cir. 1984), *cert. denied,* 469 U.S. 1225 (1985); United States v. Strand, 617 F.2d 571, 573–75 (10th Cir.), *cert. denied,* 449 U.S. 841 (1980). Evidence bearing solely on materiality should be taken outside of the jury's hearing; the judge should make the finding of materiality on the record.

---

1. Where the indictment charges the defendant with an omission, this element must be modified to show what the return failed to state. *See* United States v. Cohen, 544 F.2d 781, 783 (5th Cir.), *cert. denied,* 431 U.S. 914 (1977).

APPENDIX A
Suggestions for Improving Juror Understanding of Instructions

By Allan Lind and Anthony Partridge

This appendix is based on a paper prepared in 1978 for the Federal Judicial Center's Committee to Study Criminal Jury Instructions. The paper was an effort to set forth some suggestions for drafting jury instructions derived from several empirical studies about juror understanding of instructions. This appendix reflects, in addition, the experience that we have gained in working with the committee.

The principal empirical studies have been conducted by Robert and Veda Charrow[1] and by Amiram Elwork, Bruce Sales, and James Alfini.[2] Both groups of researchers tested lay comprehension of state-court pattern jury instructions and found substantial lack of understanding. Both research projects showed that it is possible to improve the understanding of jury instructions by removing certain linguistic features that make comprehension difficult.

Most of the suggestions below necessarily have a negative cast: They are suggestions that certain constructions be avoided. Implicit in all of the suggestions is the basic rule that instructions should be delivered in easily understood, unambiguous English. It must be emphasized that the suggestions are by no means intended as absolute rules. We do not anticipate that most instructions will be wholly free of the features identified here as undesirable. Many instructions containing some of these features may, indeed, be readily understood. But each of the features identified appears to present some obstacle to effective communication. Where the use of one of these problem features seems necessary or desirable, therefore, it may be worth a special effort to avoid including other problem features in the same passage. The obstacles should be regarded as cumulative in their effect: A juror may be able to understand with ease a single instruction, standing alone, that contains one or a few of these features. But it may be much more difficult to understand a passage that contains several of them, and still more difficult to understand a series of instructions in which such features regularly appear.

The examples used below are drawn from the three principal sets of pattern criminal instructions widely used in the federal courts: Devitt and Blackmar, *Federal Jury Practice and Instructions* (3d ed. 1977); Committee on Pattern Jury Instructions, Fifth Circuit District Judges Association, *Pattern Jury Instructions (Criminal Cases)* (1978); and Committee on Federal Criminal Jury

1. *See* Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306 (1979).

2. *See* Elwork, Sales & Alfini, *Juridic Decisions: In Ignorance of the Law or in Light of It*, 1 Law & Human Behavior 163 (1977).

Instructions of the Seventh Circuit, *Federal Criminal Jury Instructions* (1980).

Vocabulary

Suggestion 1: Avoid using words that are uncommon in everyday speech and writing.

Both intuition and research evidence tell us that the use of uncommon words tends to impede understanding of what is said. The problem is not only that jurors may not know the meaning of the words. Even if the meaning is known, it will generally require more effort to understand a passage containing one or more uncommon words than a passage whose vocabulary is more familiar.

Unfortunately, identifying uncommon words is not as simple as it sounds. On the one hand, the intuition of highly educated, legally trained people is not likely to be a reliable guide to the frequency of word use by the population at large. On the other hand, the frequency of use that is reported in published works based on word counts seems to be heavily dependent on the selection of the material to be studied. One published count is based on recordings of patients' discussions with their psychiatrists; another is based on reading matter assigned to pupils in the third through ninth grades. None of the counts, apparently, includes advertising materials or package labels, although these are surely an important part of our exposure to language.

In spite of the limitations of the publications based on word counts, they can be of considerable help in an effort to minimize the use of uncommon words. After reviewing the available publications of this type, we have concluded that the most helpful is probably E.L. Thorndike and I. Lorge, *The Teacher's Word Book of 30,000 Words* (Bureau of Publications, Teachers College, Columbia University, 1944). Although this work is based solely on word counts of samples of written English and is relatively old, it has compensating advantages when compared with more recent efforts. Also, it is still in print.

