

## **1.01 FUNCTIONS OF COURT AND JURY**

Members of the jury, I will now instruct you on the law that you must follow in deciding this case. [I will give [each of] you a copy of the instructions to use in the jury room.] [Each of you has a copy of these instructions to use in the jury room.] You must follow all of my instructions about the law, even if you disagree with them. This includes the instructions I gave you before the trial, any instructions I gave you during the trial, and the instructions I am giving you now.

As jurors, you have two duties. Your first duty is to decide the facts from the evidence that you saw and heard here in court. This is your job, not my job or anyone else's job.

Your second duty is to take the law as I give it to you, apply it to the facts, and decide if the government has proved the defendant[s] guilty beyond a reasonable doubt [and whether the defendant has proved [insert defense] by a preponderance of the evidence; by clear and convincing evidence].

You must perform these duties fairly and impartially. Do not let sympathy, prejudice, fear, or public opinion influence you. [In addition, do not let any person's race, color, religion, national ancestry, or gender influence you.]

[You must give [name of corporate/entity defendant] the same fair consideration that you would give to an individual.]

You must not take anything I said or did during the trial as indicating what I think of the evidence or what I think your verdict should be.

## 1.02 THE CHARGE

The charge[s] against the defendant [is; are] in a document called an indictment [information]. [You will have a copy of the indictment during your deliberations.]

The indictment [information] in this case charges that the defendant[s] committed the crime[s] of [fill in short description of charged offenses]. The defendant[s] [has; have] pleaded not guilty to the charge[s].

The indictment [information] is simply the formal way of telling the defendant what crime[s] [he is; they are] accused of committing. It is not evidence that the defendant[s] [is; are] guilty. It does not even raise a suspicion of guilt.

### Committee Comment

This instruction is necessary because, as stated in *United States v. Garcia*, 562 F.2d 411, 417 (7th Cir. 1977), “In almost any criminal case . . . the fact of the indictment has some emphasis. To the degree an uninstructed jury considers the matter, there is a real possibility that a charge leveled by a grand jury composed of its peers will weigh in the petit jury’s balance on the side of guilt.” Instruction on this subject is particularly important when the court permits the jury to take the indictment with it during deliberations. 2A C. Wright, N. King, S. Klein & P. Henning, *Federal Practice and Procedure, Criminal* § 486 (2009). When the jury is given the indictment – as is the common practice – the “[f]ailure to instruct the jury ‘to the effect that the indictment is not to be considered evidence of the guilt of the accused’ constitutes error.” *United States v. Smith*, 419 F.3d 521, 530-31 (6th Cir. 2005).

### **1.03 PRESUMPTION OF INNOCENCE/BURDEN OF PROOF**

[The; each] defendant is presumed innocent of [each and every one of] the charge[s]. This presumption continues throughout the case. It is not overcome unless, from all the evidence in the case, you are convinced beyond a reasonable doubt that the [defendant; particular defendant you are considering] is guilty as charged.

The government has the burden of proving [the; each] defendant's guilt beyond a reasonable doubt. This burden of proof stays with the government throughout the case.

[The; a] defendant is never required to prove his innocence. He is not required to produce any evidence at all.

#### **Alternative to paragraphs 2-3 to be used when affirmative defense is raised on which defendant has burden of proof:**

The government has the burden of proving every element of the crime[s] charged beyond a reasonable doubt. This burden of proof stays with the government throughout the case. [The; a] defendant is never required to prove his innocence. He is not required to produce any evidence at all.

However, the defendant has the burden of proving the defense of [identify defense, e.g., duress, insanity] by [a preponderance of the evidence; clear and convincing evidence].

#### **Committee Comment**

Whether or not it is constitutionally required, compare *Taylor v. Kentucky*, 436 U.S. 478 (1978) (failure to give instruction on the presumption of innocence is reversible error) with *Kentucky v. Wharton*, 441 U.S. 786 (1979) (instruction is not constitutionally required in every case), it is well established that juries in federal criminal trials should be instructed on both the presumption of innocence, *see, e.g., United States v. Covarrubias*, 65 F.3d 1362, 1369 (7th Cir. 1995) ("Juries in federal criminal trials are instructed that the defendant is presumed innocent."); *United States v. DeJohn*, 638 F.2d 1048, 1057-59 (7th Cir. 1981) (instruction recommended, but a long and confusing instruction may do more harm than good), and the government's burden to prove guilt beyond a reasonable doubt. *Coffin v. United States*, 156 U.S. 432, 452-61 (1895); *United States v. Nelson*, 498 F.2d 1247 (5th Cir. 1974); *McDonald v. United States*, 284 F.2d 232 (D.C. Cir. 1960). The cases are legion in which the Seventh Circuit has considered an instruction along these lines as curing potential error resulting from, for example, allegedly improper argument. *See, e.g., United States v. Clark*, 535 F.3d 571, 581 (7th Cir. 2008).

The alternative paragraphs are to be used when the defendant is asserting an affirmative defense on which he bears the burden of proof.

## 1.04 DEFINITION OF REASONABLE DOUBT

(No instruction)

### Committee Comment

The Seventh Circuit has repeatedly ruled that it is inappropriate for the trial judge to attempt to define “reasonable doubt” for the jury. *See, e.g., United States v. Glass*, 846 F.3d 386, 387 (7th Cir. 1988). *See also United States v. Hatfield*, 590 F.3d 945, 949 (7th Cir. 2010); *United States v. Bruce*, 109 F.3d 323, 329 (7th Cir. 1997). As the court stated in *Glass*,

This case illustrates all too well that “[a]ttempts to explain the term ‘reasonable doubt’ do not usually result in making it any clearer to the minds of the jury.” *Holland v. United States*, 348 U.S. 121, 140 (1954). And that is precisely why this circuit's criminal jury instructions forbid them. See Federal Criminal Instructions of the Seventh Circuit 2.07 (1980). “Reasonable doubt” must speak for itself. Jurors know what is “reasonable” and are quite familiar with the meaning of “doubt.” Judges’ and lawyers’ attempts to inject other amorphous catch-phrases into the “reasonable doubt” standard, such as “matter of the highest importance,” only muddy the water. This jury attested to that. It is, therefore, inappropriate for judges to give an instruction defining “reasonable doubt,” and it is equally inappropriate for trial counsel to provide their own definition. *See, e.g., United States v. Dominguez*, 835 F.2d 694, 701 (7th Cir. 1987). Trial counsel may argue that the government has the burden of proving the defendant's guilt “beyond a reasonable doubt,” but *they may not attempt to define “reasonable doubt.”*

*Glass*, 846 F.2d at 386 (emphasis in original).

## **1.05 DEFINITION OF CRIME CHARGED**

(No instruction)

### **Committee Comment**

It was once common practice to quote the language of the pertinent statute in the instructions to the jury. The Committee recommends against this practice. The purpose of the “elements” instructions is to provide the jury with the requirements for proving the defendant’s guilt, in direct language comprehensible to lay jurors. Quoting from the statute would, in most situations, undercut the pattern instructions’ goal of simplicity and comprehensibility.

## **1.06 DEFINITION OF FELONY/MISDEMEANOR**

(No instruction)

### **Committee Comment**

The Committee does not consider it necessary to have a general instruction defining the terms “felony” or “misdemeanor” because those terms are not used elsewhere in the instructions, and the determination of whether a crime is a felony or misdemeanor is a question of law.

## **1.07 BILL OF PARTICULARS**

(No instruction)

### **Committee Comment**

The Committee does not consider it necessary to give an instruction concerning the content or effect of a bill of particulars. The admissibility of evidence in light of a bill of particulars is a question of law for the court.

## 2.01 THE EVIDENCE

You must make your decision based only on the evidence that you saw and heard here in court. Do not consider anything you may have seen or heard outside of court, including anything from the newspaper, television, radio, the Internet, or any other source. [You must also continue to follow the instructions I gave you at the start of trial that you may not communicate with anyone other than your fellow jurors until after you have returned your verdict.]

