JUDGE D. BROCK HORNBY'S
2005 REVISIONS
TO

PATTERN

CRIMINAL JURY INSTRUCTIONS

FOR THE DISTRICT COURTS

OF THE FIRST CIRCUIT

DISTRICT OF MAINE INTERNET SITE EDITION
UPDATED 10/14/05

PATTERN CRIMINAL JURY INSTRUCTIONS
FOR THE FIRST CIRCUIT

Preface to 1998 Edition

Citations to Other Pattern Instructions

How to Use the Pattern Instructions

Part 1—Preliminary Instructions

1.01 Duties of the Jury
1.02 Nature of Indictment; Presumption of Innocence
1.03 Previous Trial
1.04 Preliminary Statement of Elements of Crime
1.05 Evidence; Objections; Rulings; Bench Conferences
1.06 Credibility of Witnesses
1.07 Conduct of the Jury
1.08 Notetaking
1.09 Outline of the Trial

Part 2—Instructions Concerning Certain Matters of Evidence

2.01 Stipulations
2.02 Judicial Notice
2.03 Impeachment by Prior Inconsistent Statement
2.04 Impeachment of Witness Testimony by Prior Conviction
2.05 Impeachment of Defendant's Testimony by Prior Conviction
2.06 Evidence of Defendant's Prior Similar Acts
2.07 Weighing the Testimony of an Expert Witness
2.08 Caution as to Cooperating Witness/Accomplice/Paid Informant
2.09 Use of Tapes and Transcripts
2.10 Flight After Accusation/Consciousness of Guilt
2.11 Statements by Defendant
2.12 Missing Witness
2.13 Witness (Not the Defendant) Who Takes the Fifth Amendment
2.14 Definition of “Knowingly”
2.15 “Willful Blindness” As a Way of Satisfying “Knowingly”
2.16 Definition of “Willfully”
2.17 Taking a View
2.18 Character Evidence

Part 3—Final Instructions: General Considerations

3.01 Duty of the Jury to Find Facts and Follow Law
3.02 Presumption of Innocence; Proof Beyond a Reasonable Doubt
3.03 Defendant's Constitutional Right Not to Testify
3.04 What Is Evidence; Inferences
3.05 Kinds of Evidence: Direct and Circumstantial
3.06 Credibility of Witnesses
3.07 Cautionary and Limiting Instructions as to Particular Kinds of Evidence
3.08 What Is Not Evidence

Part 4—Final Instructions: Elements of Specific Crimes [Organized by Statutory Citation]

A. Offenses Under Title 8

4.08.1325 Immigration Through Fraudulent Marriage, 8 U.S.C. § 1325(c)
4.08.1326 Re-entry and Attempted Re-entry After Deportation, 8 U.S.C. § 1326

B. Offenses Under Title 16

4.16.3372 Receiving Fish, Wildlife, Plants Illegally Taken (Lacey Act), 16 U.S.C. §§ 3372(a)(2)(A), 3373(d)(1)(B), (2)

C. Offenses Under Title 18

4.18.00 Attempt
4.18.02 Aid and Abet, 18 U.S.C. § 2
4.18.03 Accessory After the Fact, 18 U.S.C. § 3
4.18.152(1) Bankruptcy Fraud, Concealment, 18 U.S.C. § 152(1)
4.18.152(2),(3) Bankruptcy Fraud, False Oath/Account and False Declaration, 18 U.S.C. § 152(2), 152(3)
4.18.152(4) Bankruptcy Fraud, False Claim, 18 U.S.C. § 152(4)
4.18.152(5) Bankruptcy Fraud, Receipt with Intent to Defraud, 18 U.S.C. § 152(5)
4.18.152(6) Bankruptcy Fraud, Bribery and Extortion, 18 U.S.C. § 152(6)
4.18.152(7) Bankruptcy Fraud, Transfer of Property in Personal Capacity or as Agent or Officer, 18 U.S.C. § 152(7)
4.18.152(8) Bankruptcy Fraud, False Entries, 18 U.S.C. § 152(8)
4.18.152(9) Bankruptcy Fraud, Withholding Recorded Information, 18 U.S.C. § 152(9)
4.18.371(1) Conspiracy, 18 U.S.C. § 371; 21 U.S.C. § 846
4.18.371(2) Pinkerton Charge
4.18.656 Misapplication or Embezzlement of Bank Funds, 18 U.S.C. § 656
4.18.751 Escape from Custody, 18 U.S.C. § 751
4.18.752 Assisting Escape, 18 U.S.C. § 752

4.18.875	Interstate Communications—Threats, 18 U.S.C. § 875(c)
4.18.922(a)	False Statement in Connection With Acquisition of a Firearm, 18 U.S.C. § 922(a)
4.18.922(g)	Possession of a Firearm or Ammunition in or Affecting Commerce by a Convicted Felon, 18 U.S.C. § 922(g)
4.18.922(k)	Possession of a Firearm With an Obliterated or Removed Serial Number, 18 U.S.C. § 922(k)
4.18.922(v)	Possession of Semiautomatic Assault Weapons, 18 U.S.C. § 922(v)
4.18.924	Using or Carrying a Firearm During and in Relation to Drug Trafficking or Crime of Violence, 18 U.S.C. § 924(c)
4.18.982	Money Laundering – Forfeiture, 18 U.S.C. § 982(a)(1)
4.18.1001	Making a False Statement to a Federal Agency, 18 U.S.C. § 1001
4.18.1014	Making a False Statement or Report, 18 U.S.C. § 1014
4.18.1029	Access Device or Credit Card Fraud, 18 U.S.C. § 1029(a)(2)
4.18.1072	Harboring or Concealing an Escaped Prisoner, 18 U.S.C. § 1072
4.18.1341	Mail Fraud, 18 U.S.C. § 1341
4.18.1343	Wire Fraud, 18 U.S.C. § 1343
4.18.1344	Bank Fraud, 18 U.S.C. § 1344(1), (2)
4.18.1462	Use of Interactive Computer Service for Obscene Matters, 18 U.S.C. § 1462
4.18.1470	Transfer of Obscene Materials to Minors, 18 U.S.C. § 1470
4.18.1546	False Statement in Document Required by Immigration Law, 18 U.S.C. § 1546(a)
4.18.1623	False Declaration in Grand Jury Testimony, 18 U.S.C. § 1623
4.18.1832	Theft of Trade Secrets (Economic Espionage Act), 18 U.S.C. § 1832
4.18.1951	Interference with Commerce by Robbery or Extortion (Hobbs Act), 18 U.S.C. § 1951
4.18.1952	Travel Act, 18 U.S.C. § 1952
4.18.1956(a)(1)(A)	Money Laundering—Promotion of Illegal Activity or Tax Evasion, 18 U.S.C. § 1956(a)(1)(A)
4.18.1956(a)(1)(B)(i)	Money Laundering—Illegal Concealment, 18 U.S.C. § 1956(a)(1)(B)(i)
4.18.1956(a)(1)(B)(ii)	Money Laundering—Illegal Structuring, 18 U.S.C. § 1956(a)(1)(B)(ii)
4.18.1957	Money Laundering—Engaging in Monetary Transactions in Property Derived from Specific Unlawful Activity, 18 U.S.C. § 1957
4.18.2113(a)	Unarmed Bank Robbery, 18 U.S.C. § 2113(a)
4.18.2113(a),(d)	Armed or Aggravated Bank Robbery, 18 U.S.C. § 2113(a), (d)
4.18.2119	Carjacking, 18 U.S.C. § 2119
4.18.2252	Possession of Child Pornography, 18 U.S.C. § 2252A(a)(5)(B)

4.18.2314 Interstate Transportation of Stolen Money or Property, 18 U.S.C. § 2314
4.18.2422(b) Coercion and Enticement, 18 U.S.C. § 2422(b)

D. Offenses Under Title 21

4.21.841(a)(1)A Possession with Intent to Distribute a Controlled Substance, 21 U.S.C. § 841(a)(1)
4.21.841(a)(1)B Distribution of a Controlled Substance, 21 U.S.C. § 841(a)(1)
4.21.841(a)(1)C Manufacture of a Controlled Substance, 21 U.S.C. §§ 841(a)(1), 802(15)
4.21.846 Conspiracy, 21 U.S.C. § 846
4.21.853 Drugs-Forfeiture, 21 U.S.C. § 853
4.21.952 Importation of a Controlled Substance, 21 U.S.C. §§ 952, 960

E. Offenses Under Title 26

4.26.7201 Income Tax Evasion, 26 U.S.C. § 7201
4.26.7203 Failure to File a Tax Return, 26 U.S.C. § 7203
4.26.7206 False Statements on Income Tax Return, 26 U.S.C. § 7206(1)

F. Offenses Under Title 31

4.31.5322 Money Laundering—Illegal Structuring, 31 U.S.C. §§ 5322, 5324

G. Offenses Under Title 46

4.46.1903 Possessing a Controlled Substance on Board a Vessel Subject to United States Jurisdiction with Intent to Distribute, 46 U.S.C. App. § 1903

Part 5 Final Instructions: Defenses and Theories of Defense

5.01 Alibi
5.02 Mental State That Is Inconsistent with the Requisite Culpable State of Mind
5.03 Intoxication
5.04 Self-Defense
5.05 Duress
5.06 Necessity
5.07 Entrapment
5.08 Insanity [18 U.S.C. § 17]

Part 6 Final Instructions: Deliberations and Verdict

6.01 Foreperson's Role; Unanimity
6.02 Consideration of Evidence
6.03 Reaching Agreement
6.04 Return of Verdict Form
6.05 Communication with the Court
6.06 Charge to a Hung Jury

Afterword: How to Draft a Charge

PREFACE TO 1998 EDITION

At the First Circuit Judicial Conference on October 1, 1997, the assembled federal judges voted to approve the publication of these pattern instructions. Although we believe that the pattern instructions and, in particular, the commentary that accompanies them will be helpful in crafting a jury charge in a particular case, it bears emphasis that no district judge is required to use the pattern instructions, and that the Court of Appeals has not in any way approved the use of a particular instruction.

It is our hope to keep these pattern instructions updated as the law develops. As a result, we welcome any suggested modifications or improvements. In addition, we invite the submission of pattern charges for any other commonly charged crimes in the First Circuit.

Particular thanks are due to Professor Melvyn Zarr of the University of Maine School of Law and John Ciraldo of Perkins, Thompson, Hinckley & Keddy who co-chaired the drafting committee, as well as to each of the members of that committee who worked diligently to produce these pattern instructions.

D. Brock Hornby
United States Chief District Judge
District of Maine

11/97

CITATIONS TO OTHER PATTERN INSTRUCTIONS

We have abbreviated our citations to other pattern instructions as follows:

Fifth Circuit Instruction	Fifth Circuit District Judges Association Pattern Jury Instructions Committee, Pattern Jury Instructions, Criminal Cases (1990)
Sixth Circuit Instruction	Sixth Circuit District Judges Association Pattern Criminal Jury Instructions Committee, Pattern Criminal Jury Instructions (1991)
Eighth Circuit Instruction	Eighth Circuit Committee on Model Criminal Jury Instructions, Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (1996)
Ninth Circuit Instruction	Ninth Circuit Committee on Model Criminal Jury Instructions, Manual of Model Criminal Jury Instruction for the District Courts of the Ninth Circuit (1995)
Eleventh Circuit Instruction	Eleventh Circuit District Judges Association Pattern Jury Instructions Committee, Pattern Jury Instructions, Criminal Cases (1985)
Federal Judicial Center Instruction	Federal Judicial Center, Pattern Criminal Jury Instructions (1988)
Sand, et al., Instruction	Leonard B. Sand et al., Modern Federal Jury Instructions (2000)

HOW TO USE THE PATTERN INSTRUCTIONS

These instructions will function best if specific references to the case being tried are inserted. For example, every time we have put the word "defendant" in brackets we intend the instructing judge to substitute the defendant's actual name. The same holds true when the word "witness" is bracketed. General studies of juror understanding suggest that juries understand better when actual names are used rather than terms like "defendant" or "witness." On the same rationale, we have used the term "I" rather than the third person "the court" when referring to the judge. Finally, where we have given alternatives, select the alternative(s) that best fit(s) the evidence in your case.

PART 1 PRELIMINARY INSTRUCTIONS

1.01	Duties of the Jury	[Updated: 6/14/02]
1.02	Nature of Indictment; Presumption of Innocence	[Updated: 6/14/02]
1.03	Previous Trial	[Updated: 6/14/02]
1.04	Preliminary Statement of Elements of Crime	[Updated: 6/14/02]
1.05	Evidence; Objections; Rulings; Bench Conferences	[Updated: 6/14/02]
1.06	Credibility of Witnesses	[Updated: 6/14/02]
1.07	Conduct of the Jury	[Updated: 6/14/02]
1.08	Notetaking	[Updated: 6/14/02]
1.09	Outline of the Trial	[Updated: 6/14/02]

1.01 Duties of the Jury

[Updated: 6/14/02]

Ladies and gentlemen: You now are the jury in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some instructions. At the end of the trial I will give you more detailed instructions. Those instructions will control your deliberations.

It will be your duty to decide from the evidence what the facts are. You, and you alone, are the judges of the facts. You will hear the evidence, decide what the facts are, and then apply those facts to the law I give to you. That is how you will reach your verdict. In doing so you must follow that law whether you agree with it or not. The evidence will consist of the testimony of witnesses, documents and other things received into evidence as exhibits, and any facts on which the lawyers agree or which I may instruct you to accept.

You should not take anything I may say or do during the trial as indicating what I think of the believability or significance of the evidence or what your verdict should be.

Comment

(1) This instruction is derived from Ninth Circuit Instruction 1.01.

(2) "[J]urors may have the power to ignore the law, but their duty is to apply the law as interpreted by the court, and they should be so instructed." United States v. Boardman, 419 F.2d 110, 116 (1st Cir. 1969) (citing Sparf & Hansen v. United States, 156 U.S. 51 (1895)). Thus, while a jury may acquit an accused for any reason or no reason, see Horning v. District of Columbia, 254 U.S. 135, 138 (1920) ("[T]he jury has the power to bring in a verdict in the teeth of both law and facts."), trial judges may not instruct the jurors about this power of nullification. United States v. Manning, 79 F.3d 212, 219 (1st Cir. 1996); United States v. Sepulveda, 15 F.3d 1161, 1190 (1st Cir. 1993) (citing United States v. Desmarais, 938 F.2d 347, 350 (1st Cir. 1991) (collecting cases)); see also United States v. Garcia-Rosa, 876 F.2d 209, 226 (1st Cir. 1989) (this position "is consistent with that of every other federal appellate court that has addressed this issue"), vacated on other grounds, 498 U.S. 954 (1990); United States v. Trujillo, 714 F.2d 102, 105-06 (11th Cir. 1983) (collecting cases). Furthermore, "[t]his proscription is invariant; it makes no difference that the jury inquired, or that an aggressive lawyer managed to pique a particular jury's curiosity by mentioning the subject in closing argument, or that a napping prosecutor failed to raise a timely objection to that allusion." Sepulveda, 15 F.3d at 1190.

During the closing arguments in Sepulveda one of the defendants' attorneys invited the jury to "send out a question" concerning jury nullification; the jury did so, requesting the trial judge to "[c]larify the law on jury nullification." Id. at 1189. The judge responded with the following, which was affirmed by the First Circuit:

> Federal trial judges are forbidden to instruct on jury nullification, because they are required to instruct only on the law which applies to a case. As I

> have indicated to you, the burden in each instance which is here placed upon the Government is to prove each element of the offenses . . . beyond a reasonable doubt, and in the event the Government fails to sustain its burden of proof beyond a reasonable doubt as to any essential element of any offense charged against each defendant, it has then failed in its burden of proof as to such defendant and that defendant is to be acquitted. In short, if the Government proves its case against any defendant, you *should* convict that defendant. If it fails to prove its case against any defendant you *must* acquit that defendant.

Id. at 1189-90 (emphases added). Judge Selya explained that the "contrast in directives" in the last two sentences, "together with the court's refusal to instruct in any detail about the doctrine of jury nullification, left pregnant the possibility that the jury could ignore the law if it so chose." Id. at 1190.

1.02 Nature of Indictment; Presumption of Innocence

[Updated: 6/14/02]

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/her] lawyer, [_____]. [*Alternative:* The defendant, [_____], has decided to represent [him/herself] and not use the services of a lawyer. [He/She] has a perfect right to do this. [His/Her] decision has no bearing on whether [he/she] is guilty or not guilty, and it should have no effect on your consideration of the case.]

[Defendant] has been charged by the government with violation of a federal law. [He/She] is charged with [*e.g.*, having intentionally distributed heroin]. The charge against [defendant] is contained in the indictment. The indictment is simply the description of the charge against [defendant]; it is not evidence of anything. [Defendant] pleaded not guilty to the charge and denies committing the crime. [He/She] is presumed innocent and may not be found guilty by you unless all of you unanimously find that the government has proven [his/her] guilt beyond a reasonable doubt.

[*Addition for multi-defendant cases:* The defendants are being tried together because the government has charged that they acted together in committing the crime of [_____]. But you will have to give separate consideration to the case against each defendant. Do not think of the defendants as a group.]

Comment

This instruction is derived from Federal Judicial Center Instruction 1.

1.03 Previous Trial

[Updated: 6/14/02]

You may hear reference to a previous trial of this case. A previous trial did occur. But [defendant] and the government are entitled 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 proven, beyond a reasonable doubt, that the defendant committed the crime.

Comment

(1) This instruction is derived from Ninth Circuit Instruction 2.09, Federal Judicial Center Instruction 14, and Sand, et al., Instruction 2-13. The commentary to the Ninth Circuit and Federal Judicial Center instructions both recommend that this instruction not be given unless specifically requested by the defense. See also United States v. Seals, 987 F.2d 1102, 1109-10 (5th Cir. 1993) (finding it was not error to fail to instruct the jury when defense counsel refused trial court's offer to give instruction following inadvertent references to the defendant's previous trial).

(2) The District of Columbia Circuit has suggested that the following cautionary instruction be given at the *outset* of a retrial: "The defendant has been tried before. [If there has been a mistrial, so state.] You have no concern with that. The law charges you to render a verdict solely on the evidence in this trial." Carsey v. United States, 392 F.2d 810, 812 (D.C. Cir. 1967) (finding defense counsel's mention of "mistrials" did not substantially prejudice the prosecution and prevent a fair trial, so that the trial judge should have handled the matter through a cautionary instruction instead of declaring a mistrial); see also United States v. Hykel, 461 F.2d 721, 726 (3d Cir. 1972) (affirming instruction given after mention during jury selection of previous mistrial; instruction cautioning jury that "[T]he fact that this is the second trial of this case should mean nothing to you. Do you understand that? No inference of any kind should be drawn from that."); cf. United States v. Faulkner, 17 F.3d 745, 763-64 (5th Cir. 1994) (affirming court's statement to jury about true reason for mistrial in context of newscasts erroneously reporting that previous trial ended in mistrial due to jury tampering).

1.04 Preliminary Statement of Elements of Crime

[Updated: 6/14/02]

In order to help you follow the evidence, I will now give you a brief summary of the elements of the crime[s] charged, each of which the government must prove beyond a reasonable doubt to make its case:

First, [_____];
Second, [_____];
Third, [_____];
etc.

[The description of the crime in this preliminary instruction should not simply track statutory language but should be stated in plain language as much as possible.]

You should understand, however, that what I have just given you is only a preliminary outline. At the end of the trial I will give you a final instruction on these matters. If there is any difference between what I just told you, and what I tell you in the instruction I give you at the end of the trial, the instructions given at the end of the trial govern.

Comment

This instruction is derived from Eighth Circuit Instruction 1.02 and Ninth Circuit Instruction 1.02.

1.05 Evidence; Objections; Rulings; Bench Conferences

[Updated: 6/14/02]

I have mentioned the word "evidence." Evidence includes the testimony of witnesses, documents and other things received as exhibits, and any facts that have been stipulated—that is, formally agreed to by the parties.

There are rules of evidence that control what can be received into evidence. When a lawyer asks a question or offers an exhibit into evidence, and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. This simply means that the lawyer is requesting that I make a decision on a particular rule of evidence.

Then it may be necessary for me to talk with the lawyers out of the hearing of the jury, either by having a bench conference here while the jury is present in the courtroom, or by calling a recess. Please understand that while you are waiting, we are working. The purpose of these conferences is to decide how certain evidence is to be treated under the rules of evidence, and to avoid confusion and error. We will, of course, do what we can to keep the number and length of these conferences to a minimum.

Certain things are not evidence. I will list those things for you now:

(1) Statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence.

(2) Objections are not evidence. Lawyers have a duty to their client to object when they believe something is improper under the rules of evidence. You should not be influenced by the objection. If I sustain an objection, you must ignore the question or exhibit and must not try to guess what the answer might have been or the exhibit might have contained. If I overrule the objection, the evidence will be admitted, but do not give it special attention because of the objection.

(3) Testimony that I strike from the record, or tell you to disregard, is not evidence and must not be considered.

(4) Anything you see or hear about this case outside the courtroom is not evidence, unless I specifically tell you otherwise during the trial.

Furthermore, a particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you only for a particular purpose, and not for any other purpose. I will tell you when that occurs and instruct you on the purposes for which the item can and cannot be used.

Finally, some of you may have heard the terms "direct evidence" and "circumstantial evidence." Direct evidence is testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find or infer another fact. You may consider both direct and circumstantial evidence. The law

permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

Comment

This instruction is derived from Federal Judicial Center Instruction 1, Eighth Circuit Instructions 1.03, 1.07 and Ninth Circuit Instructions 1.05, 1.06.

1.06 Credibility of Witnesses

[Updated: 6/14/02]

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe everything a witness says or only part of it or none of it.

In deciding what to believe, you may consider a number of factors, including the following: (1) the witness's ability to see or hear or know the things the witness testifies to; (2) the quality of the witness's memory; (3) the witness's manner while testifying; (4) whether the witness has an interest in the outcome of the case or any motive, bias or prejudice; (5) whether the witness is contradicted by anything the witness said or wrote before trial or by other evidence; and (6) how reasonable the witness's testimony is when considered in the light of other evidence which you believe.

Comment

This instruction is derived from Eighth Circuit Instruction 1.05 and Ninth Circuit Instruction 1.07.

1.07 Conduct of the Jury

[Updated: 6/14/02]

To insure fairness, you as jurors must obey the following rules:

First, do not talk among yourselves about this case, or about anyone involved with it, until the end of the case when you go to the jury room to decide on your verdict;

Second, do not talk with anyone else about this case, or about anyone who has anything to do with it, until the trial has ended and you have been discharged as jurors. "Anyone else" includes members of your family and your friends. You may tell them that you are a juror, but do not tell them anything about the case until after you have been discharged by me;

Third, do not let anyone talk to you about the case or about anyone who has anything to do with it. If someone should try to talk to you, please report it to me immediately;

Fourth, during the trial do not talk with or speak to any of the parties, lawyers or witnesses involved in this case—you should not even pass the time of day with any of them. It is important not only that you do justice in this case, but that you also give the appearance of doing justice. If a person from one side of the lawsuit sees you talking to a person from the other side—even if it is simply to pass the time of day—an unwarranted and unnecessary suspicion about your fairness might be aroused. If any lawyer, party or witness does not speak to you when you pass in the hall, ride the elevator or the like, it is because they are not supposed to talk or visit with you;

Fifth, do not read any news stories or articles about the case or about anyone involved with it, or listen to any radio or television reports about the case or about anyone involved with it;

Sixth, do not do any research, such as consulting dictionaries or other reference materials, and do not make any investigation about the case on your own;

Seventh, if you need to communicate with me simply give a signed note to the [court security officer] to give to me; and

Eighth, do not make up your mind about what the verdict should be until after you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence. Keep an open mind until then.

Comment

This instruction is derived from Eighth Circuit Instruction 1.08 and Ninth Circuit Instruction 1.08.

1.08 Notetaking

[Updated: 6/14/02]

I am going to permit you to take notes in this case, and the courtroom deputy has distributed pencils and pads for your use. I want to give you a couple of warnings about taking notes, however. First of all, do not allow your note-taking to distract you from listening carefully to the testimony that is being presented. If you would prefer not to take notes at all but simply to listen, please feel free to do so. Please remember also from some of your grade-school experiences that not everything you write down is necessarily what was said. Thus, when you return to the jury room to discuss the case, do not assume simply because something appears in somebody's notes that it necessarily took place in court. Instead, it is your collective memory that must control as you deliberate upon the verdict. Please take your notes to the jury room at every recess. I will have the courtroom deputy collect them at the end of each day and place them in the vault. They will then be returned to you the next morning. When the case is over, your notes will be destroyed. These steps are in line with my earlier instruction to you that it is important that you not discuss the case with anyone or permit anyone to discuss it with you.

Comment

(1) "The decision to allow the jury to take notes and use them during deliberations is a matter within the discretion of the trial court." United States v. Porter, 764 F.2d 1, 12 (1st Cir. 1985). The trial judge, however, should explain to jurors that the notes should only be used to refresh their recollections of the evidence presented and "not prevent [them] from getting a full view of the case." United States v. Oppon, 863 F.2d 141, 148 n.12 (1st Cir. 1988).

(2) The district court is within its discretion to limit when the jurors may take notes during the trial. United States v. Dardea, 70 F.3d 1507, 1537 (1st Cir. 1995) (affirming trial court's decision to allow jurors to take notes only when viewing exhibits so as not to distract them from live testimony).

1.09 Outline of the Trial

[Updated: 6/14/02]

The first step in the trial will be the opening statements. The government in its opening statement will tell you about the evidence that 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.

[After the government's opening statement, [defendant]'s attorney may, if [he/she] chooses, 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 charge[s] against [defendant]. The government's evidence in this case will consist of the testimony of witnesses, and may include documents and other exhibits. In a moment I will say more about the nature of evidence.

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

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 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 [defendant] will attempt to summarize 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 that you are to use in reaching your verdict. After hearing my instructions, you will leave the courtroom together to make your decisions. Your deliberations will be secret. You will never have to explain your verdict to anyone.

Comment

(1) This instruction is derived from Federal Judicial Center Instruction 1.

(2) The third paragraph should be omitted if the defense reserves its opening statement until later. The judge should resolve this issue with the lawyers before giving the instruction.

PART 2 INSTRUCTIONS CONCERNING CERTAIN MATTERS OF EVIDENCE

2.01	Stipulations	[Updated: 6/14/02]
2.02	Judicial Notice	[Updated: 6/14/02]
2.03	Impeachment by Prior Inconsistent Statement	[Updated: 6/14/02]
2.04	Impeachment of Witness Testimony by Prior Conviction	[Updated: 6/14/02]
2.05	Impeachment of Defendant's Testimony by Prior Conviction	[Updated: 6/14/02]
2.06	Evidence of Defendant's Prior Similar Acts	[Updated: 6/14/02]
2.07	Weighing the Testimony of an Expert Witness	[Updated: 6/14/02]
2.08	Caution as to Cooperating Witness/Accomplice/Paid Informant	[Updated: 12/5/03]
2.09	Use of Tapes and Transcripts	[Updated: 12/5/03]
2.10	Flight After Accusation/Consciousness of Guilt	[Updated: 6/14/02]
2.11	Statements by Defendant	[Updated: 6/14/02]
2.12	Missing Witness	[Updated: 12/5/03]
2.13	Witness (Not the Defendant) Who Takes the Fifth Amendment	[Updated: 7/31/03]
2.14	Definition of “Knowingly”	[Updated: 6/14/02]
2.15	“Willful Blindness” As a Way of Satisfying “Knowingly”	[Updated: 6/14/02]
2.16	Definition of “Willfully”	[New: 7/31/03]
2.17	Taking a View	[Updated: 6/14/02]
2.18	Character Evidence	[Updated: 6/14/02]

Introductory Comment

Instructions concerning evidence may be used during the trial, or in the final instructions or at both times. They are collected here for easy reference.

2.01 Stipulations

[Updated: 6/14/02]

The evidence in this case includes facts to which the lawyers have agreed or stipulated. A stipulation means simply that the government and the defendant accept the truth of a particular proposition or fact. Since there is no disagreement, there is no need for evidence apart from the stipulation. You must accept the stipulation as fact to be given whatever weight you choose.

Comment

Where there are stipulations that are legal as well as factual, it is safest to include them in the jury instructions. The First Circuit has said: "We express no opinion on whether the government's duty to prove each element of a crime beyond a reasonable doubt is diluted impermissibly if the jury instructions do not submit the stipulation for the jury's consideration. This thorny question has divided the courts of appeals. . . ." United States v. Meade, 175 F.3d 215, 222 n.2 (1st Cir. 1999) (citations omitted).

2.02 Judicial Notice

[Updated: 6/14/02]

I believe that [judicially noticed fact] [is of such common knowledge] [can be so accurately and readily determined] that it cannot be reasonably disputed. You may, therefore, reasonably treat this fact as proven, even though no evidence has been presented on this point.

As with any fact, however, the final decision whether or not to accept it is for you to make. You are not required to agree with me.

Comment

Use of an instruction like this was approved in United States v. Bello, 194 F.3d 18, 25-26 (1st Cir. 1999); see also Fed. R. Evid. 201(g).

2.03 Impeachment by Prior Inconsistent Statement

[Updated: 6/14/02]

You have heard evidence that before testifying at this trial, [witness] made a statement concerning the same subject matter as [his/her] testimony in this trial. You may consider that earlier statement to help you decide how much of [witness's] testimony to believe. If you find that the prior statement was not consistent with [witness's] testimony at this trial, then you should decide whether that affects the believability of [witness's] testimony at this trial.

Comment

This instruction is for use where a witness's prior statement is admitted only for impeachment purposes. Where a prior statement is admitted substantively under Fed. R. Evid. 801(d)(1), this instruction is not appropriate. Once a prior statement is admitted substantively as non-hearsay under Rule 801(d)(1), it is actual evidence and may be used for whatever purpose the jury wishes. No instruction seems necessary in that event, but one may refer to Federal Judicial Center Instructions 33 and 34.

2.04 Impeachment of Witness Testimony by Prior Conviction

[Updated: 6/14/02]

You have heard evidence that [witness] has been convicted of a crime. You may consider that evidence, together with other pertinent evidence, in deciding how much weight to give to that witness's testimony.

Comment

(1) This instruction is adapted from Eighth Circuit Instruction 2.18, Ninth Circuit Instruction 4.8 and Federal Judicial Center Instruction 30, all of which are very similar.

(2) In United States v. Noone, 913 F.2d 20, 33 n.20 (1st Cir. 1990), the First Circuit noted that an instruction on impeachment by prior conviction should be given where witness credibility was an important part of the defense and the jury may have been misled at *voir dire*.

2.05 Impeachment of Defendant's Testimony by Prior Conviction

[Updated: 6/14/02]

You have heard evidence that [defendant] was convicted of a crime. You may consider that evidence in deciding, as you do with any witness, how much weight to give [defendant]'s testimony. The fact that [defendant] was previously convicted of another crime does not mean that [he/she] committed the crime for which [he/she] is now on trial. You must not use that prior conviction as proof of the crime charged in this case.

Comment

This instruction is adapted from the Fifth Circuit Instruction 1.13 and Federal Judicial Center Instruction 41. It is intended for use when the defendant's prior conviction is admitted under Fed. R. Evid. 609. If the evidence of the prior act was admitted under Rule 404(b), see Instruction 2.06.

2.06 Evidence of Defendant's Prior Similar Acts

[Updated: 6/14/02]

You have heard [will hear] evidence that [defendant] previously committed acts similar to those charged in this case. You may not use this evidence to infer that, because of [his/her] character, [defendant] carried out the acts charged in this case. You may consider this evidence only for the limited purpose of deciding:

(1) Whether [defendant] had the state of mind or intent necessary to commit the crime charged in the indictment;

or

(2) Whether [defendant] had a motive or the opportunity to commit the acts charged in the indictment;

or

(3) Whether [defendant] acted according to a plan or in preparation for commission of a crime;

or

(4) Whether [defendant] committed the acts [he/she] is on trial for by accident or mistake.

Remember, this is the only purpose for which you may consider evidence of [defendant]'s prior similar acts. Even if you find that [defendant] may have committed similar acts in the past, this is not to be considered as evidence of character to support an inference that [defendant] committed the acts charged in this case.

Comment

(1) See Fed. R. Evid. 105; Huddleston v. United States, 485 U.S. 681, 691-92 (1988) ("[T]he trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted."). "Perhaps the safe course for a district court, whenever the matter is in doubt, is (where asked) to give a closing general instruction that bad character is not a permissible inference." United States v. Randazzo, 80 F.3d 623, 630 (1st Cir. 1996). Randazzo contains a discussion of the "distinction between 'direct evidence' and 'other crimes' or 'Rule 404(b)' evidence." Id.; see also United States v. Santagata, 924 F.2d 391, 393-95 (1st Cir. 1991).

(2) This instruction is based upon Fifth Circuit Instruction 1.30 and Eighth Circuit Instruction 2.08.

(3) Courts should encourage counsel to specify and limit the purpose or purposes for which prior

act evidence is admitted. One or more of the above instructions should be given only for the corresponding specific purpose for which the evidence was admitted. Instructions for purposes other than that for which the specific evidence was admitted should not be given.

2.07 Weighing the Testimony of an Expert Witness

[Updated: 6/14/02]

You have heard testimony from persons described as experts. An expert witness has special knowledge or experience that allows the witness to give an opinion.

You may accept or reject such testimony. In weighing the testimony, you should consider the factors that generally bear upon the credibility of a witness as well as the expert witness's education and experience, the soundness of the reasons given for the opinion and all other evidence in the case.

Remember that you alone decide how much of a witness's testimony to believe, and how much weight it should be given.

Comment

This instruction is based upon Eighth Circuit Instruction 4.10.

2.08 Caution as to Cooperating Witness/Accomplice/Paid Informant

[Updated: 12/5/03]

You have heard the testimony of [name of witness]. [He/She]:

(1) provided evidence under agreements with the government;

[and/or]

(2) participated in the crime charged against [defendant];

[and/or]

(3) received money [or . . .] from the government in exchange for providing information.

Some people in this position are entirely truthful when testifying. Still, you should consider the testimony of these individuals with particular caution. They may have had reason to make up stories or exaggerate what others did because they wanted to help themselves. [You may consider their guilty pleas in assessing their credibility, but you are not to consider their guilty pleas as evidence against this defendant in any way.]

Comment

(1) "Though it is prudent for the court to give a cautionary instruction [for accomplice testimony], even when one is not requested, failure to do so is not automatic error especially where the testimony is not incredible or otherwise insubstantial on its face." United States v. Wright, 573 F.2d 681, 685 (1st Cir. 1978); see also United States v. House, 471 F.2d 886, 888 (1st Cir. 1973) (same for paid-informant testimony). The language varies somewhat. United States v. Paniagua-Ramos, 251 F.3d 242, 245 (1st Cir. 2001) ("no magic words that must be spoken"); United States v. Hernandez, 109 F.3d 13, 17 (1st Cir. 1997) (approving "with greater caution" or "with caution"); United States v. Brown, 938 F.2d 1482, 1486 (1st Cir. 1991) (referring to the standard accomplice instruction as "with caution and great care"); United States v. Skandier, 758 F.2d 43, 46 (1st Cir. 1985) ("scrutinized with particular care"); United States v. Hickey, 596 F.2d 1082, 1091 n.6 (1st Cir. 1979) (approving "greater care" instruction). The standard is the same for witnesses granted immunity, United States v. Newton, 891 F.2d 944, 950 (1st Cir. 1989) (jury should be instructed that such "testimony must be received with caution and weighed with care"), and for paid informants, United States v. Cresta, 825 F.2d 538, 546 (1st Cir. 1987) ("the jury must be specifically instructed to weigh the witness' testimony with care").

(2) If a co-defendant has pleaded guilty, the jury must be told they are not to consider that guilty plea as any evidence against the defendant on trial. United States v. Gonzalez-Gonzalez, 136 F.3d 6, 11 & n.4 (1st Cir. 1998). It is incorrect to say that the guilty plea "is not evidence in and of itself of the guilt of any other person." Id. at 11; United States v. Falu-Gonzalez, 205 F.3d 436, 444 (1st Cir. 2000).

(3) In United States v. Paniagua-Ramos, 251 F.3d 242, 248 n.3 (1st Cir. 2001), the court said in a footnote that, although a jury need not believe every government witness beyond a reasonable doubt, "where the accomplice's uncorroborated testimony is the only evidence of guilt, an admonition that the testimony must be believed beyond a reasonable doubt, if requested, would be advisable to guide the jury's deliberations."

2.09 Use of Tapes and Transcripts

[Not to be used if the recordings are not in English]

[Updated: 12/5/03]

At this time you are going hear conversations that were recorded. This is proper evidence for you to consider. In order to help you, I am going to allow you to have a transcript to read along as the tape is played. The transcript is merely to help you understand what is said on the tape. If you believe at any point that the transcript says something different from what you hear on the tape, remember it is the tape that is the evidence, not the transcript. Any time there is a variation between the tape and the transcript, you must be guided solely by what you hear on the tape and not by what you see in the transcript.

[In this case there are two transcripts because there is a difference of opinion as to what is said on the tape. You may disregard any portion of either or both transcripts if you believe they reflect something different from what you hear on the tape. It is what you hear on the tape that is evidence, not the transcripts.]

Comment

(1) This instruction is based upon a trial court instruction approved in United States v. Mazza, 792 F.2d 1210, 1227 (1st Cir. 1986).

(2) The instruction for two transcripts is based upon United States v. Rengifo, 789 F.2d 975, 983 (1st Cir. 1986).

(3) There is abundant First Circuit caselaw concerning the admissibility of tapes, particularly when there is a dispute over their audibility and coherence. "This court has acknowledged the importance of ensuring that a transcript offered for use as a jury aid be authenticated 'by testimony as to how they were prepared, the sources used, and the qualifications of the person who prepared them.'" United States v. Delean, 187 F.3d 60, 65 (1st Cir. 1999) (citations omitted). But ultimately the matter is left to the trial court's "broad discretion" to decide "whether 'the inaudible parts are so substantial as to make the rest [of the tape] more misleading than helpful.'" United States v. Jadusingh, 12 F.3d 1162, 1167 (1st Cir. 1994) (quoting United States v. Font-Ramirez, 944 F.2d 42, 47 (1st Cir. 1991)); see also United States v. DiSanto, 86 F.3d 1238, 1250-51 (1st Cir. 1996); United States v. Saccoccia, 58 F.3d 754, 781 (1st Cir. 1995); United States v. Carbone, 798 F.2d 21, 24 (1st Cir. 1986). The decision whether to allow the transcripts to go to the jury also is committed to the trial judge's discretion, as long as the judge makes clear that the tapes, not the transcripts, are the evidence. United States v. Ademaj, 170 F.3d 58, 65 (1st Cir. 1999); United States v. Young, 105 F.3d 1, 10 (1st Cir. 1997); United States v. Campbell, 874 F.2d 838, 849 (1st Cir. 1989) (citing Rengifo, 789 F.2d at 980).

(4) "[A]n instruction that the jury should consider only what is on the tape and not what is in the English transcript would not be appropriate." United States v. Morales-Madera, 352 F.3d 1, 9 (1st Cir. 2003).

2.10 Flight After Accusation/Consciousness of Guilt

[Updated: 6/14/02]

Intentional flight by a defendant after he or she is accused of the crime for which he or she is now on trial, may be considered by you in the light of all the other evidence in the case. The burden is upon the government to prove intentional flight. Intentional flight after a defendant is accused of a crime is not alone sufficient to conclude that he or she is guilty. Flight does not create a presumption of guilt. At most, it may provide the basis for an inference of consciousness of guilt. But flight may not always reflect feelings of guilt. Moreover, feelings of guilt, which are present in many innocent people, do not necessarily reflect actual guilt. In your consideration of the evidence of flight, you should consider that there may be reasons for [defendant]'s actions that are fully consistent with innocence.

It is up to you as members of the jury to determine whether or not evidence of intentional flight shows a consciousness of guilt and the weight or significance to be attached to any such evidence.

Comment

(1) This instruction is based on United States v. Hyson, 721 F.2d 856, 864 (1st Cir. 1983); accord United States v. Camilo Montoya, 917 F.2d 680, 683 (1st Cir. 1990); United States v. Hernandez-Bermudez, 857 F.2d 50, 54 (1st Cir. 1988); United States v. Grandmont, 680 F.2d 867, 869-70 (1st Cir. 1982). "Evidence of an accused's flight may be admitted at trial as indicative of a guilty mind, so long as there is an adequate factual predicate creating an inference of guilt of the crime charged." Hernandez-Bermudez, 857 F.2d at 52; see also United States v. Zanghi, 189 F.3d 71, 83 (1st Cir. 1999); United States v. Luciano-Mosquera, 63 F.3d 1142, 1156 (1st Cir. 1995).

(2) A flight instruction also can be given when the flight in question was from the crime scene. Luciano-Mosquera, 63 F.3d at 1153, 1156; United States v. Hernandez, 995 F.2d 307, 314-15 (1st Cir. 1993).

(3) If there is more than one defendant, the instruction should clearly specify that the absence of a particular defendant from the trial cannot be attributed to the others and is not to be considered in determining whether the others are guilty or not guilty. United States v. Rullan-Rivera, 60 F.3d 16, 20 (1st Cir. 1995); Hyson, 721 F.2d at 864-65.

(4) The First Circuit has highlighted the need to engage in a Fed. R. Evid. 403 evaluation before admitting evidence of flight. Hernandez-Bermudez, 857 F.2d at 54 ("[I]t is a species of evidence that should be viewed with caution; it should not be admitted mechanically, but rather district courts should always determine whether it serves a genuinely probative purpose that outweighs any tendency towards unfair prejudice." (citation omitted)). Evidence of threats to a witness deserves the same treatment. See United States v. Rosa, 705 F.2d 1375, 1377-79 (1st Cir. 1983); United States v. Gonsalves, 668 F.2d 73, 75 (1st Cir. 1982); United States v. Monahan, 633 F.2d 984, 985 (1st Cir. 1980); see also United States v. Rosario-Diaz, 202 F.3d 54, 70 (1st Cir. 2000).

(5) A similar instruction can be given when attempts to conceal or falsify identity might justify an inference of consciousness of guilt. See United States v. Otero-Mendez, 273 F.3d 46, 54 n.3 (1st Cir. 2001); United States v. Tracy, 989 F.2d 1279, 1285 (1st Cir. 1993).

(6) The First Circuit has also approved expanding the instruction to include "intentional hiding or evasion" when the evidence so warrants. United States v. Candelaria-Silva, 162 F.3d 698, 707 (1st Cir. 1998).