We suggest that an effort be made to use high-frequency words where they can be substituted for lower frequency words and that words be regarded as particularly suspect if they are reported in Thorndike and Lorge as appearing less frequently than ten times per million words of writing. (About six thousand words were reported as appearing at least this frequently.) But use of the Thorndike and Lorge book should be tempered by recognition of its limitations; even judges who are cautious about relying on their intui-

tion will readily recognize that some words reported as low-frequency are familiar to almost any American.

Some uncommon words that often appear in jury instructions are listed below, together with their reported frequency of use (that is, the number of times the word is used per million words of writing, as reported in Thorndike and Lorge). Parenthetical material shows the frequency of use of closely related words; arguably, the frequencies of the main and related words should be cumulated in considering the likelihood that the main word will be easily understood by jurors.

admonish	5	
applicable	3	
bailiff	2	
corroborate	2	
credibility	<1	(credible, 1)
deliberation	6	
demeanor	6	
discredit	5	
discrepancy	2	
erroneous	4	(erroneously, 1)
immunize	<1	(immune, 1; immunity, 3)
impartial	6	(impartially, 1; impartiality, 1)
impeach	3	(impeachment, 2)
inference	7	(infer, 7)
insofar	<1	
misrecollection	<1	(recollection, 11)
pertain	5	
scrutinize	4	(scrutiny, 3)
thereto	4	
unanimous	6	(unanimously, 4; unanimity, 1)
veracity	1	
vindicate	2	(vindication, 1)

The example below is a jury instruction that makes substantial use of uncommon words. These words, whose frequencies are shown on the above list, have been italicized.

Example

A witness may be *discredited* or *impeached* by evidence that the general reputation of the witness for truth and *veracity* is bad in the community where the witness now resides, or has recently resided.

> If you believe any witness has been *impeached* and thus *discredited,* it is your exclusive province to give the testimony of that witness such *credibility,* if any, as you may think it deserves.

Suggestion 2: Avoid using words to convey their less common meanings.

The research by Elwork, Sales, and Alfini suggests that difficulties in juror comprehension may be caused by the use of common words to convey relatively uncommon meanings. At worst, the word may be misunderstood; even if the word is understood, the difficulty of resolving the ambiguity may impede understanding of the entire instruction. For example, the use of the word "admit" to refer to a judge's evidentiary ruling may produce confusion with the more common meaning of conceding the truth of a proposition.

Many idioms that are used routinely by lawyers employ words in ways that are not likely to be familiar to laymen. The following idioms, often found in jury instructions, are examples:

as to
burden of proof
competent witness (referring to a quality other than the witness's skill)
court (to refer to the judge rather than the building or the institution)
disregard evidence
find a fact
immunize from prosecution
judicial notice
material matter
sustain objections

Suggestion 3: Avoid using legal terms.

The problem of legal terminology is logically subsumed under the previous suggestions, but it is worthy of special note. There is little if any harm in using legal terms that have wide common use (for example, "arrest") or when it is reasonable to assume that the juror will have learned the meaning of the term during the trial (for example, "exhibit"). But many legal terms are uncommon terms in normal speech, and many are common terms used to convey uncommon meanings. They should be avoided to the extent possible.

It is important to remember that even the most familiar terms to those trained in the law may be quite foreign to the layman. For example, the word "indictment" is reported by Thorndike and

Lorge to occur only six times per million words in normal writing. The word "information" is of course very common, but its common meaning is not as a document filed in court.

Sometimes, there is no practical alternative to using an unfamiliar legal term and defining it for the benefit of the jury. The practice should be confined to those situations in which it is absolutely necessary, however. There is no reason to expect that jurors will be able to assimilate very much new vocabulary in the course of the normal, relatively short trial.