The evidence includes only what the witnesses said when they were testifying under oath[,] [and] the exhibits that I allowed into evidence[,] [and] the stipulations that the lawyers agreed to. A stipulation is an agreement that [[certain facts are true] [or] [that a witness would have given certain testimony.]

[In addition, you may recall that I took [judicial] notice of certain facts that may be considered as matters of common knowledge. You may accept those facts as proved, but you are not required to do so.]

Nothing else is evidence. The lawyers' statements and arguments are not evidence. If what a lawyer said is different from the evidence as you remember it, the evidence is what counts. The lawyers' questions and objections likewise are not evidence.

A lawyer has a duty to object if he thinks a question is improper. If I sustained objections to questions the lawyers asked, you must not speculate on what the answers might have been.

If, during the trial, I struck testimony or exhibits from the record, or told you to disregard something, you must not consider it.

### Committee Comment

*Extraneous influence.* This instruction is consistent with the one approved by the Seventh Circuit in *United States v. Xiong*, 262 F.3d 672, 676 (7th Cir. 2001). The Seventh Circuit has also defined the minimum measures a trial judge must take when confronted with evidence of prejudicial publicity prior to or during trial. When apprised in a general fashion of the existence of damaging publicity, the trial judge should "strongly and repeatedly [admonish] the jury throughout the trial not to read or listen to any news coverage of the case." *Margoles v. United States*, 407 F.2d 727, 733 (7th Cir. 1969). When the publishing or broadcast of specific examples of inadmissible evidence is brought to the trial court's attention, the court must investigate further to determine juror exposure:

Thus, the procedure required by this circuit where prejudicial publicity is brought to the court's attention during a trial is that

the court must ascertain if any jurors who had been exposed to such publicity had read or heard the same. Such jurors who respond affirmatively must then be examined, individually and outside the presence of the other jurors, to determine the effect of the publicity.

*Id.* at 735. A court faced with a post-verdict question of extraneous prejudicial information is obligated to follow this same procedure. *United States v. Bashawi*, 272 F.3d 458, 463 (7th Cir. 2001).

*Judicial notice.* Federal Rule of Evidence 201(g) requires the court in a criminal case to “instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.”

## **2.02 CONSIDERING THE EVIDENCE**

Give the evidence whatever weight you believe it deserves. Use your common sense in weighing the evidence, and consider the evidence in light of your own everyday experience.

People sometimes look at one fact and conclude from it that another fact exists. This is called an inference. You are allowed to make reasonable inferences, so long as they are based on the evidence.

### **Committee Comment**

The Seventh Circuit has held that an instruction to the jury to use their common sense and reflect on their everyday experience “does not . . . invite a jury member to consider the evidence in light of personally-held . . . stereotypes or prejudices.” *United States v. Jones*, 808 F.2d 561, 568 (7th Cir. 1986).

### **2.03 DIRECT AND CIRCUMSTANTIAL EVIDENCE**

You may have heard the terms “direct evidence” and “circumstantial evidence.” Direct evidence is evidence that directly proves a fact. Circumstantial evidence is evidence that indirectly proves a fact.

[For example, direct evidence that it was raining outside is testimony by a witness that it was raining. Indirect evidence that it was raining outside is the observation of someone entering a room carrying a wet umbrella.]

You are to consider both direct and circumstantial evidence. The law does not say that one is better than the other. It is up to you to decide how much weight to give to any evidence, whether direct or circumstantial.

## **2.04 NUMBER OF WITNESSES**

Do not make any decisions by simply counting the number of witnesses who testified about a certain point.

What is important is how believable the witnesses were and how much weight you think their testimony deserves.

## **2.05 DEFENDANT’S FAILURE TO TESTIFY OR PRESENT EVIDENCE**

A defendant has an absolute right not to testify [or present evidence]. You may not consider in any way the fact that [the; a] defendant did not testify [or present evidence]. You should not even discuss it in your deliberations.

### **Committee Comment**

No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum.

*Carter v. Kentucky*, 450 U.S. 288, 303 (1981).

In a multi-defendant trial, this instruction must be given at the request of a non-testifying defendant over the objection of a defendant who testifies. *Bruno v. United States*, 308 U.S. 287 (1939); *United States v. Schroeder*, 433 F.2d 846, 851 (8th Cir. 1970); *United States v. Kelly*, 349 F.2d 720, 768-69 (2d Cir. 1965).

### **3.01 CREDIBILITY OF WITNESSES**

Part of your job as jurors is to decide how believable each witness was, and how much weight to give each witness's testimony[, including that of the defendant].

Some factors you may consider include:

- [the age of the witness;]
- the intelligence of the witness;
- the witness's ability and opportunity to see, hear, or know the things the witness testified about;
- the witness's memory;
- the witness's demeanor;
- whether the witness had any bias, prejudice, or other reason to lie or slant his or her testimony;
- the believability of the witness's testimony in light of the other evidence presented; and
- inconsistent statements or conduct by the witness.

#### **Committee Comment**

The bracketed portion of the instruction relating to testimony by the defendant should be given only if the defendant has testified.

The portion of the instruction relating to age should be given only when a very elderly or very young witness has testified.

The term "believability" is intended to encompass both truthfulness and accuracy.

### **3.02 ATTORNEY INTERVIEWING WITNESS**

It is proper for an attorney to interview any witness in preparation for trial.

#### **Committee Comment**

The court should give this instruction only if there has been testimony regarding interviews of witnesses.

“As the trial judge explained to the jury, ‘it is perfectly proper for a lawyer to interview a witness in preparation for trial,’ and an attorney who does not question, rehearse and prepare his witnesses before trial is not properly prepared for trial.” *United States v. Torres*, 809 F.2d 429, 439-40 (7th Cir. 1987).

### **3.03 PRIOR INCONSISTENT STATEMENTS**

You have heard evidence that before the trial, [a] witness[s] made [a] statement[s] that may be inconsistent with his testimony here in court. You may consider an inconsistent statement made before the trial [only] to help you decide how believable the [witness's; witnesses'] testimony was here in court. [If an earlier statement was made under oath, then you can also consider the earlier statement as evidence of the truth of whatever the witness said in the earlier statement.]

#### **Committee Comment**

*See, e.g., United States v. Severson*, 49 F.3d 268, 272 (7th Cir. 1995) (prior inconsistent statement not given under oath is admissible only for purposes of impeachment); *United States v. Dietrich*, 854 F.2d 1056, 1061 (7th Cir. 1988) (same); Federal Rule of Evidence 801(d)(1)(A) (inconsistent statement given under oath at trial, hearing or other proceeding, or deposition is not hearsay).

### **3.04 PRIOR INCONSISTENT STATEMENT BY DEFENDANT**

You have heard evidence that before the trial, [the; a] defendant made [a] statement[s] that may be inconsistent with his testimony here in court. You may consider an inconsistent statement by [the; a] defendant made before the trial to help you decide how believable the defendant's testimony was here in court, and also as evidence of the truth of whatever the defendant said in the earlier statement.

#### **Committee Comment**

The court should give this instruction only if a defendant testifies and inconsistent statements by that defendant are admitted that qualify for substantive use under Federal Rule of Evidence 801(d)(2)(A). The court may, if appropriate, craft instructions applicable to statements of others attributable to and admitted substantively against a defendant under one of the other subsections of Rule 801(d)(2).

### 3.05 WITNESSES REQUIRING SPECIAL CAUTION

You have heard testimony from [a witness; witnesses; name(s) of witness(es)] who:

[- [was; were] [promised; received; expected] [a] benefit[s] in return for his [testimony; cooperation with the government];]

[- has [admitted; been convicted of] lying under oath;]

[- has [plead guilty to; stated] that he was involved in [[one; some] of] the crime[s] the defendant is charged with committing.] [You may not consider his guilty plea as evidence against the defendant.]]

You may give [this witness's; these witnesses'] testimony whatever weight you believe is appropriate, keeping in mind that you must consider that testimony with caution and great care.