2.11 Statements by Defendant

[Updated: 6/14/02]

You have heard evidence that [defendant] made a statement in which the government claims [he/she] admitted certain facts.

It is for you to decide (1) whether [defendant] made the statement, and (2) if so, how much weight to give it. In making those decisions, you should consider all of the evidence about the statement, including the circumstances under which the statement may have been made [and any facts or circumstances tending to corroborate or contradict the version of events described in the statement].

Comment

(1) The instruction uses the word "statement" to avoid the more pejorative term "confession."

(2) A judge is required to give this instruction if the defendant has raised "a genuine factual issue concerning the voluntariness of such statements . . ., whether through his own or the Government's witnesses[.]" United States v. Fera, 616 F.2d 590, 594 (1st Cir. 1980). Under 18 U.S.C. § 3501(a), "[i]f the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances." (Dickerson v. United States, 530 U.S. 428 (2000), held that 18 U.S.C. § 3501 did not displace the constitutional requirements of Miranda v. Arizona, 384 U.S. 436 (1966), but Dickerson did not say that section 3501 has no effect at all. It seems safer, therefore, to charge in light of section 3501 even if Miranda requirements are satisfied.) See also Crane v. Kentucky, 476 U.S. 683, 687-91 (1986) (holding exclusion of testimony about circumstances of confession deprived defendant of a fair opportunity to present a defense). The First Circuit has held that, "[o]nce the judge makes the preliminary finding of voluntariness, the jury does not make another independent finding on that issue. Under this procedure, the jury only hears evidence on the circumstances surrounding the confession to aid it in determining the *weight or credibility* of the confession." United States v. Campusano, 947 F.2d 1, 6 (1st Cir. 1991) (quoting United States v. Nash, 910 F.2d 749, 756 (11th Cir. 1990) (quoting United States v. Robinson, 439 F.2d 553, 575 (D.C. Cir. 1970) (McGowan, J., dissenting))).

(3) In addition to determining whether a defendant's statement was voluntarily made, the court must "make[] a preliminary determination as to whether testimony about the confession is sufficiently trustworthy for the jury to consider the confession as evidence of guilt." United States v. Singleterry, 29 F.3d 733, 737 (1st Cir. 1994) (citations omitted). "The general rule is that a jury cannot rely on an extrajudicial, post-offense confession, even when voluntary, in the absence of 'substantial independent evidence which would tend to establish the trustworthiness of [the] statement.'" Id. (alteration in original) (quoting Opper v. United States, 348 U.S. 84, 93 (1954)). If evidence of the statement is admitted, "the court has the discretion to determine that the question of trustworthiness is such a close one that it would be appropriate to instruct the jury to conduct its own corroboration analysis." Id. at 739. That is the purpose of the bracketed language in the instruction.

"[A] judge has wide latitude to select appropriate, legally correct instructions to ensure that the jury weighs the evidence without thoughtlessly crediting an out-of-court confession." Id.

2.12 Missing Witness

[Updated: 12/5/03]

If it is peculiarly within the power of the government to produce a witness who could give material testimony, or if a witness, because of [his/her] relationship to the government, would normally be expected to support the government's version of events, the failure to call that witness may justify an inference that [his/her] testimony would in this instance be unfavorable to the government. You are not required to draw that inference, but you may do so. No such inference is justified if the witness is equally available to both parties, if the witness would normally not be expected to support the government's version of events, or if the testimony would merely repeat other evidence.

Comment

(1) According to United States v. Perez, 299 F.3d 1, 3 (1st Cir. 2002), United States v. DeLuca, 137 F.3d 24, 38 (1st Cir. 1998), United States v. Lewis, 40 F.3d 1325, 1336 (1st Cir. 1994), and United States v. Welch, 15 F.3d 1202, 1214 (1st Cir. 1993), the decision to give this instruction is a matter of court discretion. See also United States v. Arias-Santana, 964 F.2d 1262, 1268 (1st Cir. 1992); United States v. St. Michael's Credit Union, 880 F.2d 579, 597-99 (1st Cir. 1989). Thus, the proponent of such an instruction must demonstrate that the witness would have been "either 'favorably disposed' to testify on behalf of the government by virtue of status or relationship or 'peculiarly available' to the government." Perez, 299 F.3d at 3. The court must then "consider the explanation (if any) for the witness's absence and whether the witness, if called, would be likely to provide relevant, non-cumulative testimony." Id.

(2) Where it is a confidential informant who is undisclosed by the government, if he or she is a mere tipster—*i.e.*, if the person was not in a position to amplify, contradict or clear up inconsistencies in the government witnesses' testimony—his or her identity need not be disclosed. Indeed, in that circumstance the witness instruction would be improper, and presumably an abuse of discretion, because the informant is not essential to the right to a fair trial and the government has an interest in maintaining the confidentiality of identity. Lewis, 40 F.3d at 1336 (citing United States v. Martínez, 922 F.2d 914, 921, 925 (1st Cir. 1991)). Where a defendant has not previously sought disclosure of the confidential informant's identity, he or she is not entitled to the instruction. Perez, 299 F.3d at 4.

(3) All the missing witness instruction cases in the First Circuit appear to have been missing *government* witnesses. The cases often speak in terms of a "party," however, and this instruction might be revised accordingly. But a judge should exercise extreme caution in granting the government's request for such an instruction against a defendant. The Federal Judicial Center recommends that the instruction "not be used against the defendant who offers no evidence in his defense." Comment to Federal Judicial Center Instruction 39. Even if the defendant does put on a case and the instruction is given against the defendant, the following supplemental instruction may be warranted:

> You must, however, bear in mind that the law never compels a defendant in a criminal case to call any witnesses or produce any evidence in his behalf.

Sand, et al., Instruction 6-6.

2.13 Witness (Not the Defendant) Who Takes the Fifth Amendment

[Updated: 7/31/03]

You heard [witness] refuse to answer certain questions on the ground that it might violate [his/her] right not to incriminate [himself/herself]. You may, if you choose, draw an adverse inference from this refusal to answer and may take the refusal into account in assessing this witness's credibility and motives, but you are not required to draw that inference.

Comment

(1) This instruction is based upon United States v. Berrio-Londono, 946 F.2d 158, 160-62 (1st Cir. 1991), and United States v. Kaplan, 832 F.2d 676, 683-85 (1st Cir. 1987). The First Circuit seems to stand alone in explicitly permitting this type of instruction. Other circuits seem to disagree. See, e.g., United States v. Lizza Indus., Inc., 775 F.2d 492, 496-97 & n.2 (2d Cir. 1985); United States v. Nunez, 668 F.2d 1116, 1123 (10th Cir. 1981).

(2) It is within the discretion of the court to refuse to allow a witness to take the stand where it appears that the witness intends to claim the privilege as to essentially all questions. United States v. Johnson, 488 F.2d 1206, 1211 (1st Cir. 1973); accord United States v. Gary, 74 F.3d 304, 311-12 (1st Cir. 1996); Kaplan, 832 F.2d at 684.

2.14 Definition of "Knowingly"

[Updated: 6/14/02]

The word "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

Comment

In United States v. Tracy, 36 F.3d 187, 194-95 (1st Cir. 1994), the First Circuit acknowledged a split of authority over how to define the term "knowingly." The Fifth and Eleventh circuits use the instruction stated above, emphasizing the voluntary and intentional nature of the act. Id. at 195. The Sixth, Seventh and Ninth circuits, on the other hand, embrace an instruction to the effect that "'knowingly' . . . means that the defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake or accident." Id. (quoting Seventh Circuit Instruction 6.04); see also Model Penal Code § 2.02(2)(b)(i).

Although the First Circuit in Tracy approved of the trial court's "voluntary and intentional" instruction under the circumstances of the case, it did not expressly adopt or reject either definition of "knowingly." 36 F.3d at 194-95. There may be cases when, given the evidence, the alternative instruction will be more helpful to the jury. But the term "nature" in the alternative instruction might incorrectly suggest to the jury that the actor must realize that the act was wrongful.

2.15 "Willful Blindness" As a Way of Satisfying "Knowingly"

[Updated: 6/14/02]

In deciding whether [defendant] acted knowingly, you may infer that [defendant] had knowledge of a fact if you find that [he/she] deliberately closed [his/her] eyes to a fact that otherwise would have been obvious to [him/her]. In order to infer knowledge, you must find that two things have been established. First, that [defendant] was aware of a high probability of [the fact in question]. Second, that [defendant] consciously and deliberately avoided learning of that fact. That is to say, [defendant] willfully made [himself/herself] blind to that fact. It is entirely up to you to determine whether [he/she] deliberately closed [his/her] eyes to the fact and, if so, what inference, if any, should be drawn. However, it is important to bear in mind that mere negligence or mistake in failing to learn the fact is not sufficient. There must be a deliberate effort to remain ignorant of the fact.

Comment

(1) This instruction is drawn from the instructions approved in United States v. Gabriele, 63 F.3d 61, 66 n.6 (1st Cir. 1995), and United States v. Brandon, 17 F.3d 409, 451-52 n.72 (1st Cir. 1994).

(2) The rule in the First Circuit is that:

> [A] willful blindness instruction is warranted if (1) the defendant claims lack of knowledge; (2) the evidence would support an inference that the defendant consciously engaged in a course of deliberate ignorance; and (3) the proposed instruction, as a whole, could not lead the jury to conclude that an inference of knowledge was mandatory.

Gabriele, 63 F.3d at 66 (citing Brandon, 17 F.3d at 452, and United States v. Richardson, 14 F.3d 666, 671 (1st Cir. 1994)); accord United States v. Coviello, 225 F.3d 54, 70 (1st Cir. 2000); United States v. Camuti, 78 F.3d 738, 744 (1st Cir. 1996). "The danger of an improper willful blindness instruction is 'the possibility that the jury will be led to employ a negligence standard and convict a defendant on the impermissible ground that he should have known [an illegal act] was taking place.'" Brandon, 17 F.3d at 453 (quoting United States v. Littlefield, 840 F.2d 143, 148 n.3 (1st Cir. 1988)).

2.16 Definition of "Willfully"

[New: 7/31/03]

To act "willfully" means to act voluntarily and intelligently and with the specific intent that the underlying crime be committed—that is to say, with bad purpose, either to disobey or disregard the law—not to act by ignorance, accident or mistake.

Comment

The definition of "willfully" comes from United States v. Monteiro, 871 F.2d 204, 208-09 (1st Cir. 1989). For alternate definitions see United States v. Porter, 764 F.2d 1, 17 (1st Cir. 1985), and United States v. Drape, 668 F.2d 22, 26 (1st Cir. 1992). Specific intent is preferred. United States v. Yefsky, 994 F.2d 885, 899 (1st Cir. 1993).

2.17 Taking a View

[Updated: 6/14/02]

I am going to allow you to go to [insert location]. However, I instruct you that, while you are there, and on the way there and back, you are not to talk about what you see there or anything else relating to the case. You must simply observe. Do not do any independent exploration or experimentation while you are there.

Comment

United States v. Gray, 199 F.3d 547, 549-50 (1st Cir. 1999), held that a view is admissible evidence, thereby overruling Clemente v. Carnicon-Puerto Rico Management Associates, L.C., 52 F.3d 383 (1st Cir. 1995). The instruction is based on the court's approving quotation of a phrase from a law review note, Hulen D. Wendorf, Some Views on Jury Views, 15 Baylor L. Rev. 379 (1963). Gray suggests a number of advisable precautions in conducting a view.

2.18 Character Evidence

[Updated: 6/14/02]

[Defendant] presented evidence to show that [he/she] enjoys a reputation for honesty, truthfulness and integrity in [his/her] community. Such evidence may indicate to you that it is improbable that a person of such character would commit the crime[s] charged, and, therefore, cause you to have a reasonable doubt as to [his/her] guilt. You should consider any evidence of [defendant]'s good character along with all the other evidence in the case and give it such weight as you believe it deserves. If, when considered with all the other evidence presented during this trial, the evidence of [defendant]'s good character creates a reasonable doubt in your mind as to [his/her] guilt, you should find [him/her] not guilty.

Comment

This instruction is based upon United States v. Winter, 663 F.2d 1120, 1146-49 (1st Cir. 1981), and United States v. Lachmann, 469 F.2d 1043, 1046 (1st Cir. 1972). The First Circuit explicitly rejects the instruction that good character evidence "standing alone" is sufficient to acquit. Winter, 663 F.3d at 1145.

PART 3 FINAL INSTRUCTIONS: GENERAL CONSIDERATIONS

3.01	Duty of the Jury to Find Facts and Follow Law	[Updated: 6/14/02]
3.02	Presumption of Innocence; Proof Beyond a Reasonable Doubt	[Updated: 2/17/05]
3.03	Defendant's Constitutional Right Not to Testify	[Updated: 2/17/05]
3.04	What Is Evidence; Inferences	[Updated: 6/14/02]
3.05	Kinds of Evidence: Direct and Circumstantial	[Updated: 6/14/02]
3.06	Credibility of Witnesses	[Updated: 6/14/02]
3.07	Cautionary and Limiting Instructions as to Particular Kinds of Evidence	[Updated: 6/14/02]
3.08	What Is Not Evidence	[Updated: 6/14/02]

3.01 Duty of the Jury to Find Facts and Follow Law

[Updated: 6/14/02]

It is your duty to find the facts from all the evidence admitted in this case. To those facts you must apply the law as I give it to you. The determination of the law is my duty as the presiding judge in this court. It is your duty to apply the law exactly as I give it to you, whether you agree with it or not. You must not be influenced by any personal likes or dislikes, prejudices or sympathy. That means that you must decide the case solely on the evidence before you and according to the law. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. You must not read into these instructions, or into anything I may have said or done, any suggestions by me as to what verdict you should return—that is a matter entirely for you to decide.

Comment

On jury nullification see Comment (2) to Instruction 1.01.

3.02 Presumption of Innocence; Proof Beyond a Reasonable Doubt

[Updated: 2/17/05]

It is a cardinal principle of our system of justice that every person accused of a crime is presumed to be innocent unless and until his or her guilt is established beyond a reasonable doubt. The presumption is not a mere formality. It is a matter of the most important substance.

The presumption of innocence alone may be sufficient to raise a reasonable doubt and to require the acquittal of a defendant. The defendant before you, [_____], has the benefit of that presumption throughout the trial, and you are not to convict [him/her] of a particular charge unless you are persuaded of [his/her] guilt of that charge beyond a reasonable doubt.

The presumption of innocence until proven guilty means that the burden of proof is always on the government to satisfy you that [defendant] is guilty of the crime with which [he/she] is charged beyond a reasonable doubt. The law does not require that the government prove guilt beyond all possible doubt; proof beyond a reasonable doubt is sufficient to convict. This burden never shifts to [defendant]. It is always the government's burden to prove each of the elements of the crime[s] charged beyond a reasonable doubt by the evidence and the reasonable inferences to be drawn from that evidence. [Defendant] has the right to rely upon the failure or inability of the government to establish beyond a reasonable doubt any essential element of a crime charged against [him/her].

If, after fair and impartial consideration of all the evidence, you have a reasonable doubt as to [defendant]'s guilt of a particular crime, it is your duty to acquit [him/her] of that crime. On the other hand, if, after fair and impartial consideration of all the evidence, you are satisfied beyond a reasonable doubt of [defendant]'s guilt of a particular crime, you should vote to convict [him/her].

Comment

(1) This instruction does not use a "'guilt or innocence' comparison" warned against by the First Circuit. United States v. DeLuca, 137 F.3d 24, 37 (1st Cir. 1998); United States v. Andujar, 49 F.3d 16, 24 (1st Cir. 1995). A "guilt and non-guilt" comparison is "less troublesome," but still "could risk undercutting the government's burden by suggesting that the defendant is guilty if they do not think he is not guilty." United States v. Ranney, 298 F.3d 74, 79-80 (1st Cir. 2002).

(2) The First Circuit has repeatedly stated that "[r]easonable doubt is a fundamental concept that does not easily lend itself to refinement or definition." United States v. Vavlitis, 9 F.3d 206, 212 (1st Cir. 1993); see also United States v. Campbell, 874 F.2d 838, 843 (1st Cir. 1989). For that reason, the First Circuit has joined other circuits in advising that the meaning of "reasonable doubt" be left to the jury to discern. United States v. Cassiere, 4 F.3d 1006, 1024 (1st Cir. 1993) ("[A]n instruction which uses the words reasonable doubt without further definition adequately apprises the jury of the proper burden of proof." (quoting United States v. Olmstead, 832 F.2d 642, 646 (1st Cir. 1987)); accord United States v. Taylor, 997 F.2d 1551, 1558 (D.C. Cir. 1993) ("[T]he greatest wisdom may lie with the Fourth Circuit's and Seventh Circuit's instruction to leave to juries the task of deliberating the meaning of reasonable doubt."). The constitutionality of this practice was

reaffirmed by the Supreme Court in Victor v. Nebraska, 511 U.S. 1, 5-6 (1994). It is not reversible error to refuse further explanation, even when requested by the jury, so long as the reasonable doubt standard was "not 'buried as an aside' in the judge's charge." United States v. Littlefield, 840 F.2d 143, 146 (1st Cir. 1988) (quoting Olmstead, 832 F.2d at 646).

(3) Those judges who nevertheless undertake to define the term should consider the following. Some circuits have defined reasonable doubt as that which would cause a juror to "hesitate to act in the most important of one's own affairs." Federal Judicial Center, Commentary to Instruction 21. The First Circuit has criticized this formulation, see Gilday v. Callahan, 59 F.3d 257, 264 (1st Cir. 1995); Vavlitis, 9 F.3d at 212; Campbell, 874 F.2d at 841, as has the Federal Judicial Center. See Federal Judicial Center, Commentary to Instruction 21 ("[D]ecisions 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 decisions jurors ought to make in criminal cases."). The First Circuit has also criticized "[e]quating the concept of reasonable doubt to 'moral certainty,'" Gilday, 59 F.3d at 262, or "fair doubt," Campbell, 874 F.2d at 843, stating that "[m]ost efforts at clarification result in further obfuscation of the concept." Campbell, 874 F.2d at 843. The Federal Judicial Center has attempted to clarify the meaning of reasonable doubt by the following language:

> 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.

Federal Judicial Center Instruction 21 (emphasis added). Previously, the First Circuit joined other circuits in criticizing this pattern instruction for "possibly engender[ing] some confusion as to the burden of proof" if used without other clarifying language. United States v. Woodward, 149 F.3d 46, 69 (1st Cir. 1998); United States v. Gibson, 726 F.2d 869, 874 (1st Cir. 1984); see also Taylor, 997 F.2d at 1556; United States v. Porter, 821 F.2d 968, 973 (4th Cir. 1987) (instruction introduces "unnecessary concepts"); United States v. McBride, 786 F.2d 45, 52 (2d Cir. 1986). But later, it approved it. United States v. Rodriguez, 162 F.3d 135, 146 (1st Cir. 1998). Nevertheless, the words "'reasonable doubt' do not lend themselves to accurate definition," and "any attempt to define 'reasonable doubt' will probably trigger a constitutional challenge." Gibson, 726 F.2d at 874.

(4) The First Circuit has approved the following formulation by Judge Keeton:

> As I have said, the burden is upon the Government to prove beyond a reasonable doubt that a defendant is guilty of the charge made against the defendant. It is a strict and heavy burden, but it does not mean that a defendant's guilt must be proved beyond all possible doubt. It does require that the evidence exclude any reasonable doubt concerning a defendant's guilt.
>
> A reasonable doubt may arise not only from the evidence produced but also from a lack of evidence. Reasonable doubt exists when, after

> weighing and considering all the evidence, using reason and common sense, jurors cannot say that they have a settled conviction of the truth of the charge.
>
> Of course, a defendant is never to be convicted on suspicion or conjecture. If, for example, you view the evidence in the case as reasonably permitting either of two conclusions—one that a defendant is guilty as charged, the other that the defendant is not guilty— you will find the defendant not guilty.
>
> It is not sufficient for the Government to establish a probability, though a strong one, that a fact charged is more likely to be true than not true. That is not enough to meet the burden of proof beyond reasonable doubt. On the other hand, 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.
>
> Concluding my instructions on the burden, then, I instruct you that what the Government must do to meet its heavy burden is to establish the truth of each part of each offense charged by proof that convinces you and leaves you with no reasonable doubt, and thus satisfies you that you can, consistently with your oath as jurors, base your verdict upon it. If you so find as to a particular charge against a defendant, you will return a verdict of guilty on that charge. If, on the other hand, you think there is a reasonable doubt about whether the defendant is guilty of a particular offense, you must give the defendant the benefit of the doubt and find the defendant not guilty of that offense.

United States v. Cleveland, 106 F.3d 1056, 1062-63 (1st Cir. 1997), aff'd sub nom. Muscarello v. United States, 524 U.S. 125 (1998), recognized as abrogated on other grounds by Brache v. United States, 165 F.3d 99 (1st Cir. 1999). The First Circuit found no reversible error in Judge Barbadoro's telling the jury: "The jury must never find the defendant guilty on mere suspicion, conjecture or guess," while otherwise refusing to define reasonable doubt. United States v. Burnette, 375 F.3d 10, 20-21 (1st Cir. 2004).

3.03 Defendant's Constitutional Right Not to Testify

[Updated: 2/17/05]

[Defendant] has a constitutional right not to testify and no inference of guilt, or of anything else, may be drawn from the fact that [defendant] did not testify. For any of you to draw such an inference would be wrong; indeed, it would be a violation of your oath as a juror.

Comment

An instruction like this must be given if it is requested. Carter v. Kentucky, 450 U.S. 288, 299-303 (1981); Bruno v. United States, 308 U.S. 287, 293-94 (1939); see also United States v. Medina-Martinez, ___ F.3d. ___, No. 03-1503, 2005 U.S. App. LEXIS 195, at *20-*22 (1st Cir. Jan. 6, 2005); United States v. Ladd, 877 F.2d 1083, 1089 (1st Cir. 1989) ("We do not, however, read Carter as requiring any exact wording for such an instruction."). It must contain the statement that no adverse inference may be drawn from the fact that the defendant did not testify, or that it cannot be considered in arriving at a verdict. United States v. Brand, 80 F.3d 560, 567 (1st Cir. 1996). It is not reversible error to give the instruction even over the defendant's objection. Lakeside v. Oregon, 435 U.S. 333, 340-41 (1978). However, "[i]t may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection." Id. at 340.

3.04 What Is Evidence; Inferences

[Updated: 2/12/03]

The evidence from which you are to decide what the facts are consists of sworn testimony of witnesses, both on direct and cross-examination, regardless of who called the witness; the exhibits that have been received into evidence; and any facts to which the lawyers have agreed or stipulated. A stipulation means simply that the government and [defendant] accept the truth of a particular proposition or fact. Since there is no disagreement, there is no need for evidence apart from the stipulation. You must accept the stipulation as fact to be given whatever weight you choose.

Although you may consider only the evidence presented in the case, you are not limited in considering that evidence to the bald statements made by the witnesses or contained in the documents. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw from facts that you find to have been proven such reasonable inferences as you believe are justified in the light of common sense and personal experience.

3.05 Kinds of Evidence: Direct and Circumstantial

[Updated: 6/14/02]

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness that the witness saw something. Circumstantial evidence is indirect evidence, that is proof of a fact or facts from which you could draw the inference, by reason and common sense, that another fact exists, even though it has not been proven directly. You are entitled to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

Comment

See Ninth Circuit Instruction 1.05.

3.06 Credibility of Witnesses

[Updated: 6/14/02]

Whether the government has sustained its burden of proof does not depend upon the number of witnesses it has called or upon the number of exhibits it has offered, but instead upon the nature and quality of the evidence presented. You do not have to accept the testimony of any witness if you find the witness not credible. You must decide which witnesses to believe and which facts are true. To do this, you must look at all the evidence, drawing upon your common sense and personal experience.

You may want to take into consideration such factors as the witnesses' conduct and demeanor while testifying; their apparent fairness or any bias they may have displayed; any interest you may discern that they may have in the outcome of the case; any prejudice they may have shown; their opportunities for seeing and knowing the things about which they have testified; the reasonableness or unreasonableness of the events that they have related to you in their testimony; and any other facts or circumstances disclosed by the evidence that tend to corroborate or contradict their versions of the events.

3.07 Cautionary and Limiting Instructions as to Particular Kinds of Evidence

[Updated: 6/14/02]

A particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you only for one particular purpose, and not for any other purpose. I have told you when that occurred, and instructed you on the purposes for which the item can and cannot be used.

Comment

(1) See Eighth Circuit Instruction 1.03.

(2) Cautionary and limiting instructions as to particular kinds of evidence have been collected in Part 2 for easy reference. They may be used during the trial or in the final instructions or in both places.

3.08 What Is Not Evidence

[Updated: 6/14/02]

Certain things are not evidence. I will list them for you:

(1) Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they say in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them from the evidence differ from the way the lawyers have stated them, your memory of them controls.

(2) Questions and objections by lawyers are not evidence. Lawyers have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by my ruling on it.

(3) Anything that I have excluded from evidence or ordered stricken and instructed you to disregard is not evidence. You must not consider such items.

(4) Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at trial.

(5) The indictment is not evidence. This case, like most criminal cases, began with an indictment. You will have that indictment before you in the course of your deliberations in the jury room. That indictment was returned by a grand jury, which heard only the government's side of the case. I caution you, as I have before, that the fact that [defendant] has had an indictment filed against [him/her] is no evidence whatsoever of [his/her] guilt. The indictment is simply an accusation. It is the means by which the allegations and charges of the government are brought before this court. The indictment proves nothing.

PART 4 FINAL INSTRUCTIONS: ELEMENTS OF SPECIFIC CRIMES [Organized by Statutory Citation]

A. Offenses Under Title 8

4.08.1325 Immigration Through Fraudulent Marriage, 8 U.S.C. § 1325(c) [Updated: 6/14/02]

4.08.1326 Re-entry and Attempted Re-entry After Deportation, 8 U.S.C. § 1326 [Updated: 6/14/02]

B. Offenses Under Title 16

4.16.3372 Receiving Fish, Wildlife, Plants Illegally Taken (Lacey Act) [Updated: 6/14/02]

16 U.S.C. §§ 3372(a)(2)(A), 3373(d)(1)(B), (2)

C. Offenses Under Title 18

4.18.00 Attempt [Updated: 6/14/02]

4.18.02 Aid and Abet, 18 U.S.C. § 2 [Updated: 5/20/05]

4.18.03 Accessory After the Fact, 18 U.S.C. § 3 [Updated: 6/14/02]

4.18.152(1) Bankruptcy Fraud, Concealment, 18 U.S.C. § 152(1) [Updated: 6/14/02]

4.18.152(2),(3) Bankruptcy Fraud, False Oath/Account and False Declaration, 18 U.S.C. § 152(2), 152(3) [Updated: 2/11/03]

4.18.152(4) Bankruptcy Fraud, False Claim, 18 U.S.C. § 152(4) [Updated: 6/14/02]

4.18.152(5) Bankruptcy Fraud, Receipt with Intent to Defraud, 18 U.S.C. § 152(5) [Updated: 6/14/02]

4.18.152(6) Bankruptcy Fraud, Bribery and Extortion, 18 U.S.C. § 152(6) [Updated: 6/14/02]

4.18.152(7) Bankruptcy Fraud, Transfer of Property in Personal Capacity or as Agent or Officer, 18 U.S.C. § 152(7) [Updated: 6/14/02]

4.18.152(8) Bankruptcy Fraud, False Entries, 18 U.S.C. § 152(8) [Updated: 6/14/02]

4.18.152(9) Bankruptcy Fraud, Withholding Recorded Information, 18 U.S.C. § 152(9) [Updated: 6/14/02]

4.18.371(1) Conspiracy, 18 U.S.C. § 371; 21 U.S.C. § 846 [Updated: 10/14/05]

4.18.371(2)	Pinkerton Charge	[Updated: 6/14/02]
4.18.656	Misapplication or Embezzlement of Bank Funds, 18 U.S.C. § 656	[Updated: 12/5/03]
4.18.751	Escape from Custody, 18 U.S.C. § 751	[Updated: 6/14/02]
4.18.752	Assisting Escape, 18 U.S.C. § 752	[Updated: 6/14/02]
4.18.875	Interstate Communications—Threats, 18 U.S.C. § 875(c)	[New: 10/15/03]
4.18.922(a)	False Statement in Connection With Acquisition of a Firearm, 18 U.S.C. § 922(a)	[New: 11/26/02]
4.18.922(g)	Possession of a Firearm or Ammunition in or Affecting Commerce by a Convicted Felon, 18 U.S.C. § 922(g)(1)	[Updated: 8/3/05]
4.18.922(k)	Possession of a Firearm With an Obliterated or Removed Serial Number, 18 U.S.C. § 922(k)	[New: 7/17/03]
4.18.922(v)	Possession of Semiautomatic Assault Weapons, 18 U.S.C. § 922(v)	[New: 7/17/03]
4.18.924	Using or Carrying a Firearm During and in Relation to Drug Trafficking or Crime of Violence, 18 U.S.C. § 924(c)	[Updated: 10/14/05]
4.18.982	Money Laundering—Forfeiture, 18 U.S.C. § 982(a)(1)	[Updated: 10/14/05]
4.18.1001	Making a False Statement to a Federal Agency, 18 U.S.C. § 1001	[Updated: 6/14/02]
4.18.1014	Making a False Statement or Report, 18 U.S.C. § 1014	[Updated: 6/14/02]
4.18.1029	Access Device or Credit Card Fraud, 18 U.S.C. § 1029(a)(2)	[Updated: 2/11/03]
4.18.1072	Harboring or Concealing an Escaped Prisoner, 18 U.S.C. § 1072	[Updated: 6/14/02]
4.18.1341	Mail Fraud, 18 U.S.C. § 1341	[Updated: 5/5/05]
4.18.1343	Wire Fraud, 18 U.S.C. § 1343	[Updated: 5/20/05]
4.18.1344	Bank Fraud, 18 U.S.C. § 1344(1), (2)	[Updated: 2/17/05]
4.18.1462	Use of Interactive Computer Service for Obscene Matters, 18 U.S.C. § 1462	[New: 9/3/04]
4.18.1470	Transfer of Obscene Materials to Minors, 18 U.S.C. § 1470	[New: 9/3/04]

4.18.1512(b)(1) Witness Tampering—Knowingly Corruptly Persuading Another Person with the Intent to Influence, Delay or Prevent the Testimony of Any Person in an Official Proceeding, 18 U.S.C. § 1512(b)(1) [New: 7/19/05]

4.18.1546 False Statement in Document Required by Immigration Law, 18 U.S.C. § 1546(a) [Updated: 6/14/02]

4.18.1623 False Declaration in Grand Jury Testimony, 18 U.S.C. § 1623 [New: 11/26/02]

4.18.1832 Theft of Trade Secrets (Economic Espionage Act), 18 U.S.C. § 1832 [Updated: 6/14/02]

4.18.1951 Interference with Commerce by Robbery or Extortion (Hobbs Act), 18 U.S.C. § 1951 [Updated: 8/3/05]

4.18.1952 Travel Act, 18 U.S.C. § 1952 [Updated: 10/14/05]

4.18.1956(a)(1)(A) Money Laundering—Promotion of Illegal Activity or Tax Evasion, 18 U.S.C. § 1956(a)(1)(A) [Updated: 2/17/05]

4.18.1956(a)(1)(B(i) Money Laundering—Illegal Concealment, 18 U.S.C. § 1956(a)(1)(B)(i) [Updated: 5/5/05]

4.18.1956(a)(1)(B)(ii) Money Laundering—Illegal Structuring, 18 U.S.C. § 1956(a)(1)(B)(ii) [Updated: 2/17/05]

4.18.1957 Money Laundering—Engaging in Monetary Transactions in Property Derived from Specific Unlawful Activity, 18 U.S.C. § 1957 [Updated: 2/17/05]

4.18.2113(a) Unarmed Bank Robbery, 18 U.S.C. § 2113(a) [Updated: 2/14/02]

4.18.2113(a), d) Armed or Aggravated Bank Robbery, 18 U.S.C. § 2113(a), (d) [Updated: 2/17/05]

4.18.2119 Carjacking, 18 U.S.C. § 2119 [Updated: 7/31/03]

4.18.2252 Possession of Child Pornography, 18 U.S.C. § 2252A(a)(5)(B) [Updated: 9/3/04]

4.18.2314 Interstate Transportation of Stolen Money or Property, 18 U.S.C. § 2314 [Updated: 6/14/02]

4.18.2422(b) Coercion and Enticement, 18 U.S.C. § 2422(b) [New: 04/22/03]

D. Offenses Under Title 21

4.21.841(a)(1)A Possession with Intent to Distribute a Controlled Substance, 21 U.S.C. § 841(a)(1) [Updated: 2/17/05

4.21.841(a)(1)B Distribution of a Controlled Substance, 21 U.S.C. § 841(a)(1) [Updated: 6/14/02]

4.21.841(a)(1)C Manufacture of a Controlled Substance, 21 U.S.C. §§ 841(a)(1), 802(15) [Updated: 6/14/02]

4.21.846 Conspiracy, 21 U.S.C. § 846 [Updated: 6/14/02]

4.21.853 Drugs-Forfeiture, 21 U.S.C. § 853 [Updated: 10/14/05]

4.21.952 Importation of a Controlled Substance, 21 U.S.C. §§ 952, 960 [New: 7/31/03]

E. Offenses Under Title 26

4.26.7201 Income Tax Evasion, 26 U.S.C. § 7201 [Updated: 2/11/03]

4.26.7203 Failure to File a Tax Return, 26 U.S.C. § 7203 [Updated: 2/11/03]

4.26.7206 False Statements on Income Tax Return, 26 U.S.C. § 7206(1) [Updated: 7/31/03]

F. Offenses Under Title 31

4.31.5322 Money Laundering—Illegal Structuring, 31 U.S.C. §§ 5322, 5324 [Updated: 6/14/02]

G. Offenses Under Title 46

4.46.1903 Possessing a Controlled Substance on Board a Vessel Subject to United States Jurisdiction with Intent to Distribute, 46 U.S.C. App. § 1903 [Updated: 2/11/03]

4.08.1325 Immigration Through Fraudulent Marriage, 8 U.S.C. § 1325(c)

[Updated: 6/14/02]

[Defendant] is charged with knowingly entering into marriage for the purpose of evading the immigration laws. It is against federal law to engage in such conduct. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that [defendant] knowingly married a United States citizen; and

Second, that [he/she] knowingly entered into the marriage for the purpose of evading a provision of the United States immigration laws.

The word "knowingly" means that the act was done voluntarily and intentionally and not because of mistake or accident.

To evade a provision of law means to escape complying with the law by means of trickery or deceit.

Comment

The validity of the marriage is immaterial. Lutwak v. United States, 344 U.S. 604, 611 (1953).

4.08.1326 Re-entry and Attempted Re-entry After Deportation, 8 U.S.C. § 1326

[Updated: 6/14/02]

[Defendant] is charged with [re-entering; attempting to re-enter] the United States after being deported. It is unlawful to engage in such conduct. For you to find [defendant] guilty of this offense, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that [defendant] was an alien at the time of the alleged offense;

Second, that [defendant] had previously been deported;

Third, that [defendant] [re-entered; was found in; attempted to re-enter] the United States; and

Fourth, that [defendant] had not received the express consent of the Attorney General of the United States to apply for re-admission to the United States since the time of [his/her] previous arrest and deportation.

An "alien" is someone who is neither a citizen nor a national of the United States. A national is someone who is a citizen of the United States or someone who, although not a citizen, owes permanent allegiance to the United States.

"Re-enter" means to be physically present in the United States and free from official restraint.

Comment

(1) The First Circuit recently stated that the second element of the offense includes proving that the defendant had previously been *arrested* in addition to deported. United States v. Cabral, 252 F.3d 520, 522 (1st Cir. 2001). That seems incorrect: a 1996 amendment eliminated the statute's reference to arrest.

(2) Specific intent to reenter the United States is not an element of the completed reentry offense. United States v. Soto, 106 F.3d 1040, 1041 (1st Cir. 1997). Although the First Circuit initially seemed skeptical that specific intent is an element of the *attempted* reentry offense, see Cabral, 252 F.3d at 523-24, it has recently explicitly stated that attempt "is a specific intent crime in the sense that an 'attempt to enter' requires a subjective intent on the part of the defendant to achieve entry into the United States as well as a substantial step toward completing that entry." United States v. DeLeon, 270 F.3d 90, 92 (1st Cir. 2001). Other circuits are divided. See United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1196 (9th Cir. 2000), for possible instruction language for attempt. "[T]here is no requirement that the defendant additionally knows that what he proposes to do—i.e., attempt to enter the United States—is for him criminal conduct." DeLeon, 270 F.3d at 92.

(3) Section 1326(b) provides greater penalties for re-entry by certain aliens, including those previously convicted of certain offenses. The fact of the prior conviction is not an element of the offense, but rather a sentencing factor. Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998); accord United States v. Johnstone, 251 F.3d 281 (1st Cir. 2001) (doubting that the logic of Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), applies to section 1326(b) because Apprendi carved out an exception for "the fact of a prior conviction," but not deciding the issue); United States v. Latorre-Benavides, 241 F.3d 262, 264 (2d Cir. 2001) (holding that Apprendi did not overrule Almendarez-Torres); United States v. Pacheco-Zepeda, 234 F.3d 411, 414-15 & n.4 (9th Cir. 2000) (same but noting that "[i]f the views of the Supreme Court's individual Justices and the composition of the Court remain the same, Almendarez-Torres may eventually be overruled").

(4) In addition to proscribing re-entry and attempted re-entry by aliens after they have been deported, the statute also proscribes re-entry and attempted re-entry by aliens after they have been denied admission, excluded, or removed from the United States, and after they have "departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter." The relevant occurrence can be substituted for deportation in the instruction.

(5) The definition of "re-enter" comes from Gracidas-Ulibarry, 231 F.3d at 1191 n.3. The definition of "alien" comes from 8 U.S.C. § 1101(a)(3) (1999), and the definition of "national" comes from 8 U.S.C. § 1101(a)(22)(B) (1999).

(6) The Immigration and Naturalization Service can grant consent to apply for re-admission in the Attorney General's place. That can be explained to the jury in appropriate cases. United States v. Ramirez-Cortez, 213 F.3d 1149, 1158-59 (9th Cir. 2000).

(7) The attempt crime can occur outside of the United States. DeLeon, 270 F.3d at 93. For a discussion of whether it can occur wholly inside foreign territory, see id.

4.16.3372 Receiving Fish, Wildlife, Plants Illegally Taken (Lacey Act), 16 U.S.C. §§ 3372(a)(2)(A), 3373(d)(1)(B), (2)

[Updated: 6/14/02]

[Defendant] is charged with knowingly [importing; exporting; transporting; selling; receiving; acquiring; purchasing] in interstate or foreign commerce [fish; wildlife; plants] whose market value exceeded $350, knowing that these [fish; wildlife; plants] had been [taken; possessed; transported; sold] in violation of [state] law. It is against federal law to engage in such conduct. For you to find [defendant] guilty of this crime you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

> First, that [defendant] [imported; exported; transported; sold; received; acquired; purchased] in interstate or foreign commerce [fish; wildlife; plants] [taken; possessed; transported sold] in violation of [state] law;
>
> Second, that [defendant] did so knowingly;
>
> Third, that this conduct involved the [sale; purchase; offer to sell; offer to purchase; intent to sell; intent to purchase] [fish; wildlife; plants] with a market value over $350; and
>
> Fourth, that [defendant] knew that the [fish; wildlife; plants] were [taken; possessed; transported; sold] in violation of [state] law.

[State] law prohibits a person from [describe illegal conduct].

"Knowingly" means that the act was done voluntarily and intentionally and not because of mistake or accident.

Interstate commerce includes the transportation of [fish; wildlife; plants] between one state and another state.

"Market value" is the price that a willing buyer would pay a willing seller.

The government does not have to prove that [defendant] knew of the existence of the federal law under which [he/she] has been charged. The government also does not have to prove that [defendant] was the person who illegally took the [fish; wildlife; plants] from [state]. The government does not have to prove that [defendant] knew all the details of [state] law or the details of how the [fish; wildlife; plants] were taken. The government must prove beyond a reasonable doubt that [defendant] knew that the [fish; wildlife; plants] had been in some fashion taken or possessed in violation of [state] law.

LESSER OFFENSE

If you conclude that the government has proven beyond a reasonable doubt all the elements of the offense except the market value in excess of $350, you may convict [defendant] of a lesser offense under this Count. Alternatively, if you find that the government has proven beyond a reasonable doubt all the elements of the offense except the requirement that [defendant] knew that the [fish; wildlife; plants] had been or were being taken or possessed in violation of [state] law, you may convict [defendant] of a lesser offense under this Count if you find that the government has proven beyond a reasonable doubt that in the exercise of due care [defendant] should have known that the [fish; wildlife; plants] were [taken; possessed; transported; sold] in violation of [state] law.

Comment

(1) The Lacey Act is broader than this instruction, but this instruction attempts to set forth the felony offense under § 3373(d)(1)(B)(2). A lesser included charge is also provided in the event the government fails to prove the $350 minimum or the requisite degree of scienter. The Lacey Act is also broad enough to include other misdemeanor charges, but they do not seem to qualify as lesser included offenses.

(2) The definition of "market value" is supported by United States v. Stenberg, 803 F.2d 422, 433 (9th Cir. 1986), superseded by statute on other grounds as recognized in United States v. Atkinson, 966 F.2d 1270, 1273 n.4 (9th Cir. 1992).

(3) United States v. Todd, 735 F.2d 146, 151 (5th Cir. 1984), supports the proposition that the government need not prove that the defendant knew about the Lacey Act, only that the defendant knew that the (in that case) game was illegally taken.

(4) Definitions of various terms, such as "fish," "wildlife," "plants," "import," "taken" and "transport" are contained in 16 U.S.C. § 3371.

4.18.00 Attempt

[Updated: 6/14/02]

In order to carry its burden of proof for the crime of attempt to [_____] as charged in Count [___] of the indictment, the government must prove the following two things beyond a reasonable doubt:

> First, that [defendant] intended to commit the crime of [_____]; and
>
> Second, that [defendant] engaged in a purposeful act that, under the circumstances as [he/she] believed them to be, amounted to a substantial step toward the commission of that crime and strongly corroborated [his/her] criminal intent.

A "substantial step" is an act in furtherance of the criminal scheme. A "substantial step" must be something more than mere preparation, but less than the last act necessary before the substantive crime is completed.

The "substantial step" may itself prove the intent to commit the crime, but only if it unequivocally demonstrates such an intent.