Frequently, legal terms are introduced in situations in which they are not needed to communicate the essence of the instruction. In example 1 below, for instance, the word "accomplice" is defined and used. In example 2, the same guidance is given without introducing the term. In some cases, of course, the legal term will have been introduced by the lawyers, and the court may wish to use the term to relate the charge to what has gone before. But for the most part, juror understanding is more likely to be facilitated by avoiding the legal term altogether.

Example 1

An accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of one who asserts by his testimony that he is an accomplice, may be received in evidence and considered by the jury, even though not corroborated by other evidence, and given such weight as the jury feels it should have. The jury, however, should keep in mind that such testimony is always to be received with caution and considered with great care.

Example 2

You have heard testimony from _____, who stated that he was involved in the commission of the alleged crime charged against the defendant. You may give his testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care.

Syntax

Suggestion 4: Avoid sentences with multiple subordinate clauses, and particularly avoid placing multiple subordinate clauses before or within the main clause.

The Charrows have observed that sentence length per se is not a major problem for the comprehensibility of instructions. Long sen-

tences are as easily understood as short sentences if they are simple in their grammatical structure. However, many long sentences in pattern instructions are long because they contain many subordinate clauses. Not infrequently, as in the examples below, the subordinate clauses precede the main clause, with the result that the listener must wait for the end of the sentence to learn what it is all about. This structure should be avoided.

Example 1

If you should decide that the opinion of an expert witness is not based on sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

Example 2

Only if by evidence independent of Exhibit X you conclude that there was a scheme to defraud and you are then trying to make up your mind whether, the defendant A, who agreed to the order, thereafter had a specific intent to defraud somebody, may you take Exhibit X into account at all.

Example 3

If, then, the jury should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the defendant was ready and willing to commit crimes such as are charged in the indictment, whenever opportunity was afforded, and that government officers or their agents did no more than offer the opportunity, then the jury should find that the defendant is not a victim of entrapment.

Suggestion 5: Avoid omission of relative pronouns and auxiliary verbs.

The Charrows found that the omission of relative pronouns and auxiliary verbs increased the difficulty that jurors had in understanding the instructions. This is perhaps the one research finding reported here that does not confirm our intuition. In some cases, adherence to the suggestion produces awkward-sounding sentences. We do not argue that the relative pronoun or auxiliary verb should be included if awkwardness will result. But the research finding seems to be well grounded, and we believe it deserves attention in cases in which it does not produce evident awkwardness.

In the examples below, relative pronouns and auxiliary verbs that did not appear in the original have been added in brackets.

Example 1

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence [that] I have admitted in the case.

Example 2

The defendant is not on trial for any act or conduct [that was] not alleged in the indictment (information).

Suggestion 6: Avoid double negations.

The Charrow research identified double negations as a particularly important source of juror confusion. They can often be avoided by using the word "only." The second of the examples given below is to be preferred over the first on that ground.

Example 1

The defendant is not on trial for any act or conduct not alleged in the indictment (information).

Example 2

The defendant is charged only with filing an income tax return on behalf of X Corporation which he knew to be false, as set out in the indictment. He is not charged with any other offense.

Suggestion 7: Use a concrete style rather than an abstract one.

The research indicates that instructions that are concrete and specific are easier to understand than those that are couched in generalizations and that rely upon the jurors to apply the generalizations to the particular task that they have to perform. It is better to identify particular witnesses as having certain characteristics than to talk abstractly about witnesses who have those characteristics. It is better to speak to the jury in the second person than to talk abstractly about the decision to be made.

Example 1 below is highly abstract, leaving it to the jury to figure out which witness is being discussed and who is to treat the testimony with caution and care. Example 2 is a very concrete treatment of the same subject. We do not suggest that the average juror would fail to understand example 1 if it were standing alone. We do suggest that the abstract style identified here tends to increase the difficulty of the task of understanding a whole set of instructions.

Example 1

The testimony of an admitted perjurer should always be considered with caution and weighed with great care.