#### Committee Comment

*Witness given or promised a benefit:* The Supreme Court acknowledged, in *On Lee v. United States*, 343 U.S. 747, 757 (1952), that the use of informers “may raise serious questions of credibility. To the extent that they do, a defendant is entitled to . . . have the issues submitted to the jury with careful instructions.” The Court has never specifically articulated what is to be included in these “careful instructions” but, in *Hoffa v. United States*, 385 U.S. 293, 311-12 & n.14 (1966), approved an instruction in which the trial judge told the jury to “[c]onsider . . . any relation each witness may bear to either side of the case . . . . All evidence of a witness whose self-interest is shown from either benefits received, detriments suffered, threats or promises made, or any attitude of the witness which might tend to prompt testimony either favorable or unfavorable to the accused should be considered with caution and weighed with care.”

*Witness who has pled guilty:* This instruction is recommended for use in trials in which a witness testifies after pleading guilty to an offense arising from the same occurrence for which the defendant is on trial, and the jury learns of the plea. Such evidence may only be used for the purpose of impeachment or to reflect on the credibility of the witness. The instruction is necessary due to the possibility that an uninstructed jury may infer that the witness's guilty plea is indicative of the defendant's guilt. See *United States v. Johnson*, 26 F.3d 669, 677-80 (7th Cir. 1994). At the defendant's request, this instruction should be given immediately after the plea is admitted and repeated at the end of the trial. See *id.*; see also, *United States v. Carraway*, 108 F.3d 745, 756 (7th Cir. 1997).

### **3.06 IMPEACHMENT BY PRIOR CONVICTION**

(a)

You may consider evidence that the defendant was convicted of a crime only in deciding the believability of [his; her] testimony. [You may not consider it for any other purpose.] [The other conviction[s] [is; are] not evidence of whether the defendant is guilty of [the; any] crime [he; she] is charged with in this trial.]

(b)

You may consider evidence that a witness was convicted of a crime only in deciding the believability of [his; her] testimony. You may not consider it for any other purpose.

#### **Committee Comment**

The final sentences of instruction (a) are bracketed to account for cases in which the prior conviction is an element of the offense for which the defendant is on trial.

### **3.07 CHARACTER EVIDENCE REGARDING WITNESS**

You have heard testimony about [name]’s character for [truthfulness; untruthfulness]. You may consider this evidence only in deciding the believability of [name]’s testimony and how much weight to give to it.

#### **Committee Comment**

See Federal Rules of Evidence 404(a)(2), 404(a)(3), and 608.

### 3.08 CHARACTER EVIDENCE REGARDING DEFENDANT

You have heard testimony about the defendant's [good character; character for \_\_\_\_\_]. You should consider this testimony together with and in the same way you consider the other evidence.

#### Committee Comment

Until 1985, the Seventh Circuit adhered to the idea that when evidence of the defendant's good character was introduced, an instruction was required stating that such evidence standing alone could provide a reasonable doubt regarding the defendant's guilt. See *United States v. Donnelly*, 179 F.2d 227, 233 (7th Cir. 1950). This was taken from a reading of *Edgington v. United States*, 164 U.S. 361 (1896), and *Michelson v. United States*, 335 U.S. 469 (1948). However, in *United States v. Burke*, 781 F.2d 1234, 1238-42 (7th Cir. 1985), the Seventh Circuit rejected the "standing alone" instruction:

The "standing alone" instruction conveys to the jury the sense that even if it thinks the prosecution's case compelling, even if it thinks the defendant a liar, if it also concludes that he has a good reputation this may be the "reasonable doubt" of which other instructions speak. A "standing alone" instruction invites attention to a single bit of evidence and suggests to jurors that they analyze this evidence all by itself. No instruction flags any other evidence for this analysis -- not eyewitness evidence, not physical evidence, not even confessions. There is no good reason to consider any evidence "standing alone."

*Id.* at 1239 (emphasis in original).

Though *Burke* makes clear that a "standing alone" instruction is never mandatory, the court has indicated that such an instruction may sometimes be permissible, though it has not identified circumstances in which that might be the case. See *United States v. Ross*, 77 F.3d 1525, 1538 (7th Cir. 1996) ("This Court has repeatedly held that such an instruction, while sometimes allowable, is never necessary"); *Burke*, 781 F.2d at 1242 n.5. Several other Circuits also recognize that there may be situations in which the instruction can be used. See *United States v. Winter*, 663 F.2d 1120, 1147-49 (1st Cir. 1981); *United States v. Pujana-Mena*, 949 F.2d 24, 27-32 (2d Cir. 1991); *United States v. Spangler*, 838 F.2d 85, 87-88 (3d Cir. 1988); *United States v. Foley*, 598 F.2d 1323, 1336-37 (4th Cir. 1979).

### 3.09 STATEMENT BY DEFENDANT

You have [heard testimony; received evidence] that [the defendant; defendant (name)] made a statement to [name of person or agency]. You must decide whether [the defendant; defendant (name)] actually made the statement and, if so, how much weight to give to the statement. In making these decisions, you should consider all of the evidence, including the defendant's personal characteristics and circumstances under which the statement may have been made.

[You may not consider the statement of defendant (name) as evidence against [the; any] other defendant.]

#### Committee Comment

The second paragraph is in brackets because in some circumstances, a defendant's post-arrest inculpatory statement may be admissible against co-defendants. *See, e.g.*, Federal Rule of Evidence 804(b)(3).

This instruction utilizes the word "statement" in place of words such as "admission" and "confession." In *United States v. Gardner*, 516 F.2d 334, 346 (7th Cir. 1975), the court stated that "the word 'statements' is a more neutral description than 'confession', and should be used in its place in future instructions unless the statements can be considered a 'complete and conscious admission of guilt -- a strict confession.'" The use of the term "statement" in all such instructions eliminates the need for additional debate or litigation as to whether a particular statement fits the definition of a "strict confession" under *Gardner*.

The instruction assumes that the trial court has decided adversely to the defendant any challenge to the voluntariness of the defendant's statement, following a hearing comporting with the requirements of *Jackson v. Denno*, 378 U.S. 368 (1964), and 18 U.S.C. § 3501. Consequently, reconsideration of the voluntariness issue by the jury is not required. *Lego v. Twomey*, 404 U.S. 477 (1972).

As required by 18 U.S.C. § 3501, the instruction directs the jurors to make a determination as to the weight, if any, to be given to a statement after considering factors having to do with the defendant's personal characteristics and the conditions under which the statement was made. "Evidence about the manner in which a confession was secured will often be germane to its probative weight, a matter that is exclusively for the jury to assess." *Crane v. Kentucky*, 476 U.S. 683, 688 (1986). It is the Committee's view that the specific factors set forth in 18 U.S.C. § 3501 should not be set forth in the instruction, but, rather, should be left to argument by counsel. Inclusion of all possible subjects of consideration in a general instruction might well result in the

inclusion of irrelevant factors for many cases, while recitation of only few common factors might result in undue emphasis on those particular factors.

This instruction does not cover vicarious or adoptive admissions or statements made in furtherance of a conspiracy or joint venture.

### **3.10 DEFENDANT'S SILENCE IN THE FACE OF ACCUSATION**

You have heard evidence that \_\_\_\_\_ accused the defendant of [the; a] crime charged in the indictment and that the defendant did not [deny; object to; contradict] the accusation. If you find that the defendant was present and heard and understood the accusation, and that the accusation was made under such circumstances that the defendant would [deny; object to; contradict] it if it were not true, then you may consider whether the defendant's silence was an admission of the truth of the accusation.

#### **Committee Comment**

If a defendant is in custody, his silence in the face of an accusatory statement by a law enforcement official does not constitute an admission of the truth of the statements. Such evidence should not be received, and as a result, no instruction is necessary to cover the point. *See Doyle v. Ohio*, 426 U.S. 610 (1976). More difficult problems exist, however, when the accusatory statement is not made by a law enforcement official or when the defendant is not in custody. *See Gamble*, *The Tacit Admission Rule: Unreliable and Unconstitutional*, 14 Ga. L. Rev. 27 (1979), which challenges the admission of the evidence, under any circumstances, that makes the instruction necessary. A defendant's silence while not in custody is not subject to *Doyle*. *See Greer v. Miller*, 483 U.S. 756, 763-65 (1987); *Brecht v. Abrahamson*, 507 U.S. 619 (1993); *United States v. Jumper*, 497 F.3d 699, 704 (7th Cir. 2007).