Comment

(1) "There is no general federal statute which proscribes the attempt to commit a criminal offense. Thus, attempt is actionable only where a specific criminal statute outlaws both its actual as well as its attempted violation." United States v. Rivera-Sola, 713 F.2d 866, 869 (1st Cir. 1983). An attempt offense may be incorporated into a particular statute, e.g., 18 U.S.C. § 2113(a) (bank robbery), or set forth in a separate statute, e.g., 21 U.S.C. § 846 (attempted drug possession).

(2) Although "[t]here is no statutory definition of attempt anywhere in the federal law," the First Circuit has adopted the Model Penal Code standard. United States v. Dworken, 855 F.2d 12, 16-17 (1st Cir. 1988) (applying Model Penal Code § 5.01(1)(c) to attempt under federal drug law, 21 U.S.C. § 846); accord United States v. Doyon, 194 F.3d 207, 210 (1st Cir. 1999) (applying Model Penal Code definition of attempt).

(3) The Model Penal Code's standard for attempt covers acts *or omissions*. Model Penal Code § 5.01(1)(c). Because the First Circuit has only dealt with "overt act" cases to date, see e.g., United States v. George, 752 F.2d 749, 756 (1st Cir. 1985); Rivera-Sola, 713 F.2d at 869, it has not had occasion to address circumstances under which an omission could amount to a substantial step.

(4) Under the Model Penal Code, a defendant commits an attempt if he or she performs an act that, "under the circumstances as he[/she] believes them to be," constitutes a substantial step toward commission of a crime. Model Penal Code § 5.01(1)(c); see also Dworken, 855 F.2d at 19. Factual impossibility is not a defense to the charge of attempt. See United States v. Medina-Garcia, 918 F.2d 4, 8 (1st Cir. 1990).

(5) "If the substantial steps are themselves the sole proof of the criminal intent, then those steps unequivocally must evidence such an intent; that is, it must be clear that there was a criminal design and that the intent was *not* to commit some non-criminal act." Dworken, 855 F.2d at 17; see also United States v. Levy-Cordero, 67 F.3d 1002, 1019 (1st Cir. 1995) (discussing the substantial step requirement); Rivera-Sola, 713 F.2d at 869-70 (same). On the other hand, "[i]f there is separate evidence of criminal intent independent from that provided by the substantial steps (e.g., a confessed admission of a design to commit a crime), then substantial steps . . . must *merely* corroborate that intent." Dworken, 855 F.2d at 17 n.3 (emphasis added).

4.18.02 Aid and Abet, 18 U.S.C. § 2

[Updated: 5/20/05]

To "aid and abet" means intentionally to help someone else commit the charged crime. To establish aiding and abetting, the government must prove beyond a reasonable doubt:

> First, that someone else committed [insert charged crime]; and
>
> Second, that [defendant] consciously shared the other person's knowledge of [insert charged crime], intended to help [him/her], and [willfully] took part in the endeavor, seeking to make it succeed.

[Defendant] need not perform the [insert charged crime], be present when it is performed, or be aware of the details of its execution to be guilty of aiding and abetting. But a general suspicion that an unlawful act may occur or that something criminal is happening is not enough. Mere presence at the scene of [insert charged crime] and knowledge that [insert charged crime] is being committed are also not sufficient to establish aiding and abetting.

[An act is done "willfully" if done voluntarily and intentionally with the intent that something the law forbids be done—that is to say with bad purpose, either to disobey or disregard the law.]

Comment

(1) This instruction is based on United States v. Spinney, 65 F.3d 231, 234-35 (1st Cir. 1995), and United States v. Loder, 23 F.3d 586, 590-91 (1st Cir. 1994), but modified to reflect the statement in United States v. Geronimo, 330 F.3d 67, 75 (1st Cir. 2003), that "it would be preferable for an aiding and abetting instruction to refer specifically to the principal offense in the fashion of the Eighth Circuit pattern instruction, rather than generally to 'a crime.'" United States v. Bailey, 405 F.3d 102 (1st Cir. 2005), dealt with a failure-to-act instruction, but did not provide a clear holding on its appropriateness.

(2) "[A] fair reading of Spinney supports the proposition that the level of knowledge required to support an aiding and abetting conviction is related to the specificity of the principal offense, as to both *mens rea* and *actus reus*." United States v. Rosario-Diaz, 202 F.3d 54, 63 (1st Cir. 2000). For aiding and abetting an armed bank robbery, it is "notice of the likelihood" that the principal would use a dangerous weapon, id., defined as a "reasonable likelihood," not a "high likelihood," "low likelihood," or "semi likelihood." Id. at 63 n.1. For carjacking, the First Circuit has not decided which standard applies. United States v. Otero-Mendez, 273 F.3d 46, 51-52 (1st Cir. 2001). For aiding and abetting the use of a firearm in a crime of violence, Instruction 4.18.924(c), the level is knowledge "to a practical certainty," Rosario-Diaz, 202 F.3d at 63, and an additional requirement that the defendant "took some action intending to cause the gun to be used or carried." United States v. Medina-Roman, 376 F.3d 1, 6 (1st Cir. 2004).

(3) The Committee was evenly divided on whether to include the term "willfully" and the bracketed definition. Title 18 U.S.C. § 2 has two subsections, only the first of which, subsection (a), deals specifically with aiding and abetting. Subsection (a) does not require that an aider and abettor act "willfully." Subsection (b), dealing with one who causes an act to be done which, if performed directly by the accused or another, would be a crime, does require proof of willfulness. Subsection (b), however, did not appear until 1948 and willfulness was not added as a requirement in subsection (b) until 1951. For a good discussion of the legislative history of subsection (b) see United States v. Ruffin, 613 F.2d 408 (2d Cir. 1979), and of subsection (a) see Standefer v. United States, 447 U.S. 10 (1980). First Circuit caselaw has not consistently recognized a difference between the two subsections, treating them both generically as "aid and abet," see, e.g., United States v. Footman, 215 F.3d 145, 154 (1st Cir. 2000) ("When aiding and abetting is involved, then, the 'counsels, commands, induces, or procures' [§ 2(a)] and 'cause' [§ 2(b)] language from § 2 is properly part of the jury's instruction."), and at least some First Circuit cases use the term "willfully" when dealing specifically with subsection (a). See, e.g., United States v. O'Campo, 973 F.2d 1015, 1020 (1st Cir. 1992). Complicating matters further, "willfully" is a term subject to a variety of definitions, see Ratzlaf v. United States, 510 U.S. 135, 141 (1994), and it is unclear whether the First Circuit meant to require specific intent (to violate the law) in subsection (a) cases by using the term. Many statutes penalize conduct simply because the defendant undertakes it, regardless of whether the defendant knows that the conduct amounts to a crime (e.g., felon in possession of a firearm, 18 U.S.C. § 922(g)); it is unclear why an aider and abettor should be held to a more demanding intent. In fact, there is language in First Circuit cases supporting the contrary conclusion. In Loder, the court said that "the defendant [must] consciously share the principal's knowledge of the underlying criminal act," 23 F.3d at 591, and quoted approvingly the statement in United States v. Valencia, 907 F.2d 671 (7th Cir. 1990): "The state of mind required for conviction as an aider and abettor is the same state of mind as required for the principal offense." Id. at 680. Finally, the First Circuit at times has recognized that subsection (b) is different from subsection (a), see United States v. Strauss, 443 F.2d 986, 988 (1st Cir. 1971), and has recently held that "[a] defendant may be convicted under this section [b] even though the individual who did in fact commit the substantive act lacked the necessary criminal intent." United States v. Dodd, 43 F.3d 759, 762 (1st Cir. 1995); accord United States v. Andrade, 135 F.3d 104, 110 (1st Cir. 1998) ("Unlike aiding and abetting liability . . . there is no requirement [under section 2(b)] that the intermediary be shown to be criminally liable."). If the two subsections are treated as interchangeable, Dodd and Andrade would be inconsistent with Loder's holding that culpability under (a) requires a shared knowledge of the underlying criminal act between or among the actors. But if (b) is treated separately from (a) as Dodd and Andrade suggest, the willfulness element of (b) becomes a sensible additional requirement of specific intent for culpability of a defendant charged with causing an innocent person to act. Following the logic of Loder, where the underlying criminal act is not a specific intent crime, it may be defensible to leave out "willfully" and its definition in a subsection (a) prosecution.

United States v. Leppo, 177 F.3d 93, 95-97 (1st Cir. 1999), discusses, but does not resolve, disagreement over what "willfulness" requires in a § 2(b) case.

4.18.03 Accessory After the Fact, 18 U.S.C. § 3

[Updated: 6/14/02]

[Defendant] is charged with being an accessory after the fact to the crime of [specify crime]. It is against federal law to be an accessory after the fact. For [defendant] to be convicted of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that [specify other person] committed [specify crime];

Second, that [defendant] knew that [specify other person] committed [specify crime]; and

Third, that after the [specify crime] was completed, [defendant] tried to help [specify other person] with the intention of preventing or hindering [his/her] [arrest; trial; punishment].

Knowledge and intent may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining what [defendant] knew or intended at a particular time, you may consider any statements made or acts done or omitted by [defendant] and all other facts and circumstances received in evidence that may aid in your determination of [defendant]'s knowledge or intent. You may infer, but you are certainly not required to infer, that a person intends the natural and probable consequences of acts knowingly done or omitted. It is entirely up to you, however, to decide what facts are proven by the evidence received during this trial.

Comment

(1) The First Circuit has said that "an accessory-after-the-fact offense is almost never going to be a lesser included offense as to the principal crime" because it requires proof of one element the principal offense does not require—assistance after the crime was committed. United States v. Rivera-Figueroa, 149 F.3d 1, 6 & n.5 (1st Cir. 1998). If the defendant has not been charged as an accessory-after-the-fact, giving this charge, even at a defendant's request, has "the potential to confuse the jury." United States v. Otero-Mendez, 273 F.3d 46, 55 (1st Cir. 2001); accord Rivera-Figueroa, 149 F.3d at 7.

(2) The statute requires knowledge "that an offense against the United States has been committed." That means that the "government must prove beyond a reasonable doubt that the accessory was aware that the offender had engaged in conduct that satisfies the essential elements of the primary federal offense," but not necessarily that the defendant knew that such conduct was in fact a federal crime. United States v. Graves, 143 F.3d 1185, 1186 (9th Cir. 1998).

4.18.152(1) Bankruptcy Fraud, Concealment, 18 U.S.C. § 152(1)

[Updated: 6/14/02]

[Defendant] is charged with bankruptcy fraud through concealment. It is against federal law to commit bankruptcy fraud through concealment. For you to find [defendant] guilty of this offense, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that a proceeding in bankruptcy existed;

Second, that [defendant] concealed [property description] from [*e.g.*, bankruptcy trustee; creditors; United States Trustee];

Third, that [defendant] did so knowingly and fraudulently; and

Fourth, that the [property description] belonged to [the debtor's estate].

"Conceal" means to hide, withhold information about, or prevent disclosure or recognition of something.

A "debtor" is the person concerning whom a bankruptcy case is filed.

A "debtor's estate" is created by the filing of a bankruptcy petition.

"Property of the debtor's estate" consists of (1) all property owned by the debtor at the time the bankruptcy petition is filed, (2) all proceeds or profits from such property, and (3) any property that the estate thereafter acquires.

A "creditor" is a person or company that has a claim or a right to payment from the debtor that arose at the time, or before, the bankruptcy court issued its order for relief concerning the debtor.

A "bankruptcy trustee" is an individual who is appointed to oversee bankruptcy cases.

The "United States Trustee" is an individual appointed by, and who acts under the general supervision of, the Attorney General of the United States who oversees cases and bankruptcy trustees.

A defendant acted "fraudulently" if he or she acted willfully and with the intent to deceive or cheat. Thus, if a defendant acted in good faith, he or she cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

"Willfully" means voluntarily and intentionally and with the specific intention to do something the law forbids, or with the specific intention to fail to do something the law requires, that is to say with bad purpose, either to disobey or disregard the law.

A defendant acted "knowingly" if he or she was conscious and aware of his or her actions, realized what he or she was doing or what was happening around him or her, acted voluntarily and intentionally, and did not act because of ignorance, mistake or accident.

Comment

(1) The government need not prove that a substantial amount of estate property was concealed, although a *de minimis* value "may be probative evidence of the absence of an intent to defraud." United States v. Grant, 971 F.2d 799, 809 & n.19 (1st Cir. 1992).

(2) The First Circuit approved defining "knowingly" and "fraudulently" in the bankruptcy fraud context "through direct reference to the voluntariness, as well as the general and specific intent animating [the defendant's] conduct." United States v. Shadduck, 112 F.3d 523, 527 (1st Cir. 1997).

(3) Concerning "property of the estate," "[t]he determination whether a debtor had a legal, equitable, or possessory interest in property at the commencement of the case requires the factfinder to evaluate all relevant direct and circumstantial evidence relating to the property and to the intent of the debtor." Grant, 971 F.2d at 806.

(4) Concerning fraudulent intent, replacement of removed property may be probative of fraudulent intent, but not dispositive. Grant, 971 F.2d at 808.

(5) According to United States v. Cardall, 885 F.2d 656, 678 (10th Cir. 1989), it is not always necessary to use the words "legal or equitable interest" in describing the debtor's estate.

4.18.152(2),(3) Bankruptcy Fraud, False Oath/Account and False Declaration, 18 U.S.C. § 152(2), 152(3)

[Updated: 2/11/03]

[Defendant] is charged with bankruptcy fraud by making a false oath/account [false declaration]. It is against federal law to commit bankruptcy fraud by making a false oath/account [false declaration]. For you to find [defendant] guilty of this offense, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that a proceeding in bankruptcy existed;

Second, that [defendant] made a statement or series of statements under oath [declaration or statement under penalty of perjury] in relation to the bankruptcy proceeding. You must be unanimous on which statement or series of statements [declaration] it is;

Third, that the statement or series of statements [declaration] concerned a material fact;

Fourth, that the statement or series of statements [declaration] was false; and

Fifth, that [defendant] made the statement or series of statements knowingly and fraudulently.

As long as the statement or series of statements [declaration] is literally true, there can be no conviction.

[A "declaration" is a statement or narration of facts.]

A "material" fact is one that has a natural tendency to influence or be capable of influencing the decision of the decisionmaker to whom it was addressed.

A defendant acted "fraudulently" if he or she acted willfully and with intent to deceive or cheat. Thus, if a defendant acted in good faith, he or she cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

"Willfully" means voluntarily and intentionally and with the specific intention to do something the law forbids, or with the specific intention to fail to do something the law requires, that is to say with bad purpose, either to disobey or disregard the law.

A defendant acted "knowingly" if he or she was conscious and aware of his or her actions, realized what he or she was doing or what was happening around him or her, acted voluntarily and intentionally, and did not act because of ignorance, mistake or accident.

Comment

(1) "To support a conviction for making a false oath in bankruptcy under 18 U.S.C. § 152(2) the prosecution is required to establish (1) the existence of bankruptcy proceedings; (2) that a false statement was made in the proceedings under penalty of perjury; (3) as to a material fact; and (4) that the statement was knowingly and fraudulently made." United States v. Cutter, 313 F.3d 1, 4 n.4 (1st Cir. 2002).

(2) The First Circuit approved defining "knowingly" and "fraudulently" in the bankruptcy fraud context "through direct reference to the voluntariness, as well as the general and specific intent animating [the defendant's] conduct." United States v. Shadduck, 112 F.3d 523, 527 (1st Cir. 1997). Defining "knowingly and fraudulently" in terms of intent to deceive is supported by United States v. Gellene, 182 F.3d 578, 586-87 (7th Cir. 1999).

(3) When materiality is an element of the offense, it is for the jury. See United States v. Gaudin, 515 U.S. 506, 522-23 (1995) (holding that it was error for the trial judge to refuse to submit the question of materiality to the jury in a case in which the respondent had been convicted of making material false statements in a matter within the jurisdiction of a federal agency, in violation of 18 U.S.C. § 1001). Material misrepresentations include not only those that relate to the assets of the bankruptcy estate, but any that relate to "some significant aspect of the bankruptcy case or proceeding in which it was given." Gellene, 182 F.3d at 588 (quoting 1 Collier on Bankruptcy ¶ 7.02[2][a][iv], at 7-46 to 7-47 (Lawrence P. King ed., 15th ed. rev. 1999)).

(4) Other circuits have held that omissions of material facts can be false statements. Unites States v. Sobin, 56 F.3d 1423, 1428 (D.C. Cir. 1995); United States v. Ellis, 50 F.3d 419, 423-25 (7th Cir. 1995); United States v. Lindholm, 24 F.3d 1078, 1083-85 (9th Cir. 1994).

(5) Literal truth is a complete defense to a false oath claim. Bronston v. United States, 409 U.S. 352, 362 (1973) (criminal perjury statute); United States v. Moynagh, 566 F.2d 799, 804 (1st Cir. 1977) (dismissing charge for false statement where omission was warranted by facts and truthful), abrogated on other grounds by United States v. Nieves-Burgos, 62 F.3d 431, 436-37 (1st Cir. 1995).

4.18.152(4) Bankruptcy Fraud, False Claim, 18 U.S.C. § 152(4)

[Updated: 6/14/02]

[Defendant] is charged with bankruptcy fraud by making a false claim. It is against federal law to commit bankruptcy fraud by making a false claim. For you to find [defendant] guilty of this offense, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that a proceeding in bankruptcy existed;

Second, that [defendant] presented or caused to be presented, or used or caused to be used, a claim for proof against the bankruptcy estate;

Third, that the claim as presented or used was false; and

Fourth, that [defendant] did so knowingly and fraudulently.

A "bankruptcy estate" is created by the filing of a bankruptcy petition. It includes all property in which the debtor had an interest on the date of the commencement of the bankruptcy.

A claim for proof is sometimes also called a "proof of claim." It is a written statement setting forth a creditor's claim against the estate of a debtor. A proof of claim is "presented" or "used" if it appears in a debtor's bankruptcy schedules, unless it is listed as disputed, contingent or unliquidated.

A defendant acted "fraudulently" if he or she acted willfully and with the intent to deceive or cheat. Thus, if a defendant acted in good faith, he or she cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

"Willfully" means voluntarily and intentionally and with the specific intention to do something the law forbids, or with the specific intention to fail to do something the law requires, that is to say with bad purpose, either to disobey or disregard the law.

A defendant acted "knowingly" if he or she was conscious and aware of his or her actions, realized what he or she was doing or what was happening around him or her, acted voluntarily and intentionally, and did not act because of ignorance, mistake or accident.

Comment

The First Circuit approved defining "knowingly" and "fraudulently" in the bankruptcy fraud context "through direct reference to the voluntariness, as well as the general and specific intent animating [the defendant's] conduct." United States v. Shadduck, 112 F.3d 523, 527 (1st Cir. 1997).

4.18.152(5) Bankruptcy Fraud, Receipt with Intent to Defraud, 18 U.S.C. § 152(5)

[Updated: 6/14/02]

[Defendant] is charged with bankruptcy fraud by receiving property from a bankruptcy debtor with intent to defeat the provisions of bankruptcy law. It is against federal law to commit bankruptcy fraud in this manner. For you to find [defendant] guilty of this offense, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that a proceeding in bankruptcy existed;

Second, that [defendant] received a material amount of [property] after the bankruptcy case was filed;

Third, that [defendant] received the property from the debtor;

Fourth, that [defendant] received such property knowingly and fraudulently; and

Fifth, that [defendant] intended to defeat the provisions of bankruptcy law.

Bankruptcy law provisions are designed to promote efficient bankruptcy administration and a fair distribution of a debtor's assets to creditors. This is accomplished by allowing the trustee to make a neutral and informed assessment of the status and value of the debtor's property interests, of whatever sort. For the purposes of this case, bankruptcy law provisions are defeated when a person without the trustee's approval acts in a manner that diminishes the debtor's assets and thus interferes with their fair distribution.

"Material amount" means a significant—not an incidental—amount.

A defendant acted "fraudulently" if he or she acted willfully and with the intent to deceive or cheat. Thus, if a defendant acted in good faith, he or she cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

"Willfully" means voluntarily and intentionally and with the specific intention to do something the law forbids, or with the specific intention to fail to do something the law requires, that is to say with bad purpose, either to disobey or disregard the law.

A defendant acted "knowingly" if he or she was conscious and aware of his or her actions, realized what he or she was doing or what was happening around him or her, acted voluntarily and intentionally, and did not act because of ignorance, mistake or accident.

Comment

(1) Unlike the other section 152 subsections, this one contains an express materiality requirement.

(2) The First Circuit approved defining "knowingly" and "fraudulently" in the bankruptcy fraud context "through direct reference to the voluntariness, as well as the general and specific intent animating [the defendant's] conduct." United States v. Shadduck, 112 F.3d 523, 527 (1st Cir. 1997).

4.18.152(6) Bankruptcy Fraud, Bribery and Extortion, 18 U.S.C. § 152(6)

[Updated: 6/14/02]

[Defendant] is charged with bankruptcy fraud by [giving; offering; receiving; attempting to obtain] any [money; property; remuneration; compensation; reward; advantage; promise] for [acting; forbearing from acting] in a proceeding in bankruptcy. It is against federal law to commit bankruptcy fraud in this manner. For you to find [defendant] guilty of this offense, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that a proceeding in bankruptcy existed;

Second, that [defendant] [gave; offered; received; attempted to obtain] [to; from] [specify other person] any [money; property; remuneration; compensation; reward; advantage; promise] after the bankruptcy case was filed;

Third, that [defendant] did this to get [specify other person] to [take; forbear from taking] some action in the bankruptcy proceeding; and

Fourth, that [defendant] did so knowingly and fraudulently.

A defendant acted "fraudulently" if he or she acted willfully and with the intent to deceive or cheat. Thus, if a defendant acted in good faith, he or she cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

"Willfully" means voluntarily and intentionally and with the specific intention to do something the law forbids, or with the specific intention to fail to do something the law requires, that is to say with bad purpose, either to disobey or disregard the law.

A defendant acted "knowingly" if he or she was conscious and aware of his or her actions, realized what he or she was doing or what was happening around him or her, acted voluntarily and intentionally, and did not act because of ignorance, mistake or accident.

To "forbear" means to refrain from enforcing a right, obligation, or debt.

Comment

(1) The First Circuit approved defining "knowingly" and "fraudulently" in the bankruptcy fraud context "through direct reference to the voluntariness, as well as the general and specific intent animating [the defendant's] conduct." United States v. Shadduck, 112 F.3d 523, 527 (1st Cir. 1997).

(2) The definition of "forbear" is from Black's Law Dictionary 656 (7th ed. 1999). The bankruptcy code does not define the term.

4.18.152(7) Bankruptcy Fraud, Transfer of Property in Personal Capacity or as Agent or Officer, 18 U.S.C. § 152(7)

[Updated: 6/14/02]

[Defendant] is charged with bankruptcy fraud by transferring or concealing [his/her] [property; the property of [specify third person or corporation] for whom [he/she] was acting as an agent or officer] [in contemplation of bankruptcy; with intent to defeat the provisions of the bankruptcy law]. It is against federal law to commit bankruptcy fraud in this manner. For you to find [defendant] guilty of this offense, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

> First, that [defendant] transferred or concealed [funds; property] in [his/her] personal capacity; as an officer or agent of [specify third party or corporation]];
>
> Second, that the [funds; property] belonged to [defendant; a third person; a corporation for whom [defendant] was an agent or officer];
>
> Third, that [defendant] did so knowingly and fraudulently; and
>
> Fourth, that [defendant] did so [in contemplation of bankruptcy; with the intent to defeat the provisions of bankruptcy law].

["In contemplation of bankruptcy" means in expectation of, or planning for, the future probability of a bankruptcy proceeding.]

[Bankruptcy law provisions are designed to promote efficient bankruptcy administration and a fair distribution of a debtor's assets to creditors. This is accomplished by allowing the trustee to make a neutral and informed assessment of the status and value of the debtor's property interests, of whatever sort. For the purposes of this case, bankruptcy law provisions are defeated when a person without the trustee's approval acts in a manner that diminishes the debtor's assets and thus interferes with their fair distribution.]

"Transfer" means move property from one place to another or change the title of property so that someone else owns it.

"Conceal" means to hide, withhold information about, or prevent disclosure or recognition of something.

A defendant acted "fraudulently" if he or she acted willfully and with the intent to deceive or cheat. Thus, if a defendant acted in good faith, he or she cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

"Willfully" means voluntarily and intentionally and with the specific intention to do something the law forbids, or with the specific intention to fail to do something the law requires, that is to say with bad purpose, either to disobey or disregard the law.

A defendant acted "knowingly" if he or she was conscious and aware of his or her actions, realized what he or she was doing or what was happening around him or her, acted voluntarily and intentionally, and did not act because of ignorance, mistake or accident.

Comment

The First Circuit approved defining "knowingly" and "fraudulently" in the bankruptcy fraud context "through direct reference to the voluntariness, as well as the general and specific intent animating [the defendant's] conduct." United States v. Shadduck, 112 F.3d 523, 527 (1st Cir. 1997).

4.18.152(8) Bankruptcy Fraud, False Entries, 18 U.S.C. § 152(8)

[Updated: 6/14/02]

[Defendant] is charged with bankruptcy fraud by knowingly and fraudulently concealing, destroying, mutilating, falsifying or making false entries in recorded information relating to the property and financial affairs of a debtor [after the bankruptcy case was filed; in contemplation of bankruptcy]. It is against federal law to commit bankruptcy fraud in this manner. For you to find [defendant] guilty of this offense, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that [a proceeding in bankruptcy existed; a bankruptcy proceeding was contemplated];

Second, that [defendant] concealed or falsified or made false entries in recorded information as charged;

Third, that the recorded information related to the property or financial affairs of a debtor; and

Fourth, that [defendant] did so knowingly and fraudulently.

"In contemplation of bankruptcy" means in expectation of, or planning for, the future probability of a bankruptcy proceeding.

"Recorded information" includes books, documents, records and papers.

"Conceal" means to hide, withhold information about, or prevent disclosure or recognition of something.

A defendant acted "fraudulently" if he or she acted willfully and with the intent to deceive or cheat. Thus, if a defendant acted in good faith, he or she cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

"Willfully" means voluntarily and intentionally and with the specific intention to do something the law forbids, or with the specific intention to fail to do something the law requires, that is to say with bad purpose, either to disobey or disregard the law.

A defendant acted "knowingly" if he or she was conscious and aware of his or her actions, realized what he or she was doing or what was happening around him or her, acted voluntarily and intentionally, and did not act because of ignorance, mistake or accident.

Comment

The First Circuit approved defining "knowingly" and "fraudulently" in the bankruptcy fraud context "through direct reference to the voluntariness, as well as the general and specific intent animating [the defendant's] conduct." United States v. Shadduck, 112 F.3d 523, 527 (1st Cir. 1997).

4.18.152(9) Bankruptcy Fraud, Withholding Recorded Information, 18 U.S.C. § 152(9)

[Updated: 6/14/02]

[Defendant] is charged with bankruptcy fraud by knowingly and fraudulently withholding from the bankruptcy trustee, after the bankruptcy was filed, recorded information relating to the property and financial affairs of a debtor.

Where a bankruptcy trustee has been appointed, a debtor must (1) cooperate with the trustee to enable the trustee to perform the trustee's duties and (2) surrender to the trustee all property of the estate and any recorded information, including books, documents, records and papers relating to property of the estate.

It is against federal law to commit bankruptcy fraud by knowingly and fraudulently withholding from the bankruptcy trustee, after the bankruptcy was filed, recorded information relating to the property and financial affairs of a debtor. For you to find [defendant] guilty of this offense, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that a proceeding in bankruptcy existed;

Second, that the trustee was entitled to possession of the recorded information;

Third, that [defendant] withheld from the trustee the recorded information after the bankruptcy was filed;

Fourth, that the recorded information related to the property or financial affairs of a debtor; and

Fifth, that [defendant] did so knowingly and fraudulently.

A "bankruptcy trustee" is an individual who is appointed to oversee bankruptcy cases.

"Recorded information" includes books, documents, records and papers.

A defendant acted "fraudulently" if he or she acted willfully and with the intent to deceive or cheat. Thus, if a defendant acted in good faith, he or she cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

"Willfully" means voluntarily and intentionally and with the specific intention to do something the law forbids, or with the specific intention to fail to do something the law requires, that is to say with bad purpose, either to disobey or disregard the law.

A defendant acted "knowingly" if he or she was conscious and aware of his or her actions, realized what he or she was doing or what was happening around him or her, acted voluntarily and intentionally, and did not act because of ignorance, mistake or accident.

Comment

The First Circuit approved defining "knowingly" and "fraudulently" in the bankruptcy fraud context "through direct reference to the voluntariness, as well as the general and specific intent animating [the defendant's] conduct." United States v. Shadduck, 112 F.3d 523, 527 (1st Cir. 1997).

4.18.371(1) Conspiracy, 18 U.S.C. § 371; 21 U.S.C. § 846

[Updated: 10/14/05]

[Defendant] is accused of conspiring to commit a federal crime— specifically, the crime of [insert crime]. It is against federal law to conspire with someone to commit this crime.

For you to find [defendant] guilty of conspiracy, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

> First, that the agreement specified in the indictment, and not some other agreement or agreements, existed between at least two people to [substantive crime]; and
>
> Second, that [defendant] willfully joined in that agreement; [and
>
> Third, that one of the conspirators committed an overt act during the period of the conspiracy in an effort to further the purpose of the conspiracy.]

A conspiracy is an agreement, spoken or unspoken. The conspiracy does not have to be a formal agreement or plan in which everyone involved sat down together and worked out all the details.

But the government must prove beyond a reasonable doubt that those who were involved shared a general understanding about the crime. Mere similarity of conduct among various people, or the fact that they may have associated with each other or discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy, but you may consider such factors.

To act "willfully" means to act voluntarily and intelligently and with the specific intent that the underlying crime be committed—that is to say, with bad purpose, either to disobey or disregard the law—not to act by ignorance, accident or mistake. The government must prove two types of intent beyond a reasonable doubt before [defendant] can be said to have willfully joined the conspiracy: an intent to agree and an intent, whether reasonable or not, that the underlying crime be committed. Mere presence at the scene of a crime is not alone enough, but you may consider it among other factors. Intent may be inferred from the surrounding circumstances.

Proof that [defendant] willfully joined in the agreement must be based upon evidence of [his/her] own words and/or actions. You need not find that [defendant] agreed specifically to or knew about all the details of the crime, or knew every other co-conspirator or that [he/she] participated in each act of the agreement or played a major role, but the government must prove beyond a reasonable doubt that [he/she] knew the essential features and general aims of the venture. Even if [defendant] was not part of the agreement at the very start, [he/she] can be found guilty of conspiracy if the government proves that [he/she] willfully joined the agreement later. On the other hand, a person who has no knowledge of a conspiracy, but simply happens to act in a way that furthers some object or purpose of the conspiracy, does not thereby become a conspirator.

[An overt act is any act knowingly committed by one or more of the conspirators in an effort to accomplish some purpose of the conspiracy. Only one overt act has to be proven. The government

is not required to prove that [defendant] personally committed or knew about the overt act. It is sufficient if one conspirator committed one overt act at some time during the period of the conspiracy.]

The government does not have to prove that the conspiracy succeeded or was achieved. The crime of conspiracy is complete upon the agreement to commit the underlying crime [and the commission of one overt act].

Comment

(1) This charge is based largely upon United States v. Rivera-Santiago, 872 F.2d 1073, 1078-80 (1st Cir. 1989), as modified by United States v. Piper, 35 F.3d 611, 614-15 (1st Cir. 1994). See also United States v. Richardson, 225 F.3d 46, 53 (1st Cir. 2000) (approving Pattern's statement that proof of willful joinder "must" be based upon evidence of the defendant's own words and/or actions); United States v. Boylan, 898 F.2d 230, 241-43 (1st Cir. 1990); Blumenthal v. United States, 332 U.S. 539, 557 (1947).

(2) The third element (overt act) is not required in a drug conspiracy under 21 U.S.C. § 846. United States v. Shabani, 513 U.S. 10, 11 (1994), nor in a money laundering conspiracy under 18 U.S.C. § 1956(h). Whitfield v. United States, 543 U.S. 209, 125 S. Ct. 687, 694 (2005).

(3) Where an overt act is required, only one member of a conspiracy need commit an overt act, and the overt act need not be illegal. See United States v. Flaherty, 668 F.2d 566, 580 n.4 (1st Cir. 1981).

(4) The Government does not have to prove that the defendant intended to commit the underlying offense himself or herself. Piper, 35 F.3d at 614-15. There must be proof, however, that a second conspirator with criminal intent existed. United States v. Alzanki, 54 F.3d 994, 1003 (1st Cir. 1995).

(5) "Whether there is a single conspiracy, multiple conspiracies, or no conspiracy at all is ordinarily a factual matter for the jury to determine." United States v. Mena-Robles, 4 F.3d 1026, 1033 (1st Cir. 1993). A multiple conspiracy instruction should be provided if "'on the evidence adduced at trial, a reasonable jury could find more than one such illicit agreement, or could find an agreement different from the one charged.'" United States v. Brandon, 17 F.3d 409, 449 (1st Cir. 1994) (quoting Boylan, 898 F.2d at 243). The following is appropriate language that the Fifth and Ninth Circuits have used for multiple-conspiracy instructions:

> If you find that the conspiracy charged did not exist, then you must return a not guilty verdict, even though you find that some other conspiracy existed. If you find that a defendant was not a member of the conspiracy charged in the indictment, then you must find that defendant not guilty, even though that defendant may have been a member of some other conspiracy.

Fifth Circuit Instruction 2.21; see also Ninth Circuit Instruction 8.17.

(6) The definition of "willfully" comes from United States v. Monteiro, 871 F.2d 204, 208-09 (1st Cir. 1989). For alternate definitions see United States v. Porter, 764 F.2d 1, 17 (1st Cir. 1985), and United States v. Drape, 668 F.2d 22, 26 (1st Cir. 1992). Specific intent is preferred. United States v. Yefsky, 994 F.2d 885, 899 (1st Cir. 1993).

(7) "A conspiracy does not automatically terminate simply because the Government, unbeknownst to some of the conspirators, has 'defeat[ed]' the conspiracy's 'object.'" United States v. Jimenez Recio, 537 U.S. 270, 274 (2003). Impossibility is not a defense. United States v. Giry, 818 F.2d 120, 126 (1st Cir. 1987).

(8) A conspiracy to defraud the IRS may present unique problems of "purpose" or "knowledge." United States v. Goldberg, 105 F.3d 770, 774 (1st Cir. 1997).

(9) Note that some substantive offenses contain their own conspiracy prohibitions. See, e.g., 18 U.S.C. § 241 (civil rights conspiracy) (no overt act required, see United States v. Crochiere, 129 F.3d 233, 237-38 (1st Cir. 1997)); 18 U.S.C. § 1201(c) (kidnapping) (overt act required); 18 U.S.C. § 1951(a) (Hobbs Act) (no overt act required, see United States v. Palmer, 203 F.3d 55, 63 (1st Cir. 2000)); 18 U.S.C. § 1956(h) (money laundering) (no overt act required, see Whitfield v. United States, 125 S. Ct. at 694).

(10) Withdrawal is not an affirmative defense if the conspiratorial agreement has already been made. United States v. Rogers, 102 F.3d 641, 644 (1st Cir. 1996).

(11) There must be at least two conspirators. "[A] conspiracy conviction is not possible if the defendant conspired only with government agents or informants." United States v. Nelson-Rodriguez, 319 F.3d 12, 39 (1st Cir. 2003) (describing the statement as "true" but "inapplicable in that case"). In a Mann Act case, "[t]here is an inherent policy judgment in the [statute] not to prosecute women who do no more than consent to being transported across state lines for the purpose of prostitution." United States v. Footman, 215 F.3d 145, 151 (1st Cir. 2000). If that is all there is, the woman is a victim, not a co-conspirator. "But that policy simply does not apply when the women assume roles in running the business." Id. "[T]he issue is whether she agreed to further the conspiracy and took steps to do so, beyond her working as a prostitute herself and crossing state lines." Id.

(12) If the record supports it, the defendant is entitled to an instruction "that a buyer and seller in a single drug transaction are not invariably part of a drug conspiracy. The classic example is a single sale for personal use and without prearrangement." United States v. Martinez-Medina, 279 F.3d 105, 120 (1st Cir. 2002) (citing United States v. Moran, 984 F.2d 1299, 1302-04 (1st Cir. 1993)). "[A] single drug sale, without more, does not establish a conspiracy. But . . . [e]ven a single sale for resale, embroidered with evidence suggesting a joint undertaking between buyer and seller, could suffice." United States v. Gomes, 376 F.3d 42, 44 (1st Cir. 2004) (citations omitted).

(13) The First Circuit has not decided whether the jury must be unanimous on one specific criminal object of a multi-object conspiracy. United States v. Marino, 277 F.3d 11, 32 (1st Cir. 2002).

(14) See Comment (2) to Instruction 4.21.841(a)(1) concerning enhanced penalties for drug quantity.

(15) 18 U.S.C. § 371 also prohibits conspiracies "to defraud the United States, or any agency thereof in any manner or for any purpose." For a case applying that portion of the statute see United States v. Thurston, 358 F.3d 51 (1st Cir. 2004).

4.18.371(2) Pinkerton Charge

[Updated: 6/14/02]

There is another method by which you may evaluate whether to find [defendant] guilty of the substantive charge in the indictment.

If, in light of my instructions, you find beyond a reasonable doubt that [defendant] was guilty on the conspiracy count (Count ___), then you may also, but you are not required to, find [him/her] guilty of the substantive crime charged in Count ___, provided you find beyond a reasonable doubt each of the following elements:

> First, that someone committed the substantive crime charged in Count ___;
>
> Second, that the person you find actually committed the substantive crime was a member of the conspiracy of which you found [defendant] was a member;
>
> Third, that this co-conspirator committed the substantive crime in furtherance of the conspiracy;
>
> Fourth, that [defendant] was a member of this conspiracy at the time the substantive crime was committed and had not withdrawn from it; and
>
> Fifth, that [defendant] could reasonably have foreseen that one or more of [his/her] co-conspirators might commit the substantive crime.

If you find all five of these elements to exist beyond a reasonable doubt, then you may find [defendant] guilty of the substantive crime charged, even though [he/she] did not personally participate in the acts constituting the crime or did not have actual knowledge of them.

If, however, you are not satisfied as to the existence of any one of these five elements, then you may not find [defendant] guilty of the particular substantive crime unless the government proves beyond a reasonable doubt that [defendant] personally committed that substantive crime, or aided and abetted its commission.

Comment

(1) This instruction is adapted from Sand, et al., Instruction 19-13. The instruction implements the rule laid down in Pinkerton v. United States, 328 U.S. 640 (1946). The instruction can be given even though the indictment does not charge vicarious liability. See United States v. Sanchez, 917 F.2d 607, 612 (1st Cir. 1990).

(2) The model instruction omits the penultimate paragraph of Sand, et al., Instruction 19-13. That paragraph attempts to explain the reason for the Pinkerton rule, namely that co-conspirators act as agents of one another and therefore are liable for each other's acts. The paragraph seems to fall

into an area more appropriate for argument, preemptively addressing possible juror concerns about the fairness of a rule of vicarious liability. Such an explanation may be fair ground for closing argument, but it seems out of place in the court's charge.

If a court is inclined to include such a paragraph, it should consider rewording the Sand charge, which reads, "all of the co-conspirators must bear criminal responsibility for the commission of the substantive crimes." The use of "must" seems inconsistent with the principle that the jury can—but is not required to—hold a defendant vicariously liable on a Pinkerton theory.

(3) The instruction requires that the substantive crime be committed while the defendant is a member of the conspiracy. There is no vicarious liability for acts committed before one joins a conspiracy, United States v. O'Campo, 973 F.2d 1015, 1021 (1st Cir. 1992) (explaining the requirement of contemporaneous participation: "[a]n individual cannot . . . be held reasonably to have 'foreseen' actions which occurred prior to his entrance in the conspiracy"), nor for acts committed after a true withdrawal from the conspiracy. United States v. Rogers, 102 F.3d 641, 644 (1st Cir. 1996) (stating that withdrawal "may insulate [a defendant] from Pinkerton liability for substantive crimes of others that occur after his withdrawal"); United States v. Munoz, 36 F.3d 1229, 1234 (1st Cir. 1994) (stating that the government's burden included proving that co-conspirators' acts were committed "at a time when [the defendant] was still a member of the conspiracy," but affirming the conviction on the grounds that there was no evidence of affirmative withdrawal).

(4) The theory of Pinkerton liability must not be confused with aider and abettor liability. The latter theory requires proof of a higher mental state, United States v. Collazo-Aponte, 216 F.3d 163, 196 (1st Cir. 2000), vacated on other grounds, 532 U.S. 1036 (2001); United States v. Shea, 150 F.3d 44, 50 (1st Cir. 1998), but has a "broader application": it can apply to acts that are not necessarily done pursuant to an agreement between the perpetrator and the defendant. Nye & Nissen v. United States, 336 U.S. 613, 620 (1949).

(5) Although the First Circuit has acknowledged the view in other circuits that the Pinkerton charge should not be given in "marginal case[s]" because of the risk that the jury will draw the inverse of the Pinkerton inference, *i.e.*, the jury will hold the defendant "vicariously liable" for a conspiracy merely because the government shows that others have committed numerous substantive offenses, United States v. Sanchez, 917 F.2d 607, 612 n.4 (1st Cir. 1990) (citing United States v. Sperling, 506 F.2d 1323, 1341-42 (2d Cir. 1974) (Friendly, J.)), the First Circuit seems skeptical of the alleged risk. See United States v. Wester, 90 F.3d 592, 597 (1st Cir. 1996) (rejecting a defendant's argument that a Pinkerton instruction was improper because when various substantive offenses are in issue and the government concentrates its proof on the substantive offenses rather than the conspiracy, there is undue risk that the jury will draw the inverse of the Pinkerton inference, stating "We agree neither with the premise nor the conclusion" and that dealing with such a "complication" is "well within" a jury's ability).

4.18.656 Misapplication or Embezzlement of Bank Funds, 18 U.S.C. § 656

[Updated: 12/5/03]

[Defendant] is charged with the illegal [misapplication] [embezzlement] of bank funds. It is against federal law for a bank employee to [misapply] [embezzle] bank funds. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that [defendant] was an [officer; director; agent; employee] of [name of bank];

Second, that [name of bank] was [bank's relationship to federal jurisdiction];

Third, that [defendant] [willfully misapplied][embezzled] bank funds exceeding $1,000.