Example 2

_____ has admitted lying under oath. You may give his testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care.

Other Features

Suggestion 8: Avoid instructing the jury about things they don't need to know.

A surprising number of the instructions that we have reviewed in the course of our work for the Center's committee include discussion of matters that do not seem appropriate for jury consideration. It is apparently customary, for example, to distinguish carefully between direct evidence and circumstantial evidence before telling the jury that the distinction is irrelevant to their consideration of the evidence. Many instructions include discussion of evidentiary rules that seems more appropriately addressed to the judge than to the jury. While it may not be inherently harmful to inform the jury of an evidentiary rule, instructions of this type frequently introduce other problem features. In the first example below, for instance, the word "incompetent" is used to mean something other than its most common meaning, and the word "corroborate" is a low-frequency word. The instruction in the second example avoids these problems simply by not talking about admissibility. The third example, a pattern jury instruction printed in its entirety, is offered as an extreme example: It contains no advice to the jury at all.

Example 1

An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of one who asserts by his testimony that he is an accomplice, may be received in evidence and considered by the jury, even though not corroborated by other evidence, and given such weight as the jury feels it should have.

Example 2

The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for per-

sonal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest, or by prejudice against defendant.

Example 3

Where the true identity of a person is in issue, any proved or admitted fingerprint of this person may be received in evidence to be used as an exemplar or specimen, for comparison with any fingerprint in dispute.

APPENDIX B
Comparison of Selected Instructions from This Collection with Similar Instructions from Other Collections

By Allan Lind and Anthony Partridge

This appendix compares four of the Federal Judicial Center committee's instructions with other pattern instructions covering substantially the same subject matter. For each instruction, we show the total number of words, the Flesch "readability" score, and the number of uncommon words used.

The "readability" score is an index designed by Dr. Rudolph Flesch to test written materials for ease of comprehension.[1] It combines into a single score two measures that are associated with ease of comprehension: the average number of syllables per word and the proportion of words that are concrete as contrasted with abstract. The test does not require much subjective judgment by the person doing the scoring and may therefore be said to be relatively objective. As with any test of this nature, however, it provides an indirect and imperfect measure of comprehensibility. We would generally expect improvement in comprehensibility to be accompanied by improvement in Flesch scores, but it should not be assumed that instructions with higher Flesch scores are invariably more understandable than instructions with lower scores.

Words identified as "uncommon" are those reported by Thorndike and Lorge to be used less frequently than ten times per million words of writing.[2] The count of uncommon words is unduplicated: A word is counted only once even if it is used more than once in a particular instruction.

The instructions to be compared were chosen by us to represent a variety of types of instruction, but they are in no sense a statistical cross section. The general instruction about credibility of witnesses is characterized, in all of the collections, by a high level of abstraction; by its nature, it cannot focus on particular witnesses or particular testimony. The instruction on the treatment of evidence of the defendant's good character is a more targeted instruction about the way in which a particular kind of evidence should be considered. The accomplice instruction is an example of a cautionary instruction about a particular witness or witnesses. The instruction about the defendant's prior convictions is an example of

1. Flesch, *Measuring the Level of Abstraction,* 34 J. Applied Psychology 384 (1950).

2. A discussion of the Thorndike and Lorge frequency list and its limitations is included in appendix A. In that list, the observed frequency of regular plurals, comparatives, superlatives, and verb forms is not reported separately; rather, the observed frequency of these forms is included in the reported frequencies of their root words. Also, the frequency of adverbs ending in "ly" is reported separately only if the adverb occurs at least once per million words of writing. In determining whether to classify words as uncommon, we have modified the frequency reported in Thorndike and Lorge by combining separately reported frequencies of "-ly" adverbs and their root words and "-ness" nouns and their root words.

an instruction limiting the purpose for which certain evidence can be considered.

Comparison of the pattern instructions required that decisions be made in some cases about optional language. Also, in two instances in which a collection of instructions included a separate instruction to the effect that the weight of the evidence is not necessarily determined by the number of witnesses testifying on one side, that instruction was treated for purposes of the comparisons as part of the general instruction on evaluating witnesses' testimony.