Under Federal Rule of Evidence 801(d)(2)(B), before silence can be considered to be an admission, the court must consider whether the defendant was present and heard and understood the statement and had an opportunity to deny it but did not do so. *See, e.g., United States v. Ward*, 377 F.3d 671, 675 (7th Cir. 2004).

### **3.11 EVIDENCE OF OTHER ACTS BY DEFENDANT**

You have heard [testimony; evidence] that the defendant committed [crimes; acts; wrongs] other than the ones charged in the indictment. Before using this evidence, you must decide whether it is more likely than not that the defendant did the [crimes; acts; wrongs] not charged in the indictment. If you decide that he did, then you may consider this evidence to help you decide [describe purpose for which other act evidence was admitted, e.g. the defendant's intent, absence of mistake, etc.]. You may not consider it for any other purpose. Keep in mind that the defendant is on trial here for \_\_\_\_\_, not for the other [crimes; acts; wrongs].

#### **Committee Comment**

See Federal Rule of Evidence 404(b) (admissibility of other act evidence for limited purposes); *see also, e.g., United States v. Perkins*, 548 F.3d 510, 514 (7th Cir. 2008) (jury must find that the defendant committed the act in question). Other act evidence may be admitted to show, among other things, predisposition, motive, opportunity, intent, preparation, plan, knowledge, identity, presence, or absence of mistake or accident. The instruction contemplates reference to the particular purposes for which the court has admitted the evidence to help focus the jury on the fact that this is the sole purpose for which it may consider the evidence. The cautionary language at the end of the instruction is included for the same reasons and to avoid misuse of other act evidence. *See, e.g., Sixth Circuit Criminal Instruction 7.13; Eighth Circuit Criminal Instructions 2.08 & 2.09.*

This instruction may also be given during the trial at the time the evidence is introduced. The trial judge may refer specifically to the other act evidence in question if necessary for clarity. The judge should take care, however, not to characterize the evidence or to give it additional weight.

### 3.12 IDENTIFICATION TESTIMONY

You have heard testimony of an identification of a person. Identification testimony is an expression of the witness's belief or impression. In evaluating this testimony, you should consider the opportunity the witness had to observe the person at the time [of the offense] and to make a reliable identification later. You should also consider the circumstances under which the witness later made the identification.

The government must prove beyond a reasonable doubt that the defendant is the person who committed the crime that is charged.

#### **Committee Comment**

A specific instruction on witness identification must be given when identification is in issue. *United States v. Hall*, 165 F.3d 1095, 1007 (citing *United States v. Anderson*, 730 F.2d 1254, 1257-58 (7th Cir. 1984)). This instruction, derived from the instruction recommended in *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972), cautions the jury to weigh carefully the circumstances surrounding the identification before reaching a conclusion. See *United States v. Crotteau*, 218 F.3d 826, 833 (7th Cir. 2000) (approving the 1996 version of this instruction). It has long been the practice in this Circuit to leave to argument factors that may bear on the accuracy of an identification. The Committee notes, however, that there has been some support for judicial instruction on such points. See *Hall*, 165 F.3d at 1120 (Easterbrook, J., concurring).

The phrase "of the offense" in the first paragraph is bracketed because identification testimony does not always involve an eyewitness to the offense itself.

A court may, but is not required to, admit expert testimony regarding the reliability of eyewitness testimony. See *United States v. Carter*, 410 F.3d 942, 950 (7th Cir. 2005).

### 3.13 OPINION TESTIMONY

You have heard [[a witness; certain witnesses], namely, name of witness(es)], who [[gave opinions about; testified about][certain subjects; specify the subject(s), if possible]. You do not have to accept [this witness's; these witnesses' [opinions; testimony]]. You should judge [this witness's; these witnesses' [opinions; testimony]] the same way you should judge the testimony of any other witness. In deciding how much weight to give to this testimony, you should consider the [witness's; witnesses'] qualifications, how [he; they] reached [his; their] [opinions; conclusions], and the factors I have described for determining the believability of testimony.

#### **Committee Comment**

The term “expert” and the 1996 pattern instruction’s reference to witnesses with “special knowledge or skill” have been omitted to avoid the perception that the court credits the testimony of such a witness or the witness’s qualifications.

Some jurisdictions do not offer a standard instruction on expert testimony. The Illinois Pattern Jury Instructions recommend that no instruction be given on this subject while noting that the credibility of expert testimony is a proper subject of closing argument. See IPI Criminal 3d 3.18 (1992). Similarly, the Indiana Pattern Jury Instructions do not include a specific instruction on the subject. The general instruction relating to the jury’s role in determining the weight and credibility of witnesses is thought to be sufficient. Nevertheless, the danger that an expert’s testimony will be given undue weight by the jury does exist. See *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972) (noting the influence of expert testimony in prosecutions in which the defendant's sanity is an issue); *United States v. Gold*, 661 F. Supp 1127, 1129-30 (D.D.C. 1987). The Committee believes that it is appropriate to give the jury a specific instruction that an expert's opinion should be evaluated along with all other evidence.

If the court wishes to give an instruction concerning the jury’s consideration of lay opinion testimony, this instruction may be adapted for that purpose by eliminating the reference to “the witness’s qualifications” as a factor to be considered.

### 3.14 RECORDED CONVERSATIONS/TRANSCRIPTS

You have [heard recorded conversations; seen video recordings]. This is [proper] evidence that you should consider together with and in the same way you consider the other evidence.

[You were also given transcripts of the conversations [on the video recordings] to help you follow the recording(s) as you listened to [it; them]. The recordings are the evidence of what was said and who said it. The transcripts are not evidence. If you noticed any differences between what you heard in the conversations and what you read in the transcripts, your understanding of the recording is what matters. In other words, you must rely on what you heard, not what you read. And if you could not hear or understand certain parts of the recordings, you must ignore the transcripts as far as those parts are concerned. [You may consider a person's actions, facial expressions, and lip movements that you are able to observe on a video recording to help you determine what was said and who said it.]]

[I am providing you with the recordings and a device with instructions on its use. It is up to you to decide whether to listen to the recordings during your deliberations. You may, if you wish, rely on your recollections of what you heard during the trial.]

[If, during your deliberations, you wish to have another opportunity to view [a; any]transcript[s][as you listen to a recording], send a written message to the [marshal; court security officer], and I will provide you with the transcript[s].]

#### **Committee Comment**

The word “proper” in the first paragraph is bracketed as an optional addition. In *United States v. Cunningham*, 462 F.3d 708, 712-15 (7th Cir. 2006), the court concluded that it was error to admit evidence regarding the process of court approval for interception of wire communications. Though the Seventh Circuit has never disapproved an instruction that characterizes recorded conversations as “proper” evidence, the Committee expresses no view in that regard.

The second paragraph of the instruction, concerning the use of transcripts, is in brackets because in some cases it is stipulated or undisputed that the transcripts are accurate. In such cases, there is no need to instruct the jury that the transcripts may be used only for limited purposes.

The fourth paragraph of the instruction is bracketed because some judges may prefer to allow the jury to take all of the transcripts along with the exhibits admitted in evidence. No particular practice is prescribed in this regard.

### **3.15 FOREIGN LANGUAGE RECORDINGS/ENGLISH TRANSCRIPTS**

During the trial, \_\_\_\_\_ language recordings were admitted in evidence. You were also given English transcripts of those recordings so you could consider the contents of the recordings. It is up to you to decide whether a transcript is accurate, in whole or in part. You may consider the translator's knowledge, training, and experience, the nature of the conversation, and the reasonableness of the translation in light of all the evidence in the case. You may not rely on any knowledge you may have of the \_\_\_\_\_ language. Rather, your consideration of the transcripts should be based on the evidence introduced in the trial.

[You may consider a person's actions, facial expressions, and lip movements that you are able to observe on a video recording to help you determine what was said and who said it.]

#### **Committee Comment**

This instruction is not required if the parties stipulate to the accuracy of the translation of a non-English-language recording.