[To prove that [defendant] willfully misapplied funds, the Government must prove two things: that [defendant] wrongfully used the bank's funds, and that [defendant] intended to injure or defraud the bank. To "defraud" means to cause the bank, through consciously dishonest means, to part with its funds.]

[To prove that [defendant] "embezzled" funds, the Government must prove three things: (1) that initially [defendant] was entrusted with or otherwise lawfully possessed the bank's funds; (2) that [defendant] wrongfully took or used those funds; and (3) that [defendant] intended to injure or defraud the bank. To "defraud" means to cause the bank, through consciously dishonest means, to part with its funds.]

Comment

(1) "Courts have struggled to give precise definition to the crime of misapplication, consistently noting that 'the problem that has confronted and perplexed the courts is that there is no statutory definition or common law heritage that gives content to the phrase "willfully misapplies."' These uncertain origins have posed a challenge to courts attempting to distinguish bad judgment from bad conduct that is illegal. Nevertheless, in Wester, we recently discussed the two notions that underlie the crime of misapplication: one relating to conduct, *i.e.*, wrongful use of bank funds, the other focusing on an intent to injure or defraud a bank. The government cannot prove its claim of misapplication without establishing both elements. The interrelationship between these elements is subtle, given that 'the same facts can easily be the basis for deeming the conduct to be wrongful and the intent fraudulent.'" United States v. Blasini-Lluberas, 169 F.3d 57, 62-63 (1st Cir. 1999) (quoting United States v. Wester, 90 F.3d 592, 595 (1st Cir. 1996)) (internal citations and footnote omitted). The reference to intent to *injure* the bank now seems questionable in light of the definition of defraud under 18 U.S.C. § 1344 in United States v. Kenrick, 221 F.3d 19, 26-29 (1st Cir. 2000) (en banc).

(2) In Moore v. United States, 160 U.S. 268, 269-70 (1895), the United States Supreme Court

defined "embezzlement" as "the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come." What makes embezzlement different from larceny is "the fact that the original taking of the property was lawful, or with the consent of the owner . . . ." Id. at 270. Although the statute does not mention intent to injure or defraud, intent has traditionally been recognized as an element of embezzlement. E.g., United States v. Scheper, 520 F.2d 1355, 1357 (4th Cir. 1975).

(3) If $1,000 or less is taken, the crime is a misdemeanor. 18 U.S.C. § 656.

4.18.751 Escape from Custody, 18 U.S.C. § 751

[Updated: 6/14/02]

[Defendant] is accused of [escaping; attempting to escape] from [facility] while [he/she] was in federal custody. It is against federal law to [attempt to] escape from federal custody. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that on [date], [defendant] was in federal custody at [facility];

Second, that [he/she] was in custody because [he/she] had been [e.g., arrested for a felony charge; arrested for a misdemeanor charge; convicted of a crime];

Third, that [he/she] [left; attempted to leave] [facility] without permission; and

Fourth, that [he/she] knew that [he/she] did not have permission to leave.

Comment

(1) The nature of the custody must be proven specifically, since the statute provides for dual penalties: escape is a felony if custody was by reason of any conviction or a felony arrest, but only a misdemeanor if custody was by reason of a misdemeanor arrest or for extradition or expulsion. United States v. Vanover, 888 F.2d 1117, 1121 (6th Cir. 1989); United States v. Green, 797 F.2d 855, 858 n.4 (10th Cir. 1986); United States v. Edrington, 726 F.2d 1029, 1031 (5th Cir. 1984); United States v. Richardson, 687 F.2d 952, 958 (7th Cir. 1982); see also United States v. Bailey, 444 U.S. 394, 407 (1980) (stating in dictum that prosecution must prove nature of custody to convict under section 751(a)). The determination of whether an offense underlying an arrest is a felony or misdemeanor is a question of law for the court, but the determination that the defendant was being held by reason of conviction or arrest for a particular crime is a question of fact for the jury. Richardson, 687 F.2d at 958.

(2) Custody need not involve physical restraint; the failure to comply with an order that restrains the defendant's freedom may be an escape. Bailey, 444 U.S. at 413 (holding that failure to return to custody is an "escape" in violation of section 751); United States v. Puzzanghera, 820 F.2d 25, 26 n.1 (1st Cir. 1987); see also 18 U.S.C. § 4082(a) ("The willful failure of a prisoner to remain within the extended limits of his confinement, or to return within the time prescribed . . . shall be deemed an escape [under 18 U.S.C. §§ 751-57].").

(3) The defense of necessity or duress may be an issue. On this matter, see Bailey, 444 U.S. at 409-13.

4.18.752 Assisting Escape, 18 U.S.C. § 752

[Updated: 6/14/02]

[Defendant] is accused of aiding or assisting [prisoner]'s escape from [facility] while [he/she] was in federal custody. It is against federal law to aid or assist someone else in [escaping; attempting to escape] from federal custody. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that on [date], [prisoner] was in federal custody at [facility];

Second, that [prisoner] was in custody because [he/she] had been [e.g., arrested for a felony charge; convicted of a crime];

Third, that [prisoner] [left; attempted to leave] [facility] without permission;

Fourth, that [prisoner] knew that [he/she] did not have permission to leave; and

Fifth, that [defendant] knew that [prisoner] was [escaping; attempting to escape] and intentionally helped [him/her] to do so.

Comment

(1) See generally Notes to Instruction 4.18.751 for Escape from Custody, 18 U.S.C. § 751.

(2) Section 752 also makes it an offense to instigate an escape. If the facts so warrant, the word "instigate" should be added or substituted for "aid or assist" with appropriate grammatical changes.

(3) The crime of aiding or assisting an escape cannot occur after the escapee reaches temporary safety or a point beyond immediate active pursuit. United States v. DeStefano, 59 F.3d 1, 4-5 & n.6 (1st Cir. 1995). At that point, any further assistance can at most constitute harboring or concealing under 18 U.S.C. § 1072. Id. at 4.

(4) The government need not prove that the defendant was aware of the federal status of the escaped prisoner. United States v. Aragon, 983 F.2d 1306, 1310 (4th Cir. 1993); United States v. Hobson, 519 F.2d 765, 769-70 (9th Cir. 1975); cf. United States v. Feola, 420 U.S. 671, 685 (1975) ("The concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of a judicial forum.").

4.18.875 Interstate Communications—Threats, 18 U.S.C. § 875(c)

[New: 10/15/03]

[Defendant] is accused of transmitting a threat in interstate or foreign commerce. It is against federal law to send [transmit] [make] any communication in interstate or foreign commerce that contains any threat to [kidnap] [injure] a person.

For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that the communication was sent in interstate commerce;

Second, that [defendant] intended to send [transmit] [make] the communication; and

Third, that the communication contained a true threat to [injure] [kidnap] someone.

In determining whether a communication is a true threat you must use an objective standard. A true threat is one that a reasonable recipient, familiar with the context of the communication, would find threatening and that [defendant] reasonably should have foreseen would be taken as a threat. The government does not have to prove that [defendant] subjectively intended the recipient to understand the communication as a threat. In determining whether a communication is a true threat, you should consider the factual context. This may include the tone of the communication, the manner in which it was made, and the effect on [listeners] [readers]. It is not necessary that the statement be made face to face. It is also not necessary to prove that [defendant] actually intended to carry out the threat.

Comment

(1) This instruction is based on United States v. Nishnianidze, 342 F.3d 6 (1st Cir. 2003) and United States v. Whiffen, 121 F.3d 18 (1st Cir. 1997). The definition of "true threat" goes back to United States v. Fulmer, 108 F.3d 1486 (1st Cir. 1997), a case arising under 18 U.S.C. § 115. However, unlike Fulmer, a defendant charged under 18 U.S.C. § 875 need not "knowingly" threaten the recipient; the defendant need only intend to send the communication, and there is no requirement that the defendant subjectively intend the recipient to understand the communication as a threat.

(2) If the defendant is charged pursuant to 18 U.S.C. § 875(b), the government must prove an additional element: "that the threat was transmitted with the specific intent to extort money or a thing of value." To act with intent to "extort" means to act with the intent to obtain something of value from someone else, with that person's consent, but induced by the wrongful use of actual or threatened force, violence, or fear. United States v. Anderson, 14 Fed. Appx. 33, 36 (2nd Cir. 2001); United States v. Cohen, 738 F.2d 287, 289 (8th Cir. 1984). The term "thing of value" is used in everyday meaning and is not limited to money or tangible things with an identifiable price. United States v. Fagan, 821 F.2d 1002, 1015 n. 9 (5th Cir. 1987), cert. denied, 484 U.S. 1005 (1988). It is not necessary to prove that the defendant actually succeeded in obtaining the money or other thing of value.

4.18.922(a) False Statement in Connection With Acquisition of a Firearm, 18 U.S.C. § 922(a)(6)

[New: 11/26/02]

[Defendant] is charged with making a false statement in connection with trying to buy a [firearm/ammunition], specifically [insert alleged false statement]. It is against federal law to knowingly make a false statement in connection with trying to buy a [firearm/ammunition]. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that [defendant] knowingly made a false statement as charged in the Indictment;

Second, that at the time [he/she] made the statement, [defendant] was trying to buy a [firearm/ammunition] from a [licensed dealer/licensed importer/licensed manufacturer/ licensed collector]; and

Third, that the statement was intended to, or likely to, deceive the licensed dealer/licensed importer/licensed manufacturer/licensed collector] about a fact material to the lawfulness of the sale.

The government does not have to prove that [defendant] knew that he/she was violating the law.

A statement is "false" if it is untrue when made.

A false statement is made "knowingly" if the person making it knows that it is false or demonstrates a reckless disregard for the truth, with a conscious purpose to avoid learning the truth.

A fact is "material" if it has a natural tendency to influence or to be capable of influencing the decision of the [licensed dealer/licensed importer/licensed manufacturer/licensed collector] as to whether it is lawful to sell the [firearm/ammunition] to the buyer, regardless of whether the [licensed dealer/licensed importer/licensed manufacturer/licensed collector] actually relies upon the statement.

Intent or knowledge may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining what [defendant] knew or intended at a particular time, you may consider any statements made or acts done or omitted by [defendant] and all other facts and circumstances received in evidence that may aid in your determination of [defendant]'s knowledge or intent. You may infer, but you certainly are not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts are proven by the evidence received during this trial.

Comment

(1) United States v. Currier, 621 F.2d 7, 10 (1st Cir. 1980), stated that section 922(a)(6) "does not require a showing that appellant 'knowingly' violated the law; it simply requires proof that appellant 'knowingly' made a false statement."

(2) The definition of "knowingly" is different from the customary definition of "knowingly" in Pattern 2.14 for other types of offenses. It comes from United States v. Wright, 537 F.2d 1144, 1145 (1st Cir. 1976), a case arising under 18 U.S.C. § 922(a)(6). United States v. Santiago-Fraticelli, 730 F.2d 828, 831 (1st Cir. 1984), emphasized that section 922(a)(6)'s scope is "not limited to situations in which an accused knew he was lying." "[W]hen a person recklessly fails to ascertain the meaning of the questions contained in Form 4473, and simply answers the questions without regard to whether the answers are truthful," he is acting "knowingly" for purposes of this section.

(3) Section 922 does not require proof that the transaction was in interstate commerce. The requirement of a transaction with a licensed dealer is sufficient. Those dealers' general involvement with interstate commerce is ample to justify federal regulation of even intrastate sales. United States v. Crandall, 453 F.2d 1216, 1217 (1st Cir. 1972).

(4) The definition of "material" is modified from United States v. Arcadipane, 41 F.3d 1, 7 (1st Cir. 1994).

(5) If necessary, a definition of "firearm" can be taken from the statute, 18 U.S.C. § 921(a)(3).

4.18.922(g) Possession of a Firearm or Ammunition in or Affecting Commerce by a Convicted Felon, 18 U.S.C. § 922(g)(1)

[Updated: 8/3/05]

[Defendant] is charged with possessing [a firearm; ammunition] in or affecting commerce after having been convicted of a crime punishable by imprisonment for more than one year. It is against federal law for a convicted felon to possess [a firearm; ammunition] that was connected with interstate [or foreign] commerce. For you to find [defendant] guilty of this crime, you must be satisfied that the government has proven each of the following things beyond a reasonable doubt:

> First, that [defendant] has been convicted in any court of [at least one] crime punishable by imprisonment for a term exceeding one year. I instruct you that the crime of [_____] is such a crime. [*Alternative:* The parties have stipulated that [defendant] has been convicted of a crime which is punishable by imprisonment for a term exceeding one year. You are to take that fact as proven.]
>
> Second, that [defendant] knowingly possessed the [firearm; ammunition] described in the indictment. [The term "firearm" means any weapon which will or is designed or may readily be converted to expel a projectile by the action of an explosive. The term "firearm" also includes the frame or receiver of any such weapon.]
>
> Third, that the firearm was connected with interstate [or foreign] commerce. This means that the [firearm; ammunition], at any time after it was manufactured, moved from one state to another [or from a foreign country into the United States]. The travel need not have been connected to the charge in the indictment, need not have been in furtherance of any unlawful activity and need not have occurred while [defendant] possessed the firearm.

The word "knowingly" means that the act was done voluntarily and intentionally, not because of mistake or accident.

The term "possess" means to exercise authority, dominion or control over something. It is not necessarily the same as legal ownership. The law recognizes different kinds of possession.

[Possession includes both actual and constructive possession. A person who has direct physical control of something on or around his or her person is then in actual possession of it. A person who is not in actual possession, but who has both the power and the intention to exercise control over something is in constructive possession of it. Whenever I use the term "possession" in these instructions, I mean actual as well as constructive possession.]

[Possession [also] includes both sole and joint possession. If one person alone has actual or constructive possession, possession is sole. If two or more persons share actual or constructive possession, possession is joint. Whenever I have used the word "possession" in these instructions, I mean joint as well as sole possession.]

Comment

(1) The charge is based on United States v. Bartelho, 71 F.3d 436, 439 (1st Cir. 1995).

(2) The definition of "knowingly" is based on United States v. Tracy, 36 F.3d 187, 194-95 (1st Cir. 1994). Care must be taken, however, for some parts of the firearms statute require proof of willfulness. See 18 U.S.C. § 924(a)(1)(D). Willfulness requires proof that the defendant knew the conduct was unlawful. Bryan v. United States, 524 U.S. 184, 192 (1998). In United States v. Sabetta, 373 F.3d 75, 81-82 (1st Cir. 2004), the court held that it is unnecessary to define the term "knowingly" because a lay jury can reasonably understand it in a felon-in-possession case.

(3) United States v. Rogers, 41 F.3d 25, 29 (1st Cir. 1994), discusses dominion, control, possession and ownership. United States v. Booth, 111 F.3d 1, 2 (1st Cir. 1997), counsels against defining constructive possession in terms of dominion and control "over the area in which the object is located" and thereby limits United States v. Wight, 968 F.2d 1393, 1398 (1st Cir. 1992). However, the jury may be told in appropriate circumstances that knowledge could be inferred from control of the area. See Booth, 111 F.3d at 2.

(4) Possession of multiple firearms and/or ammunition in one place at one time constitutes only a single offense under 18 U.S.C. § 922(g). United States v. Verrecchia, 196 F.3d 294, 298 (1st Cir. 1999). In a multiple weapons case, no instruction requiring jury unanimity on any particular firearm is required. Id. Because possession of multiple weapons is a single offense unless there are separate possessions, the trial judge faced with multiple possession counts must decide whether to: (1) require the government to elect or combine counts before trial; (2) allow multiple counts but require a specific jury finding of separate possessions; or (3) allow multiple counts with no special jury instruction, but make a post-verdict "correction" by not entering judgment of conviction on any multiplicitous counts. Three circuits have made it clear that the jury, not the trial or appellate judges, must find separate possession as a critical element of a multi-count weapons possession conviction. United States v. Frankenberry, 696 F.2d 239, 245 (3d Cir. 1982); United States v. Szalkiewicz, 944 F.2d 653, 654 (9th Cir. 1991); United States v. Valentine, 706 F.2d 282, 294 (10th Cir. 1983). The Eleventh Circuit has held that it was not plain error for the trial judge to fail to give a separate possession instruction, and upheld conviction on multiple counts because sufficient evidence of separate possession was presented at trial, even though there was no jury finding to that effect. United States v. Bonavia, 927 F.2d 565, 569-71 (11th Cir. 1991). The Sixth Circuit in United States v. Throneburg, 921 F.2d 654, 657 (6th Cir. 1990), explained that the trial judge should exercise his or her discretion to vacate any multiplicitous guilty verdicts, the government in its discretion can decide how many counts to bring, and no jury instruction or finding is required as to separate possessions. A possible instruction is as follows:

> If you have found the defendant guilty on Count I, you may not find [him/her] guilty on Count II unless you also find that the government has proven beyond a reasonable doubt that the firearm and ammunition were acquired at different times or that they were stored in different places.

(5) United States v. Acosta, 67 F.3d 334, 340 (1st Cir. 1995), supports the broad definition of "commerce." See also United States v. Joost, 133 F.3d 125, 131 (1st Cir. 1998). In United States v. Wilkerson, the First Circuit held that "the evidence that a firearm has traveled at some time in

interstate commerce is sufficient to establish a nexus between the firearm and interstate commerce." 411 F.3d 1, 10 (1st Cir. 2005); see also United States v. Weems, 322 F.3d 18, 25 (1st Cir. 2003) (approving an instruction that the government must show that the firearm had "previously traveled in interstate commerce or it previously [had] been transported across State lines, even though it wasn't in the Defendant's possession at the time," as a correct statement of the law after Scarborough v. United States, 431 U.S. 563 (1977)). It is not necessary "that the felon be the one who transported the firearm in interstate commerce." Weems, 322 F.3d at 25-26.

(6) The trial judge determines as a matter of law whether a previous conviction qualifies under 18 U.S.C. § 922(g)(1). Bartelho, 71 F.3d at 440. "Any court" encompasses only domestic, not foreign, convictions. Small v. United States, 125 S. Ct. 1752 (2005). The *fact* of conviction, however, is for the jury unless it is stipulated, and so too is any factual issue on the restoration of civil rights. Id. at 440-41. It should be noted that, although the court in Bartelho found the approach of United States v. Flower, 29 F.3d 530 (10th Cir. 1994), persuasive, 71 F.3d at 440, Flower seems to be in conflict with Bartelho to the extent that it treats a factual dispute concerning restoration of civil rights as a preliminary matter to be resolved by the court prior to admitting the conviction into evidence. See 29 F.2d at 535-36.

(7) An aiding and abetting charge under the statute requires the court to instruct the jury that the aiding and abetting defendant must know or have cause to believe the firearm possessor's status as a convicted felon. United States v. Xavier, 2 F.3d 1281, 1286-87 (3d Cir. 1993).

4.18.922(k) Possession of a Firearm With an Obliterated or Removed Serial Number, 18 U.S.C. § 922(k)

[New: 7/17/03]

[Defendant] is charged with possessing a firearm in or affecting commerce with an obliterated or removed serial number. It is against federal law to possess a firearm with an obliterated or removed serial number that has been connected with interstate [or foreign] commerce. For you to find [defendant] guilty of this crime, you must be satisfied that the government has proven each of the following things beyond a reasonable doubt:

First, that [defendant] knowingly possessed the firearm described in the Indictment;

Second, that the serial number was removed, obliterated or altered at the time [defendant] possessed the firearm; and

Third, that the firearm was connected with interstate [or foreign] commerce. This means that the firearm, at any time after it was manufactured, moved from one state to another [or from a foreign country into the United States]. The travel need not have been connected to the charge in the indictment, need not have been in furtherance of any unlawful activity and need not have occurred while [defendant] possessed the firearm.

The term "firearm" means any weapon which will or is designed or may readily be converted to expel a projectile by the action of an explosive. The term "firearm" also includes the frame or receiver of any such weapon.

The word "knowingly" means that the act was done voluntarily and intentionally, not because of mistake or accident.

The term "possess" means to exercise authority, dominion or control over something. It is not necessarily the same as legal ownership. The law recognizes different kinds of possession.

[Possession includes both actual and constructive possession. A person who has direct physical control of something on or around his or her person is then in actual possession of it. A person who is not in actual possession, but who has both the power and the intention to exercise control over something is in constructive possession of it. Whenever I use the term "possession" in these instructions, I mean actual as well as constructive possession.]

[Possession [also] includes both sole and joint possession. If one person alone has actual or constructive possession, possession is sole. If two or more persons share actual or constructive possession, possession is joint. Whenever I have used the word "possession" in these instructions, I mean joint as well as sole possession.]

Comment

(1) The definition of "firearm" comes from 18 U.S.C. § 921(a)(3).

(2) The definition of "knowingly" is based on United States v. Tracy, 36 F.3d 187, 194-95 (1st Cir. 1994).

(3) United States v. Rogers, 41 F.3d 25, 29 (1st Cir. 1994), discusses dominion, control, possession and ownership. United States v. Booth, 111 F.3d 1, 2 (1st Cir. 1997), counsels against defining constructive possession in terms of dominion and control "over the area in which the object is located" and thereby limits United States v. Wight, 968 F.2d 1393, 1398 (1st Cir. 1992). However, the jury may be told in appropriate circumstances that knowledge could be inferred from control of the area. See Booth, 111 F.3d at 2.

(4) Under First Circuit law, the court is not required to define the term "alter" unless the particular circumstances of the case require further elaboration. Instead, it is "ordinarily . . . enough to charge the jury in the words of the statute, leaving it to the common sense of the jury to understand the purpose and to adjust its application to carry out that purpose. 'Alter,' in this statute, is not some highly obscure or special-purpose term that cries out for elaboration. This, then, is an instance in which the district judge may choose to elaborate but is not ordinarily required to do so." United States v. Adams, 305 F.3d 30, 34 (1st Cir. 2002).

(5) United States v. Acosta, 67 F.3d 334, 340 (1st Cir. 1995), supports the broad definition of "commerce." See also United States v. Joost, 133 F.3d 125, 131 (1st Cir. 1998). United States v. Weems, 322 F.3d 18, 25 (1st Cir. 2003), approved an instruction that the government must show that the firearm had "previously traveled in interstate commerce or it previously [had] been transported across State lines, even though it wasn't in the Defendant's possession at the time," as a current statement of the law after Scarborough v. United States, 431 U.S. 563 (1977). It is not necessary "that the felon be the one who transported the firearm in interstate commerce." Weems, 322 F.3d at 25-26.

4.18.922(v) Semiautomatic Assault Weapons, 18 U.S.C. § 922(v)

[New: 7/17/03]

[Defendant] is charged with [manufacturing, transferring, possessing] a semiautomatic assault weapon. It is against federal law to [manufacture, transfer, possess] a semiautomatic assault weapon. For you to find [defendant] guilty of this crime, you must be satisfied that the government has proven beyond a reasonable doubt that [defendant] knowingly [manufactured, transferred, possessed] the semiautomatic assault weapon described in the indictment.

An [describe weapon] is a semiautomatic assault weapon.

The word "knowingly" means that the act was done voluntarily and intentionally, not because of mistake or accident.

[The term "possess" means to exercise authority, dominion or control over something. It is not necessarily the same as legal ownership. The law recognizes different kinds of possession.]

[Possession includes both actual and constructive possession. A person who has direct physical control of something on or around his or her person is then in actual possession of it. A person who is not in actual possession, but who has both the power and the intention to exercise control over something is in constructive possession of it. Whenever I use the term "possession" in these instructions, I mean actual as well as constructive possession.]

[Possession [also] includes both sole and joint possession. If one person alone has actual or constructive possession, possession is sole. If two or more persons share actual or constructive possession, possession is joint. Whenever I have used the word "possession" in these instructions, I mean joint as well as sole possession.]

Comment

(1) The term "semiautomatic assault weapon" is defined in 18 U.S.C. § 921(a)(30). See also 18 U.S.C. § 922(v)(2)-(4) for a description of weapons excluded from the scope of the prohibition in section 922(v)(1).

(2) The definition of "knowingly" is based on United States v. Tracy, 36 F.3d 187, 194-95 (1st Cir. 1994).

(3) United States v. Rogers, 41 F.3d 25, 29 (1st Cir. 1994), discusses dominion, control, possession and ownership. United States v. Booth, 111 F.3d 1, 2 (1st Cir. 1997), counsels against defining constructive possession in terms of dominion and control "over the area in which the object is located" and thereby limits United States v. Wight, 968 F.2d 1393, 1398 (1st Cir. 1992). However, the jury may be told in appropriate circumstances that knowledge could be inferred from control of the area. See Booth, 111 F.3d at 2.

(4) Like the statute, this instruction omits any requirement that the government establish that the semiautomatic assault weapon in question is connected with interstate or foreign commerce. The Supreme Court's decision in United States v. Lopez, 514 U.S. 549 (1995), raises the question whether criminalizing mere possession of a semiautomatic assault weapon exceeds Congress's authority under the Commerce Clause. But in Navegar, Inc. v. United States, 192 F.3d 1050, 1062 (D.C. Cir. 1999), reh'g denied, 200 F.3d 868 (2000), the D.C. Circuit upheld the constitutionality of 18 U.S.C. § 922(v) under the third prong of Lopez as regulation of intrastate activity that, by its nature, substantially affects interstate commerce. Examining the legislative history of the statute, the court concluded that "the intrastate activities regulated by the [statute] nonetheless have a substantial effect on interstate commerce. The prohibition of the intrastate activities is an 'essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" Id. at 1061 (quoting Lopez, 514 U.S. at 561); cf United States v. Haney, 264 F.3d 1161, 1171 (10th Cir. 2001) (holding 18 U.S.C. § 922(o) is constitutional on the basis that intrastate machinegun possession substantially affects interstate commerce). While the First Circuit has not yet addressed the constitutionality of section 922(v), it has upheld the constitutionality of the Youth Handgun Safety Act ("YHSA"), 18 U.S.C. § 922(x), on the same basis used in Navegar: "we think the possessory prong of the YHSA . . . is 'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" United States v. Cardoza, 129 F.3d 6, 12 (1st Cir. 1997) (quoting Lopez, 514 U.S. at 561).

4.18.924 Using or Carrying a Firearm During and in Relation to, or Possessing a Firearm in Furtherance of Drug Trafficking or Crime of Violence, 18 U.S.C. § 924(c)

[Updated: 10/14/05]

[Defendant] is accused of using or carrying a firearm during and in relation to, or possessing a firearm in furtherance of [_____]. It is against federal law to [use/carry/possess] a firearm [during/in relations to/in furtherance of] [_____]. For you to find [defendant] guilty of this crime, you must be satisfied that the government has proven each of the following things:

First, [defendant] committed the crime of [_____, described in Count ___]; and

Second, [defendant] knowingly used or carried a firearm during and in relation to, or possessed a firearm in furtherance of the commission of that crime.

The word "knowingly" means that an act was done voluntarily and intentionally, not because of mistake or accident.

To "carry" a firearm during and in relation to a crime means to move or transport the firearm on one's person or in a vehicle or container during and in relation to the crime. It need not be immediately accessible.

To "use" a firearm during and in relation to a crime means to employ the firearm actively, such as to brandish, display, barter, strike with, fire or attempt to fire it, or even to refer to it in a way calculated to affect the underlying crime. The firearm must have played a role in the crime or must have been intended by the defendant to play a role in the crime. That need not have been its only purpose, however.

A defendant's possession of a firearm is "in furtherance of" a crime if the firearm possession made the commission of the underlying crime easier, safer or faster, or in any other way helped the defendant commit the crime. There must be some connection between the firearm and the underlying crime, but the firearm need not have been actively used during the crime.

Comment

(1) If the predicate crime of violence or drug trafficking is not charged in the same indictment, the jury must be instructed as to the elements of that crime and that the government must prove each element beyond a reasonable doubt. The First Circuit has cautioned against "generic references to 'a drug trafficking crime' when referring to the particular predicate offense." United States v. Manning, 79 F.3d 212, 221 n.9 (1st Cir. 1996). It is a question of law for the court, however, whether the crime, if proven, qualifies as a crime of violence or drug trafficking. United States v. Weston, 960 F.2d 212, 217 (1st Cir. 1992), overruled on other grounds by Stinson v. United States, 508 U.S. 36 (1993). But see Eleventh Circuit Instruction 28 (instructing jury to determine whether or not the predicate offense is a "crime of violence"), criticized by Sand, et al., ¶ 35.08, at 35-112. "Drug trafficking crime" and "crime of violence" are defined in 18 U.S.C. § 924(c)(2), (3).

(2) The definition of "knowingly" is based upon United States v. Tracy, 36 F.3d 187, 194-95 (1st Cir. 1994).

(3) The definition of "use" comes from United States v. Valle, 72 F.3d 210, 217 (1st Cir. 1995), and Bailey v. United States, 516 U.S. 137, 143-48 (1995). Earlier cases must be treated with great care. Muscarello v. United States, 524 U.S. 125, 127 (1998), established that "carry" includes the use of a vehicle. See also United States v. Ramirez-Ferrer, 82 F.3d 1149, 1153-54 (1st Cir. 1996) (a firearm can be "carried" by having it in a boat); Manning, 79 F.3d at 212.

It seems best not to define "use or carry" separately from "during and in relation to." Possession alone without proof of a relationship to the underlying crime is insufficient, United States v. Plummer, 964 F.2d 1251, 1254-55 (1st Cir. 1992), but facilitating the predicate crime need not be the sole purpose. United States v. Payero, 888 F.2d 928, 929 (1st Cir. 1989).

Use or availability of the firearm for offensive or defensive purposes is not required. See Smith v. United States, 508 U.S. 223, 236-39 (1993) (holding that § 924(c)(1) applies where the defendant merely bartered weapons for drugs).

(4) Congress added the "possess[ion]" "in furtherance of" language to the statute in response to Bailey v. United States, 516 U.S. 137, 141, 149-50 (1995), where the Court held that the word "use" requires some active employment of the firearm. See United States v. Ceballos-Torres, 218 F.3d 409, 413-14 (5th Cir. 2000) (discussing the legislative history of the amendment). Although the First Circuit has decided cases involving the "in furtherance of" language, it has not defined the term explicitly. See, e.g., United States v. Luciano, 329 F.3d 1, 12 (1st Cir. 2003) ("We do not have to explore exhaustively the semantic contours of 'in furtherance of' in order to resolve this appeal"; close proximity of firearms and loaded magazines to a significant stockpile of heroin was sufficient). It has said:

> When guns and drugs are found together and a defendant has been convicted of possession with intent to distribute, the gun, whether kept for protection from robbery of drug-sale proceeds, or to enforce payment for drugs, may reasonably be considered to be possessed 'in furtherance of' an ongoing drug-trafficking crime.

United States v. Garner, 338 F.3d 78, 81 (1st Cir. 2003) quoted in United States v. Cruz, 352 F.3d 99, 509 (1st Cir. 2003). It has also said:

> the current version of the statute does not require the Government to show that the Defendant "actively employed" the firearm "in furtherance of" the drug crime. We held, however, that it must be shown in order to secure a conviction that the Defendant has "possessed the gun to *further the drug crime*." In Grace, the underlying offenses were possession and distribution of drugs. The Court there found that the possession of the gun was in furtherance of the possession and distribution of the drugs. We said that the "government must illustrate through specific facts, which tie the defendant to the firearm, that the firearm was possessed to advance or promote the criminal activity."

United States v. Villafane-Jimenez, 410 F.3d 74, 82-83 (1st Cir. 2005) (citations omitted).

The First Circuit has also said that

> One might expect with such a common criminal offense that the legal framework would be well settled, but, as is so often the case with general statutory terms, it is not. One could argue, in particular, about whether the "in furtherance" requirement refers to subjective purpose or objective potential (or whether either would do). Statutory language, legislative history, model jury instructions and case law do not cleanly resolve the issue . . . .
>
> . . . .
>
> In practice, the same evidence tends to be relevant whether the ultimate test is objective furtherance or a subjective purpose to further. Similarly, in most cases the result will be the same, whichever ultimate test is used.

United States v. Felton, 417 F.3d 97, 104-05 (1st Cir. 2005) (citations omitted). It has also quoted approvingly from the legislative history that possession "in furtherance of" imposes a "slightly higher standard" than "during and in relation to," the nexus requirement for using or carrying, and requires the government to show that the firearm possession was "to address or promote the commission of the underlying offense." United States v. Delgado-Hernandez, 420 F.3d 16, 25 (1st Cir. 2005) (emphasis in original removed).

The Fifth Circuit has said that factors that a jury may consider when deciding whether a defendant's possession of a firearm is "in furtherance of" a crime include:

> the type of [criminal] activity that is being conducted, accessibility of the firearm, the type of the weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to [criminal proceeds or contraband], and the time and circumstances under which the gun is found.

Ceballos-Torres, 218 F.3d at 414-15. According to the First Circuit, "fairly general factors—such as whether the gun was loaded and accessible to the defendant—are relevant whatever the crime involved." Felton, ___ F.3d at ___ n.7, 2005 WL 1792458 at *8 n.7 (discrediting defendant's distinction between drug cases and violent crime cases with respect to the "in furtherance" requirement).

(5) For definition of "firearm," see 18 U.S.C. § 921(a)(3). "[A] gun does not even have to be operational, let alone loaded, to qualify as a firearm for section 924 purposes." United States v. Grace, 367 F.3d 29, 36 (1st Cir. 2004).

"The Government [does] not need to prove that Defendants specifically intended to use or did use a firearm in the course of the [drug] transport activity in order for a jury to convict them. . . . The Government need[s] only to prove individually their general intent, e.g., that they each knew that they carried a firearm during the course of the drug offense conduct." Villafane-Jimenez, 410 F.3d at 82. Moreover, "[i]f a gun is possessed for some other, perhaps legitimate, purpose, an intent to have it available for possible use in connection with, say, a drug deal, or as a device to lend courage during such a transaction, will suffice to invoke the statute." United States v. Vazquez Guadalupe, 407 F.3d 492, 500 n.4 (1st Cir. 2005) (quoting United States v. Castro-Lara, 970 F.2d 976, 983 (1st Cir. 1992)).

(6) An aiding or abetting instruction may be appropriate for either or both of the two elements of the crime, but the jury should be instructed that the "shared knowledge" requirement, see Instruction

4.18.02 (Aid and Abet), requires that the defendant have a "practical certainty" the firearm will be used, carried or possessed. United States v. Negrón Narváez, 403 F.3d 33, 37-38 (1st Cir. 2005); United States v. Balsam, 203 F.3d 72, 83 (1st Cir. 2000); United States v. Spinney, 65 F.3d 231, 238 (1st Cir. 1995); see also United States v. Otero-Mendez, 273 F.3d 46, 52 (1st Cir. 2001) (carjacking case) ("prosecution must prove that [defendant] knew a firearm would be carried or used in a crime of violence and that he willingly took some action to facilitate that carriage or use"). An additional required element is that the defendant "took some action intending to cause the gun to be used or carried." United States v. Medina-Roman, 376 F.3d 1, 6 (1st Cir. 2004).

(7) The First Circuit has also "repeatedly held that under Pinkerton, [328 U.S. 640 (1946); Pattern 4.18.371(2)], the defendant does not need to have carried the gun himself to be liable under § 924(c). So long as there is sufficient evidence that a co-conspirator carried or used a firearm in furtherance of the conspiracy and that this was reasonably foreseeable to the defendant, the defendant can be held liable as if he himself carried or used the firearm." United States v. Flecha-Maldonado, 373 F.3d 170, 179 (1st Cir. 2004).

(8) The First Circuit has not decided "that a charge under 18 U.S.C. § 924(c)(1) is never susceptible to an affirmative justification defense such as self-defense," but has stated that "if they exist at all, such situations are few and far between." Currier v. United States, 320 F.3d 52, 56, 57 (1st Cir. 2003).

4.18.982 Money Laundering—Forfeiture, 18 U.S.C. § 982(a)(1)

[Updated: 10/14/05]

In light of your verdict that [defendant] is guilty of money laundering, you must now also decide whether [he/she] should surrender to the government [his/her] ownership interest in certain property as a penalty for committing that crime. We call this "forfeiture."

On this charge, federal law provides that the government is entitled to forfeiture, if it proves, by a preponderance of the evidence, that the property in question:

(1) was involved in one or more of the money laundering Counts of which you have convicted [defendant]; **OR**

(2) was traceable to such property.

Note that this is a different standard of proof than you have used for the money laundering charges. A "preponderance of the evidence" means an amount of evidence that persuades you that something is more likely true than not true. It is not proof beyond a reasonable doubt.

Property "involved in" a money laundering transaction means the money being laundered, any commissions or fees paid to the launderer, and any property used to facilitate the laundering. Mingling tainted funds with legitimate funds exposes the legitimate funds to forfeiture as well, if the mingling was done for the purpose of concealing the nature or source of the tainted funds, in other words, to "facilitate" the money laundering.

While deliberating, you may consider any evidence admitted during the trial. However, you must not reexamine your previous determination regarding [defendant]'s guilt of money laundering. All of my previous instructions concerning consideration of the evidence, the credibility of witnesses, your duty to deliberate together and to base your verdict solely on the evidence without prejudice, bias or sympathy, and the requirement of unanimity apply here as well.

On the verdict form, I have listed the various items that the government claims [defendant] should forfeit. You must indicate which, if any, [defendant] shall forfeit.

Do not concern yourselves with claims that others may have to the property. That is for the judge to determine later.

Comment

(1) This forfeiture instruction can be used if the underlying offense is 21 U.S.C. § 1956(a)(1), (2) or (3) or 21 U.S.C. § 1957. See 18 U.S.C. § 982(a)(1).

(2) The right to a jury trial on a criminal forfeiture count is not constitutional. Libretti v. United States, 516 U.S. 29 (1995). Instead, it is created solely by rule as follows:

> Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

Fed. R. Crim P. 32.2(b)(4). The language of the Rule seems to contemplate a bifurcated proceeding, see also 2000 Advisory Committee Note. Pre-Libretti First Circuit caselaw left bifurcation to the trial judge's discretion. See, e.g., United States v. Desmarais, 938 F.2d 347, 349-50 (1st Cir. 1991); United States v. Maling, 737 F. Supp. 684, 705 (D. Mass. 1990), aff'd. sub nom. United States v. Richard, 943 F.2d 115 (1st Cir. 1991); United States v. Saccoccia, 58 F.3d 754, 770 (1st Cir. 1995).

The First Circuit has held that United States v. Apprendi, 530 U.S. 466 (2000) does not disturb the Libretti holding as it applies to forfeiture proceedings. United States v. Keene, 341 F.3d 78, 85-86 (1st Cir. 2003) (Apprendi's requirements do not apply to criminal forfeitures issues under 21 U.S.C. § 853 because "forfeiture is not viewed as a separate charge, but as 'an aspect of punishment imposed following conviction of a substantive charge'") (citation omitted); see also United States v. Hall, 411 F.3d 651, 654 (6th Cir. 2005) ("Apprendi did not affect Libretti's holding that criminal forfeitures are part of the sentence alone. . . . To our knowledge, every other circuit to consider the issue after Apprendi has reached the same conclusion") (internal citation omitted) (citing cases from the First, Fourth, Fifth, Seventh, Ninth and Eleventh circuits). The First Circuit has not addressed whether United States v. Booker, ___ U.S. ___, 125 S. Ct. 738 (2005) affects the vitality of Libretti, but caselaw from other circuits hold that, like Apprendi, Booker does not apply to criminal forfeiture proceedings. See United States v. Fruchter, 411 F.3d 377, 383 (2d Cir. 2005) (Because "[c]riminal forfeiture [under 18 U.S.C. § 3554] is, simply put, a different animal from determinate sentencing," Libretti remains the determinative decision post-Booker); Hall, 411 F.3d at 654-55 (holding that Booker does not "allow[] us to turn our back on the Supreme Court's prior ruling in this area (Libretti)" because criminal forfeiture [under 18 U.S.C. § 982(a)(2)] is "a form of indeterminate sentencing"); United States v. Tedder, 403 F.3d 836, 841 (7th Cir. 2005) ("There is no statutory maximum forfeiture, so Apprendi, and its successors, including Booker, do not alter this conclusion" that "the sixth amendment does not apply to forfeitures" [under 18 U.S.C. § 982]) (internal citations omitted).

(3) Rule 32.2 seems to indicate that the question of a money judgment is for the court only, and never for the jury. The text of 32.2(b)(1) divides its description of the court's role: "If the government seeks forfeiture of specific *property*, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a *personal money judgment*, the court must determine the amount of money that the defendant has to pay." Fed. R. Crim. P. 32.2(b)(1) (2002) (emphasis added). The jury's role is limited to the nexus determination for property: "Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant," Fed. R. Crim. P. 32.2(b)(4). There is no reference to the jury's role in a money judgment.

The advisory committee notes for the 2000 adoption also support this distinction. After explicitly taking no position on the correctness of allowing money judgments (the First Circuit permits them, see, e.g., United States v. Candelaria-Silva, 166 F.3d 19, 42 (1st Cir. 1999)), the notes go on to prescribe different decisional rules for the different kinds of judgments: when forfeiture of

property is asked for, the court determines the nexus; when a personal money judgment is asked for, the court determines the amount. Fed. R. Crim. P. 32.2(b)(1), advisory committee's note. Then, in discussing subdivision (b)(4), the notes state, "The *only* issue for the jury in such cases would be whether the government has established the requisite nexus between the property and the offense." Fed. R. Crim. P. 32.2(b)(4), advisory committee's note (emphasis added). No mention is made of a role for the jury with respect to personal money judgments.

This distinction has been noted by some commentators, see, e.g., 3 Charles Alan Wright, et al., Federal Practice and Procedure: Criminal 3d § 547, at 448 (2004) ("Rule 32.2(b)(4) does not offer any jury right in regards to personal money judgments or substitute assets"); Smith, supra, at 14-54 ("There is *no* right to a jury trial of the forfeiture issue if . . . the government seeks a personal money judgment instead of an order forfeiting specific assets") (emphasis supplied), but has not been dealt with by the courts. Although there is room for some uncertainty, this seems to be the best interpretation of the rule.

(4) The standard of proof is preponderance of the evidence. United States v. Cunan, 156 F.3d 110, 116 (1st Cir. 1998). The First Circuit has held post-Apprendi that the standard of proof for criminal forfeitures under 21 U.S.C. § 853 remains preponderance of the evidence. Keene, 341 F.3d at 85-86 (refusing to apply Apprendi's requirements to criminal forfeitures, and holding that the preponderance "evidentiary standard used to impose the forfeiture was proper") (citing United States v. Rogers, 102 F.3d 641, 647 (1st Cir. 1996) (observing with approval that "almost every circuit that has pronounced on the issue has held that the standard of proof under section 853 . . . is preponderance of the evidence.")). That standard, however, may not apply to every type of forfeiture. See 18 U.S.C. § 2253(e) ("Order of Forfeiture—The Court shall order forfeiture of property referred to in subsection (a) if the trier of fact determines, *beyond a reasonable doubt*, that such property is subject to forfeiture") (emphasis supplied) (applying to a "person who is convicted of an offense under this chapter [ch. 110 Sexual Exploitation of Children] involving a visual depiction . . ., or who is convicted of an offense under section 2421, 2422, or 2423 of chapter 117 [Transport for Illegal Sexual Activity]).