EVALUATION OF TESTIMONY; CREDIBILITY OF WITNESSES

	Devitt & Blackmar	Fifth Circuit	Seventh Circuit	D.C. Bar Ass'n	FJC Committee
Length (words)	322	190	78	481	260
Flesch score	42.4 (Difficult)	48.3 (Difficult)	47.9 (Difficult)	41.0 (Difficult)	64.8 (Standard)
Uncommon words	15 contradict credence credibility credible demeanor discredit discrepancy inconsistency juror misrecollection pertain scrutinize transaction uncommon unimportant	8 believability candor contradict credibility credible defendant nonexistent outcome	2 bias credibility	24 animosity bias capability credence credibility credible contradict corroborate defendant demeanor discredit discrepancy improbability improbable inconsistency intentional misrecollection outcome pertain transaction truthful uncommon unimportant unreasonable	2 defendant outcome

NOTE: The instructions compared are Devitt & Blackmar §§17.01, 17.20; Fifth Circuit No. B6; Seventh Circuit (1980) No. 1.02; D.C. Bar Nos. 2.11, 2.13; FJC Committee No. 23. See p. xv for full citations to the collections.

EVIDENCE OF DEFENDANT'S GOOD CHARACTER

	Devitt & Blackmar	Fifth Circuit	Seventh Circuit	D.C. Bar Ass'n	FJC Committee
Length (words)	169	120	54	175	89
Flesch score	40.1 (Difficult)	39.2 (Difficult)	30.4 (Very difficult)	49.6 (Difficult)	64.7 (Standard)
Uncommon words	8 defendant improbable inconsistent inference integrity law-abiding trait veracity	7 defendant improbable inconsistent integrity law-abiding trait veracity	2 defendant trait	3 convincing defendant improbable	1 defendant

NOTE: The instructions compared are Devitt & Blackmar §15.25; Fifth Circuit No. S3; Seventh Circuit (1980) No. 3.15; D.C. Bar No. 2.42; FJC Committee No. 51. See p.xv for full citations to the collections.

ACCOMPLICE TESTIMONY

	Devitt & Blackmar	Fifth Circuit	Seventh Circuit	D.C. Bar Ass'n	FJC Committee
Length (words)	127	200	49	114	143
Flesch score	40.3 (Difficult)	52.8 (Fairly difficult)	76.3 (Fairly easy)	38.9 (Difficult)	58.4 (Fairly difficult)
Uncommon words	7 accomplice corroborate defendant incompetent participation unsupported voluntary	7 accomplice codefendant dismissal incompetent indictment lesser unsupported	1 defendant	6 accomplice defendant participation scrutinize uncorroborated voluntary	3 lenient prosecution truthful

NOTE: The instructions compared are Devitt & Blackmar §17.06; Fifth Circuit No. S2B; Seventh Circuit (1980) No. 3.22; D.C. Bar No. 2.22; FJC Committee No. 24. See p. xv for full citations to the collections.

IMPEACHMENT OF DEFENDANT BY PRIOR CONVICTION

	Devitt & Blackmar	Fifth Circuit	Seventh Circuit	D.C. Bar Ass'n	FJC Committee
Length (words)	49	154	48	75	110*
Flesch score	46.2 (Difficult)	43.0 (Difficult)	60.9 (Standard)	43.1 (Difficult)	85.4 (Easy)
Uncommon words	4 credibility defendant felony insofar	5 credibility defendant dishonesty felony insofar	3 credibility defendant insofar	6 credence credibility defendant evaluate evaluation inference	1 defendant

NOTE: The instructions compared are Devitt & Blackmar §17.13; Fifth Circuit No. B7F; Seventh Circuit (1980) No. 3.16; D.C. Bar No. 1.08; FJC Committee No. 41. See p. xv for full citations to the collections.

*Actually longer because blanks for offense description were not counted.