### **3.16 SUMMARIES RECEIVED IN EVIDENCE**

Certain [summaries; charts; etc.] were admitted in evidence. [You may use those [summaries; charts] as evidence [even though the underlying [documents; evidence] are not here].]

[The accuracy of the [summaries; charts] has been challenged. [The underlying [documents; evidence] [has; have] also been admitted so that you may determine whether the summaries are accurate.]

[It is up to you to decide how much weight to give to the summaries.]

#### **Committee Comment**

See Federal Rule of Evidence 1006. For an undisputed summary, only the first two sentences should be given. For a disputed summary, the entire instruction should be given, except for the second sentence of the first paragraph.

### **3.17 DEMONSTRATIVE SUMMARIES/CHARTS NOT RECEIVED IN EVIDENCE**

Certain [summaries; charts; etc.] were shown to you to help explain other evidence that was admitted, [specifically, identify the demonstrative exhibit, if appropriate]. These [summaries; charts] are not themselves evidence or proof of any facts, [so you will not have these particular [summaries; charts] during your deliberations]. If they do not correctly reflect the facts shown by the evidence, you should disregard the [summaries; charts] and determine the facts from the underlying evidence.

### **3.18 JUROR NOTE-TAKING**

If you have taken notes during the trial, you may use them during deliberations to help you remember what happened during the trial. You should use your notes only as aids to your memory. The notes are not evidence. All of you should rely on your independent recollection of the evidence, and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any more weight than the memory or impressions of each juror.

#### **Committee Comment:**

This instruction is adapted from Seventh Circuit Pattern Civil Instruction 1.07.

#### **4.01 ELEMENTS/BURDEN OF PROOF**

[The indictment charges defendant[s] with; Count[s] \_\_\_ of the indictment charge[s] the defendant with] \_\_\_\_\_. In order for you to find the defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. \_\_\_\_\_ and
2. \_\_\_\_\_ and
3. \_\_\_\_\_ and

4. [Addressing any issues raised by an affirmative defense on which the government bears the burden of proof, e.g., entrapment.]

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

**4.02 ELEMENTS/BURDEN OF PROOF IN CASE  
INVOLVING INSANITY DEFENSE**

[The indictment charges defendant[s] with; Count \_\_ of the indictment is a charge of] \_\_\_\_\_. In order for you to find the defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. \_\_\_\_\_ and \_\_\_\_\_
2. \_\_\_\_\_ and \_\_\_\_\_
3. \_\_\_\_\_

If you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has proved each of these [three] elements beyond a reasonable doubt, then you should find the defendant guilty [of this charge], unless you decide that the defendant is not guilty by reason of insanity.

If the defendant has proven the defense of insanity by clear and convincing evidence, then you should find the defendant not guilty by reason of insanity. Clear and convincing evidence is not as high a burden of proof as beyond a reasonable doubt.

[Insert definition of insanity from Instruction \_\_\_\_.]

**Committee Comment**

This instruction is parallel to the general elements instruction. The Seventh Circuit has not had occasion to define “clear and convincing” evidence as that term is used in the insanity statute. The court has stated in another context, however, that “‘highly probable’ . . . is the Supreme Court’s definition of . . . ‘clear and convincing evidence.’” *United States v. Boos*, 329 F.3d 907, 911 (7th Cir. 2003) (citing *Colorado v. New Mexico*, 467 U.S. 310 (1984)). The contrast with the requirement of proof beyond a reasonable doubt is taken from Sixth Circuit Instruction 6.04 and is used so that the jury is aware of the different level of proof required.

**4.03 ELEMENTS/BURDEN OF PROOF IN CASE  
INVOLVING COERCION DEFENSE**

[The indictment charges defendant[s] with; Count \_\_ of the indictment is a charge of] \_\_\_\_\_. In order for you to find the defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. \_\_\_\_\_ and \_\_\_\_\_
2. \_\_\_\_\_ and \_\_\_\_\_
3. \_\_\_\_\_

If you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty [of this charge], unless the defendant has proven the defense of coercion. If the defendant has proven that it is more likely than not that he was coerced, then you should find the defendant not guilty.

[Insert definition of coercion from Instruction \_\_\_\_.]

**Committee Comment**

The defendant bears the burden of proving a coercion defense. *Dixon v. United States*, 548 U.S. 1 (2006).

The “preponderance of the evidence” definition is adapted from the Seventh Circuit Pattern Civil Instructions.

#### 4.04 UNANIMITY ON SPECIFIC ACTS

Count(s) \_\_\_ charge the defendant with [fill in description of multiple acts, e.g., making more than one false statement]. The government is not required to prove that the defendant made every one of the [fill in shorthand description, e.g., false statements] alleged in [Count \_\_\_; the particular Count you are considering]. However, the government is required to prove that the defendant made at least one of the [fill in shorthand description, e.g., false statements] that is alleged in [Count \_\_\_; the particular Count]. To find that the government has proven this, you must agree unanimously on which particular [shorthand description, e.g. false statement] the defendant made, as well as all of the other elements of the crime charged.

[For example, [on Count \_\_\_], if some of you were to find that the government has proved beyond a reasonable doubt that the defendant [fill in description of one of the particular acts charged, e.g., "made a false statement regarding his taxable income"], and the rest of you were to find that the government has proved beyond a reasonable doubt that the defendant [fill in description of a different particular act charged, e.g., "made a false statement about the number of exemptions to which he was entitled"], then there would be no unanimous agreement on which [shorthand description, e.g., false statement] the government has proved. On the other hand, if all of you were to find that the government has proved beyond a reasonable doubt that the defendant [fill in description of one of the particular acts charged, e.g., "made a false statement regarding his taxable income"], then there would be a unanimous agreement on which [shorthand description, e.g., false statement] the government proved.]

#### Committee Comment

This instruction may apply when the government alleges in a single count that the defendant violated the law in more than one way. The law in this regard has developed significantly in recent years. When *Richardson v. United States*, 526 U.S. 813 (1999), and *Schad v. Arizona*, 501 U.S. 624, 631-32 (1991) (plurality opinion), are read together, it appears that unanimity is required when the government alleges more than one possibility for an element of the crime (e.g., a false statement charge in which the government charges that the defendant made one or more of three alleged false statements), but not when the government contends that the defendant committed an element of the crime using one or more of several possible means (e.g., a armed robbery charge in which the government charges that the defendant committed a robbery using a knife, or a gun, or both). *Richardson*, 513 U.S. at 817.

The element/means distinction is not always clear. Some guidance has been provided by the Seventh Circuit's post-*Richardson* cases. See, e.g., *United States v. Griggs*, 569 F.3d 341, 344 (7th Cir. 2009), which gives as examples of

when a jury must be unanimous on particular acts situations in which a single count charges multiple perjurious statements, multiple objects of a single conspiracy, and multiple predicate acts of an alleged continuing criminal enterprise. By analogy, false statement-type charges (including false tax return charges) including multiple alleged false statements in a single count and RICO charges likely require a unanimity instruction, though there is no definitive post-Richardson guidance from the Seventh Circuit on charges of this sort. See also *United States v. Mannava*, 565 F.3d 412, 415-16 (7th Cir. 2009) (conviction under 18 U.S.C. § 2422(b), which makes it a crime to induce a minor to engage in sexual activity for which a person can be charged with a criminal offense, requires unanimity regarding the underlying state criminal offense involved); *United States v. Davis*, 471 F.3d 783, 791 (7th Cir. 2006) (if fraud charge alleges multiple schemes, unanimity regarding the particular scheme is required). On the other hand, a jury need not be unanimous on which overt act the defendants committed in furtherance of a charged conspiracy. See *Griggs*, 569 F.3d at 343-44. The Committee notes that it is common for mail, wire, and bank fraud charges to include allegations regarding multiple false statements, promises, or representations. Since *Richardson*, the Seventh Circuit has not spoken on the question of whether, in a case, unanimity on the particular false statement, promise, or representation is required. Though it is likely that these constitute allegations regarding a means, not an element, of the offense (the element being the existence of a scheme, not the particulars how the scheme was executed), the Committee takes no definitive position on the point.