(5) The definition of "involved in" comes from United States v. McGauley, 279 F.3d 62, 75-76 & n.14 (1st Cir. 2002).

(6) The rights of third parties are determined in an ancillary proceeding before the judge without a jury. 2000 Advisory Committee Note to Rule 32.2(b)(4).

4.18.1001 Making a False Statement to a Federal Agency, 18 U.S.C. § 1001

[Updated: 2/11/03]

[Defendant] is charged with making a false statement in a matter within the jurisdiction of a government agency. It is against federal law to make a false statement in a matter within the jurisdiction of a government agency. For you to find the defendant guilty of this crime you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that [defendant] knowingly made a material false statement;

Second, that [defendant] made the statement voluntarily and intentionally; and

Third, that [defendant] made the statement in a [e.g., U.S. Customs declaration].

A false statement is made "knowingly" if the defendant knew that it was false or demonstrated a reckless disregard for the truth with a conscious purpose to avoid learning the truth.

A statement is "material" if it has a natural tendency to influence or to be capable of influencing the decision of the decisionmaker to which it was addressed, regardless of whether the agency actually relied upon it.

A statement is "false" if it was untrue when made.

Comment

(1) A false "exculpatory no" is sufficient. Brogan v. United States, 522 U.S. 398, 408 (1998), overruling United States v. Chevoor, 526 F.2d 178, 183-84 (1st Cir. 1975). "To prove a false statement in violation of 18 U.S.C. § 1001, the government must show that the defendant: (1) knowingly and willfully, (2) made a statement, (3) in relation to a matter within the jurisdiction of a department or agency of the United States, (4) with knowledge of its falsity." United States v. Duclos, 214 F.3d 27, 33 (1st Cir. 2000).

(2) The charge refers only to false statements. Section 1001, the False Statements Accountability Act of 1996, is much broader, and in a given case the instruction will need to be modified to deal with the other potential violations. See 18 U.S.C. § 1001(a)(1)-(3) (punishing one who "knowingly and willfully (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious or fraudulent statement or entry") (as amended by PL 104-292, Oct. 11, 1996).

(3) In United States v. London, 66 F.3d 1227, 1241-42 (1st Cir. 1995), the First Circuit stated that "[i]n the context of the False Statements Act, 18 U.S.C. § 1001, a false statement is made knowingly if defendant demonstrated a reckless disregard of the truth, with a conscious purpose to avoid learning the truth." The First Circuit also has approved instructing the jury on good faith and

referring to advice of counsel in that respect. United States v. Arcadipane, 41 F.3d 1, 8 (1st Cir. 1994); see also United States v. Dockray, 943 F.2d 152, 155 (1st Cir. 1991) ("[G]ood faith is an absolute defense to a charge of mail or wire fraud. . . .").

(4) In United States v. Gaudin, 515 U.S. 506, 511 (1995), the Supreme Court held that the issue of materiality is for the jury.

(5) The definition of materiality is based upon both United States v. Sebaggala, 256 F.3d 59, 65 (1st Cir. 2001), and the court's description of what the parties agreed to as a definition in Gaudin, 515 U.S. at 509. Accord Arcadipane, 41 F.3d at 7 ("[M]ateriality requires only that the fraud in question have a natural tendency to influence, or be capable of affecting or influencing, a governmental function. The alleged concealment or misrepresentation need not have influenced the actions of the Government agency, and the Government agents need not have been actually deceived." (quoting United States v. Corsino, 812 F.2d 26, 30 (1st Cir. 1986))).

(6) The statute deals only with false statements "within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States." 18 U.S.C. § 1001(a). It seems best to specify in the instruction the document or other context in which the false statement was allegedly made. Whether it was made there is a jury issue. It should be a separate question for the judge whether that document or context brings it "within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States." Id.

(7) The government is not required to prove that the defendant had a purpose to mislead a federal agency, United States v. Yermian, 468 U.S. 63, 68-75 (1984), or that the statement was made for a fraudulent purpose. United States v. McGauley, 279 F.3d 62, 69 (1st Cir. 2002).

4.18.1014 Making a False Statement or Report, 18 U.S.C. § 1014

[Updated: 2/11/03]

[Defendant] is charged with making a false statement or report for the purpose of influencing the action of [appropriate governmental agency or entity listed in statute] upon [his/her] [application; commitment; loan; etc.]. It is against federal law to make a false statement for such a purpose. For you to find the defendant guilty of this crime you must be convinced that the government has proven each of these things beyond a reasonable doubt:

> First, that [defendant] made or caused to be made a false statement or report to [appropriate governmental agency or entity listed in statute] upon [an application; commitment; loan; etc.];
>
> Second, that [defendant] acted knowingly; and
>
> Third, that [defendant] made the false statement or report for the purpose of influencing in any way the action of [appropriate governmental agency/ financial institution] on the [application; commitment; loan; etc.].

A false statement is made "knowingly" if the defendant knew that it was false or demonstrated a reckless disregard for the truth with a conscious purpose to avoid learning the truth.

A statement is "false" if it was untrue when made.

Comment

(1) This charged is based largely upon United States v. Concemi, 957 F.2d 942, 951 (1st Cir. 1992).

(2) Materiality is not required. United States v. Wells, 519 U.S. 482, 489-90 (1997).

(3) Section 1014 also includes "willful overvalu[ation]." This charge refers only to false statements or reports, but can be modified accordingly.

(4) Section 1014 lists the governmental agencies and related entities covered by the statute as well as the kinds of actions that are covered.

(5) When the victim is a federally insured bank, the knowledge that must be proven is knowledge that a bank will be defrauded, not any specific bank, and not knowledge of its insured status. United States v. Graham, 146 F.3d 6, 10 (1st Cir. 1998).

(6) Letters of credit are included. United States v. Agne, 214 F.3d 47, 54 (1st Cir. 2000).

4.18.1029 Access Device or Credit Card Fraud, 18 U.S.C. § 1029(a)(2)

[Updated: 2/11/03]

[Defendant] is charged with knowingly and fraudulently using [an] unauthorized access device[s] between [date] and [date]. It is against federal law to knowingly and fraudulently use access devices without authorization.

For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that [defendant] used [an] access device[s];

Second, that [defendant] used it without authorization and thereby obtained something of value aggregating at least $1,000 during the one-year period from [date] to [date];

Third, that [defendant] acted knowingly, willfully and with the intent to defraud;

Fourth, that [defendant]'s conduct affected interstate or foreign commerce.

The term "access device" [means any card, plate, code, account number or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services or any other thing of value, or that can be used to initiate a transfer of funds other than a transfer originated solely by paper instrument. It] includes credit cards.

The term "unauthorized access device" includes any access device or credit card that is lost, stolen, expired, revoked, canceled or obtained with intent to defraud.

[Defendant] acted "knowingly" if [he/she] was conscious and aware of [his/her] actions, realized what [he/she] was doing or what was happening around [him/her], and did not act because of ignorance, mistake or accident.

To act with "intent to defraud" means to act with the intent to deceive or cheat someone. Good faith on the part of [defendant] is a complete defense to a charge of credit card fraud. If [defendant] actually believed in good faith that [he/she] was acting properly, even if [he/she] was mistaken in that belief, and even if others were injured by [his/her] conduct, there would be no crime. An honest mistake in judgment does not rise to the level of criminal conduct. A defendant does not act in good faith if, even though he or she honestly holds a certain opinion or belief, he or she also acted with the purpose of deceiving others. While the term good faith has no precise definition, it means among other things a belief or opinion honestly held, an absence of malice or ill will, and an intention to avoid taking unfair advantage of another. The burden is on the government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt. The defendant is under no obligation to prove good faith.

Conduct "affects" interstate or foreign commerce if the conduct has a demonstrated connection or link with such commerce. It is not necessary for the government to prove that [defendant] knew or

intended that [his/her] conduct would affect commerce; it is only necessary that the natural consequences of [his/her] conduct affected commerce in some way.

Comment

(1) The definition of good faith used here was cited approvingly in the context of credit card fraud in United States v. Goodchild, 25 F.3d 55, 59-60 (1st Cir. 1994).

(2) This instruction can be modified for § 1029(a)(1) and (3) offenses (knowingly and with intent to defraud producing, using, or trafficking in a counterfeit access device or possessing 15 or more counterfeit or unauthorized access devices). (The elements of interstate commerce and intent to defraud are the same.) On a § 1029(a)(3) offense, the jury does not have to be unanimous on which 15 cards were illegally possessed. United States v. Lee, 317 F.3d 26, 40-41 (1st Cir. 2003).

4.18.1072 Harboring or Concealing an Escaped Prisoner, 18 U.S.C. § 1072

[Updated: 6/14/02]

[Defendant] is accused of harboring or concealing an escaped prisoner, [prisoner]. It is against federal law to harbor or conceal an escaped prisoner. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that [prisoner] escaped from [the custody of the Attorney General; federal penal or correctional institution];

Second, that [defendant] did some physical act to help to allow [prisoner] to avoid detection or apprehension;

Third, that [defendant] acted knowingly and willfully.

To act "knowingly and willfully" means to act with the knowledge that [prisoner] has escaped from custody and with the purpose and intent to help or allow him to avoid detection or apprehension.

Comment

(1) If the Attorney General has designated a nonfederal facility as the place of incarceration, escape from that facility is an escape from "the custody of the Attorney General" under this section. United States v. Eaglin, 571 F.2d 1069, 1073 (9th Cir. 1977).

(2) Several circuits have held that "[t]he words 'harbor' and 'conceal' refer to any physical act of providing assistance, including food, shelter, and other assistance to aid the prisoner in avoiding detection and apprehension." United States v. Kutas, 542 F.2d 527, 528 (9th Cir. 1976); see also Laaman v. United States, 973 F.2d 107, 114 (2d Cir. 1992) (construing same terms as in section 1071, which proscribes concealing fugitives from arrest rather than escaped prisoners); United States v. Yarbrough, 852 F.2d 1522, 1543 (9th Cir. 1988) (same); United States v. Silva, 745 F.2d 840, 849 (4th Cir. 1984) (same); United States v. Foy, 416 F.2d 940, 941 (7th Cir. 1969) (same).

(3) Section 1072 requires proof that the defendant "willfully" harbored or concealed the escaped prisoner. This element has been read to require that the defendant had knowledge that the person whom he aided had escaped from custody. Eaglin, 571 F.2d at 1074; United States v. Deaton, 468 F.2d 541, 543 (5th Cir. 1972). It is not necessary that the government prove that the defendant was aware of the federal status of the escaped prisoner. Eaglin, 571 F.2d at 1074 n.4; cf. United States v. Aragon, 983 F.2d 1306, 1310 (4th Cir. 1993) (knowledge of federal status not an element of assisting escape under 18 U.S.C. § 752); United States v. Feola, 420 U.S. 671, 684-85 (1975) (knowledge of federal status not an element of assaulting a federal officer under 18 U.S.C. § 111).

4.18.1341 Mail Fraud, 18 U.S.C. § 1341

[Updated: 5/5/05]

[Defendant] is charged with violating the federal statute making mail fraud illegal.

For you to find [defendant] guilty of mail fraud, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

> First, that there was a scheme, substantially as charged in the indictment, to defraud [or to obtain money or property by means of false or fraudulent pretenses];
>
> Second, that the scheme to defraud involved the misrepresentation or concealment of a material fact or matter [or the scheme to obtain money or property by means of false or fraudulent pretenses involved a false statement, assertion, half-truth or knowing concealment concerning a material fact or matter];
>
> Third, that [defendant] knowingly and willfully participated in this scheme with the intent to defraud; and
>
> Fourth, that the United States mail was used, on or about the date alleged, in furtherance of this scheme.

A scheme includes any plan, pattern or course of action. It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme or that the alleged scheme actually succeeded in defrauding anyone. But the government must prove beyond a reasonable doubt that the scheme was substantially as charged in the indictment.

The term "defraud" means to deceive another in order to obtain money or property. [It includes a scheme to deprive another of the intangible right of the honest services of government officials.]

[The term "false or fraudulent pretenses" means any false statements or assertions that were either known to be untrue when made or were made with reckless indifference to their truth and that were made with the intent to defraud. The term includes actual, direct false statements as well as half-truths and the knowing concealment of facts.]

A "material" fact or matter is one that has a natural tendency to influence or be capable of influencing the decision of the decisionmaker to whom it was addressed.

[Defendant] acted "knowingly" if [he/she] was conscious and aware of [his/her] actions, realized what [he/she] was doing or what was happening around [him/her] and did not act because of ignorance, mistake or accident.

An act or failure to act is "willful" if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be

done; that is to say, with bad purpose either to disobey or to disregard the law. Thus, if [defendant] acted in good faith, [he/she] cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

Intent or knowledge may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining what [defendant] knew or intended at a particular time, you may consider any statements made or acts done or omitted by [defendant] and all other facts and circumstances received in evidence that may aid in your determination of [defendant]'s knowledge or intent. You may infer, but you certainly are not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts are proven by the evidence received during this trial.

The mailing does not itself have to be essential to the scheme, but it must have been made to carry it out. There is no requirement that [defendant] [him/herself] was responsible for the mailing, that the mailing itself was fraudulent or that the use of the mail was intended as the specific or exclusive means of accomplishing the alleged fraud. But the government must prove beyond a reasonable doubt that [defendant] knew, or could reasonably have foreseen, that use of the mail would follow in the course of the scheme.

Comment

(1) Although "[t]he mailing need not be an essential element of the scheme," it must be "a step in the plot" or "incident to an essential part of the scheme." United States v. Pimental, 380 F.3d 575, 586 (1st Cir. 2004) (citations and internal quotations omitted); see also United States v. McCann, 366 F.3d 46, 52 (1st Cir. 2004) ("the mailing must be for the purpose of executing the scheme" but need not be an essential element); United States v. Sawyer, 239 F.3d 31, 39-40 (1st Cir. 2001) (same). A mailing is incident to an essential part of the scheme "where it is a normal concomitant of a transaction that is essential to the fraudulent scheme." United States v. Contenti, 735 F.2d 628, 631 n.2 (1st Cir. 1984) (quoting United States v. Lea, 618 F.2d 426, 431 (7th Cir. 1980)). "[T]he defendant need not personally mail anything so long as it is reasonably foreseeable that the mails will be used in the ordinary course of business to further the scheme." United States v. Cacho-Bonilla, 404 F.3d 84, 90 (1st Cir. 2005).

(2) Following a 1994 amendment, the mail fraud statute applies to the use of any private or commercial interstate carrier as well as the use of the United States mail. 18 U.S.C. § 1341 (amended by Pub. L. 103-322, § 250006, 108 Stat. 1796). For a case involving a private or commercial carrier, "mail" in the pattern charge could be changed to "mail or delivery by a private or commercial interstate carrier."

(3) The definition of defraud comes from United States v. Kenrick, 221 F.3d 19, 26-27 (1st Cir. 2000) (en banc). We have dropped the statutory term "artifice" as archaic. It adds nothing to "scheme," a term more understandable to most jurors.

(4) The "false or fraudulent pretenses" part of the statute extends it to "false promises and misrepresentations as to the future." McNally v. United States, 483 U.S. 350, 359 (1987).

(5) Schemes to deprive others of the intangible right of honest services are included by virtue of 18 U.S.C. § 1346. Two kinds of intent must be proven: intent to deprive the public of honest services, and intent to deceive the public. Sawyer, 239 F.3d at 41. Specific language should be drafted to deal with the particular charge. Consult id.; United States v. Woodward, 149 F.3d 46, 54-55 & n.6 (1st Cir. 1998) (explaining the intent requirement and types of circumstances involving honest services fraud); United States v. Sawyer, 85 F.3d 713, 723-25 (1st Cir. 1996) (discussing the meaning of the term "intangible right to honest services"). Except for honest services fraud, a fraud charge must involve "property." Cleveland v. United States, 531 U.S. 12, 15, 20-25 (2000) (statute does not extend to fraud in obtaining state or municipal licenses because, although they are valuable, they are not "property" in the government regulators' hands).

(6) Materiality must go to the jury, Neder v. United States, 527 U.S. 1, 4, 25 (1999), and is listed as a separate element of the offense following United States v. Blastos, 258 F.3d 25 (1st Cir. 2001).

(7) "It is not necessary to establish that the intended victim was *actually* defrauded." United States v. Allard, 926 F.2d 1237, 1242 (1st Cir. 1991). Mail fraud does "not require that the victims be pure of heart." United States v. Camuti, 78 F.3d 738, 742 (1st Cir. 1996).

(8) Good faith is an absolute defense. United States v. Dockray, 943 F.2d 152, 155 (1st Cir. 1991). Although good faith is included in this charge, "[a] separate instruction on good faith is not required in this circuit where the court adequately instructs on intent to defraud." Camuti, 78 F.3d at 744 (citing Dockray, 943 F.2d at 155).

(9) There is no requirement that the person deceived be the same person who is deprived of money or property. United States v. Christopher, 142 F.3d 46, 53-54 (1st Cir. 1998).

(10) The First Circuit has approved the following instruction in a duty to disclose case:

> A failure to disclose a material fact may also constitute a false or fraudulent misrepresentation if, one, the person was under a general professional or a specific contractual duty to make such a disclosure; and, two, the person actually knew such disclosure ought to be made; and, three, the person failed to make such disclosure with the specific intent to defraud.
>
> . . . .
>
> The government has to prove as to each count considered separately, that the alleged misrepresentation as charged in the indictment was made with the intent to defraud, that is, to advance the scheme or artifice to defraud. Such a scheme in each case has to be reasonably calculated to deceive a lender of ordinary prudence, ordinary care and comprehension.

. . . .

> [I]t is not a crime simply to be careless or sloppy in discharging your duties as an attorney or a[s] an appraiser. That may be malpractice, but it's not a crime.

United States v. Cassiere, 4 F.3d 1006, 1022 (1st Cir. 1993) (alterations in original).

(11) To prove causation, the government must demonstrate "that the defendant knew, or could have reasonably foreseen, that the use of the mails [would] follow in the ordinary course of business. It is not necessary to prove that the defendant personally executed the mailing, but merely that the defendant caused the mailing by doing some act from which it is reasonably foreseeable that the mails will be used." Pimental, 380 F.3d at 584 (citations and internal quotations omitted).

(12) Although the mail and wire fraud statutes require that the defendant "*hav[e] devised or intend[ed] to devise* any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," 18 U.S.C §§ 1341, 1343 (emphasis added), the First Circuit has held that in mail and wire fraud cases "[t]he government need not prove that the defendant devised the fraudulent scheme," United States v. Serrano, 870 F.2d 1, 6 (1st Cir. 1989). The First Circuit has, in dicta in cases after Serrano, made inconsistent statements on this issue. See United States v. Carrington, 96 F.3d 1, 7 (1st Cir. 1996) ("The crime of wire fraud . . . requires that the defendant devise a scheme to defraud and then transmit a wire communication for the purposes of executing the scheme."). Compare Pimental, 380 F.3d at 584 (the first element the government must show to prove mail fraud is "the devising or attempting to devise a scheme or artifice to defraud") with United States v. Martin, 228 F.3d 1, 15 (1st Cir. 2000) (the first element the government must show to prove wire or mail fraud is "a scheme to defraud by means of false pretenses"). Given the clear holding in Serrano and the more recent statement in Martin, these pattern charges for mail and wire fraud do not require that the defendant have devised or intended to devise the scheme.

4.18.1343 Wire Fraud, 18 U.S.C. § 1343

[Updated: 5/20/05]

[Defendant] is charged with violating the federal statute making wire fraud illegal.

For you to find [defendant] guilty of wire fraud, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

> First, that there was a scheme, substantially as charged in the indictment, to defraud [or to obtain money or property by means of false or fraudulent pretenses];
>
> Second, that the scheme to defraud involved the misrepresentation or concealment of a material fact or matter [or the scheme to obtain money or property by means of false or fraudulent pretenses involved a false statement, assertion, half-truth or knowing concealment concerning a material fact or matter];
>
> Third, that [defendant] knowingly and willfully participated in this scheme with the intent to defraud; and
>
> Fourth, that an interstate [or foreign] wire communication was used, on or about the date alleged, in furtherance of this scheme.

A scheme includes any plan, pattern or course of action. It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme or that the alleged scheme actually succeeded in defrauding anyone. But the government must prove beyond a reasonable doubt that the scheme was substantially as charged in the indictment.

The term "defraud" means to deceive another in order to obtain money or property. [It includes a scheme to deprive another of the intangible right of the honest services of government officials.]

[The term "false or fraudulent pretenses" means any false statements or assertions that were either known to be untrue when made or were made with reckless indifference to their truth and that were made with the intent to defraud. The term includes actual, direct false statements as well as half-truths and the knowing concealment of facts.]

A "material" fact or matter is one that has a natural tendency to influence or be capable of influencing the decision of the decisionmaker to whom it was addressed.

[Defendant] acted "knowingly" if [he/she] was conscious and aware of [his/her] actions, realized what [he/she] was doing or what was happening around [him/her] and did not act because of ignorance, mistake or accident.

An act or failure to act is "willful" if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be

done; that is to say, with bad purpose either to disobey or to disregard the law. Thus, if [defendant] acted in good faith, [he/she] cannot be guilty of the crime. The burden to prove intent, as with all other elements of the crime, rests with the government.

Intent or knowledge may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining what [defendant] knew or intended at a particular time, you may consider any statements made or acts done or omitted by [defendant] and all other facts and circumstances received in evidence that may aid in your determination of [defendant]'s knowledge or intent. You may infer, but you certainly are not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts are proven by the evidence received during this trial.

An "interstate [or foreign] wire communication" includes a telephone communication from one state to another [or between the United States and a foreign country.] [The term also includes a wire transfer of funds between financial institutions as well an e-mail transmission or other internet communication.] The wire communication does not itself have to be essential to the scheme, but it must have been made to carry it out. There is no requirement that [defendant] [him/herself] was responsible for the wire communication, that the wire communication itself was fraudulent or that the use of wire communications facilities in interstate commerce was intended as the specific or exclusive means of accomplishing the alleged fraud. But the government must prove beyond a reasonable doubt that [defendant] knew, or could reasonably have foreseen, that use of a wire communication would follow in the course of the scheme.

Phone calls designed to lull a victim into a false sense of security, postpone injuries or complaints or make the transaction less suspect are phone calls in furtherance of a scheme to defraud.

Comment

(1) See the Comments to Instruction 4.18.1341 (Mail Fraud). "The mail and wire fraud statutes share the same language in relevant part" and are therefore subject to the same analysis. Carpenter v. United States, 484 U.S. 19, 25 n.6 (1987); accord McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc., 904 F.2d 786, 791 n.8 (1st Cir. 1990) (same). "Accordingly, . . . caselaw construing § 1341 is instructive for purposes of § 1343." United States v. Fermin Castillo, 829 F.2d 1194, 1198 (1st Cir. 1987).

(2) "[U]se of the wires must be 'incident to an essential part of the scheme,'" United States v. Lopez, 71 F.3d 954, 961 (1st Cir. 1995) (quoting a mail fraud case, Pereira v. United States, 347 U.S. 1, 8 (1954)), which means that the wire communication must be "a normal concomitant of a transaction that [was] essential to the fraudulent scheme." Fermin Castillo, 829 F.2d at 1199 (alteration in original) (quoting a mail fraud case, United States v. Contenti, 735 F.2d 628, 631 n.2 (1st Cir. 1984)). The concept is construed broadly, and includes use of the wires to "'lull victims into a sense of false security, [and] postpone their ultimate complaint to the authorities.'" Lopez, 71 F.3d at 961 (quoting United States v. Lane, 474 U.S. 438, 451-52 (1986) (Lane actually reads "false sense of security")).

(3) The term "interstate or foreign wire communication" includes an e-mail transmission or other internet communication. See, e.g., United States v. Martin, 228 F.3d 1, 18 (1st Cir. 2000) (affirming wire fraud conviction based on e-mails).

(4) A plot to defraud a foreign government of tax revenue violates the statute. Pasquantino v. United States, 125 S. Ct. 1766 (2005).

4.18.1344 Bank Fraud, 18 U.S.C. § 1344(1), (2)

[Updated: 2/17/05]

[Defendant] is charged with bank fraud. It is against federal law to engage in such conduct against certain financial institutions. For you to find [defendant] guilty of this crime you must be convinced that the government has proven each of these things beyond a reasonable doubt:

> First, a scheme, substantially as charged in the indictment, to defraud a financial institution [or to obtain a financial institution's money by means of false or fraudulent pretenses];
>
> Second, [defendant]'s knowing and willful participation in this scheme with the intent to defraud [or to obtain money by means of false or fraudulent pretenses];
>
> Third, the financial institution was federally insured or was a federal reserve bank or a member of the federal reserve system.

A scheme includes any plan, pattern or course of action. The term "defraud" means to deceive the bank in order to obtain money or other property by misrepresenting or concealing a material fact. It includes a scheme to deprive another of the intangible right of honest services.

[The term "false or fraudulent pretenses" means any false statements or assertions that concern a material aspect of the matter in question, that were either known to be untrue when made or made with reckless indifference to their truth and that were made with the intent to defraud. They include actual, direct false statements as well as half- truths and the knowing concealment of facts.]

A "material" fact or matter is one that has a natural tendency to influence or be capable of influencing the decision of the decisionmaker to whom it was addressed.

[Defendant] acted "knowingly" if [he/she] was conscious and aware of [his/her] actions, realized what [he/she] was doing or what was happening around [him/her], and did not act because of ignorance, mistake or accident.

An act or failure to act is "willful" if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

Intent or knowledge may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining what [defendant] knew or intended at a particular time, you may consider any statements made or acts done or omitted by [defendant] and all other facts and circumstances received in evidence that may aid in your determination of [defendant]'s knowledge or intent. You may infer, but you certainly are not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts are proven by the evidence received during this trial.

The government need not prove that the scheme was successful, that the financial institutions suffered a financial loss, that the defendant knew that the victim of the scheme was a federally insured financial institution [federal reserve bank; member of the federal reserve system] or that the defendant secured a financial gain.

Comment

(1) This instruction is based largely on United States v. Kenrick, 221 F.3d 19, 26-29 (1st Cir. 2000) (en banc). Accord United States v. Brandon, 17 F.3d 409, 424-28 (1st Cir. 1994); United States v. Benjamin, 252 F.3d 1 (1st Cir. 2001). Kenrick concluded that intent to harm is not required. 221 F.3d at 29. United States v. Moran ("Moran I"), 312 F.3d 480, 493 (1st Cir. 2002), confirmed that a defendant's conduct need not directly induce the bank to disburse funds.

(2) See the Comments to Instruction 4.18.1341 (Mail Fraud).

(3) If more than one scheme is charged in a particular count, the jury should be instructed that it has to make a unanimous finding with respect to a particular scheme. United States v. Puerta, 38 F.3d 34, 40-41 (1st Cir. 1994).

(4) The prosecution need not prove that the defendant knew the financial institution's status; it is sufficient for the prosecutor to prove the objective fact that the institution was insured. Brandon, 17 F.3d at 425.

(5) In United States v. Blastos, 258 F.3d 25, 27 (1st Cir. 2001), the defendant argued that the previous pattern charge was inadequate under Neder v. United States, 527 U.S. 1 (1999), because the instruction did not identify materiality as a separate element of the offense. (Neder had not yet been decided when the first patterns were published.) The First Circuit assumed arguendo that was so, but found it harmless error in light of the rest of the charge on materiality, noting "that the district court gave an instruction on materiality that, although it did not meet the specific requirements of Neder, accomplished the same purpose." Blastos, 258 F.3d at 29. The revised pattern still does not list materiality as a separate element because it seems most logical to treat it as part of the definition of "defraud" or "false or fraudulent pretenses." An argument can be made in light of Blastos, however, that it is safer to separate out materiality as a separate numbered element of the offense. The instruction then presumably would add a new "Second" namely, "The use of false statements, assertions, half-truths, or knowing concealments, concerning material facts or matters;" and the other elements would be renumbered accordingly. In Moran I, the court said that "the government must show that the defendants: (1) engaged in a scheme or artifice to defraud or obtain money by means of materially false statements or misrepresentations; (2) from a federally insured financial institution; and, (3) did so knowingly." 312 F.3d at 488 (citation omitted). In United States v. Moran, 393 F.3d 1, 13 (1st Cir. 2004), the First Circuit made clear that materiality is required under 18 U.S.C. § 1344(1) (defraud) and under § 1344(2) (false pretenses).

4.18.1462 Use of Interactive Computer Service for Obscene Matters, 18 U.S.C. § 1462

[New: 9/3/04]

[Defendant] is charged with knowingly using an interactive computer service to carry obscene [pictures] [writings] in interstate or foreign commerce. It is against federal law to use an interactive computer service to carry obscene [pictures] [writings] in interstate or foreign commerce. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that [defendant] knowingly used an interactive computer service;

Second, that [defendant] did so in order to carry one or more of the charged [pictures] [writings] in interstate or foreign commerce;

Third, that the particular [picture] [writing] was obscene; and

Fourth, that [defendant] knew at the time the general contents, character and nature of the [pictures] [writings].

"Knowingly" means that the act was done voluntarily and intentionally and not because of mistake or accident.

The term "interactive computer service" means any information service, system or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

"Interstate commerce" includes commerce between one state, territory, possession, or the District of Columbia and another state, territory, possession and the District of Columbia.

"Foreign commerce" includes commerce with a foreign country.

Material is "obscene" when:

(1) the average person, applying contemporary community standards, would find that the material, taken as a whole, appeals to a degrading, unhealthy or morbid interest in sex as distinguished from normal, healthy sexual desires;

(2) the average person, applying contemporary community standards, would find that the material depicts or describes ultimate sexual acts, excretory functions, masturbation or lewd exhibition of the genitals in a patently offensive way; and

(3) a reasonable person would find that the material, taken as a whole, lacks serious literary, artistic, political or scientific value.

All three characteristics of this test must be present in the particular listed material for it to be found to be obscene. It is not necessary for the government to prove that [defendant] knew or believed the material to be legally obscene.

["Lewd, lascivious or filthy" as used in the Indictment all have the same meaning as "obscene."]

Comment

(1) For the caselaw supporting the obscenity definition, see instruction on Transfer of Obscene Materials to Minors, 4.18.1470 (§ 1470).

(2) A three-judge court in the Northern District of California has persuasively explained why Supreme Court precedents should be interpreted as giving the same meaning to the phrase "lewd, lascivious or filthy" as to the defined term "obscene." Apollomedia Corp. v. Reno, 19 F. Supp. 2d 1081, 1094-95 (N.D. Cal. 1998). If the Indictment does not use the phrase, however, there is no need to refer to it.

4.18.1470 Transfer of Obscene Materials to Minors, 18 U.S.C. § 1470

[New: 9/3/04]

[Defendant] is charged with knowingly using [the mail] [a facility or means of interstate or foreign commerce] to transfer obscene matter to someone under age sixteen[, or attempting to do so]. It is against federal law knowingly to transfer obscene matter to a person under age sixteen while knowing he/she is under age sixteen, by using [the mail] [a facility or means of interstate or foreign commerce] [, or to attempt to do so]. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that [defendant] knowingly transferred the material as charged to the person listed;

Second, that [defendant] used [the mail] [a facility or means of interstate or foreign commerce] to do so;

Third, that [defendant] knew at the time the general contents, character and nature of the material;

Fourth, that the material was obscene; and

Fifth, that at the time, the recipient was not yet sixteen years old and [defendant] knew that he/she was not yet sixteen years old.

"Knowingly" means that the act was done voluntarily and intentionally and not because of mistake or accident.

"Interstate commerce" includes commerce between one state, territory, possession, or the District of Columbia and another state, territory, possession and the District of Columbia.

"Foreign commerce" includes commerce with a foreign country.

Material is "obscene" when:

(1) the average person, applying contemporary community standards, would find that the material, taken as a whole, appeals to a degrading, unhealthy or morbid interest in sex as distinguished from normal, healthy sexual desires;

(2) the average person, applying contemporary community standards, would find that the material depicts or describes ultimate sexual acts, excretory functions, masturbation or lewd exhibition of the genitals in a patently offensive way; and

(3) a reasonable person would find that the material, taken as a whole, lacks serious literary, artistic, political or scientific value.

All three characteristics of this test must be present in the particular listed material for it to be found to be obscene. It is not necessary for the government to prove that [defendant] knew or believed the material to be legally obscene.

[Use Attempt instruction, 4.18.00, as appropriate.]

Comment

(1) We have modeled the obscenity definition on the short, plain language instruction of the Federal Judicial Center pattern charge. See, e.g., Federal Judicial Center, Pattern Criminal Jury Instructions Nos. 87-89 (1987). It comes almost directly from Miller v. California, 413 U.S. 15, 24 (1973). Many other Circuits use much lengthier charges, see, e.g., Eleventh Circuit Pattern Jury Instructions (criminal cases) Nos. 53-55 (2003), but they do not seem to make this difficult question easier. The short charge focuses the jury on the important issues.

(2) "[O]bscenity is to be judged according to the average person in the community, rather than the most prudish or the most tolerant." Smith v. United States, 431 U.S. 291, 304 (1977). It is unnecessary to specify what community. Jenkins v. Georgia, 418 U.S. 153, 157 (1974). But the Supreme Court has taken pains "to make clear that children are not to be included for these purposes as part of the 'community.'" Pinkus v. United States, 436 U.S. 293, 297 (1978) (conviction under 18 U.S.C. § 1461). It is not error to say that the community includes both sensitive and insensitive people. Id. at 298-301. While the community as a whole is generally the standard for judging obscenity, an exception has been recognized for material aimed at a clearly defined deviant sexual group. Id. at 302 ("Nothing prevents a court from giving an instruction on prurient appeal to deviant sexual groups as part of an instruction pertaining to appeal to the average person where the evidence . . . would support such a charge."). The knowledge characterization comes from Hamling v. United States, 418 U.S. 87, 123-24 (1974). "A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law." Hamling v. United States, 418 U.S. 87, 104 (1974). The test is *not* one of national standards. Id. at 105-08.

(3) This instruction does not use the term "prurient," but instead the definition of "prurient" in Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985) ("[P]rurience may be constitutionally defined for the purposes of identifying obscenity as that which appeals to a shameful or morbid interest in sex."). There seems to be no reason to use the actual term which may be more difficult for a jury.

(4) The "normal, healthy sexual desires" distinction comes from Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1985). The Supreme Court has made clear that, in order to constitute obscenity, the material must be, at the very least, "in some sense erotic." E.g., Ashcroft v. ACLU, 535 U.S. 564, 579 (2002); Cohen v. California, 403 U.S. 15, 20 (1971) ("Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic."). In United States v. Gravenhorst, 377 F.3d 49, 52 n.3 (1st Cir. 2004), the First Circuit said that, while it was not plain error to instruct the jury on the erotic

requirement, a specific reference to "erotic" in the instructions was unnecessary. "To the extent that the word 'erotic' in modern usage can denote material that while prurient is nonetheless not legally obscene, an instruction might simply emphasize . . . that the material must as a whole appeal to a degrading, unhealthy or morbid interest in sex, but without making specific reference to the term 'erotic.'" Id. Accordingly, this instruction does not include the erotic requirement. Given the language of the instruction ("degrading, unhealthy, or morbid interest *in sex*") the jury may not find material obscene unless it concludes that the material has a sexual connotation.

(5) The list of images that are covered (ultimate sexual acts, excretory functions, masturbation or lewd exhibition of the genitals) comes from Miller v. California, 413 U.S. 15, 25 (1973). Nudity alone is not enough. Jenkins v. Georgia, 418 U.S. 153, 161 (1974).

(6) It is clear that on the issue of literary, artistic, political or scientific value, the standard is a reasonable person, not the average person of the other two factors. Pope v. Illinois, 481 U.S. 497, 500-01 & n.3 (1987).

4.18.1512(b)(1) Witness Tampering—Knowingly Corruptly Persuading Another Person with the Intent to Influence, Delay or Prevent the Testimony of Any Person in an Official Proceeding, 18 U.S.C. § 1512(b)(1)

[New: 7/19/05]

[Defendant] is charged with knowingly corruptly persuading [name of person], with the intent to influence, delay or prevent the testimony of [name of person] in an official proceeding. Federal law prohibits knowingly corruptly persuading another person with the intent to influence, delay or prevent the testimony of any person in an official proceeding. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First: that on about the date charged, [defendant] corruptly persuaded [name of person];

Second: that [defendant] did so knowingly;

Third: that [defendant] did so with the intent to influence, delay or prevent the testimony of [name of person] in an official proceeding; and

Fourth: that [defendant] believed that there was a current or future official proceeding in which the testimony might occur.

The word "knowingly" means that the act was done voluntarily and intentionally with the knowledge that it was wrong, and not because of mistake or accident.

An "official proceeding" is a proceeding before a federal court, a federal judge, the United States Congress or a federal agency.

Comment

(1) This instruction is based on United States v. Cruzado-Laureano, 404 F.3d 470, 487 (1st Cir. 2005), and Arthur Andersen LLP v. United States, __U.S.__, 125 S. Ct. 2129 (2005). See also United States v. Freeman, 208 F.3d 332, 337 (1st Cir. 2000) (listing the elements the government must prove under 18 U.S.C. § 1512(b)(2)(A)); 2 Leonard B. Sand et al., Modern Federal Jury Instructions (Criminal) §§ 46-28, 46-30 to 46-32 (2004).

(2) This instruction applies in cases involving corrupt persuasion. 18 U.S.C. § 1512(b) also prohibits using intimidation against, threatening, attempting to use intimidation against, attempting to threaten, attempting to corruptly persuade, and engaging in misleading conduct toward another person with the intent to influence, delay or prevent any person from testifying in an official proceeding. If the facts so warrant, replace "corruptly persuaded" in the pattern instruction with "used intimidation against," "threatened," "attempted to use intimidation against," "attempted to threaten," "attempted to corruptly persuade" or "engaged in misleading conduct toward." In that event, part of the definition of "knowingly" ("with the knowledge that it was wrong") should probably be deleted, since it comes only from the juxtaposition of "knowingly" and "corruptly" in

Arthur Andersen.

(3) The pattern instruction does not include a definition of "corruptly." Many cases will not require a definition because it will be clear that the alleged persuasion is corrupt (*e.g.* bribing a witness to influence his testimony). The First Circuit has not defined the term, and the Supreme Court does not suggest a definition in Arthur Andersen. The statute does not define "corruptly" or "corruptly persuades," but does state that "the term 'corruptly persuades' does not include conduct which would be misleading conduct but for a lack of a state of mind." 18 U.S.C. § 1515(a)(6). The Ninth Circuit called this statement "circuitous[]" and "unhelpful[]," and interpreted it as merely "establish[ing] that the government is required to prove scienter as an element" of section 1512(b). United States v. Khatami, 280 F.3d 907, 911 (9th Cir. 2002).

The Third Circuit and the D.C. Circuit provide some insight into the meaning of "corruptly" or "corruptly persuades." Both courts concluded that influencing someone to violate a legal duty constitutes "corrupt persuasion." United States v. Davis, 183 F.3d 231, 250 (3d Cir. 1999) (urging someone "to violate his legal duty not to kill [a witness] or aid in [that witness'] death" is corrupt persuasion); United States v. Morrison, 98 F.3d 619, 629 (D.C. Cir. 1996) (influencing someone to violate her legal duty to testify truthfully is corrupt persuasion). The Third Circuit also stated "that both attempting to *bribe* someone to *withhold* information and attempting to *persuade* someone to provide *false* information to federal investigators constitute 'corrupt persuasion' punishable under § 1512(b)." United States v. Farrell, 126 F.3d 484, 488 (3d Cir. 1997).

The Court in Arthur Andersen rejected the district court's instruction that the jury could find that the defendant acted corruptly if the defendant "intended to subvert, undermine, or impede governmental factfinding." __U.S. at __, 125 S. Ct. at 2135-36 (internal quotation marks omitted). The Court stated that this definition did "no limiting work whatsoever" because it encompassed lawful conduct such as innocently persuading another to withhold information from the government. Id. at 2136.

(4) "Official proceeding" is defined as:

> (A) a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;
> (B) a proceeding before the Congress;
> (C) a proceeding before a Federal Government agency which is authorized by law; or
> (D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce.

18 U.S.C. § 1515(a)(1). "Both a federal trial and a federal grand jury investigation are 'official proceedings' within the meaning of the statute." United States v. Frankhauser, 80 F.3d 641, 651 (1st Cir. 1996). In appropriate cases, include a description of the insurance proceedings listed in subsection 1515(a)(1)(D) in the definition of "official proceeding."

(5) Although "an official proceeding need not be pending or about to be instituted at the time of the offense," 18 U.S.C. § 1512(f)(1), the defendant must contemplate some official proceeding in which the testimony might occur. See Frankhauser, 80 F.3d at 651 (even though the statute does not "require actual knowledge of a pending proceeding[,] . . . the defendant must act knowingly and with the intent to impair an object's availability for use in *a particular official proceeding*") (interpreting 18 U.S.C. § 1512(b)(2)(B) (emphasis added). The word "might" comes from the statement in Arthur Andersen that under 18 U.S.C. §§ 1512(b)(2)(A) and (B), which prohibit withholding or interfering with the use of documents or other objects in an official proceeding, a defendant cannot be "a knowingly . . . corrupt persuader" if "he does not have in contemplation any particular official proceeding in which those documents *might* be material." 125 S. Ct. at 2137 (emphasis added) (alteration in original). In determining whether a defendant intended to interfere with an identifiable proceeding, "[e]ach case must be evaluated on its own facts." Frankhauser, 80 F.3d at 652.

4.18.1546 False Statements in Document Required by Immigration Law, 18 U.S.C. § 1546(a)

[Updated: 2/11/03]

[Defendant] is charged with making a false statement under oath in a document required by federal immigration laws. It is against federal law to make a false statement under oath in a document required by federal immigration laws. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that [defendant] knowingly made a material false statement under oath;

Second, that [defendant] made the statement voluntarily and intentionally; and

Third, that [defendant] made the statement in an immigration form [identify number and title of document].

A false statement is made "knowingly" if [defendant] knew that it was false or demonstrated a reckless disregard for the truth with a conscious purpose to avoid learning the truth.

The statement is "material" if it has a natural tendency to influence or to be capable of influencing the decision of the decisionmaker to which it was addressed.