If used, this instruction should be sequenced so that it accompanies the “elements” and definitional instructions for the particular count(s) for which it is used. If the instruction applies to some counts but not others, the trial judge should include language in the instruction identifying the counts to which the instruction applies. The example provided in the second paragraph is optional and, if given, should be adapted to the particular case.

#### 4.05 DATE OF CRIME CHARGED

The indictment charges that [the crime; insert other description] happened “on or about” [fill in date]. The government must prove that the crime happened reasonably close to that date. The government is not required to prove that the crime happened on that exact date.

##### **Committee Comment**

This instruction is unnecessary in the average case in which no discrepancy exists between the date charged in the indictment and the date suggested by the evidence at trial.

If there is such a discrepancy, this instruction may be given if the date suggested by the evidence falls within the applicable statute of limitations, *Ledbetter v. United States*, 170 U.S. 606, 612 (1898); *United States v. Leibowitz*, 857 F.2d 373, 378 (7th Cir. 1988). Use of the phrase “on or about” in the indictment makes a date reasonably near the date in the indictment sufficient, and only a material variance will cause the government’s case to fail. *Leibowitz*, 857 F.2d at 378.

There are two possible exceptions to this rule:

a. when the date charged is an essential element of the offense and the defendant was misled by such date in preparing a defense. *See, e.g., United States v. Bourque*, 541 F.2d 290, 293-96 (1st Cir. 1976), *United States v. Cina*, 699 F.2d 853, 859 (7th Cir. 1983).

b. when the defendant asserts an alibi defense for the specific date(s) charged. *Leibowitz*, 857 F.2d at 378-79.

#### **4.06 SEPARATE CONSIDERATION – ONE DEFENDANT CHARGED WITH MULTIPLE CRIMES**

[The; certain] defendant[s] has been accused of more than one crime. The number of charges is not evidence of guilt and should not influence your decision.

You must consider each charge [and the evidence concerning each charge] separately. Your decision on one charge, whether it is guilty or not guilty, should not influence your decision on any other charge.

#### **4.07 SEPARATE CONSIDERATION – MULTIPLE DEFENDANTS CHARGED WITH SAME OR MULTIPLE CRIME(S)**

Even though the defendants are being tried together, you must consider each defendant [and the evidence concerning that defendant] separately. Your decision concerning one defendant, whether it is guilty or not guilty, should not influence your decision concerning any other defendant.

#### **4.08 PUNISHMENT (OPTIONAL INSTRUCTION)**

In deciding your verdict, you should not consider the possible punishment for the defendant[s] [who [is; are] on trial]. If you decide that the government has proved [the; a] defendant guilty beyond a reasonable doubt, then it will be my job to decide on the appropriate punishment.

#### **Committee Comment**

This instruction is commonly requested by the government in certain districts within the Circuit and is given by some, but not all judges. The Committee has included it so that there is some standardization. The most common argument against giving an instruction in the way it is now commonly given – i.e., “you should not consider the issue of punishment” – is that it tends to denigrate the burden of proof and to undermine the seriousness of the jury’s task. The rewording of the commonly-given instruction that is proposed here will go at least part of the way toward eliminating the risk that this will occur. The wording is adapted from Sixth Circuit Instruction 8.05.

In a case in which the jury has heard evidence suggesting the range of sentence the defendant may face – for example, when a cooperating witness charged with the same offenses testifies and is cross examined on the sentence he faced absent a cooperation agreement – the trial judge may wish to consider modifying this instruction so that it does not suggest that it is inappropriate for the jury to consider the possible punishment that particular witness faced.

#### 4.09 ATTEMPT

A person attempts to commit [identify offense, e.g., bank robbery] if he knowingly takes a substantial step toward committing [offense], intending to commit [offense]. A substantial step is an act beyond mere planning or preparation to commit the crime, but less than the last act necessary to commit the crime.

#### Committee Comment

See *United States v. Barnes*, 230 F.3d 311, 315 (7th Cir. 2000); *United States v. Rovetuso*, 768 F.2d 809, 822 (7th Cir. 1985). The definition of “substantial step” is included because the term is difficult to understand without explanation.

In *United States v. Gladish*, 536 F.3d 646 (7th Cir. 2008), the court concluded that explicitly sexual Internet chatter combined with the defendant sending the purported minor a video of himself masturbating did not amount to a “substantial step” as required to convict the defendant of attempting to induce the minor to engage in sexual activity. The court stated that “[t]he requirement of proving a substantial step serves to distinguish people who pose real threats from those who are all hot air.” *Id.* at 650. See also *United States v. Zawada*, 552 F.3d 531 (7th Cir. 2008) (planning for meeting with minor sufficient to constitute substantial step under plain error review); *United States v. Davey*, 550 F. 2d 653 (7th Cir. 2008) (affirming denial of motion to withdraw guilty plea; substantial step toward completion of substantive offense demonstrated by planning a meeting with purported minor, travel across state lines to achieve meeting, and telephone contact with purported minor upon arrival for further planning); *Doe v. City of Lafayette*, 337 F.3d 757, 783 (7th Cir. 2004) (merely thinking sexual thoughts about children does not constitute substantial step towards sexual abuse).

#### 4.10 KNOWINGLY – DEFINITION

A person acts knowingly if he realizes what he is doing and is aware of the nature of his conduct, and does not act through ignorance, mistake, or accident. [In deciding whether the defendant acted knowingly, you may consider all of the evidence, including what the defendant did or said.]

[You may find that the defendant acted knowingly if you find beyond a reasonable doubt that he had a strong suspicion that [state fact as to which knowledge is in question, e.g., “drugs were in the suitcase,” “the financial statement was false,”] and that he deliberately avoided the truth. You may not find that the defendant acted knowingly if he was merely mistaken or careless in not discovering the truth.]

#### Committee Comment

The Seventh Circuit has approved the definition of “knowledge” given in the first paragraph of this instruction. See *United States v. Graham*, 431 F.3d 585, 590 (7th Cir. 2005).

The second paragraph, commonly referred to as an “ostrich” instruction, is not appropriate in every case. Such an instruction is appropriate “where (1) the defendant claims a lack of guilty knowledge, and (2) the government has presented evidence sufficient for a jury to conclude that the defendant deliberately avoided learning the truth.” *United States v. Carani*, 492 F.3d 867, 873 (7th Cir. 2007) (citing *United States v. Carrillo*, 435 F.3d 767, 780 (7th Cir. 2006)). Deliberate avoidance is more than mere negligence. *Carani*, 492 F.3d at 873. The defendant “must have ‘deliberately avoided acquiring knowledge of the crime being committed by cutting off his curiosity through an effort of the will.’” *Id.* (quoting *United States v. Leahy*, 464 F.3d 773, 796 (7th Cir. 2006)). “The purpose of the ostrich instruction is to inform the jury that a person may not escape criminal liability by pleading ignorance if he knows or strongly suspects he is involved in criminal dealings but deliberately avoids learning more exact information about the nature or extent of those dealings.” *Carrillo*, 435 F.3d at 780 (internal quotation marks and citation omitted). “[E]vidence merely supporting a finding of negligence—that a reasonable person would have been strongly suspicious, or that a defendant should have been aware of criminal knowledge—does not support an inference that a particular defendant was deliberately ignorant.” *Carrillo*, 435 F.3d at 781; *United States v. Stone*, 987 F.2d 469, 472 (7th Cir. 1993) (explaining that it is improper to use an ostrich instruction “to convict [a defendant] on the basis of what [he] should have known”).

Accordingly, an ostrich instruction is inappropriate when the government’s evidence leaves the jury with a “binary choice” – the defendant had actual knowledge, or he lacked knowledge. See *United States v. Craig*, 178

F.3d 891, 898 (7th Cir.1999); *United States v. Giovanetti*, 919 F.2d 1223, 1228 (7th Cir. 1990). “If the evidence against the defendant points solely to direct knowledge of the criminal venture, it would be error to give the [ostrich] instruction.” *United States v. Caliendo*, 910 F.2d 429, 435 (7th Cir. 1990) (internal quotation marks and citation omitted).