A statement is "false" if it is untrue when made.

4.18.1623 False Declaration in Grand Jury Testimony, 18 U.S.C. § 1623

[New: 11/26/02]

[Defendant] is charged with making a false declaration in [his/her] grand jury testimony. It is against federal law to knowingly make a false material declaration to the grand jury while under oath.

For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

> First, that [defendant] was under oath as a witness before the Grand Jury of this Court;
>
> Second, that [defendant] made a false declaration that was material to the grand jury's investigation; and
>
> Third, that at the time [defendant] made the false declaration, [he/she] knew the declaration was false.

A declaration is false if it is untrue when made.

A declaration is "material" to the grand jury's investigation if it is capable of affecting or influencing the grand jury inquiry or decision. It is not necessary for the government to prove that the grand jury was, in fact, misled or influenced in any way by the false declaration.

Comment

(1) The definition of materiality comes from United States v. Doherty, 906 F.2d 41, 43-44 (1st Cir. 1990), that stated that the statement must be "material to the grand jury's investigation" but need not actually influence the grand jury. The phrase "capable of influencing" comes from United States v. Scivola, 766 F.2d 37, 44 (1st Cir. 1985) (quoting United States v. Giarratano, 622 F.2d 153, 156 (5th Cir. 1980)), a case that held that materiality can be satisfied even if the declaration only affected the credibility of a witness. United States v. Goguen, 723 F.2d 1012, 1019 (1st Cir. 1983), used slightly different language ("might have influenced"). These cases all precede the Supreme Court's holding in United States v. Gaudin, 515 U.S. 506 (1995), and then specifically in Johnson v. United States, 520 U.S. 461, 465 (1997) ("[T]here is no doubt that materiality is an element of perjury under § 1623. . . . Gaudin therefore dictates that materiality be decided by the jury, not the court."), that the question of materiality is for the jury. However, the language of the First Circuit cases still seems pertinent.

(2) The Fifth Circuit pattern charge has the following additional language that may sometimes be appropriate, but for which we have found no caselaw:

> If you should find that a particular question was ambiguous or capable of being understood in two different ways, and that [defendant] truthfully answered one

reasonable interpretation of the question under the circumstances presented, then such answer would not be false. Similarly, if you should find that the question was clear, but the answer was ambiguous, and that one reasonable interpretation of the answer would be truthful, then the answer would not be false.

4.18.1832 Theft of Trade Secrets (Economic Espionage Act), 18 U.S.C. § 1832

[Updated: 6/14/02]

[Defendant] is charged with stealing trade secrets. It is against federal law to steal trade secrets. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

> First, that [defendant] knowingly [stole; took without permission; copied without permission; downloaded without permission; received while knowing it was stolen or taken without permission] a trade secret;
>
> Second, that the trade secret was related to or included in a product produced for or placed in interstate or foreign commerce;
>
> Third, that [defendant] had the intent of economically benefiting someone other than the trade secret's owner; and
>
> Fourth, that [defendant] intended or knew that his action would injure the trade secret's owner.

The term "trade secret" means all forms and types of financial, business, scientific, technical, economic or engineering information, including program devices, designs, prototypes, methods, techniques, processes, procedures, programs or codes, whether tangible or intangible, and however stored if the owner has taken reasonable measures to keep the information secret and if the information derives independent economic value, actual or potential, from not being generally known to or readily ascertainable through proper means, by the public.

The term "interstate commerce" means trade or travel from one state to another.

4.18.1951 Interference with Commerce by Robbery or Extortion (Hobbs Act), 18 U.S.C. § 1951

[Updated: 8/3/05]

[Defendant] is accused of obstructing, delaying or affecting commerce by committing [robbery][extortion]. It is against federal law to engage in such conduct. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that [defendant] knowingly and willfully obtained property from [person or corporation robbed/extorted];

Second, that [defendant] did so by means of [extortion][robbery];

Third, that the [extortion] [robbery] affected interstate commerce.

The term "interstate commerce" means commerce between any point in a state and any point outside the state. It is only necessary that the government prove beyond a reasonable doubt that there is a realistic probability that the acts committed by [defendant] as charged in the indictment would have some slight or minimal effect on interstate commerce. It is not necessary for you to find that [defendant] knew or intended that [his/her] actions would affect interstate commerce.

["Extortion" means obtaining property from another with his or her consent, but where that consent is obtained [by the wrongful use of actual or threatened force, violence or fear] [under color of official right.]]

[To prove extortion by fear, the government must show: (1) that the victim believed that economic loss would result from failing to comply with [defendant's] demands and (2) that the circumstances made the fear reasonable. Economic loss may include the possibility of lost business opportunities. But the loss feared must be a particular economic loss, not merely the loss of a potential benefit.]

[To prove extortion under color of official right, the government must show that [defendant public official] obtained property to which [he/she] was not entitled and knew at the time that [he/she] was obtaining it in return for official acts. The government need not show that [defendant public official] initiated the transfer, nor does the government need to show that [defendant public official] actually had the ultimate authority to achieve the desired result. [If the property was obtained as a political or campaign contribution, the government must prove that the payment or other transfer was made in return for an explicit promise or understanding by [defendant] to perform or not to perform an official act. It is not necessary for the government to show that the official action or inaction actually occurred.]]

["Robbery" means unlawfully taking or obtaining personal property from another, against his or her will, by means of actual or threatened force, or violence, or fear of injury to his or her person or property, or property in his or her custody or possession, or the person or property of a relative or member of his family or of anyone in his or her company at the time of the taking or obtaining.]

To act "willfully" means to act voluntarily and intelligently and with the specific intent that the underlying crime be committed—that is to say, with bad purpose, either to disobey or disregard the law—not to act by ignorance, accident or mistake.

Comment

(1) The elements of the Hobbs Act offense are taken from the statute and from United States v. Cruzado-Laureano, 404 F.3d 470, 480 (1st Cir. 2005).

(2) The color-of-official-right extortion definition is based on United States v. Rivera Rangel, 396 F.3d 476 (1st Cir. 2005) and Evans v. United States, 504 U.S. 255, 268 (1992). The political contribution instruction is based on McCormick v. United States, 500 U.S. 257, 273 (1991) and Evans, 504 U.S. at 268. The statute's treatment of extortion under color of official right "reaches anyone who actually exercises official powers, regardless of whether those powers were conferred by election, appointment, or some other method." Rivera Rangel, 396 F.3d at 484 n.8 (quoting United States v. Freeman, 6 F.3d 586, 593 (9th Cir. 1993)).

(3) The "fear" element of extortion can include fear of economic loss. United States v. Sturm, 870 F.2d 769, 771-72 (1st Cir. 1989). "[T]he loss feared must be a particular economic loss, not merely the loss of a potential benefit." Rivera Rangel, 396 F.3d at 483 (internal quotations omitted). It is not necessary that there be an explicit threat; it is enough if the victim understood the defendant's conduct as an implied threat. Id. at 484 n.7.

"To establish extortion through fear of economic loss, the government must show that the victim believed that economic loss would result from his . . . failure to comply with the alleged extortionist's terms, and that the circumstances . . . rendered that fear reasonable." Rivera Rangel, 396 F.3d at 483 (citation and internal quotations omitted) (quoting United States v. Capo, 817 F.2d 947, 951 (2d Cir. 1987) ("[T]he proof need establish that the victim *reasonably* believed: first, that the defendant had the power to harm the victim, and second, that the defendant would exploit that power to the victim's detriment.")

If the extortion is based on economic fear, the term "wrongful" must be defined to require that the government prove that the defendant did not have a claim of right to the property and that the defendant knew that he or she was not legally entitled to the property obtained. Sturm, 870 F.2d at 772-73, 774-75.

(4) The definition of "interstate commerce" should be modified according to the facts of the case within the range provided by 18 U.S.C. § 1951(b)(3). In United States v. McKenna, 889 F.2d 1168, 1171 (1st Cir. 1989), the First Circuit described the commerce element as a mixed question of law and fact. First, "[t]he district court must determine if, as a matter of law, interstate commerce could be affected. If the court determines it could be, the question is turned over to the jury to determine if, as a matter of fact, interstate commerce was affected as the district court charged it could have been." Id. Other circuits have stated explicitly that it is unnecessary to show that the defendant intended to affect commerce. See United States v. Cerilli, 603 F.2d 415, 424 (3d Cir. 1979) (the defendant does not need to intend to affect interstate commerce); United States v. Gupton, 495 F.2d

550, 551 (5th Cir. 1974) ("[T]he government need not show that the accused set out with the specific conscious purpose or desire to obstruct commerce.").

(5) To meet the jurisdictional requirement, "the government need only show that the conduct created a realistic probability of a minimal effect on interstate commerce." United States v. Brennick, 405 F.3d 96 (1st Cir. 2005). See also Rivera Rangel, 396 F.3d at 482; United States v. Capozzi, 347 F.3d 327, 335. "The Hobbs Act's scope extends to the limit of Congress' Commerce Clause authority. Because of the statute's broad sweep, to prove a Hobbs Act violation, the government must show only that the [defendant's] conduct created a realistic probability of a *de minimis* effect on interstate commerce." Capozzi, 347 F.3d at 335 (citations and internal quotations omitted). "The commerce element may be satisfied where threatened or potential effects on commerce never materialize because extortionate demands are met or where the extortion has a beneficial effect on interstate commerce." Tormos-Vega, 959 F.2d at 1113 (citation and internal quotations omitted).

The First Circuit has described the required "*de minimis* effect" as "some slight impact on commerce," see United States v. Devin, 918 F.2d 280, 293 (1st Cir. 1990), and upheld an instruction that the jury must find the activity to have had a "minimal, slight or subtle effect" on interstate commerce, United States v. Butt, 955 F.2d 77, 80 n.2 (1st Cir. 1992). This standard survives the decision in United States v. Lopez, 514 U.S. 549 (1995). Capozzi, 347 F.3d at 335-36.

Where the victim is an individual, the government has a heightened burden of showing an effect on commerce "[b]ecause criminal acts that are directed at individuals rather than at businesses normally have a less substantial effect on interstate commerce." United States v. McCormack, 371 F.3d 22, 28 (1st Cir. 2004) (vacated and remanded on other grounds, McCormack v. United States, 125 S. Ct. 992 (2005)).

(6) To obtain property "entail[s] both a deprivation and acquisition of property." Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 404-05 (2003) (citing United States v. Enmons, 410 U.S. 396 (1973)). Thus, depriving someone of a property right of exclusive control of a business asset, as by causing an abortion clinic to shut down, was insufficient where the person "did not acquire any such property." Id.

(7) Section 1951 includes prohibitions on conspiracy and attempt. A Hobbs Act conspiracy does not require an overt act. Tormos-Vega, 959 F.2d at 1115.

4.18.1952 Travel Act, 18 U.S.C. § 1952

[Updated: 10/14/05]

[Defendant] is charged with a violating the Travel Act. It is against federal law to [describe offense]. For you to find the defendant guilty of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

> First, that [defendant] [traveled; caused someone else to travel] in interstate commerce or [in foreign commerce] or that [he/she] [used an interstate facility such as the mail, the internet or telephone];
>
> Second, that [he/she] did so with the intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of an unlawful activity [here violation of . . .]; and
>
> Third, that [he/she] later performed or attempted to perform acts in furtherance of promoting, managing, establishing carrying on or facilitating [specify the unlawful activity].

"Interstate commerce" includes commerce or travel between one state and another state, and the use of the mail, telephone and internet. There is no requirement that the interstate travel or use of interstate facilities be essential to the scheme. It is enough if the interstate travel or use of interstate facilities made the unlawful activity easier.

Comment

(1) This instruction is based on United States v. Escobar-de Jesus, 187 F.3d 148, 177 (1st Cir. 1999), United States v. Woodward, 149 F.3d 46, 65-68 (1st Cir. 1998), and United States v. Hathaway, 534 F.2d 386, 398 (1st Cir. 1976); accord United States v. Nishnianidze, 342 F.3d 6, 15 (1st Cir. 2003). There are other forms of Travel Act violations which, if charged, would change the second element in the instruction. For certain penalties, a different third element (committing a crime of violence to further an unlawful activity) must be charged and proven beyond a reasonable doubt. 18 U.S.C. § 1952(a)(B).

(2) Jurisdiction under the Travel Act is predicated upon the existence of a connection between the interstate act and the illegal objective. The Travel Act is to be "construed narrowly," with a concern whether the interstate act's relationship to the unlawful activity is more than "incidental." United States v. Hathaway, 534 F.2d 386, 398 (1st Cir. 1976) (citing Rewis v. United States, 401 U.S. 808, 812 (1971) (holding that interstate travel by customers of an illegal gambling operation was insufficient to bring such conduct under the prohibitions of the Travel Act; expansive reading of "interstate commerce" under the statute would alter sensitive federal-state relationships); Perrin v. United States, 444 U.S. 37, 50 (1979) (concern in Rewis was the "tenuous interstate commerce element;" "so long as the requisite interstate nexus is present, the statute reflects a clear and deliberate intent on the part of Congress to alter the federal-state balance in order to reinforce state law enforcement.").

(3) "Unlawful activity" is defined in 18 U.S.C. § 1952(b). The appropriate one(s) should be selected and specified in the charge.

(4) "[F]ederal courts have correctly applied § 1952 to those individuals whose agents or employees cross state lines in furtherance of the illegal activity." United States v. Fitzpatrick, 892 F.2d 162, 167 (1st Cir. 1989) (concluding that interstate travel by others that results in violation of state bribery statute gives rise to a substantive violation of the Travel Act by the one who ordered the travel).

4.18.1956(a)(1)(A) Money Laundering—Promotion of Illegal Activity or Tax Evasion, 18 U.S.C. § 1956(a)(1)(A)

[Updated: 2/17/05]

[Defendant] is charged with violating that portion of the federal money laundering statute that prohibits certain financial transactions intended to [promote specified unlawful activity; evade federal income taxes]. It is against federal law to engage in such conduct. For [defendant] to be convicted of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that [defendant] entered into a financial transaction or transactions, on or about the date alleged, with a financial institution engaged in interstate commerce;

Second, that the transaction involved the use of proceeds of unlawful activities, specifically, proceeds of the [_____];

Third, that [defendant] knew that these were the proceeds of some kind of crime that amounts to a state or federal felony; and

Fourth, that [defendant] entered into the transaction or transactions with the intent to [promote the carrying on of specified unlawful activity; evade federal income taxes].

A [withdrawal; deposit; transfer; etc.] of funds from a bank is a financial transaction.

"Proceeds" means any property, or any interest in property, that someone acquires or retains as a result of the commission of the unlawful activity.

"Promote" means to further, to help carry out, or to make easier.

Knowledge may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining what [defendant] knew or intended at a particular time, you may consider any statements made or acts done or omitted by [defendant] and all other facts and circumstances received in evidence that may aid in your determination of [defendant]'s knowledge or intent. You may infer, but you are certainly not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts are proven by the evidence received during this trial.

Comment

(1) The specified unlawful activities are listed in 18 U.S.C. § 1956 (c)(7). "[T]he 'proceeds' used for money laundering must be 'proceeds' from a different illegal activity than the illegal activity of money laundering itself." United States v. Castellini, 392 F.3d 35, 38 (1st Cir. 2004).

(2) "'[T]he defendant need not know exactly what crime generated the funds involved in a transaction, only that the funds are the proceeds of some kind of crime that is a felony under Federal or State law.'" United States v. Isabel, 945 F.2d 1193, 1201 n.13 (1st Cir. 1991) (quoting S. Rep. No. 433, 99th Cong., 2d Sess. 12 (1986)) (alteration in original); 18 U.S.C. § 1956 (c)(1); United States v. Corchado-Peralta, 318 F.3d 255, 256 (1st Cir. 2003). A willful blindness instruction may be appropriate. United States v. Rivera-Rodriguez, 318 F.3d 268, 271 (1st Cir. 2003). Moreover, the government is not required to specify the predicate offense in the indictment, United States v. McGauley, 279 F.3d 62, 77 n15 (1st Cir. 2002), or to secure a conviction on the underlying unlawful activity. United States v. Richard, 234 F.3d 763, 768 (1st Cir. 2000).

(3) "Sole or exclusive intent to evade taxes is not required. . . ." United States v. Zanghi, 189 F.3d 71, 78 (1st Cir. 1999).

(4) It is not a defense that legitimate funds are also involved, and there is no de minimis exception. United States v. McGauley, 279 U.S. F.3d 62, 71 (1st Cir. 2002).

(5) The statute, 18 U.S.C. § 1956(c)(4), has a number of "commerce" requirements, and the instruction should choose the appropriate one. Some interstate commerce involvement is required, although a minimal effect is sufficient. United States v. Owens, 167 F.3d 739, 755 (1st Cir. 1999). Federal insurance of bank deposits is sufficient. 18 U.S.C. § 1956 (c)(6)(A), cross-referencing 33 U.S.C. § 5312 (a)(2); United States v. Benjamin, 252 F.3d 1, 9 (1st Cir. 2001).

(6) Consult the statute for lengthy definitions of "transaction" and "financial transaction," as well as subsidiary terminology like "monetary instruments" and "financial institution" and choose the appropriate terms. In United States v. Richard, 234 F.3d 763, 768 (1st Cir. 2000), the court stated: "giving criminally derived checks to a co-conspirator, who deposits them into a bank account, is a transfer to, and involves the use of, a financial institution, which satisfies the definition of "monetary transaction" in section 1957(f)(1) [similar, for these purposes, to § 1956]. Further, transferring funds to a co-conspirator involves monetary instruments, namely the currency or checks involved, which satisfies section 1956(c)(5).

4.18.1956(a)(1)(B)(i) Money Laundering—Illegal Concealment, 18 U.S.C. § 1956(a)(1)(B)(i)

[Updated: 5/5/05]

[Defendant] is charged with violating that portion of the federal money laundering statute that prohibits concealment of the proceeds of certain unlawful activities. It is against federal law to engage in such concealment. For [defendant] to be convicted of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

> First, that [defendant] entered into a financial transaction or transactions, on or about the date alleged, with a financial institution engaged in interstate commerce;
>
> Second, that the transaction involved the use of proceeds of unlawful activities, specifically, proceeds of the [_____];
>
> Third, that [defendant] knew that these were the proceeds of some kind of crime that amounts to a state or federal felony; and
>
> Fourth, that [defendant] knew that the transaction or transactions were designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of that specified unlawful activity.

A [withdrawal; deposit; transfer; etc.] of funds from a bank is a financial transaction.

Knowledge may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining what [defendant] knew or intended at a particular time, you may consider any statements made or acts done or omitted by [defendant] and all other facts and circumstances received in evidence that may aid in your determination of [defendant]'s knowledge or intent. You may infer, but you are certainly not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts are proven by the evidence received during this trial.

Comment

(1) The specified unlawful activities are listed in 18 U.S.C. § 1956 (c)(7). "[T]he 'proceeds' used for money laundering must be 'proceeds' from a different illegal activity than the illegal activity of money laundering itself." United States v. Castellini, 392 F.3d 35, 38 (1st Cir. 2004).

(2) "'[T]he defendant need not know exactly what crime generated the funds involved in a transaction, only that the funds are the proceeds of some kind of crime that is a felony under Federal or State law.'" United States v. Isabel, 945 F.2d 1193, 1201 n.13 (1st Cir. 1991) (quoting S. Rep. No. 433, 99th Cong., 2d Sess. 12 (1986)) (alteration in original); 18 U.S.C. § 1956 (c)(1); United States v. Corchado-Peralta, 318 F.3d 255, 256 (1st Cir. 2003). A willful blindness instruction may be appropriate. United States v. Rivera-Rodriguez, 318 F.3d 268, 271 (1st Cir. 2003). Moreover,

the government is not required to specify the predicate offense in the indictment, United States v. McGauley, 279 F.3d 62, 77 n15 (1st Cir. 2002), or to secure a conviction on the underlying unlawful activity. United States v. Richard, 234 F.3d 763, 768 (1st Cir. 2000).

(3) "To prove a violation of 18 U.S.C. § 1956(a)(1)(B)(i), the government must show that [the defendant] conducted financial transactions involving the proceeds of unlawful activity, knowing that the transactions involved the proceeds of unlawful activity, and that the transactions were designed 'to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.'" United States v. McGauley, 279 F.3d 62, 69 (1st Cir. 2002) (quoting 18 U.S.C. § 1956(a)(1)(B)(i)). "The knowledge requirement under 18 U.S.C. § 1956(a)(1)(B)(i) is twofold: the government must demonstrate (i) that the defendant knew that the funds involved in the financial transaction were the proceeds of some unlawful activity; and (ii) that he knew that the transaction itself was 'designed in whole or in part to conceal the nature, location, source, ownership, or control of the proceeds of such unlawful activity.'" United States v. Frigerio-Migiano, 254 F.3d 30, 33 (1st Cir. 2001). "Where the defendant is someone other than the source of the illegal proceeds . . ., the statute is concerned with [the defendant's] knowledge of the source's intent in the transaction." United States v. Martinez-Medina, 279 F.3d 105, 115 (1st Cir. 2002). Purchases of goods and deposits of money are not alone sufficient to meet the requirement that a defendant know that a transaction is designed to disguise or conceal, at least where that defendant is not otherwise involved in the illegal conduct. The First Circuit vacated a conviction where, although the spouse knew that her husband's income was tainted, there was no proof of the design element as to her expenditures, purchases and deposits. United States v. Corchado-Peralta, 318 F.3d 255, 258-59 (1st Cir. 2003). "A conviction requires evidence of intent to disguise or conceal the transaction, whether from direct evidence, like the defendant's own statements, or from circumstantial evidence, like the use of a third party to disguise the true owner, or unusual secrecy." United States v. Cruzado-Laureano, 404 F.3d 470, 483 (1st Cir. 2005).

(4) It is not a defense that legitimate funds are also involved, and there is no de minimis exception. United States v. McGauley, 279 U.S. F.3d 62, 71 (1st Cir. 2002).

(5) The statute, 18 U.S.C. § 1956(c)(4), has a number of "commerce" requirements, and the instruction should choose the appropriate one. Some interstate commerce involvement is required, although a minimal effect is sufficient. United States v. Owens, 167 F.3d 739, 755 (1st Cir. 1999). Federal insurance of bank deposits is sufficient. 18 U.S.C. § 1956 (c)(6)(A), cross-referencing 33 U.S.C. § 5312 (a)(2); United States v. Benjamin, 252 F.3d 1, 9 (1st Cir. 2001).

(6) Consult the statute for lengthy definitions of "transaction" and "financial transaction," as well as subsidiary terminology like "monetary instruments" and "financial institution" and choose the appropriate terms. In United States v. Richard, 234 F.3d 763, 768 (1st Cir. 2000), the court stated: "giving criminally derived checks to a co-conspirator, who deposits them into a bank account, is a transfer to, and involves the use of, a financial institution, which satisfies the definition of "monetary transaction" in section 1957(f)(1) [similar, for these purposes, to § 1956]. Further, transferring funds to a co-conspirator involves monetary instruments, namely the currency or checks involved, which satisfies section 1956(c)(5).

4.18.1956(a)(1)(B)(ii) Money Laundering—Illegal Structuring, 18 U.S.C. § 1956(a)(1)(B)(ii)

[Updated: 2/17/05]

[Defendant] is charged with violating that portion of the federal money laundering statute that prohibits structuring transactions to avoid reporting requirements. It is against federal law to engage in such conduct. For [defendant] to be convicted of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

> First, that [defendant] entered into a financial transaction or transactions, on or about the date alleged, with a financial institution engaged in interstate commerce, involving the use of proceeds of unlawful activities, specifically, proceeds of the [_____];
>
> Second, that [defendant] knew that these were the proceeds of unlawful activity;
>
> Third, that [defendant] knew that the transaction or transactions were structured or designed in whole or in part so as to avoid transaction reporting requirements under federal law.

A [withdrawal; deposit; transfer; etc.] of funds from a bank is a financial transaction.

Federal law requires that [withdrawal; deposit; transfer; etc.] of a sum of more than $10,000 cash [from; into] a bank account in a single business day be reported by the bank to the Internal Revenue Service.

Knowledge may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining what [defendant] knew or intended at a particular time, you may consider any statements made or acts done or omitted by [defendant] and all other facts and circumstances received in evidence that may aid in your determination of [defendant]'s knowledge or intent. You may infer, but you are certainly not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts are proven by the evidence received during this trial.

Comment

(1) "'[T]he defendant need not know exactly what crime generated the funds involved in a transaction, only that the funds are the proceeds of some kind of crime that is a felony under Federal or State law.'" United States v. Isabel, 945 F.2d 1193, 1201 n.13 (1st Cir. 1991) (quoting S. Rep. No. 433, 99th Cong., 2d Sess. 12 (1986)) (alteration in original). "[T]he 'proceeds' used for money laundering must be 'proceeds' from a different illegal activity than the illegal activity of money laundering itself." United States v. Castellini, 392 F.3d 35, 38 (1st Cir. 2004).

(2) The requirements for withdrawal/deposit transaction reporting are set forth at 31 U.S.C. § 5313; 31 C.F.R. § 103.22 (1997).

(3) The statute, 18 U.S.C. § 1956(c)(4), has a number of "commerce" requirements, and the instruction should choose the appropriate one. Some interstate commerce involvement is required, although a minimal effect is sufficient. United States v. Owens, 167 F.3d 739, 755 (1st Cir. 1999).

(4) If there is a criminal forfeiture count pursuant to 18 U.S.C. § 982(a)(1), see United States v. McGauley, 279 F.3d 62, 75-76 (1st Cir. 2002), for instruction language on "involved" or "traceable" property.

4.18.1957 Money Laundering—Engaging in Monetary Transactions in Property Derived From Specified Unlawful Activity, 18 U.S.C. § 1957

[Updated: 2/17/05]

[Defendant] is charged with knowingly engaging [or attempting to engage] in a monetary transaction involving more than $10,000 of criminally derived property. It is against federal law to engage in such activity. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of the following beyond a reasonable doubt:

> First, that [defendant] [deposited; withdrew; exchanged funds] [or attempted to deposit; withdraw; exchange funds] over $10,000 in a financial institution affecting interstate commerce on the date specified;
>
> Second, [he/she] knew that the [money; deposit; etc.] came from some kind of criminal offense;
>
> Third, the [money; deposit; etc.] was in fact criminally derived from [specified unlawful activity]; and
>
> Fourth, the [specified unlawful activity] took place in the United States.

"Affecting interstate commerce" means that the transaction affected commerce in any way or degree; a minimal effect is sufficient [deposit in an FDIC-insured bank is sufficient].

The government does not have to prove that [defendant] knew that the money was derived from the [specified unlawful activity] or that [defendant] committed the [specified unlawful activity]. It is enough that [defendant] had general knowledge that the [money; deposit; etc.] came from some kind of criminal offense.

Comment

(1) The enumeration of the elements of this crime is based on United States v. Benjamin, 252 F.3d 1 (1st Cir. 2001) and United States v. Richard, 234 F.3d 763 (1st Cir. 2000).

(2) The government must prove the predicate crime beyond a reasonable doubt, but not a specific, individual underlying offense (*e.g.*, a particular mailing or a particular drug offense). "[C]ircumstantial evidence may suffice to allow a jury to infer a predicate act from an overall criminal scheme." United States v. Carucci, 364 F.3d 339, 345 (1st Cir. 2004).

(3) "Section 1957(f) only requires that the transactions have a de minimis effect on commerce." Benjamin, 252 F.3d at 9 (The bank's certificate of insurance issued by the FDIC, "certifying that the bank is federally insured, suffices to satisfy the requirement that the transactions has at least a minimum impact on interstate commerce."). The Benjamin court approved an instruction defining monetary transaction as "deposit [etc.] . . . in or affecting interstate or foreign commerce." Id. at 10.

For the district court's full instruction on the definition of interstate commerce, see id.

(4) Acquittal on the underlying unlawful activity does not preclude a conviction for money laundering. See Richard, 234 F.3d at 768; see also United States v. Whatley, 133 F.3d 601, 605-06 (8th Cir. 1998). Section 1957 money laundering does not require that the defendant committed the underlying offense. Benjamin, 252 F.3d at 7; Richard, 234 F.3d at 768. It also does not require that the defendant knew that the money came from specified unlawful activity, only that the defendant knew that the property was criminally derived. Richard, 234 F.3d at 768. But the government must prove beyond a reasonable doubt that the money was in fact the proceeds of specified unlawful activity separate from the laundering transaction. United States v. Castellini, 392 F.3d 35, 38, 45 n.7 (1st Cir. 2004).

(5) "[G]iving criminally derived checks to a co-conspirator, who deposits them into a bank account, is a transfer to, and involves the use of, a financial institution, which satisfies the definition of 'monetary transaction' in section 1957(f)(1). Further, transferring funds to a co-conspirator involves monetary instruments, namely the currency or checks involved, which satisfies section 1956(c)(5)." Richard, 234 F.3d at 768.

(6) If there is a criminal forfeiture count pursuant to 18 U.S.C. § 982(a)(1), see United States v. McGauley, 279 F.3d 62, 75-76 (1st Cir. 2002), for instruction language on "involved" or "traceable" property.

4.18.2113(a) Unarmed Bank Robbery, 18 U.S.C. § 2113(a)

[Updated: 6/14/02]

[Defendant] is accused of robbing the [bank; savings and loan association; credit union]. It is against federal law to rob a federally insured [bank; savings and loan association; credit union]. For you to find the defendant guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

> First, that [defendant] intentionally took money belonging to the [bank; savings and loan association; credit union], from a [bank; savings and loan association; credit union] employee or from the [bank; savings and loan association; credit union] while a [bank; savings and loan association; credit union] employee was present;
>
> Second, that [defendant] used intimidation or force and violence when [he/she] did so; and
>
> Third, that at that time, the deposits of the [bank; savings and loan association; credit union] were insured by the [_____]. [The parties have so stipulated].

"Intimidation" is actions or words used for the purpose of making someone else fear bodily harm if he or she resists. The actual courage or timidity of the victim is irrelevant. The actions or words must be such as to intimidate an ordinary, reasonable person.

Comment

(1) Subjective intent to steal (*i.e.,* knowledge by the defendant that he or she has no claim to the money) is not a required element under 18 U.S.C. § 2113(a). United States v. DeLeo, 422 F.2d 487, 490-91 (1st Cir. 1970).

(2) See the Comments to Instruction 4.18.2113(a) and (d) (Armed or Aggravated Bank Robbery).

4.18.2113(a),(d) Armed or Aggravated Bank Robbery, 18 U.S.C. § 2113(a) & (d)

[Updated: 2/17/05]

[Defendant] is accused of robbing the [bank; savings and loan association; credit union]. It is against federal law to rob a federally insured [bank; savings and loan association; credit union]. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

> First, that [defendant] intentionally took money belonging to the [bank; savings and loan association; credit union] from a [bank; savings and loan association; credit union] employee or from the [bank; savings and loan association; credit union] while a [bank; savings and loan association; credit union] employee was present;
>
> Second, that [defendant] used intimidation or force and violence when [he/she] did so;
>
> Third, that at that time, the deposits of the [bank; savings and loan association; credit union] were insured by the [_____]. [The parties have so stipulated]; and
>
> Fourth, that [defendant], by using a dangerous weapon or device, assaulted someone or put someone's life in jeopardy.

"Intimidation" is actions or words used for the purpose of making someone else fear bodily harm if he or she resists. Whether the victim was courageous or timid is irrelevant. The actions or words must be such as to intimidate an ordinary, reasonable person.

"Assault" means to threaten bodily harm with an apparent present ability to succeed, where the threat is intended to and does generate a reasonable apprehension of such harm in a victim. The threat does not have to be carried out.

Lesser Offense, 18 U.S.C. § 2113(a)

If you find [defendant] not guilty of this charge, you must proceed to consider whether the defendant is guilty of the lesser offense of robbing a [bank; savings and loan association; credit union] without either an assault or jeopardizing someone's life with a dangerous weapon. The lesser offense requires the government to prove beyond a reasonable doubt the first, second and third, but not the fourth, things I have described. In other words, the government must prove everything except using a dangerous weapon to assault someone or jeopardize someone's life.

Comment

(1) Subjective intent to steal (*i.e.,* knowledge by the defendant that he or she has no claim to the money) is not a required element under 18 U.S.C. § 2113(a) & (d). United States v. DeLeo, 422 F.2d 487, 490-91 (1st Cir. 1970).

(2) In some cases it may be appropriate to charge that possession of recently stolen property may support an inference of participation in the theft of the property. See United States v. Rose, 104 F.3d 1408, 1413 (1st Cir. 1997). The inference is permissible, not mandatory or a presumption. Id.

(3) "[B]y using a dangerous weapon or device" modifies both the "assaulted" and "put someone's life in jeopardy" language of § 2113(d). Simpson v. United States, 435 U.S. 6, 13 n.6 (1978). This part of Simpson is not affected by the Comprehensive Crime Control Act of 1984, 18 U.S.C. § 924(c)(1).

(4) An unloaded gun is a dangerous weapon. McLaughlin v. United States, 476 U.S. 16, 17-18 (1986). Whether some other weapon or device is dangerous is generally a question of fact for the jury. See Federal Judicial Center Instruction 105, commentary at 146; Eighth Circuit Instruction 6.18.2113B, commentary at 375 n.4; United States v. Benson, 918 F.2d 1, 2-4 (1st Cir. 1990) (upholding bench trial decision that movement of hand inside a pocket, revealing a metallic object that a teller could reasonably believe to be a gun (actually a knife) and telling the teller that it was a gun, amounts to use of a dangerous weapon or device); United States v. Cannon, 903 F.2d 849, 854 (1st Cir. 1990) (approving instruction that toy gun "may be dangerous if it instills fear in the average citizen, creating an immediate danger that a violent response will follow").

(5) The instruction on the lesser offense of unarmed bank robbery should be given if there is a factual dispute over use of a weapon and a jury finding of the lesser-included offense would not be irrational. United States v. Ferreira, 625 F.2d 1030, 1031-33 (1st Cir. 1980). The defendant, however, can waive the right to a lesser-included offense charge. United States v. Lopez Andino, 831 F.2d 1164, 1171 (1st Cir. 1987) (criminal civil rights charges).

(6) If an aiding and abetting charge is given for armed bank robbery, the jury should be instructed that the shared knowledge requirement, see Instruction 4.18.02 (Aid and Abet), extends to both the robbery and the understanding that a weapon would be used. Knowledge includes notice of the "likelihood" of a weapon's use—apparently something more than simple constructive knowledge, but less than actual knowledge. United States v. Spinney, 65 F.3d 231, 236-37 (1st Cir. 1995). "[A]n enhanced showing of constructive knowledge will suffice." Id. at 237.

(7) "Proof of federal insurance at the time of the robbery is an essential element for conviction under 18 U.S.C. § 2113," and the First Circuit has admonished the government to pay more attention to the temporal requirement in meeting the evidentiary burden. United States v. Judkins, 267 F.3d 22, 23 & n.1 (1st Cir. 2001).

4.18.2119 Carjacking, 18 U.S.C. § 2119

[Updated:7/31/03]

[Defendant] is charged with carjacking. It is against federal law to take a motor vehicle by force and violence or intimidation with intent to cause death or serious bodily injury. For you to find the defendant guilty of this crime you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

> First, that [defendant] knowingly took a motor vehicle from [name] by force and violence or by intimidation;
>
> Second, that the motor vehicle previously had been transported, shipped, or received across state or national boundaries;
>
> Third, that [defendant] intended to cause death or seriously bodily harm at the time [he/she] demanded or took control of the motor vehicle; [and]
>
> [Fourth, that serious bodily injury [death] resulted].

"Intimidation" is actions or words used for the purpose of making someone else fear bodily harm if he or she resists. The actual courage or timidity of the victim is irrelevant. The actions or words must be such as to intimidate an ordinary, reasonable person.

"Bodily injury" means a cut, abrasion, bruise, burn, disfigurement, physical pain, illness; or impairment of the function of a bodily member, organ or mental faculty; or any other injury to the body, no matter how temporary.

"Serious bodily injury" means bodily injury that involves a substantial risk of death or extreme physical pain or protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty. It "resulted" from the carjacking if it was caused by the actions of the carjacker at any time during the commission of the carjacking.

"Knowingly" means that the act was done voluntarily and intentionally and not because of mistake or accident.

Comment

(1) The fourth element affects the available sentence. Under Jones v. United States, 526 U.S. 227, 252 (1999), unless the aggravating conduct is charged and proven beyond a reasonable doubt as part of the offense, the sentence enhancements will not apply (maximum of 15 years without the fourth element; maximum of 25 years if serious bodily injury results; maximum of life imprisonment or death if death results). 18 U.S.C. § 2119(1)-(3).

(2) According to United States v. Rosario-Diaz, 202 F.3d 54, 63 (1st Cir. 2000), the Supreme

Court held in Holloway v. United States, 526 U.S. 1, 8 (1999), that "the mental state required by the statute ('intent to cause death or serious bodily harm') is measured at the moment that the defendant demands or takes control of the vehicle. The focus of the statute is narrow." The intent may be conditional or unconditional. In other words, it is sufficient that the defendant intends to cause death or serious bodily harm only in the face of resistance by the victim. Holloway, 526 U.S. at 7-10. If the charge is aiding and abetting, "the government must prove that the [aiding and abetting] defendant intended to cause death or serious bodily injury." United States v. Otero-Mendez, 273 F.3d 46, 52 (1st Cir. 2001). The First Circuit has not decided whether that means to a "practical certainty" or only that the defendant be "on notice." Id. at 52; accord United States v. Evans-Garcia, 322 F.3d 110, 114 n.5 (1st Cir. 2003). It has also described the scope of aider and abettor liability as "interesting" and "intriguing" and the case law as "remarkably silent." Ramirez-Burgos v. United States, 313 F.3d 23, 31 (1st Cir. 2002).

(3) The word "knowingly" is inserted because of this language in United States v. Rivera-Figueroa, 149 F.3d 1, 4 (1st Cir. 1998) (internal citations omitted): "[W]e may assume that a defendant who 'takes a motor vehicle' must know what he is doing, and that this knowledge must be possessed by a defendant who merely directs another to act (and so is liable as a principal), or assists the taker (and is so liable as an aider and abettor). But nothing in the statute requires that the taking be an ultimate motive of the crime. It is enough that the defendant be aware that the action in which he is engaged, whether by himself or through direction or assistance to another, involves the taking of a motor vehicle."

(4) The definitions of bodily injury and serious bodily injury come from 18 U.S.C. § 1365(g)(3), cross-referenced in the carjacking statute. The list should be shortened to the ones pertinent to the offense charged. If the conduct is within the special maritime and territorial jurisdiction, certain sex offenses are also included. 18 U.S.C. §§ 2241-42. The definition of "resulted" comes from Ramirez-Burgos v. United States, 313 F.3d 23, 30 n.9 (1st Cir. 2002), where the court also said: "We do not here set forth the temporal limits of a carjacking under § 2119. But we reaffirm, without hesitation, the commission of a carjacking continues at least while the carjacker maintains control over the victim and her car."

(5) The statute requires that the motor vehicle have been transported, shipped or received in interstate or foreign commerce. "Commerce" is defined in 18 U.S.C. § 10 as respectively "commerce between one State, Territory, Possession, or the District of Columbia, and another State, Territory, Possession, or the District of Columbia" or "commerce with a foreign country." "The jurisdictional element of 18 U.S.C. § 2119 requires that the government prove that the car in question has been moved in interstate commerce, at some time." Otero-Mendez, 273 F.3d at 51.

(6) In cases of interpretive difficulty, it may be helpful to remember that the Supreme Court has said that the carjacking statute is modeled on three other statutes—18 U.S.C. § 2111, 2113 and 2118. Jones, 526 U.S. at 235 & n.4.

4.18.2252 Possession of Child Pornography, 18 U.S.C. § 2252A(a)(5)(B)

[Updated: 9/3/04]

[Defendant] is accused of knowingly possessing child pornography that has [been mailed; moved in interstate or foreign commerce]. It is against federal law to possess child pornography that has [been mailed; moved in interstate or foreign commerce]. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that [defendant] knowingly possessed [*e.g.*, book; videotape; computer disk];

Second, that the [_____] contained at least one image of child pornography;

Third, that [defendant] knew that [_____] contained an image of child pornography; and

Fourth, that the image of child pornography had [been mailed; moved in interstate or foreign commerce].

But if you find that [defendant]: (1) possessed fewer than three images of child pornography; and (2) promptly and in good faith took reasonable steps to destroy each such image and did not retain the image or allow any person to access the image or a copy of the image [or reported the matter to a law enforcement agency and provided that law enforcement agency access to each such image], then you shall find [defendant] not guilty. It is the government's burden to prove beyond a reasonable doubt all the elements I listed previously and, in addition, that [defendant]'s possession does not fit within the rule I have just described.

"Knowingly" means that the act was done voluntarily and intentionally and not because of mistake or accident.

"Possess" means to exercise authority, dominion or control over something. The law recognizes different kinds of possession.

["Possession" includes both actual and constructive possession. A person who has direct physical control of something on or around his or her person is then in actual possession of it. A person who is not in actual possession, but who has both the power and the intention to exercise control over something is in constructive possession of it. Whenever I use the term "possession" in these instructions, I mean actual as well as constructive possession.]

["Possession" [also] includes both sole possession and joint possession. If one person alone has actual or constructive possession, possession is sole. If two or more persons share actual or constructive possession, possession is joint. Whenever I have used the word "possession" in these instructions, I mean joint as well as sole possession.]

"Child pornography" is any [photograph; film; video; picture; computer image; computer-generated image], where a person under age 18 engaging in sexually explicit conduct was used to produce the [photograph; computer image; etc.].

"Sexually explicit conduct" includes any *one* of the following five categories of conduct, whether actual or simulated: (1) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex; (2) bestiality; (3) masturbation; (4) sadistic or masochistic abuse; or (5) lascivious exhibition of the genital or pubic area of any person.

Whether an image of the genitals or pubic area constitutes a "lascivious exhibition" requires a consideration of the overall content of the material. In considering the overall content of the image, you may, but are not required to, consider the following factors: (1) whether the genitals or pubic area are the focal point of the image; (2) whether the setting of the image is sexually suggestive, for example, a location generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose or inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the image suggests sexual coyness or a willingness to engage in sexual activity; (6) whether the image appears intended or designed to elicit a sexual response in the viewer. An image need not involve all of these factors to constitute a "lascivious exhibition." It is for you to decide the weight, or lack of weight, to be given to any of the factors I just listed. This list of factors is not comprehensive and you may consider other factors specific to this case that you find relevant.

An image has been "shipped or transported in interstate or foreign commerce" if it has been transmitted over the Internet or over telephone lines.