#### **4.11 WILLFULLY – DEFINITION**

(No Instruction)

##### **Committee Comment**

The Committee has not proposed a general definition of willfulness because the term is statute-specific. The pattern elements instructions for statutes requiring proof of willfulness include the necessary definitional instructions.

#### **4.12 SPECIFIC INTENT/GENERAL INTENT**

The Committee recommends avoiding instructions that distinguish between “specific intent” and “general intent.” Instead, the trial judge should give instructions that define the precise mental state required by the particular offense charged. Distinctions between “specific intent” and “general intent” more than likely confuse rather than enlighten juries. *See United States v. Bailey*, 444 U.S. 394, 398-413 (1980); *See also, Liparota v. United States*, 471 U.S. 419, 433 n.16 (1985) (suggesting that jury instructions should “eschew use of difficult legal concepts like ‘specific intent’ and ‘general intent.’”).

#### **4.13 DEFINITION OF POSSESSION**

A person possesses an object if he has the ability to exercise control over it. A person possesses an object if he has the ability and intention to exercise direction or control over the object, either directly or through others, even if he is not in physical contact with it.

[More than one person may possess an object. If two or more persons share possession, that is called “joint” possession. If only one person possesses the object, that is called “sole” possession. The term “possess” in these instructions includes both joint and sole possession.]

#### **Committee Comment**

The instruction provides a definition of “constructive” possession. See, e.g., *United States v. Harris*, 325 F.2d 865, 870 (7th Cir. 2003); *United States v. Folks*, 236 F.3d 384, 389 (7th Cir. 2001). There is no need to use the term “constructive” in the jury instructions, as it would introduce an element of confusion. It is better simply to provide the definition without using the legal term.

The second (bracketed) paragraph should be used only in a case in which there is evidence of possession by more than one person.

#### **4.14 POSSESSION OF RECENTLY STOLEN PROPERTY**

If you find that the defendant was in possession of property that recently had been stolen, you may infer that [he; she] knew it was stolen. You are not required to make this inference.

The term “recently” has no fixed meaning. The more time that has passed since the property was stolen, the more doubtful an inference of the defendant’s knowledge becomes.

#### **Committee Comment**

*See Barnes v. United States*, 412 U.S. 837, 843 (1973), and *United States v. Woody*, 55 F.3d 1257, 1265 (7th Cir. 1995), both of which hold that an inference of knowledge from possession of recently stolen property is legally appropriate. The current version of the instruction modifies the previous version to alter language that arguably suggested that the defendant is under an obligation to explain his possession of recently stolen property.

## 5.01 RESPONSIBILITY

A person who [orders; authorizes; [or] in some other way is responsible for] the criminal acts of another person may be found guilty whether or not the other person [is; has been] found guilty.

### **Committee Comment**

This instruction has relatively narrow application. When Congress enacted the Sherman Act, it was concerned that juries would hesitate to convict lower level employees who actually had violated the law but had done so at the direction of their superiors, so it added the verbs “authorized” and “ordered” into the Act to clarify its intent that the superiors also were personally liable. *See United States v. Wise*, 370 U.S. 405, 413 (1962). This instruction reassures jurors that if they acquit a lower level employee, they are not obliged to acquit his superior who ordered the conduct.

## 5.02 PERSONAL RESPONSIBILITY OF CORPORATE AGENT

A person who acts on behalf of a [corporation; partnership; other entity] also is personally responsible for what he does or causes someone else to do. However, a person is not responsible for the conduct of others performed on behalf of a corporation merely because that person is an officer, employee, or other agent of a corporation.

### Committee Comment

A corporate agent through whose act, default or omission the corporation committed a crime is himself guilty of that crime. This principle applies regardless of whether the crime requires consciousness of wrongdoing and it applies not only to those corporate agents who themselves committed the criminal act, but also to those who by virtue of their managerial positions or their similar relation to the actor could be deemed responsible for its commission. *See, e.g., United States v. Park*, 421 U.S. 658, 670 (1975) (clean warehouse case). “Two fundamental principles are thoroughly settled. One is that neither in the civil nor the criminal law can an officer protect himself behind a corporation where he is the actual, present, and efficient actor; and the second is that all parties active in promoting a misdemeanor, whether agents or not, are principals.” *United States v. Wise*, 370 U.S. 405, 410 (1962). Implicit in these principles is the notion that criminal culpability attaches because of the agent’s act, default or omission, not simply and solely because of the officer’s position in the corporation.

### **5.03 ENTITY RESPONSIBILITY-ENTITY DEFENDANT – AGENCY**

[Name of entity] is a [corporation; other type of entity]. A [corporation; other type of entity] may be found guilty of an offense. A [corporation; other type of entity] acts only through its agents and employees, that is, people authorized or employed to act for the [corporation; other type of entity].

[The indictment charges [name of entity] with; Count \_\_ of the indictment is a charge of] \_\_\_\_\_. In order for you to find [name of entity] guilty of this charge, the government must prove each of the following things beyond a reasonable doubt:

First, the offense charged was committed by an agent or employee of [name of entity]; and

Second, in committing the offense, the agent[s] or employee[s] intended, at least in part, to benefit [name of entity]; and

Third, the agent[s] or employee[s] acted within [his/their] authority.

If you find from your consideration of all the evidence that the government has proved each of these propositions beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any of these propositions beyond a reasonable doubt, then you should find the defendant not guilty.

An act is within the authority of an agent or employee if it concerns a matter that [name of entity] generally entrusted to that agent or employee. [Name of entity] need not have actually authorized or directed the particular act.

If an agent or employee was acting within his authority, then [name of entity] is not relieved of its responsibility just because the act was illegal, or was contrary to [name of entity]'s instructions, or was against [name of entity]'s general policies. However, you may consider the fact that [name of entity] had policies and instructions and how carefully it tried to enforce them when you determine whether [name of entity]'s agent[s] or employee[s] was acting with the intent to benefit [name of entity] or was acting within his authority.

#### **Committee Comment**

This instruction adopts the position of the majority of the courts of appeals that have considered the question of the responsibility of a corporation for the criminal conduct of its agents. The majority view is that unless the criminal statute explicitly provides otherwise, a corporation is vicariously

criminally liable for the crimes committed by its agents acting within the scope of their employment--that is, within their actual or apparent authority and on behalf of the corporation.

In non-regulatory cases, however, intent to benefit the corporation is treated as a separate element. *See, e.g., United States v. One Parcel of Land Located at 7326 Highway 45 N., Three Lakes*, 965 F.2d 311, 316 (7th Cir. 1992), in which the court held that agents are outside the scope of their employment when not acting at least in part for the benefit of the corporation, implying that the intent to benefit is an element of corporate responsibility. *See also United States v. Barrett*, 51 F.3d 86, 89 (7th Cir. 1995) (“common sense dictates that when an employee acts to the detriment of his employer and in violation of the law, his actions normally will be deemed to fall outside the scope of his employment and thus will not be imputed to his employer.”). *Cf. Doe v. R.R.Donnelley & Sons Co.*, 42 F.3d 439, 446 (7th Cir. 1994) (a sexual harassment case in which the Seventh Circuit noted that “[k]nowledge of the agent is imputed to the corporate principal only if the agent receives the knowledge while acting within the scope of the agent’s authority and when the knowledge concerns a matter within the scope of that authority”); *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 321 (7th Cir. 1992) (same).

In *United States v. LaGrou Distribution Systems, Inc.*, 466 F.3d 585 (7th Cir. 2006), the corporate defendant was convicted of felonies related to the knowing and intentional unsanitary storage of meat and poultry. The trial court used Pattern Instruction 5.02-5.03 and added this to its definition of “knowingly” (see Instruction 4.06):

A corporation acts through its agents . . . and “knows” through its agents . . . To distinguish knowledge belonging exclusively to an agent from knowledge belonging to the corporate principal, courts rely on certain presumptions. Where a corporate agent obtains knowledge while acting in the scope of agency, he presumably reports that knowledge to this corporate principal so the court imputes such knowledge to a corporation.