Comment

(1) It seems unnecessary to define "computer." If elaboration is required, the statute provides one: "an electronic, magnetic, optical, electromechanical, or other high speed data processing device performing logical, arithmetic, or storage functions." 18 U.S.C. § 2256(6) (referring to 18 U.S.C. § 1030(e)(1)).

(2) The instruction can easily be modified for a charge of transportation or receipt. For these charges, however, the fewer-than-three-images defense is not available. See 18 U.S.C. § 2252A(d).

(3) For juror comprehension, we have not used the statutory term "visual depiction." Instead, we recommend replacing it with the type of image at issue in the case, *e.g.*, photograph or computer-generated image. There is a broader definition of "visual depiction" that may be appropriate in some cases. See 18 U.S.C. 2256(5).

(4) The definition of child pornography in this instruction includes only the language from 18 U.S.C. § 2256(8)(A). In Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), the Supreme Court held subsections (B) and (D) of 18 U.S.C. § 2256(8) unconstitutional. The Court did not rule on subsection (C) – which prohibits photographs, computer images, etc. that have "been created,

adapted, or modified to appear that an identifiable [person under age 18] is engaging in sexually explicit conduct" – referring to it as covering "computer morphing." 535 U.S. at 242. It said: "Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in [New York v. Ferber, 458 U.S. 747 (1982)]." Id. (In Ferber the Court upheld a prohibition on distributing material that depicts a sexual performance by an actual child.) The Supreme Court added: "Respondents do not challenge this provision, and we do not consider it." Id.

(5) The definitions of sexually explicit conduct should be pared down to those material to the actual case. They are taken largely from 18 U.S.C. § 2256. The elaboration of "lascivious" comes from United States v. Amirault, 173 F.3d 28, 31 (1st Cir. 1999).

(6) "Identifiable" is defined in 18 U.S.C. § 2256(9).

(7) "Interstate commerce" and "foreign commerce" are defined in 18 U.S.C. § 10. "Under the case law, proof of transmission of pornography over the Internet or over telephone lines satisfies the interstate commerce element of the offense." United States v. Hilton, 257 F.3d 50, 54 (1st Cir. 2001). The First Circuit addressed the constitutionality of the commerce jurisdictional element for the analogous § 2251(a) in United States v. Morales-DeJesus, 372 F.3d 6 (1st Cir. 2004).

(8) An alternative jurisdictional basis for the crime involves production of child pornography using materials that moved in interstate commerce. 18 U.S.C. § 2252A(a)(5)(B).

4.18.2314 Interstate Transportation of Stolen Money or Property, 18 U.S.C. § 2314

[Updated: 6/14/02]

[Defendant] is accused of taking stolen [money; property], from [state] to [state], on or about [date]. It is against federal law to transport [money; property] from one state to another knowing that the [money; property] is stolen. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that the [money; property] was stolen;

Second, that [defendant] took the [money; property] from [state] to [state], or willfully caused it to be taken;

Third, that, when [defendant] took the [money; property] from [state] to [state], or willfully caused it to be taken, [he/she] knew that it was stolen;

Fourth, that the [money; property] [totaled; was worth] $5,000 or more.

It does not matter whether [defendant] stole the [money; property] or someone else did. However, for you to find [defendant] guilty of this crime, it must be proven beyond a reasonable doubt that [he/she] took at least $5,000 [worth of property] or willfully caused at least $5,000 [worth of property] to be taken from [state] to [state] knowing it was stolen.

Comment

(1) The government must prove that a defendant caused stolen money or property to be transported; it is not necessary to prove that he or she actually transmitted or transported the money or property himself or herself. United States v. Doane, 975 F.2d 8, 11 (1st Cir. 1992).

Where liability is based on causing transportation rather than on transporting, the government must prove that the causation was "willful." United States v. Leppo, 177 F.3d 93, 97 (1st Cir. 1999). The willfulness requirement derives from 18 U.S.C. § 2(b), not from 18 U.S.C. § 2314 itself, and applies automatically, even where the indictment makes no reference to aider and abettor liability under section 2(b). Id.

The First Circuit has left open the precise definition of the "willfulness" mental state. Ignorant causation-in-fact is not sufficient, but the court has not necessarily rejected reasonable foreseeability. See id. at 96-97. Accordingly, there is no clear guidance from the court on the proper definition of "willfully" for purposes of this statute. Trial judges may wish to use the definition proposed for 18 U.S.C. § 2(b), see Pattern Instruction 4.18.02 (Aid and Abet), unless the First Circuit clearly rules that a lesser mental state suffices.

(2) Unexplained possession of recently stolen money or property may be used to support an inference that the possessor knew it was stolen in the light of surrounding circumstances shown by evidence in the case so long as the jury is instructed that the inference is permissible, not mandatory.

United States v. Thuna, 786 F.2d 437, 444-45 (1st Cir. 1986); see also United States v. Lavoie, 721 F.2d 407, 409-10 (1st Cir. 1983) (same in context of 18 U.S.C. § 2313); cf. Freije v. United States, 386 F.2d 408, 410-11 (1st Cir. 1967) (defendants who come forward with an explanation for possession of stolen vehicles are entitled to an instruction that the explanation, if believed, negates any inference of knowledge arising from mere fact of possession). Such possession also may support an inference regarding interstate transportation. See Thuna, 786 F.2d at 444-45 (possession in one state of property recently stolen in another state, if not satisfactorily explained, is a circumstance from which a jury may infer that the person knew the property to be stolen and caused it to be transported in interstate commerce).

(3) This instruction can be modified for the transportation, transmission or transfer of stolen money or property in foreign commerce or for items converted or taken by fraud. 18 U.S.C. § 2314.

(4) This instruction also can be adapted for cases concerning the transportation of stolen vehicles. 18 U.S.C. § 2312.

(5) For cases in which the definition of "value" is important, 18 U.S.C. § 2311 defines "value" as "the face, par, or market value, whichever is the greatest." The conventional definition of "market value" is the price that a willing buyer would pay a willing seller. See, e.g., United States v. Wentz, 800 F.2d 1325, 1326 (4th Cir. 1986); United States v. Bakken, 734 F.2d 1273, 1278 (7th Cir. 1984); United States v. Reid, 586 F.2d 393, 394 (5th Cir. 1978).

4.18.2422(b) Coercion and Enticement, 18 U.S.C. § 2422(b)

[New: 4/22/03]

[Defendant] is charged with using [the mail] [a facility or means of interstate or foreign commerce] to [persuade] [induce] [entice] [coerce] someone under age eighteen to engage in [prostitution] [sexual activity] for which a person can be charged with a criminal offense [, or with attempting to do so]. It is against federal law to engage in such conduct [or to attempt to do so]. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt:

First, that on about the date charged, [defendant] knowingly [persuaded] [induced] [enticed] [coerced] the person in question to engage in [prostitution] [sexual activity];

Second, that he/she did so by using [the mail] [a facility or means of interstate or foreign commerce];

Third, that the person at the time was less than eighteen years old; and

Fourth, that the sexual activity was a criminal offense.

[Define the criminal offense that the government claims the sexual activity amounted to]

"Knowingly" means that the act was done voluntarily and intentionally and not because of mistake or accident.

"Interstate commerce" includes commerce between one state, territory, possession, or the District of Columbia and another state, territory, possession and the District of Columbia.

"Foreign commerce" includes commerce with a foreign country.

[Use Attempt instruction, see Pattern 4.18.00, as appropriate.]

Comment

(1) The Sixth Circuit has said: "Congress has made a clear choice to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves. Hence, a conviction under the statute only requires a finding that the defendant had an intent to persuade or to attempt to persuade." United States v. Bailey, 228 F.3d 637, 639 (6th Cir. 2000), cert. denied, 532 U.S. 1009 (2001).

(2) On an attempt charge, several courts have concluded that the victim need not actually be under age eighteen. See, e.g., United States v. Root, 296 F.3d 1222, 1227 (11th Cir. 2002), cert. denied, 537 U.S. 1176 (2003) ("We conclude that an actual minor victim is not required for an attempt conviction under 18 U.S.C. § 2422(b).").

(3) Sexual activity includes the production of child pornography as defined in 18 U.S.C. § 2256(8). 18 U.S.C. § 2427.

4.21.841(a)(1)A Possession With Intent to Distribute a Controlled Substance, 21 U.S.C. § 841 (a) (1)

[Updated: 2/17/05]

[Defendant] is accused of possessing [controlled substance] on or about [date] intending to distribute it to someone else. It is against federal law to have [controlled substance] in your possession with the intention of distributing it to someone else. For you to find [defendant] guilty of this crime you must be convinced that the government has proven each of these things beyond a reasonable doubt:

> First, that [defendant] on that date possessed [controlled substance], either actually or constructively;
>
> Second, that [he/she] did so with a specific intent to distribute the [controlled substance] over which [he/she] had actual or constructive possession; and
>
> Third, that [he/she] did so knowingly and intentionally.

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

[A person's intent may be inferred from the surrounding circumstances. Intent to distribute may, for example, be inferred from a quantity of drugs larger than that needed for personal use. In other words, if you find that [defendant] possessed a quantity of [controlled substance]—more than that which would be needed for personal use—then you may infer that [defendant] intended to distribute [controlled substance]. The law does not require you to draw such an inference, but you may draw it.]

The term "possess" means to exercise authority, dominion or control over something. The law recognizes different kinds of possession.

["Possession" includes both actual and constructive possession. A person who has direct physical control of something on or around his or her person is then in actual possession of it. A person who is not in actual possession, but who has both the power and the intention to exercise control over something is in constructive possession of it. Whenever I use the term "possession" in these instructions, I mean actual as well as constructive possession.]

["Possession" [also] includes both sole possession and joint possession. If one person alone has actual or constructive possession, possession is sole. If two or more persons share actual or constructive possession, possession is joint. Whenever I have used the word "possession" in these instructions, I mean joint as well as sole possession.]

If you find [defendant] guilty, you will also have to answer one or more questions under the standard of proof beyond a reasonable doubt concerning the quantity of the substance involved, which may affect the potential sentence.

Comment

(1) The enumeration of the elements of this crime is based upon United States v. Latham, 874 F.2d 852, 863 (1st Cir. 1989); see also United States v. Akinola, 985 F.2d 1105, 1109 (1st Cir. 1993).

(2) After Apprendi v. New Jersey, 530 U.S. 466 (2000), it will be necessary to get a verdict on quantity range if the government is seeking (and has appropriately charged) higher than the maximum penalties contained in the catchall penalty provision of 21 U.S.C. § 841 for the particular drug involved (20 years for substances with a cocaine base, 18 U.S.C. § 841(b)(1)(C), and 5 years for a marijuana substance, id. § 841(b)(1)(D)). See United States v. Perez-Ruiz, 353 F.3d 1, 16 (1st Cir. 2003) ("The jury instructions must supply a proper linkage." "Absent either a special verdict form or a suitably formed jury instruction (requiring a finding beyond a reasonable doubt [concerning quantity]), the verdict did not cure the potential Apprendi problem"); United States v. Duarte, 246 F.3d 56, 60 (1st Cir. 2001); United States v. Robinson, 241 F.3d 115, 119 (1st Cir. 2001); United States v. Caba, 241 F.3d 98, 101 (1st Cir. 2001). (The same holds true for the enhanced penalty for cases where death or serious bodily injury resulted. 21 U.S.C. § 841(b)(1)(C). The standards for the latter charge are discussed in United States v. Soler, 275 F.3d 146, 152-53 (1st Cir. 2002). Soler also discusses the standards for an enhancement case based upon nearness to a school under 21 U.S.C. § 860. Id. at 153-55.) But the First Circuit has held that even after Apprendi, quantity is not an element of the offense, and that the government needs "to prove *only* that the offense 'involved' a particular type and quantity of drug, not that the defendant knew that he was distributing that particular drug type and quantity." United States v. Collazo-Aponte, 281 F.3d 320, 326 (1st Cir. 2002); accord Derman v. United States, 298 F.3d 34, 42-43 (1st Cir. 2002) ("in a drug conspiracy case, the jury should determine the existence *vel non* of the conspiracy as well as any facts about the conspiracy that will increase the possible penalty for the crime of conviction beyond the default statutory maximum; and the judge should determine, at sentencing, the particulars regarding the involvement of each participant in the conspiracy") (footnote omitted); United States v. Colon-Solis, 354 F.3d 101, 103 (1st Cir. 2004) ("we derive the applicable statutory maximum in a drug conspiracy case from a conspiracy-wide perspective"). We suggest the following addition to the verdict form:

> How much [specify controlled substance], in total, was involved? [check ***only*** one]
>
> _____ at least [specify threshold quantity to qualify for penalties in 21 U.S.C. § 841(b)(1)(A)] of [specify controlled substance]
> _____ at least [specify threshold quantity to qualify for penalties in § 841(b)(1)(B)] of [specify controlled substance]
> _____ less than [specify threshold quantity to qualify for penalties in § 841(b)(1)(B)] of [specify controlled substance]

In United States v. Nelson-Rodriguez, 319 F.3d 12 (1st Cir. 2003), however, the court stated that Derman "is not necessarily the last word on the subject," and detailed volume problems for "complex conspiracies" where "only the Supreme Court can provide final guidance" for the Apprendi issues. 319 F.3d at 46-47.

(3) The statutory penalty provisions applicable in a marijuana case are more complicated than those applicable in cases involving other controlled substances. Section 841(b)(1)(D), which would otherwise be the default penalty provision for a marijuana charge under 21 U.S.C. § 841(a), is explicitly limited by section 841(b)(4). 21 U.S.C. § 841(b)(1)(D) ("In the case of less than 50 kilograms of marihuana . . . such person shall, except as provided in paragraph[] (4) . . . of this subsection, be sentenced to a term of imprisonment of not more than 5 years. . . ."). Section 841(b)(4) provides that a person who distributes "a small amount of marihuana for no remuneration shall be treated as provided in section 844 [the section prohibiting simple possession]." Therefore, in accord with Apprendi v. New Jersey, 530 U.S. 466 (2000), any conviction under section 841 involving marijuana must also include a determination of the applicability of section 841(b)(4). See United States v. Lowe, 143 F. Supp. 2d 613 (S.D. W. Va. 2000) (discussing the applicability of section 841(b)(4) as the baseline penalty provision for section 841 marijuana cases); see, e.g., United States v. Miranda, 248 F.3d 434, 444-45 (5th Cir. 2001) (holding that the maximum sentence for conspiring to posses with the intent to distribute a measurable, but not specifically determined, amount of marijuana was governed by section 841(b)(4)). But see United States v. Duarte, 246 F.3d 56, 59 (1st Cir. 2001) (referring to section 841(b)(1)(D) as providing the "'default statutory maximum' . . . for a violation of 21 U.S.C. § 841(a)(1) involving marijuana," without discussing section 841(b)(4)).

Additionally, one court has held that section 841(b)(4) applies only to distribution (not possession with intent to distribute) charges. United States v. Laakkonen, 149 F. Supp. 2d 315, 318-19 (W.D. Ky. 2001).

(4) "Apprendi applies only when the disputed 'fact' enlarges the applicable statutory maximum and the defendant's sentence exceeds the original maximum." Caba, 241 F.3d at 101. It does not apply to mandatory minimum sentences, Harris v. United States, 536 U.S. 545 (2002), and it is not necessary to get a specific jury finding with respect to "guideline [factual] findings (including, inter alia, drug weight calculations) that increase the defendant's sentence, but do not elevate the sentence to a point beyond the lowest applicable statutory maximum." Caba, 241 F.3d at 101; accord United States v. Martinez-Medina, 279 F.3d 105, 122 (1st Cir. 2002) ("Apprendi does not apply to findings made for purposes of the sentencing guidelines, such as the court's determination that the [defendants] were accountable for [several] murders.").

(5) Quantity, see United States v. Roberts, 119 F.3d 1006, 1016-17 (1st Cir. 1997); United States v. Ocampo-Guarin, 968 F.2d 1406, 1410 (1st Cir. 1992), or quantity and purity can support an inference of intent to distribute. See United States v. Bergodere, 40 F.3d 512, 518 (1st Cir. 1994). One ounce of cocaine, however, is not sufficient to support the inference. Latham, 874 F.2d at 862-63. Other indicia of intent to distribute are scales, firearms and large amounts of cash. United States v. Ford, 22 F.3d 374, 382-83 (1st Cir. 1994).

(6) The defendant's intent to distribute must relate specifically to the controlled substance in his or her possession, not to "some unspecified amount of [controlled substance], that [he/she] did not

currently possess, at some unspecified time in the future." Latham, 874 F.2d at 861. However, the government need not prove that the defendant knew which particular controlled substance was involved. United States v. Hernandez, 218 F.3d 58, 65 (1st Cir. 2000); United States v. Kairouz, 751 F.2d 467, 468-69 (1st Cir. 1985) (affirming the instruction: "if defendant . . . 'intend[ed] to distribute a controlled substance, it does not matter that . . . [he has] made a mistake about what controlled substance it happen[ed] to be'") (alteration in original); see also United States v. Garcia-Rosa, 876 F.2d 209, 216 (1st Cir. 1989); United States v. Cheung, 836 F.2d 729, 731 (1st Cir. 1988). Similarly, the government is not required to prove that the defendant knew the specific weight or amount of the controlled substance involved. United States v. Collazo-Aponte, 281 F.3d 320, 325-26 (1st Cir. 2002).

(7) For a discussion on the issue of "possession," see Akinola, 985 F.2d at 1109, Ocampo-Guarin, 968 F.2d at 1409-10, and United States v. Almonte, 952 F.2d 20, 23-24 (1st Cir. 1991). "[I]ntent is an element of constructive possession, which 'exists when a person "knowingly has the power and intention at a given time to exercise dominion and control over an object, either directly or through others."'" United States v. Paredes-Rodriguez, 160 F.3d 49, 54 (1st Cir. 1998). Inability to escape with the contraband does not prevent a defendant from satisfying the power-to-exercise-control part of constructive possession. United States v. Van Horn, 277 F.3d 48, 54-55 (1st Cir. 2002).

(8) The First Circuit has affirmed the refusal to give a "transitory possession as defense" instruction, United States v. Teemer, 394 F.3d 59, 64-65 (1st Cir. 2005), thereby disagreeing with United States v. Mason, 233 F.3d 619, 622-24 (D.C. Cir. 2000).

21.841(a)(1)B Distribution of a Controlled Substance, 21 U.S.C. § 841(a)(1)

[Updated: 10/15/03]

[Defendant] is accused of distributing [controlled substance] on or about [date]. It is against federal law to distribute, that is, to transfer [controlled substance] to another person. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

> First, that on the date alleged [defendant] transferred [controlled substance] to another person;
>
> Second, that [he/she] knew that the substance was [controlled substance]; and
>
> Third, that [defendant] acted intentionally, that is, that it was [his/her] conscious object to transfer the controlled substance to another person.

It is not necessary that [defendant] have benefitted in any way from the transfer.

If you find [defendant] guilty, you will also have to answer one or more questions concerning the quantity of the substance involved, which may affect the potential sentence.

Comment

(1) The statute defines "distribute" as meaning "to deliver," 21 U.S.C. § 802(11), which in turn is defined as meaning "the actual constructive or attempted *transfer* of a controlled substance, whether or not there exists an agency relationship." § 802(8) (emphasis added). Therefore, distribution includes both selling and buying. United States v. Castro, 279 F.3d 30, 34 (1st Cir. 2002) (rejecting defendant's argument that facilitating the purchase of drugs did not constitute distribution). However, the court may refuse to instruct on the meaning of the term "distribute" "because it is within the common understanding of jurors." United States v. Acevedo, 842 F.2d 502, 506-07 (1st Cir. 1988).

(2) "[D]eliver[y] or transfer [of] possession of a controlled substance to another person" constitutes distribution regardless of whether the transferor has "any financial interest in the transaction." United States v. Morales-Cartagena, 987 F.2d 849, 852 (1st Cir. 1993). Thus, courts are in broad agreement that the mere sharing of narcotics can support a distribution charge. See, e.g., United States v. Corral-Corral, 899 F.2d 927, 936 n.7 (10th Cir. 1990); United States v. Ramirez, 608 F.2d 1261, 1264 (9th Cir. 1979). Distribution, however, does not include "'the passing of a drug between joint possessors who simultaneously acquired possession at the outset for their own use.'" United States v. Rush, 738 F.2d 497, 514 (1st Cir. 1984) (quoting United States v. Swiderski, 548 F.2d 445, 450-51 (2d Cir. 1977)) (overturning distribution conviction of husband and wife who jointly purchased and shared 4 grams of cocaine).

(3) "[I]ntent is an element of constructive possession, which 'exists when a person "knowingly has the power and intention at a given time to exercise dominion and control over an object, either directly or through others."'" United States v. Paredes-Rodriguez, 160 F.3d 49, 54 (1st Cir. 1998) (citations omitted).

(4) See Comment (2) to Instruction 4.21.841(a)(1) concerning instructions in enhanced penalty cases.

4.21.841(a)(1)C Manufacture of a Controlled Substance, 21 U.S.C. §§ 841(a)(1), 802(15)

[Updated: 6/14/02]

[Defendant] is accused of manufacturing [controlled substance] on or about [date]. It is against federal law to manufacture, that is to produce or prepare, [controlled substance]. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that [defendant] manufactured [controlled substance];

Second, that [he/she] knew that the substance [he/she] was manufacturing was [controlled substance]; and

Third, that [defendant] acted intentionally, that is, that it was [his/her] conscious object to manufacture the controlled substance.

The term "manufacture" as it relates to this case means the production, preparation, propagation, compounding or processing of a controlled substance, either directly or indirectly or by extraction from substances of natural origin. The term "manufacture" includes the act of growing.

If you find [defendant] guilty, you will also have to answer one or more questions concerning the quantity of the substance involved, which may affect the potential sentence.

Comment

(1) The definition of manufacture includes other processes in addition to those listed above, *e.g.*, "independently by means of chemical synthesis or by a combination of extraction and chemical synthesis." 21 U.S.C. § 802(15).

(2) Marijuana grown for personal use falls within the definition of "manufacture." United States v. One Parcel of Real Property (Great Harbor Neck), 960 F.2d 200, 205 (1st Cir. 1992); see also 21 U.S.C. § 802(22) ("'[P]roduction' includes the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.").

(3) "[I]ntent is an element of constructive possession, which 'exists when a person "knowingly has the power and intention at a given time to exercise dominion and control over an object, either directly or through others."'" United States v. Paredes-Rodriguez, 160 F.3d 49, 54 (1st Cir. 1998) (citations omitted).

(4) See Comment (2) to Instruction 4.18.841(a)(1) concerning instructions in enhanced penalty cases.

4.21.846 Conspiracy, 21U.S.C. § 846

[Updated: 6/14/02]

See Instruction 4.18.371(1).

4.21.853 Drugs—Forfeiture, 21 U.S.C. § 853

[Updated: 10/14/05]

In light of your verdict that [defendant] is guilty of the [drug crime], you must now also decide whether [he/she] should surrender to the government [his/her] ownership interest in certain property as a penalty for committing that crime. We call this "forfeiture."

On this charge, federal law provides that the government is entitled to forfeiture, if it proves, by a preponderance of the evidence, that the property in question was proceeds of the crime or derived from proceeds of the crime.

Note that this is a different standard of proof than you have used for the [drug crime] charges. A "preponderance of the evidence" means an amount of evidence that persuades you that something is more likely true than not true. It is not proof beyond a reasonable doubt.

"Proceeds" are any property that [defendant] obtained, directly or indirectly, as the result of the crime.

If the government proves that property was acquired by [defendant] during the period of the [drug crime] or within a reasonable time after such period and there was no likely source other than the [drug crime] for the property, you may presume that the property is proceeds or traceable to the proceeds of the [drug crime]. You may presume this even if the government has presented no direct evidence to trace the property to drug proceeds, but you are not required to make this presumption. [Defendant] may present evidence to rebut this presumption, but [he/she] is not required to present any evidence.

While deliberating, you may consider any evidence admitted during the trial. However, you must not reexamine your previous determination regarding [defendant]'s guilt of the [drug crime]. All of my previous instructions concerning consideration of the evidence, the credibility of witnesses, your duty to deliberate together and to base your verdict solely on the evidence without prejudice, bias or sympathy, and the requirement of unanimity apply here as well.

On the verdict form, I have listed the various items that the government claims [defendant] should forfeit. You must indicate which, if any, [defendant] shall forfeit.

Do not concern yourselves with claims that others may have to the property. That is for the judge to determine later.

Comment

(1) This forfeiture instruction can be used for most drug offenses. 21 U.S.C. § 853(a).

(2) The right to a jury trial on a criminal forfeiture count is not constitutional. Libretti v. United States, 516 U.S. 29 (1995). Instead, it is created solely by rule as follows:

> Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

Fed. R. Crim P. 32.2(b)(4). The language of the Rule seems to contemplate a bifurcated proceeding, see also 2000 Advisory Committee Note. Pre-Libretti First Circuit caselaw left bifurcation to the trial judge's discretion. See, e.g., United States v. Desmarais, 938 F.2d 347, 349-50 (1st Cir. 1991); United States v. Maling, 737 F. Supp. 684, 705 (D. Mass. 1990), aff'd, sub nom. United States v. Richard, 943 F.2d 115 (1st Cir. 1991); United States v. Saccoccia, 58 F.3d 754, 770 (1st Cir. 1995).

The First Circuit has held that United States v. Apprendi, 530 U.S. 466 (2000) does not disturb the Libretti holding as it applies to forfeiture proceedings. United States v. Keene, 341 F.3d 78, 85-86 (1st Cir. 2003) (Apprendi's requirements do not apply to criminal forfeitures issues under 21 U.S.C. § 853 because "forfeiture is not viewed as a separate charge, but as 'an aspect of punishment imposed following conviction of a substantive charge'") (citation omitted); see also United States v. Hall, 411 F.3d 651, 654 (6th Cir. 2005) ("Apprendi did not affect Libretti's holding that criminal forfeitures are part of the sentence alone…. To our knowledge, every other circuit to consider the issue after Apprendi has reached the same conclusion") (internal citation omitted) (citing cases from the First, Fourth, Fifth, Seventh, Ninth and Eleventh circuits). The First Circuit has not addressed whether United States v. Booker, __ U.S. __, 125 S. Ct. 738 (2005) affects the vitality of Libretti, but caselaw from other circuits hold that, like Apprendi, Booker does not apply to criminal forfeiture proceedings. See United States v. Fruchter, 411 F.3d 377, 383 (2d Cir. 2005) (Because "[c]riminal forfeiture [under 18 U.S.C. § 3554] is, simply put, a different animal from determinate sentencing," Libretti remains the determinative decision post-Booker); Hall, 411 F.3d at 654-55 (holding that Booker does not "allow[] us to turn our back on the Supreme Court's prior ruling in this area (Libretti)" because criminal forfeiture [under 18 U.S.C. § 982(a)(2)] is "a form of indeterminate sentencing"); United States v. Tedder, 403 F.3d 836, 841 (7th Cir. 2005) ("There is no statutory maximum forfeiture, so Apprendi, and its successors, including Booker, do not alter this conclusion" that "the sixth amendment does not apply to forfeitures" [under 18 U.S.C. § 982]) (internal citations omitted).

(3) Rule 32.2 seems to indicate that the question of a money judgment is for the court only, and never for the jury. The text of 32.2(b)(1) divides its description of the court's role: "If the government seeks forfeiture of specific *property*, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a *personal money judgment*, the court must determine the amount of money that the defendant has to pay." Fed. R. Crim. P. 32.2(b)(1) (2002) (emphasis added). The jury's role is limited to the nexus determination for property: "Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant," Fed. R. Crim. P. 32.2(b)(4). There is no reference to the jury's role in a money judgment.

The advisory committee notes for the 2000 adoption support this distinction. After explicitly

taking no position on the correctness of allowing money judgments (the First Circuit permits them, see, e.g., United States v. Candelaria-Silva, 166 F.3d 19, 42 (1st Cir. 1999)), the notes go on to prescribe different decisional rules for the different kinds of judgments: when forfeiture of property is asked for, the court determines the nexus; when a personal money judgment is asked for, the court determines the amount. Fed. R. Crim. P. 32.2(b)(1), advisory committee's note. Then, in discussing subdivision (b)(4), the notes state, "The *only* issue for the jury in such cases would be whether the government has established the requisite nexus between the property and the offense." Fed. R. Crim. P. 32.2(b)(4), advisory committee's note (emphasis added). No mention is made of a role for the jury with respect to personal money judgments.

This distinction has been noted by some commentators, see, e.g., 3 Charles Alan Wright, et al., Federal Practice and Procedure: Criminal 3d § 547, at 448 (2004) ("Rule 32.2(b)(4) does not offer any jury right in regards to personal money judgments or substitute assets"); Smith, supra, at 14-54 ("There is *no* right to a jury trial of the forfeiture issue if . . . the government seeks a personal money judgment instead of an order forfeiting specific assets") (emphasis supplied), but has not been dealt with by the courts. Although there is room for some uncertainty, this seems to be the best interpretation of the rule.

(4) The First Circuit has held post-Apprendi that the standard of proof is preponderance of the evidence. Keene, 341 F.3d at 85-86 (refusing to apply Apprendi's requirements to criminal forfeitures, and holding that the preponderance "evidentiary standard used to impose the forfeiture was proper") (citing United States v. Rogers, 102 F.3d 641, 647 (1st Cir. 1996) (observing with approval that "almost every circuit that has pronounced on the issue has held that the standard of proof under section 853 . . . is preponderance of the evidence.")). That standard, however, may not apply to every type of forfeiture. See 18 U.S.C. § 2253(e) ("Order of Forfeiture—The Court shall order forfeiture of property referred to in subsection (a) if the trier of fact determines, *beyond a reasonable doubt*, that such property is subject to forfeiture") (emphasis supplied) (applying to a "person who is convicted of an offense under this chapter [ch. 110 Sexual Exploitation of Children] involving a visual depiction . . ., or who is convicted of an offense under section 2421, 2422, or 2423 of chapter 117 [Transport for Illegal Sexual Activity]).

(5) The rebuttable presumption comes from 21 U.S.C. § 853(d).

(6) The rights of third parties are determined in an ancillary proceeding before the judge without a jury. 21 U.S.C. § 853(n)(2); 2000 Advisory Committee Note to Rule 32.2(b)(4).

4.21.952 Importation of a Controlled Substance, 21 U.S.C. §§ 952, 960

[New: 7/31/03]

[Defendant] is accused of importing [controlled substance]into the United States. It is against federal law to import [controlled substance] into the United States. For you to find [defendant] guilty of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

First, that [defendant] imported [controlled substance];

Second, that [defendant] did so knowingly or intentionally; and

Third, that [defendant] knew that the [controlled substance] came from outside the United States.

Comment

(1) In United States v. Geronimo, 330 F.3d 67, 72 (1st Cir. 2002), the First Circuit confirmed that section 960 incorporates a scienter requirement into section 952 and that "to convict a principal actor of importing a controlled substance, the prosecution must prove that the accused knew the drugs were imported." To do that, the court concluded that the government must prove that the defendant knew the drugs were of foreign origin. In United States v. Mejia-Lozano, 829 F.2d 269 (1st Cir. 1987), however, the court held that the defendant need not know the destination of the drugs. In Mejia, it was not a sufficient defense that the defendant did not know that her flight from Bogota, Columbia to Geneva, Switzerland, would stop in transit in San Juan, Puerto Rico. "We hold that the offense was complete the moment defendant, knowingly in possession of cocaine, landed in this country with the contraband, regardless of her knowledge of the aircraft's itinerary or the planned terminus of her journey." Id. at 272.

(2) For a definition of "knowingly" see Pattern 2.14.

(3) As the First Circuit observed in Geronimo, "[t]he term 'import' is defined in the statute as 'any bringing in or introduction of [an] article into any area (whether or not such bringing in or introduction constitutes an importation within the meaning of the tariff laws of the United States).' 21 U.S.C. § 951(a)(1)." 330 F.3d at 72 n.1.

4.26.7201 Income Tax Evasion, 26 U.S.C. § 7201

[Updated: 2/12/03]

[Defendant] is charged with federal income tax evasion. It is against federal law intentionally to evade or defeat the assessment or payment of federal income tax. For you to find [defendant] guilty of this crime, the government must prove the following things beyond a reasonable doubt:

> First, that [defendant] owed substantially more federal income tax for the year[s] [_____] than was indicated as due on [his/her] income tax return;
>
> Second, that [defendant] intended to evade or defeat the assessment or payment of this tax; and
>
> Third, that [defendant] willfully committed an affirmative act in furtherance of this intent.
>
> [Fourth, that [defendant] did not have a good-faith belief that [he/she] was complying with the provisions of [specific provision]. A belief may be in good faith even if it is unreasonable.]

A person may not be convicted of federal tax evasion on the basis of a willful *omission* alone; he or she also must have undertaken an affirmative act of evasion. The affirmative act requirement can be met by [the filing of a false or fraudulent tax return that substantially understates taxable income or by other affirmative acts of concealment of taxable income such as keeping a double set of books, making false entries or invoices or documents, concealing assets, handling affairs so as to avoid keeping records, and so forth].

[Defendant] acted "willfully" if the law imposed a duty on [him/her], [he/she] knew of the duty, and [he/she] voluntarily and intentionally violated that duty. Thus, if [defendant] acted in good faith, [he/she] cannot be guilty of this crime. The burden to prove intent, as with all other elements of the crime, rests with the government. This is a subjective standard: what did [defendant] honestly believe, not what a reasonable person should have believed. Negligence, even gross negligence, is not enough to meet the "willful" requirement.

Comment

(1) This instruction covers two distinct felony crimes under § 7201. A defendant may be charged with a "willful attempt to evade or defeat" either "the 'assessment' of a tax" or "the 'payment' of a tax." United States v. Hogan, 861 F.2d 312, 315 (1st Cir. 1988) (citing Sansone v. United States, 380 U.S. 343, 354 (1965)). "The elements of both crimes are the same." Id.

(2) The felony of tax evasion under § 7201 is distinguishable from the misdemeanor of failing to file a tax return under § 7203 in that it requires an affirmative "attempt to evade or defeat taxes." Sansone, 380 U.S. at 351; see also United States v. Waldeck, 909 F.2d 555, 557, 559 (1st Cir. 1990). "A mere willful failure to pay a tax" is not sufficient. Sansone, 380 U.S. at 351.

(3) Although § 7201 does not contain an explicit "substantiality" requirement, most circuits require the government to prove that the amount of tax evaded was substantial. See, e.g., United States v. Gonzales, 58 F.3d 506, 509 (10th Cir. 1995); United States v. Romano, 938 F.2d 1569, 1571 (2d Cir. 1991); United States v. Goodyear, 649 F.2d 226, 227 (4th Cir. 1981); United States v. Burkhart, 501 F.2d 993, 995 (6th Cir. 1974); McKenna v. United States, 232 F.2d 431, 436 (8th Cir. 1956). But see United States v. Marashi, 913 F.2d 724, 735 (9th Cir. 1990). The First Circuit appears to follow this majority approach. See United States v. Sorrentino, 726 F.2d 876, 879, 880 n.1 (1st Cir. 1984) (showing of substantiality required under net-worth method of proof) (citing United States v. Nunan, 236 F.2d 576 (2d Cir. 1956) (showing that a substantial tax was evaded required generally in § 7201 cases)); United States v. Morse, 491 F.2d 149, 153 n.3 (1st Cir. 1974) (showing of a substantial discrepancy required under bank-deposits method of proof). But the Government need not prove the exact amount due. Sorrentino, 726 F.2d at 880 n.1.

(4) "Willfulness" is an element of any crime under 26 U.S.C. §§ 7201-07. That term has been defined in the context of criminal tax cases as "requir[ing] the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." Cheek v. United States, 498 U.S. 192, 201 (1991); see also United States v. Olbres, 61 F.3d 967, 970 (1st Cir. 1995). Mistake, negligence and gross negligence are not sufficient to meet the willfulness requirement of these tax crimes. Hogan, 861 F.2d at 316; United States v. Aitken, 755 F.2d 188, 191-93 (1st Cir. 1985).

(5) Cheek also held that the government has the burden of "negating a defendant's claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws." 498 U.S. at 202. A defendant has a valid good-faith defense "whether or not the claimed belief or misunderstanding is objectively reasonable." Id.; see also Aitken, 755 F.2d at 190-92. However, a belief that the tax statutes are unconstitutional is "irrelevant to the issue of willfulness." Cheek, 498 U.S. at 206.

(6) The court may add an instruction on conscious avoidance "if a defendant claims a lack of knowledge, the facts suggest a conscious course of deliberate ignorance, and the instruction, taken as a whole, cannot be misunderstood as mandating an inference of knowledge." United States v. Littlefield, 840 F.2d 143, 147 (1st Cir. 1988). Such an instruction does not impermissibly lessen the government's burden of proof because "it goes to *knowledge* and not to willfulness." Hogan, 861 F.2d at 316 (emphasis added).

4.26.7203 Failure to File a Tax Return, 26 U.S.C. § 7203

[Updated: 2/12/03]

[Defendant] is charged with willful failure to file a tax return for the year[s] [_____]. It is against federal law to engage in such conduct. For you to find [defendant] guilty of this charge, the government must prove each of the following three things beyond a reasonable doubt:

First, that [defendant] was required to file an income tax return for the year[s] [_____];

Second, that [defendant] failed to file an income tax return for the year[s] in question; and

Third, that [defendant] acted willfully.

To act "willfully" means to violate voluntarily and intentionally a known legal duty to file, not to act as a result of accident or negligence.

Comment

(1) Failure to file a tax return under § 7203 is a misdemeanor. In the appropriate circumstances, the charge can be used as a lesser included offense for the crime of willful tax evasion under § 7201. See Spies v. United States, 317 U.S. 492, 497-99 (1943). "Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony." Id. at 499.

(2) See Comment to Instruction 4.26.7201 (Income Tax Evasion) for a discussion of willfulness, good faith and deliberate ignorance in the context of tax crimes. See also United States v. Turano, 802 F.2d 10, 11 (1st Cir. 1986) (stating that trial court's instruction on good-faith defense did not "improperly inject[ ] an objective element into the subjective willfulness inquiry"); United States v. Sempos, 772 F.2d 1, 2 (1st Cir. 1985) ("Financial or domestic problems . . . do not rule out willfulness. . . .").

4.26.7206 False Statements on Income Tax Return, 26 U.S.C. § 7206(1)

[Updated: 7/31/03]

[Defendant] is charged with willfully filing a false federal income tax return. It is against federal law to engage in such conduct. For you to find [defendant] guilty of this charge, the government must prove each of the following things beyond a reasonable doubt:

> First, that [defendant] made or caused to be made, a federal income tax return for the year in question that [he/she] verified to be true;
>
> Second, that the tax return was false as to a material matter;
>
> Third, that [defendant] signed the return willfully and knowing it was false; and
>
> Fourth, that the return contained a written declaration that it was made under the penalty of perjury.

A "material" matter is one that is likely to affect the calculation of tax due and payable, or to affect or influence the IRS in carrying out the functions committed to it by law, such as monitoring and verifying tax liability. A return that omits material items necessary to the computation of taxable income is not true and correct.

"Willfully" means a voluntary, intentional violation of a known legal duty.

Comment

(1) The elements come directly from United States v. Boulerice, 325 F.3d 75, 79-80 (1st Cir. 2003). They are somewhat redundant and arguably depart from the statutory language (which applies to anyone who "willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter," id. at 79), but it seems safest to use the elements as approved. The four elements have a long lineage (see string citation in Boulerice) and seem to go back to a charge by Judge Shadur, approved by the Seventh Circuit in 1982. United States v. Oggoian, 678 F.2d 671, 673 (7th Cir. 1982).

(2) Materiality is a question for the jury, and the definition of materiality here comes largely from United States v. DiRico, 78 F.3d 732, 735-36 (1st Cir. 1996). The standard is objective. United States v. Romanow, 509 F.2d 26, 28 (1st Cir. 1975). The government need not prove the taxpayer's knowledge of the materiality. United States v. Boulerice, 325 F.3d 75, 82 (1st Cir. 2003).

(3) The definition of "willfully" from United States v. Boulerice, 325 F.3d 75, 80 (1st Cir. 2003). See Comment to Instruction 4.26.7201 (Income Tax Evasion) for a discussion of willfulness, good faith and deliberate ignorance in the context of tax crimes. See also United States v. Pomponio, 429 U.S. 10, 11-13 (1976); United States v. Bishop, 412 U.S. 346, 360 (1973); United States v. Drape,

668 F.2d 22, 26 (1st Cir. 1982) ("Intent may be established where a taxpayer 'chooses to keep himself uninformed as to the full extent that [the return] is insufficient.'" (quoting Katz v. United States, 321 F.2d 7, 10 (1st Cir. 1963)) (alteration in original)).

(4) The defendant's signature on the tax return is sufficient to support a finding by the jury that he or she read the return and knew its contents. United States v. Olbres, 61 F.3d 967, 971 (1st Cir. 1995); Drape, 668 F.2d at 26; Romanow, 509 F.2d at 27.

(5) The instruction can be modified to apply to a willful omission of material facts on a tax return. See Siravo v. United States, 377 F.2d 469, 472 (1st Cir. 1967) ("[A] return that omits material items necessary to the computation of income is not 'true and correct' within the meaning of section 7206.").

4.31.5322 Money Laundering—Illegal Structuring, 31 U.S.C. §§ 5322, 5324

[Updated: 6/14/02]

[Defendant] is charged with violating that portion of the federal money laundering statute that prohibits structuring a transaction to avoid reporting requirements. It is against federal law to structure transactions for the purpose of evading the reporting requirements. For [defendant] to be convicted of this crime, the government must prove the following things beyond a reasonable doubt:

> First, [defendant] structured or assisted in structuring [attempted to structure or assist in structuring] a transaction with one or more domestic financial institutions; and
>
> Second, [defendant] did so with the purpose of evading the reporting requirements of federal law affecting the transactions.

Federal law requires that transactions in currency of more than $10,000 be reported by a financial institution to the Internal Revenue Service.

A [withdrawal; deposit; etc.] from a [_____] is a financial transaction.

Comment

(1) Congress deleted the statutory willfulness requirement for structuring offenses in response to the Supreme Court's decision in Ratzlaf v. United States, 510 U.S. 135, 136-37 (1994) (holding that the government must prove not only the defendant's purpose to evade a financial institution's reporting requirements, but also the defendant's knowledge that structuring itself was unlawful). See Act of Sept. 23, 1994, Pub. L. No. 103-325, § 411, 108 Stat. 2160, 2253, codified at 31 U.S.C. §§ 5322(a) & (b), 5324(c); see also United States v. Hurley, 63 F.3d 1, 14 n.2 (1st Cir. 1995). The amendments restore:

> the clear Congressional intent that a defendant need only have the intent to evade the reporting requirement as the sufficient mens rea for the offense. The prosecution would need to prove that there was an intent to evade the reporting requirement, but would not need to prove that the defendant knew that structuring was illegal. However, a person who innocently or inadvertently structures or otherwise violates section 5324 would not be criminally liable.

H.R. Conf. Rep. No. 652, 103d Cong., 1st Sess. 147, 194 (1994), reprinted in 1994 U.S.S.C.A.N. 1977, 2024. (For criminal acts after September 23, 1994, the amendments also moot the debate over whether United States v. Aversa, 984 F.2d 493 (1st Cir. 1993), vacated and remanded, 510 U.S. 1069 (1996), which had held that "reckless disregard" was sufficient to satisfy the now defunct willfulness requirement, survived Ratzlaf. See United States v. London, 66 F.3d 1227, 1245 (1st Cir. 1995) (Torruella, J., dissenting)).

(2) The requirements for currency transaction reports are set forth at 31 U.S.C. § 5313; 31 C.F.R. § 103.22 (1997).

4.46.1903 Possessing a Controlled Substance On Board a Vessel Subject to United States Jurisdiction With Intent to Distribute, 46 U.S.C. App. § 1903

[Updated: 6/14/02]

[Defendant] is charged with illegally possessing [controlled substance] while on board a vessel subject to United States jurisdiction, intending to distribute it to someone else. It is against federal law to have [controlled substance] in your possession while on board a vessel subject to United States jurisdiction, with the intention of distributing all or part of the [controlled substance] to someone else. I have determined that [name of vessel] was subject to United States jurisdiction on [date charged]. For you to find [defendant] guilty of this crime you must be convinced that the government has proven each of these things beyond a reasonable doubt:

> First, that on the date charged [defendant] was on board [name of vessel] and at that time possessed [controlled substance], either actually or constructively;
>
> Second, that [he/she] did so with a specific intent to distribute the [controlled substance] over which [he/she] had actual or constructive possession;
>
> Third, that [he/she] did so knowingly and intentionally.

The term "possess" means to exercise authority, dominion or control over something. The law recognizes different kinds of possession.

["Possession" includes both actual and constructive possession. A person who has direct physical control of something on or around his or her person is then in actual possession of it. A person who is not in actual possession, but who has both the power and the intention to exercise control over something is in constructive possession of it. Whenever I use the term "possession" in these instructions, I mean actual as well as constructive possession.]

["Possession" [also] includes both sole possession and joint possession. If one person alone has actual or constructive possession, possession is sole. If two or more persons share actual or constructive possession, possession is joint. Whenever I have used the word "possession" in these instructions, I mean joint as well as sole possession.]

Comment

(1) There is First Circuit caselaw dealing with jury instructions as to the jurisdictional part of the statute. See United States v. Saavedra, 250 F.3d 60, 64-65 (1st Cir. 2001) (defendant's knowledge of jurisdiction not required); United States v. Santana-Rosa, 132 F.3d 860, 865 (1st Cir. 1998) (holding that the court must give an instruction defining customs waters). These cases, however, interpret the statute before its 1996 amendment, which added the following language:

> Jurisdiction of the United States with respect to vessels subject to this chapter is not an element of any offense. All jurisdictional issues

> arising under this chapter are preliminary questions of law to be determined solely by the trial judge.

46 U.S.C. App. § 1903(f) (1996). The effect was "to remove from the jury and confide to the judge" this issue. United States v. Gonzalez, 311 F.3d 440, 443 (1st Cir. 2002).

(2) See Comment (2) to Instruction 4.18.841(a)(1) concerning instructions in enhanced penalty cases.

PART 5 FINAL INSTRUCTIONS: DEFENSES AND THEORIES OF DEFENSE

5.01	Alibi	[Updated: 6/14/02]
5.02	Mental State That Is Inconsistent with the Requisite Culpable State of Mind	[Updated: 6/14/02]
5.03	Intoxication	[Updated: 6/14/02]
5.04	Self-Defense	[Updated: 6/14/02]
5.05	Duress	[Updated: 4/5/04]
5.06	Necessity	[Updated: 7/31/03]
5.07	Entrapment	[Updated: 10/14/05]
5.08	Insanity [18 U.S.C. § 17]	[Updated: 6/14/02]

5.01 Alibi

[Updated: 6/14/02]

One of the issues in this case is whether [defendant] was present at the time and place of the alleged crime. If, after considering all the evidence, you have a reasonable doubt that [defendant] was present, then you must find [defendant] not guilty.

Comment

A defendant is entitled to a special instruction that on the issue of alibi a reasonable doubt is sufficient to acquit. See, e.g., Duckett v. Godinez, 67 F.3d 734, 745 (9th Cir. 1995); United States v. Simon, 995 F.2d 1236, 1243 (3d Cir. 1993); United States v. Hicks, 748 F.2d 854, 858 (4th Cir. 1984); United States v. Burse, 531 F.2d 1151, 1153 (2d Cir. 1976); United States v. Megna, 450 F.2d 511, 513 (5th Cir. 1971).

5.02 Mental State That Is Inconsistent with the Requisite Culpable State of Mind

[Updated: 6/14/02]

Evidence has been presented of [defendant]'s [carelessness; negligence; ignorance; mistake; good faith; abnormal mental condition; etc.]. Such [_____] may be inconsistent with [the requisite culpable state of mind]. If after considering the evidence of [_____], together with all the other evidence, you have a reasonable doubt that [defendant] acted [requisite culpable state of mind], then you must find [defendant] not guilty.

Comment

(1) This instruction may be given whenever the evidence of defendant's mental state, if believed, would tend to raise a reasonable doubt about the requisite culpable state of mind. See United States v. Batista, 834 F.2d 1, 6 (1st Cir. 1987) (approving an instruction that "the jury . . . consider the statements and acts of appellant or any other circumstance in determining his state of mind, and to make sure that they were convinced beyond a reasonable doubt that appellant acted willfully and knowingly"); cf. United States v. Sturm, 870 F.2d 769, 777 (1st Cir. 1989) ("Jury instructions that allow a conviction even though the jury may not have found that the defendant possessed the mental state required for the crime constitute plain error."). However, this instruction is a reinforcement of—not a substitute for—language instructing the jury on the exact mental state required for conviction under the relevant statute.

(2) A defendant's abnormal mental condition, just like ignorance, mistake or intoxication, may raise a reasonable doubt that the defendant acted with the requisite culpable state of mind. As the Court of Appeals for the First Circuit held in United States v. Schneider, 111 F.3d 197, 201 (1st Cir. 1997), "in principle there should be no bar to medical evidence that a defendant, although not insane, lacked the requisite state of mind." In practice, the trial judge must screen such evidence for relevance, potential for confusion, reliability and helpfulness. Id.

(3) For a discussion of the "tax-crime exception" to the general proposition that ignorance of the law is no defense, see United States v. Aversa, 984 F.2d 493, 500-01 (1st Cir. 1993), vacated and remanded on other grounds, 510 U.S. 1069 (1994) (citing Cheek v. United States, 498 U.S. 192, 199-201 (1991)).

5.03 Intoxication

[Updated: 6/14/02]

You have heard evidence that [defendant] was intoxicated. "Intoxicated" means being under the influence of alcohol or drugs or both. Some degrees of intoxication may prevent a person from having [the requisite culpable state of mind]. If after considering the evidence of intoxication, together with all the other evidence, you have a reasonable doubt that [defendant] had [the requisite culpable state of mind], then you must find [defendant] not guilty.

Comment

"Voluntary" intoxication may rebut proof of intent in a "specific intent" but not a "general intent" crime. United States v. Sewell, 252 F.3d 647, 650-51 (2d Cir. 2001); United States v. Oakie, 12 F.3d 1436, 1442 (8th Cir. 1993). The burden of proof to support the necessary intent, however, remains with the government. United States v. Burns, 15 F.3d 211, 218 (1st Cir. 1994). In Burns, the court declined to rule on whether intoxication is a diminished capacity defense barred by the Insanity Reform Act of 1984, 18 U.S.C. § 17. 15 F.3d at 218 n.4.

5.04 Self-Defense

[Updated: 6/14/02]

Evidence has been presented that [defendant] acted in self-defense. Use of force is justified when a person reasonably believes that it is necessary for the defense of oneself or another against the immediate use of unlawful force. However, a person must use no more force than appears reasonably necessary in the circumstances.

The government has the burden of proving that [defendant] did not act in self-defense.

Comment

(1) The instruction is modeled on Sixth Circuit Instruction 6.06. A defendant is entitled to a self-defense instruction if he or she produces sufficient evidence "to require the consideration of a reasonable doubt as to the justification for the homicide." DeGroot v. United States, 78 F.2d 244, 251 (9th Cir. 1935); see also United States v. Morton, 999 F.2d 435, 437 (9th Cir. 1993).

(2) This model instruction is quoted with apparent approval in United States v. Bello, 194 F.3d 18, 26 (1st Cir. 1999).

5.05 Duress

[Updated: 4/5/04]

Evidence has been presented that [defendant] was threatened by [_____] with serious bodily injury or death.

[Defendant] cannot be found guilty if [defendant] participated in the [describe offense] only because [defendant]: (1) acted under an immediate threat of serious bodily injury or death; (2) had a well-grounded belief that the threat would be carried out; and (3) had no reasonable opportunity to escape or otherwise frustrate the threat.

On this issue, just as on all others, the burden is on the government to prove the defendant's guilt beyond a reasonable doubt. For you to find [defendant] guilty, therefore, you must be convinced that the government has proven beyond a reasonable doubt not only that [defendant] participated in the [describe offense] but also any of the following three things:

> One, that no such threat occurred or it was not immediate; OR
>
> Two, that [defendant] had a reasonable opportunity to escape or otherwise frustrate the threat but did not exercise it; OR
>
> Three, that [defendant] did not have a well-grounded belief that the threat would be carried out.

Comment

(1) "In assessing whether a defendant has established sufficient grounds to mount a duress defense, courts do not examine the defendant's subjective perceptions about whether the threat was likely to be acted upon or whether escape was possible. Rather, as suggested by our use of the qualifiers 'well-grounded' and 'reasonable' in describing the elements of the defense, the inquiry hypothesizes a defendant of ordinary firmness and judgment and asks what such a defendant was likely to have experienced or how such a defendant was likely to have acted." United States v. Castro-Gomez, 360 F.3d 216, 219 (1st Cir. 2004) (citation omitted).

(2) Before this defense can go to the jury, the court must determine that the defendant has met the entry-level burden of producing enough evidence to support the three elements for a finding of duress. United States v. Arthurs, 73 F.3d 444, 448 (1st Cir. 1996); United States v. Amparo, 961 F.2d 288, 291 (1st Cir. 1992). This is only a burden of production, not persuasion. The burden of persuasion remains with the government if the charged crime requires *mens rea*. Amparo, 961 F.2d at 291; see also United States v. Bailey, 444 U.S. 394, 415-16 (1980); United States v. Ciambrone, 601 F.2d 616, 626-27 (2d Cir. 1979); Model Penal Code § 2.09. But although First Circuit law is still unsettled, it seems likely that in a case where *mens rea* is not required—for example, possession of a firearm by a felon—the burden of proof will shift to the defendant. See United States v. Diaz,

285 F.3d 92, 95-97 (1st Cir. 2002) (citing approvingly United States v. Dodd, 225 F.3d 340, 343-50 (3d Cir. 2000) and United States v. Deleveaux, 205 F.3d 1292, 1298-1301 (11th Cir. 2000)).

(3) The First Circuit has stated: "The traditionally separate defenses of necessity and duress have become increasingly blurred in modern decisions, to the point of merger." United States v. Nelson-Rodriguez, 319 F.3d 12, 40 n.9 (1st Cir. 2003), citing United States v. Bailey, 444 U.S. 394, 410 (1980).

5.06 Necessity

[Updated: 7/31/03]

Evidence has been presented that [defendant] acted out of necessity.

[Defendant] cannot be found guilty if [he/she] participated in the [describe offense] only out of necessity. A person acts out of necessity if he or she acted because he or she: (1) was faced with a choice of evils and he or she chose the lesser evil; (2) acted to prevent imminent harm; (3) had a reasonable belief that his or her actions would directly cause the harm to be avoided; and (4) had no legal alternative but to violate the law.

On this issue, just as on all others, the burden is on the government to prove [defendant]'s guilt beyond a reasonable doubt. For you to find [defendant] guilty, therefore, you must be convinced that the government has proven beyond a reasonable doubt not only that [defendant] participated in the [describe offense], but also any of the following four things:

> One, that no choice of evils existed or that [defendant] did not choose the lesser evil; OR
>
> Two, that there was no imminent harm, or that [defendant] did not act to prevent it; OR
>
> Three, that [defendant] did not reasonably believe that [his/her] acts would directly cause the harm to be avoided; OR
>
> Four, that [defendant] had an alternative other than to violate the law.

"Imminent harm" means an emergency or a crisis involving immediate danger to oneself or another.

Comment

(1) Before this defense can go to the jury, the court must determine that the defendant has met the "entry-level burden" of producing enough evidence to support the defense's four elements. United States v. Ayala, 289 F.3d 16, 26 (1st Cir. 2002); United States v. Maxwell, 254 F.3d 21, 26 (1st Cir. 2001); see also United States v. Sued-Jimenez, 275 F.3d 1, 6 (1st Cir. 2001). As with the defense of duress, the entry-level burden is apparently a burden of production. United States v. Bailey, 444 U.S. 394, 415 (1980); cf. United States v. Amparo, 961 F.2d 288, 291 (1st Cir. 1992) (describing the burden of production necessary to support the defense of duress). The burden of persuasion remains with the government, at least if the charged crime requires *mens rea*. Cf. United States v. Duclos, 214 F.3d 27, 33 (1st Cir. 2000) (assuming without deciding that the government bore the burden of proving the non-existence of the defendant's necessity defense); Amparo, 961 F.2d at 291 (duress).

(2) The First Circuit has stated: "The traditionally separate defenses of necessity and duress have become increasingly blurred in modern decisions, to the point of merger." United States v. Nelson-Rodriguez, 319 F.3d 12, 40 n.9 (1st Cir. 2003), citing United States v. Bailey, 444 U.S. 394, 410 (1980).

5.07 Entrapment

[Updated: 8/3/05]

[Defendant] maintains that [he/she] was entrapped. A person is "entrapped" when he or she is induced or persuaded by law enforcement officers or their agents to commit a crime that he or she was not otherwise ready and willing to commit. The law forbids his or her conviction in such a case. However, law enforcement agents are permitted to use a variety of methods to afford an opportunity to a defendant to commit an offense, including the use of undercover agents, furnishing of funds for the purchase of controlled substances, the use of informers and the adoption of false identities.

For you to find [defendant] guilty of the crime with which [he/she] is charged, you must be convinced that the government has proven beyond a reasonable doubt that [defendant] was not entrapped. To show that [defendant] was not entrapped, the government must establish beyond a reasonable doubt one of the following two things:

> One, that [the officer] did not persuade or talk [defendant] into committing the crime. Simply giving someone an opportunity to commit a crime is not the same as persuading [him/her], but persuasion, false statements or excessive pressure by [the officer] or an undue appeal to sympathy can be improper; OR
>
> Two, that [defendant] was ready and willing to commit the crime without any persuasion from [the officer] or any other government agent. You may consider such factors as: (a) the character or reputation of the defendant; (b) whether the initial suggestion of criminal activity was made by the government; (c) whether the defendant was engaged in the criminal activity for profit; (d) whether the defendant showed reluctance to commit the offense, and whether that reluctance reflects the conscience of an innocent person or merely the caution of a criminal; (e) the nature of the persuasion offered by the government; and (f) how long the government persuasion lasted. In that connection, you have heard testimony about actions by [defendant] for which [he/she] is not on trial. You are the sole judges of whether to believe such testimony. If you decide to believe such evidence, I caution you that you may consider it only for the limited purpose of determining whether it tends to show [defendant]'s willingness to commit the charged crime or crimes without the persuasion of a government agent. You must not consider it for any other purpose. You must not, for instance, convict [defendant] because you believe that [he/she] is guilty of other improper conduct for which [he/she] has not been charged in this case.

Comment

(1) "A criminal defendant is entitled to an instruction on his theory of defense so long as the theory is a valid one and there is evidence in the record to support it. In making this determination, the district court is not allowed to weigh the evidence, make credibility determinations, or resolve conflicts in the proof. Rather, the court's function is to examine the evidence on the record and to draw those inferences as can reasonably be drawn therefrom, determining whether the proof, taken in the light most favorable to the defense can *plausibly* support the theory of the defense. This is not a very high standard to meet, for in its present context, to be 'plausible' is to be 'superficially reasonable.'" United States v. Gamache, 156 F.3d 1, 9 (1st Cir. 1998) (citations omitted). This seems to be a lower hurdle than previously required, that "[t]he record must show 'hard evidence,'

which if believed by a rational juror, 'would suffice to create a reasonable doubt as to whether government actors induced the defendant to perform a criminal act that he was not predisposed to commit.'" United States v. Young, 78 F.3d 758, 760 (1st Cir. 1996) (quoting United States v. Rodriguez, 858 F.2d 809, 814 (1st Cir. 1988)).

(2) The instruction is consistent with recent First Circuit caselaw. See, e.g., United States v. Nishnianidze, 342 F.2d 6, 17-18 (1st Cir. 2003); United States v. LeFreniere, 236 F.3d 41, 44-45 (1st Cir. 2001); Gamache, 156 F.3d at 9-12; United States v. Montañez, 105 F.3d 36, 38 (1st Cir. 1997); United States v. Acosta, 67 F.3d 334, 337-40 (1st Cir. 1995); United States v. Gendron, 18 F.3d 955, 960-64 (1st Cir. 1994); United States v. Gifford, 17 F.3d 462, 467-70 (1st Cir. 1994); United States v. Hernandez, 995 F.2d 307, 313 (1st Cir. 1993); United States v. Reed, 977 F.2d 14, 18 (1st Cir. 1992); see also United States v. Pion, 25 F.3d 18, 20 (1st Cir. 1994). We have intentionally avoided using the word "predisposition," a term that has proven troublesome to some jurors. See, e.g., United States v. Rogers, 121 F.3d 12, 17 (1st Cir. 1997). See also United States v. Tom, 330 F.3d 83, 91-92 1st Cir. 2003), where the First Circuit seems to approve an alternate formulation (incorrectly labeled an entrapment "offense" rather than defense).

(3) "[H]olding out the prospect of illicit gain is not the sort of government inducement that can pave the way for an entrapment defense." United States v. Sanchez-Berrios, ___ F.3d ___, Nos. 03-2333, 03-2334, 03-2335, 2005 WL 2277629, at *___ (1st Cir. Sept. 20, 2005).

(4) It may be necessary to conform the charge to the defendant's theory of defense:

> Of course, the district court has a great deal of latitude in formulating a charge. But taken as a whole, the examples given were *all* either coercion examples or involved abstractions ("dogged insistence") rather far from the examples of inducement by an undue appeal to sympathy, which the defendant expressly requested and which were more pertinent to his defense. By omitting any "sympathy" examples, the trial court may well have left the jury with the mistaken impression that coercion is a necessary element of entrapment and, in this case, such a misunderstanding could well have affected the outcome.

Montañez, 105 F.2d at 39; see also United States v. Terry, 240 F.3d 65, 70 (1st Cir. 2001); Gamache, 156 F.3d at 9-11.

(5) "[T]he government cannot prove predisposition if the defendant's willingness to commit the crime was itself manufactured by the government in the course of dealing with the defendant before he committed the crime charged." United States v. Alzate, 70 F.3d 199, 201 (1st Cir. 1995) (citing Jacobson v. United States, 503 U.S. 540, 549 & n.2 (1992)). If that is the issue, a more precise instruction is advisable. See id. But, although the predisposition must exist before the contact with government agents, behavior after the contact can be used as evidence of the pre-existing predisposition. Rogers, 127 F.3d at 15.

(6) There is a separate defense known as entrapment by estoppel:

> Entrapment by estoppel requires [defendant] to establish: (1) that a

> government official told him the act was legal; (2) that he relied on the advice; (3) that the reliance was reasonable; (4) that, given the reliance, prosecution would be unfair.

United States v. Ellis, 168 F.3d 558, 561 (1st Cir. 1999); accord United States v. Bunnell, 280 F.3d 46, 49-50 (1st Cir. 2002). On this defense, the defendant has the burden of proof. United States v. Villafane-Jimenez, 410 F.3d 74, 80 (1st Cir. 2005). The first element requires an "affirmative representation" that the conduct was legal. Id. at 80 n.7.

(7) No case has yet decided that the judicial doctrine of sentencing entrapment or manipulation, see, e.g., United States v. Woods, 210 F.3d 70, 75 (1st Cir. 2000); United States v. Montoya, 62 F.3d 1, 3-5 (1st Cir. 1995), should be considered by the jury even though, after Apprendi, juries are called upon to make findings that affect minimum and maximum sentences.

5.08 Insanity [18 U.S.C. § 17]

[Updated: 6/14/02]

If you find that the government has proven beyond a reasonable doubt all the elements of the crime, you must then determine whether [defendant] has proven by clear and convincing evidence that [he/she] was legally insane at the time. For you to find [defendant] not guilty only by reason of insanity, you must be convinced that [defendant] has proven each of these things by clear and convincing evidence:

> First, that at the time of the crime [defendant] suffered from severe mental disease or defect; and
>
> Second, that the mental disease or defect prevented [him/her] from understanding the nature and quality or wrongfulness of [his/her] conduct.

Clear and convincing evidence is evidence that makes it highly probable that [defendant] had a severe mental disease or defect that prevented [him/her] from understanding the nature and quality of wrongfulness of [his/her] conduct.

You may consider evidence of [defendant]'s mental condition before or after the crime to decide whether [he/she] was insane at the time of the crime. Insanity may be temporary or extended.

In making your decision, you may consider not only the statements and opinions of the psychiatric experts who have testified but also all of the other evidence. You are not bound by the statements or opinions of any witness but may accept or reject any testimony as you see fit.

You will have a jury verdict form in the jury room on which to record your verdict. You have three choices. You may find [defendant] not guilty, guilty, or not guilty only by reason of insanity. If you find that the government has not proven all the elements of the crime beyond a reasonable doubt, you will find [defendant] *not guilty*. If you find that the government has proven all the elements of the crime beyond a reasonable doubt and that [defendant] has proven by clear and convincing evidence that [he/she] was legally insane at the time of the crime, you will find [him/her] *not guilty only by reason of insanity*. If you find that the government has proven all the elements of the crime beyond a reasonable doubt and that [defendant] has not proven by clear and convincing evidence that [he/she] was legally insane at the time of the crime, you will find [him/her] *guilty*.

Comment

(1) The constitutionality of placing the burden on the defendant to prove insanity is settled. See United States v. Pryor, 960 F.2d 1, 3 (1st Cir. 1992) (citing Leland v. Oregon, 343 U.S. 790 (1952) and Rivera v. Delaware, 429 U.S. 877 (1976)).

(2) A trial judge is not required to instruct a jury on the consequences of a verdict of not guilty by reason of insanity, United States v. Tracy, 36 F.3d 187, 196 (1st Cir. 1994), except "under certain

limited circumstances," such as when a prosecutor or witness has said before the jury that the defendant will "go free." Shannon v. United States, 512 U.S. 573, 587 (1994); see also Tracy, 36 F.3d at 196 n.8.

(3) The phrase "nature and quality [of defendant's conduct]" can be troublesome. It is not apparent what difference, if any, there is between the words "nature" and "quality." But given the lineage of the phrase to at least M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843), and its presence in the governing statute, 18 U.S.C. § 17, the safer course would be not to truncate the phrase.

A more troublesome issue arises when the defendant raises both the insanity defense and a *mens rea* defense based on abnormal mental condition. If evidence tends to show that a defendant failed to understand the "nature and quality" of his or her conduct, that evidence will not only tend to help prove an insanity defense but it will also typically tend to raise reasonable doubt about the requisite culpable state of mind. See Instruction 5.02. In Martin v. Ohio, 480 U.S. 228, 234 (1987), the Supreme Court held that the trial judge must adequately convey to the jury that evidence supporting an affirmative defense may also be considered, where relevant, to raise reasonable doubt as to the requisite state of mind. This "overlap" problem may be solved by adequate instructions. Id. But the "overlap" problem may be *avoided* by omitting the "nature and quality" phrase from the insanity instruction unless the defendant wants it.

PART 6 FINAL INSTRUCTIONS: DELIBERATIONS AND VERDICT

6.01	Foreperson's Role; Unanimity	[Updated: 6/14/02]
6.02	Consideration of Evidence	[Updated: 6/14/02]
6.03	Reaching Agreement	[Updated: 6/14/02]
6.04	Return of Verdict Form	[Updated: 6/14/02]
6.05	Communication with the Court	[Updated: 6/14/02]
6.06	Charge to a Hung Jury	[Updated: 2/17/05]

6.01 Foreperson's Role; Unanimity

[Updated: 6/14/02]

I come now to the last part of the instructions, the rules for your deliberations.

When you retire you will discuss the case with the other jurors to reach agreement if you can do so. You shall permit your foreperson to preside over your deliberations, and your foreperson will speak for you here in court. Your verdict must be unanimous.

6.02 Consideration of Evidence

[Updated: 6/14/02]

Your verdict must be based solely on the evidence and on the law as I have given it to you in these instructions. However, nothing that I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

6.03 Reaching Agreement

[Updated: 6/14/02]

Each of you must decide the case for yourself, but you should do so only after considering all the evidence, discussing it fully with the other jurors, and listening to the views of the other jurors.

Do not be afraid to change your opinion if you think you are wrong. But do not come to a decision simply because other jurors think it is right.

This case has taken time and effort to prepare and try. There is no reason to think it could be better tried or that another jury is better qualified to decide it. It is important therefore that you reach a verdict if you can do so conscientiously. If it looks at some point as if you may have difficulty in reaching a unanimous verdict, and if the greater number of you are agreed on a verdict, the jurors in both the majority and the minority should reexamine their positions to see whether they have given careful consideration and sufficient weight to the evidence that has favorably impressed the jurors who disagree with them. You should not hesitate to reconsider your views from time to time and to change them if you are persuaded that this is appropriate.

It is important that you attempt to return a verdict, but, of course, only if each of you can do so after having made your own conscientious determination. Do not surrender an honest conviction as to the weight and effect of the evidence simply to reach a verdict.

Comment

This is *not* an Allen charge for a deadlocked jury. See Instruction 6.06. Some authority outside the First Circuit, however, holds that an instruction like this in the general charge makes a later supplemental charge to a deadlocked jury more sustainable. United States v. Brown, 634 F.2d 1069, 1070 (7th Cir. 1980) (requiring this type of charge as a precondition for a later supplemental charge); Comment to Eighth Circuit Instruction 10.02 ("preferable"); accord United States v. Rodriguez-Mejia, 20 F.3d 1090, 1091-92 (10th Cir. 1994); United States v. Williams, 624 F.2d 75, 76-77 (9th Cir. 1980); see also Comment to Sixth Circuit Instruction 8.04.

6.04 Return of Verdict Form

[Updated: 6/14/02]

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

[Read form.]

After you have reached unanimous agreement on a verdict, your foreperson will fill in the form that has been given to you, sign and date it, and advise the jury officer outside your door that you are ready to return to the courtroom.

After you return to the courtroom, your foreperson will deliver the completed verdict form as directed in open court.

6.05 Communication with the Court

[Updated: 6/14/02]

If it becomes necessary during your deliberations to communicate with me, you may send a note through the jury officer signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with me on anything concerning the case except by a signed writing, and I will communicate with any member of the jury on anything concerning the case only in writing, or orally here in open court. If you send out a question, I will consult with the parties as promptly as possible before answering it, which may take some time. You may continue with your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including me—how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have been discharged.

Comment

(1) Although Rogers v. United States, 422 U.S. 35, 39 (1975), could be read as requiring any response to a deliberating jury's questions to occur orally in open court in the defendant's presence, the First Circuit seems to permit a written response, so long as the lawyers are shown the jury's note and have the opportunity to comment on the judge's proposed response. See, e.g., United States v. Maraj, 947 F.2d 520, 525-26 (1st Cir. 1991).

(2) "[I]t is always best for the trial judge not to know the extent and nature of a division among the jurors and to instruct the jury not to reveal that information. Nevertheless, 'if the jury does volunteer its division, the court may rely and act upon it.'" United States v. Rengifo, 789 F.2d 975, 985 (1st Cir. 1986) (quoting United States v. Hotz, 620 F.2d 5, 7 (1st Cir. 1980)) (citations omitted).

6.06 Charge to a Hung Jury

[Updated: 2/17/05

I am going to instruct you to go back and resume your deliberations. I will explain why and give you further instructions.

In trials absolute certainty can be neither expected nor attained. You should consider that you are selected in the same manner and from the same source as any future jury would be selected. There is no reason to suppose that this case would ever be submitted to 12 men and women more intelligent, more impartial or more competent to decide it than you, or that more or clearer evidence would be produced in the future. Thus, it is your duty to decide the case, if you can conscientiously do so without violence to your individual judgment.

The verdict to which a juror agrees must, of course, be his or her own verdict, the result of his or her own convictions, and not a mere acquiescence in the conclusion of his or her fellow jurors. Yet, in order to bring 12 minds to a unanimous result, you must examine the questions submitted to you with an open mind and with proper regard for, and deference to, the opinion of the other jurors.

In conferring together you ought to pay proper respect to each other's opinions and you ought to listen with a mind open to being convinced by each other's arguments. Thus, where there is disagreement, jurors favoring acquittal should consider whether a doubt in their own mind is a reasonable one when it makes no impression upon the minds of the other equally honest and intelligent jurors who have heard the same evidence with the same degree of attention and with the same desire to arrive at the truth under the sanction of the same oath.

On the other hand, jurors favoring conviction ought seriously to ask themselves whether they should not distrust the weight or sufficiency of evidence which fails to dispel reasonable doubt in the minds of the other jurors.

Not only should jurors in the minority re-examine their positions, but jurors in the majority should do so also, to see whether they have given careful consideration and sufficient weight to the evidence that has favorably impressed the persons in disagreement with them.

Burden of proof is a legal tool for helping you decide. The law imposes upon the prosecution a high burden of proof. The prosecution has the burden to establish, with respect to each count, each essential element of the offense, and to establish that essential element beyond a reasonable doubt. And if with respect to any element of any count you are left in reasonable doubt, the defendant is entitled to the benefit of such doubt and must be acquitted.

It is your duty to decide the case, if you can conscientiously do so without violence to your individual judgment. It is also your duty to return a verdict on any counts as to which all of you agree, even if you cannot agree on all counts. But if you cannot agree, it is your right to fail to agree.

I now instruct you to go back and resume your deliberations.

Comment

(1) This charge contains all the elements of the modified Allen charge, Allen v. United States, 164 U.S. 492, 501-02 (1896), approved in United States v. Nichols, 820 F.2d 508, 511-12 (1st Cir. 1987). In the interest of clarity, these elements have been rearranged and clearer language substituted. The elements satisfy the requirements contained in United States v. Hernandez-Albino, 177 F.3d 33, 38 (1st Cir. 1999) and United States v. Paniajua-Ramos, 135 F.3d 193, 197 (1st Cir. 1998): the instruction must be carefully phrased (1) to place the onus of reexamination on the majority as well as the minority, (2) to remind the jury of the burden of proof, and (3) to inform the jury of their right to fail to agree. According to United States v. Angiulo, 485 F.2d 37, 40 (1st Cir. 1973), "whenever a jury first informs the court that it is deadlocked, any supplemental instruction which urges the jury to return to its deliberations must include the three balancing elements stated above." In Paniajua-Ramos, the court found plain error in an Allen charge that started with the pattern charge but emphasized the need to agree and did not clearly refer to the jury's right to fail to agree. 135 F.3d at 198-99.

(2) The First Circuit has found such a charge proper upon a *sua sponte* jury report of deadlock after nine hours of deliberation over two days, Nichols, 820 F.2d at 511-12, but improper after three hours of deliberation with no jury report of difficulties in agreeing, United States v. Flannery, 451 F.2d 880, 883 (1st Cir. 1971). But the court has said recently that "[t]here is no per se minimum period of deliberation that must expire before a mistrial may be declared on account of a hung jury." United States v. McIntosh, 380 F.3d 548, 555 (1st Cir. 2004).

(3) It used to be thought that a direct charge like this must be used once the jury indicates deadlock, rather than an indirect response to a question that may imply an obligation to deliberate indefinitely. United States v. Manning, 79 F.3d 212, 222-23 (1st Cir. 1996) (finding it improper to respond to jury question whether it was obliged to reach a verdict by asking "Would reading any portion of the testimony to you assist you in reaching a decision?"). Moreover, it was said that *any* supplemental charge that urges the jury to return to its deliberations must contain all three elements referred to in Comment (1). Hernandez-Albino, 177 F.3d at 38. In United States v. Figueroa-Encarnacion, 343 F.3d 23, 32-33 (1st Cir. 2003), however, the court upheld the following instruction under plain-error review:

> The court received a note from you that basically says that you have not been able to reach an agreement. And you also state that even if you deliberate more time you're not going to reach an agreement.
>
> Well, after a 12 day trial some days we worked eight hours, some days we only worked four hours. But it's still 12 days of receiving evidence. I think it is too premature for the judge after 12 days of receiving evidence to accept that there is a deadlock. These matters do occur, and they occur sometimes more times that we would like, but they occur.
>
> So, what the Court is going to do is to send you home, relax, not think about the case and come back tomorrow at 9:30 AM and at

> which time I will provide you an instruction. Please do not begin any deliberation until you come back here tomorrow morning.

The jury note had stated: "We wish to advise you that up to this moment we have not been able to reach an agreement. We understand that even if we stay deliberating for more time we will not be able to reach a verdict." The First Circuit upheld the instruction because "the judge did not perceive the jury to be deadlocked and the instruction "did not imply a duty to achieve unanimity, nor was it addressed to jurors holding a minority viewpoint." According to the First Circuit, "[i]t stands to reason that if a district court's instructions lack the coercive elements of an Allen charge, it need not include the Allen cure."

(4) In United States v. Barone, 114 F.3d 1284, 1304 (1st Cir. 1997), the First Circuit cautioned against using the Allen charge a second time because "[a] successive charge tends to create a greater degree of pressure." Although the First Circuit declined to create a per se rule against issuing a second charge, Id., it has recently indicated that a second charge may be warranted in only the most unique and extreme circumstances. In United States v. Keene, 287 F.3d 229, 235 (1st Cir. 2002), the court stated that "the giving of successive Allen charges is an extraordinary measure—and one that should be shunned absent special circumstances." In that case, the jurors had deliberated for about as long as evidence had been presented, the dispute to be resolved by the jury was sharply focused, the first Allen charge had been unsuccessful, and the jury was increasingly adamant, in its notes to the trial court, that it was irretrievably deadlocked. The court indicated that, in other settings, the party desiring a second Allen charge must be able to identify "special circumstances" that would "favor[] the utterance of yet another modified Allen charge" but did not offer an indication of what those circumstances might be. Id.

AFTERWORD: HOW TO DRAFT A CHARGE

Traditionally, jury instructions have been lengthy and have repeated various elements of the charge several times and in different ways. That custom may have something to do with the fact that judges are former lawyers and therefore accustomed to using many words when one would do. More charitably, the practice may have instinctively reflected the concern that lay jurors could not easily absorb an oral charge on complicated legal issues and remember all such issues in the jury room unless the law was drummed into them.

These pattern charges are premised on the assumption that at the beginning of the 21st century there is no good reason to deny a lay juror a written set of instructions to guide deliberations in the jury room. If a written jury charge is provided, any given element need be stated only once, for the jury can use the written charge as a reference in the jury room. Furthermore, the various steps in deciding the case or the elements of the crime, as the case may be, should be laid out in a logical, sequential order so that the jury can easily follow them. If these premises are accepted, the result is a charge that the judge can deliver orally while the jurors simultaneously read the written document silently to themselves in approximately 30 minutes in most cases. The jurors will not become bored nor will they be frightened that they will be unable to remember or follow the law during their deliberations. Instead, they can retire to the jury room with confidence.

It is for these reasons that the language in these pattern instructions is succinct, if not terse. We have tried to use plain English, although others can undoubtedly suggest improvements. We have attempted to follow the spirit of the appellate caselaw without wholesale adoption of the language, which tends to be judges' and lawyers' language not easily comprehensible by a lay juror.

We have presented charges for the types of crimes and the types of issues that seem to arise most frequently in the First Circuit. We will be pleased to add to these as other judges provide proposed language or as experience demonstrates that others are needed.

Since instances will frequently come up, however, where there is no pattern charge for a particular crime, we offer the following suggested approach for writing a new charge. It is only a suggestion, but it may be a useful outline for a new judge confronted with a new crime. This should be done at the outset of the trial so that a draft charge is ready for the lawyers when the trial ends.

1. First, look at the statute in question. The specific elements of the offense usually will be obvious from a reading of the statute. They can then be listed as the separate numbered elements the government must prove beyond a reasonable doubt. There will commonly be a jurisdictional element (for example, interstate commerce or federal insurance of a financial institution); one or more "forbidden conduct" elements; and a "*mens rea*" (e.g., knowingly, willfully) element. One can generally begin an instruction as follows:

> [Defendant] is charged with [possession with intent to distribute, possession of a firearm by a convicted felon, etc.]. It is against federal law to [fill in the prohibition]. For you to find the defendant guilty of this offense the government must satisfy you beyond a

reasonable doubt of the following elements:

[Proceed to number and describe the elements.]

Bear in mind that although some elements may be stipulated (for example, the jurisdictional element such as the insured status of a bank or the effect on interstate commerce), it is safest to list them for the jury's consideration nevertheless. See Comment to Instruction 2.01.

Dictate or write your first rough draft now.

2. Next, look at the pattern instructions from other circuits and the Federal Judicial Center. They often will suggest alternative language, and the comments may alert you to relevant caselaw. Those who drafted the pattern instructions—the Federal Judicial Center Pattern Instructions in particular—have made a conscious attempt to write in plain English and to keep the instructions simple. You may also want to consult the several academic writers on jury instructions, although sometimes their suggestions tend to depend more heavily on abstruse appellate caselaw language. Do your first rewrite now.

3. Next, consult the proposed jury instructions submitted by the prosecution lawyer and the defense lawyer to see whether their reading of the statute is different from yours. Do this with an open mind, for they frequently will pick out matters that you have missed. Make appropriate changes to your draft. Be careful, however, of the lawyers' tendency to use legalese that juries cannot understand, or to copy from a form book or a charge in a different case, without taking the time to ponder what is appropriate in this case.

4. Now read the cases cited in the lawyers' proposed jury instructions, the comments to the pattern instructions or the academic treatises and the annotations to the statute in question. Primarily, of course, you must search for U.S. Supreme Court and First Circuit precedent; if there is no such precedent on point, then you will have to assess other circuits' approaches. Make any necessary corrections to your charge.

5. Be careful of the thorny issue of "intent." In 1952, Justice Robert Jackson sketched out the dimensions of the problem in the landmark case of Morissette v. United States, 342 U.S. 246 (1952). He described the "variety, disparity and confusion of [the] definitions of the requisite but elusive mental element." Id. at 252. That year, the American Law Institute (ALI) began its ten-year quest to remedy the problem, culminating in the promulgation of the Model Penal Code in 1962. The ALI found that there were two reasons why the mental element was so elusive. The first was the reason given by Justice Jackson: There were just too many verbal formulas in circulation, none of which had precise meaning. The second reason was more subtle: The mental element might vary for the different elements of a crime.

   The Model Penal Code remedied both problems. First, it reduced the number of mental states to four ("purposely," "knowingly," "recklessly" and "negligently") and gave relatively precise definitions of each. See Model Penal Code § 2.02(2). Second, it made clear that the state-of-mind analysis should apply *separately* to each element of the crime, and it drafted crimes accordingly. See id. § 2.02(1).

The Model Penal Code found favor with the vast majority of the states—around 40 of them—but not with Congress. Thus, federal judges still must struggle with pre-Model Penal Code statutory tools. Federal criminal statutes present a "variety, disparity and confusion" of numerous verbal formulas; even where meaning can be ascribed to the mental element, its application to other elements of the crime may remain unclear.

In 1989, then Attorney General Richard Thornburgh described the situation as follows:

> [W]ithin Title 18, in describing the general criminal intent or mens rea that must accompany conduct before it is considered criminal, the Congress, over the course of 200 years, has provided 78 different terms, ranging from "wantonly" to "without due . . . circumspection," to help clarify the subject. . . .
>
> As a body of jurisprudence, our federal criminal law is thus not only stultifying but borders on the embarrassing. Far worse, it is seriously inefficient. . . .

Address at the 66th Annual Meeting (May 19, 1989), in A.L.I. Proc. 405, 408 (1989).

Thus, inspection of a federal statute for the state-of-mind requirement must be made with the understanding that issues of interpretation are likely to be lurking, that they are issues of "common law," and that case law must be consulted.

The trickiest issue of interpretation is that of which mental state applies to each element of the crime. This has remained at the heart of a long line of post-Morissette cases in the Supreme Court. See, e.g., United States v. X-Citement Video, Inc., 513 U.S. 64, 68-78 (1994); Ratzlaf v. United States, 510 U.S. 135, 140-49 (1994), superseded by statute, 31 U.S.C. §§ 5322(a), (b), 5324(c); Cheek v. United States, 498 U.S. 192, 199-204 (1991); Liparota v. United States, 471 U.S. 419, 423-33 (1985); United States v. International Minerals & Chem. Corp., 402 U.S. 558, 560-65 (1971); United States v. Freed, 401 U.S. 601, 607-10 (1971).

In cases where no appellate decision has helpfully interpreted the statute at hand, you will have to engage in the same kind of analysis the Supreme Court undertook in X-Citement Video, namely, carefully examine the statutory text and context; test each proffered interpretation against criminal law principles; examine cognate case law; search the legislative history; consider applicable canons of construction; finally, make an additional overarching inquiry: which interpretation provides the jury with a more helpful test of the defendant's possible blameworthiness? X-Citement Video, 513 U.S. at 68-78.

6. When you have finished these steps, go back and re-work your charge to simplify the language. Use shorter words, avoid legalese, eliminate subordinate clauses and the passive voice where possible and speak in simple declarative sentences. Say it once, clearly and

simply, rather than several times in a convoluted fashion. Now distribute it to the lawyers for their consideration— ideally before the trial is even over, and perhaps even at the outset.