The Seventh Circuit deemed this an accurate summary of the law in cases where “knowingly” was the required level of *mens rea*, as distinguished from *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), in which “corruptly” was the corporate *mens rea* required to convict. *LaGrou Distribution Systems*, 466 F.3d at 592. (In *Arthur Andersen*, the Supreme Court observed that the charging statute, 18 U.S.C. § 1512(b)(2)(A), required proof that the defendant “knowingly . . . corruptly persuaded” another person “with intent to cause” that person to withhold documents from an official proceeding. *Arthur Andersen*, 544 U.S. at 704-05. To act with this intent, defendants must be “persuaders conscious of their wrongdoing.” *Id.* at 706.)

In *Pugh v. Tribune Co.*, 521 F.3d 686 (7th Cir. 2008), a civil securities fraud case involving inflation of circulation figures, the court reaffirmed the principle of Instruction 5.03:

A corporation may be held liable for statements by employees who have apparent authority to make them. Accordingly, the corporate scienter inquiry must focus on ‘the state of mind of the individual corporate official or officials who make or issue the statement (or order or approve it or its making or issuance, or who furnish information or language for the inclusion therein, or the like) rather than generally to the collective knowledge of all the corporation’s officers and employees acquired in the course of their employment.

*Pugh*, 521 F.3d at 697.

In *United States v. Ladish Malting Co.*, 135 F.3d 484 (7th Cir. 1998), the court held that corporations are deemed to have knowledge if the knowledge is possessed by persons with authority to do something about what they know, regardless of their title within the company (i.e., it is not necessary for a “supervisor” to know about a safety hazard if a member of the company’s safety committee knew about it). *Id.* at 492-93. The court also held that corporations are not entitled to a “forgetfulness” instruction because corporations qua corporations don’t forget things. *Id.* at 492. The court reaffirmed these principles in *United States v. L.E. Myers Co.*, 562 F.3d 845, 853-55 (7th Cir. 2009).

In *United States v. One Parcel of Land . . .*, *supra*, a drug forfeiture case, the court in dicta glossed these agency principles: a corporation knows what its agents know when they are acting for the benefit of the corporation; but a corporation is not imputed to know what its employees are doing when they act outside of the scope of their agency and are not acting for or in behalf of the corporation. 965 F.2d at 316-17; *see also id.* at 322 (Posner, J., dissenting).

#### **5.04 ENTITY RESPONSIBILITY – ENTITY DEFENDANT – AGENCY-RATIFICATION**

If you find that an agent’s act was outside his authority, then you must consider whether the corporation later approved the act. An act is approved if, after it is performed, another agent of the corporation, with the authority to perform or authorize the act, and with the intent to benefit the corporation, either expressly approves the act, or engages in conduct that is consistent with approving the act. A corporation is legally responsible for any act or omission approved by its agents.

#### **Committee Comment**

This instruction is patterned on ordinary agency principles of post hoc ratification. Note, however, that the Supreme Court declined to require corporate ratification for liability to attach in a civil antitrust case, finding that “a ratification rule would have anticompetitive effects, directly contrary to the purposes of the antitrust laws.” *American Society of Mechanical Engineers, Inc. v. Hydrolevel*, 456 U.S. 556, 573 (1982).

## **5.05 JOINT VENTURE**

An offense may be committed by more than one person. A defendant's guilt may be established without proof that the defendant personally performed every act constituting the crime charged.

## 5.06 AIDING AND ABETTING/ACTING THROUGH ANOTHER

(a)

Any person who knowingly [aids; counsels; commands; induces; or procures] the commission of an offense may be found guilty of that offense if he knowingly participated in the criminal activity and tried to make it succeed.

(b)

If a defendant knowingly causes the acts of another, then the defendant is responsible for those acts as though he personally committed them.

### Committee Comment

The Seventh Circuit has not yet clearly reconciled two competing lines of cases on what level of mens rea is required for aider and abettor liability. See, e.g., Baruch, “What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law,” 70 FDMLR 1341, 1401-09 (2002). One line of cases suggests that it is sufficient for the defendant to provide material assistance to the main actor regardless of whether the defendant desired that the underlying crime succeed. *United States v. Ortega*, 44 F.3d 505, 508 (7th Cir. 1995). In *United States v. Garcia*, 45 F.3d 196, 199 (7th Cir. 1995), however, the court held that an aider and abettor must desire to help the activity succeed. Many subsequent cases have adopted the higher level of mens rea, declaring it consistent with the material assistance standard. See, e.g., *United States v. Irwin*, 149 F.3d 565, 571-73 (7th Cir. 1998); but see *United States v. Andrews*, 442 F.3d 996, 1002 (7th Cir. 2006) (aiding and abetting a violation of 18 U.S.C. § 924(c) requires proof that the defendant knowingly and intentionally assisted the principal’s use of a dangerous weapon in a violent felony), citing *Ortega*, 44 F.3d at 508. The committee suggests that, absent clearer direction from the Seventh Circuit, the more prudent course is to hold the government to the higher standard.

## 5.07 PRESENCE/ACTIVITY/ASSOCIATION

(a)

A defendant's presence at the scene of a crime and knowledge that a crime is being committed is not sufficient by itself to establish the defendant's guilt.

(b)

If a defendant performed acts that advanced a criminal activity but had no knowledge that a crime was being committed or was about to be committed, those acts are not sufficient by themselves to establish the defendant's guilt.

(c)

A defendant's association with persons involved in a [crime; criminal scheme] is not sufficient by itself to prove his participation or membership in the scheme.

### Committee Comment

Only the particular subpart(s) that apply in the particular case should be given.

*"Mere presence" instruction (subpart (a)).* It is the Committee's position that the presence instruction should be used in a limited fashion. If there is no evidence other than mere presence at the scene of the crime, then presumably a motion for a directed verdict or judgment of acquittal would be granted by the trial judge. However, there may be some cases where a defendant is present and takes some action which is the subject of conflicting testimony. In those situations, the Committee believes that a presence instruction might be appropriate.

Instruction (a) restates traditional law. See *United States v. Valenzuela*, 596 F.2d 824, 830-31 (9th Cir. 1979), *United States v. Garguilo*, 310 F.2d 249, 253 (2d Cir. 1962), *United States v. Moya-Gomez*, 860 F.2d 706, 759 (7th Cir. 1988); *United States v. Jones*, 950 F.2d 1309, 1313 (7th Cir. 1991). It omits the word "mere," commonly used to modify "presence." The omission is due to the Committee's belief that "mere" is unnecessary and, in some situations, misleading or argumentative.

Instruction (a) is most typically given in conspiracy cases – *United States v. Quintana*, 508 F.2d 867, 880 (7th Cir. 1975), *United States v. Atterson*, 926 F.2d 649, 655-56 (7th Cir. 1991), *United States v. Williams*, 798 F.2d 1024, 1028-29 (7th Cir. 1996) – and aiding and abetting cases, *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949), *United States v. Townsend*, 924 F.2d

1385, 1393-94 (7th Cir. 1991), *United States v. Boykins*, 9 F.3d 1278, 1287-88 (7th Cir. 1993).

Instruction (a) may be given where a defendant charged with a substantive crime such as assault, alleges that although he/she was present at the scene of the crime, he/she did not do it.

Acts that advance criminal activity (subpart (b)). Instruction (b) has been given by judges in this circuit for many years. It stems from cases such as *Dennis v. United States*, 302 F.2d 5, 12-13 (10th Cir. 1962); *United States v. Benz*, 740 F.2d 903, 910-11 (11th Cir. 1984); *United States v. Windom*, 19 F.3d 1190 (7th Cir. 1994); *United States v. Carrillo*, 269 F.3d 761, 770 (7th Cir. 2001); *United States v. Ramirez*, 574 F.3d 869, 883 (7th Cir. 2009).

Instruction (a) or Instruction (b) may be given where a defendant charged with a substantive crime, such as assault or possession of narcotics, alleges that although he was present at the scene of the crime, he was not a participant in the criminal activity.

If a defendant is charged with conspiracy on the basis of furnishing supplies or services to someone engaged in a criminal conspiracy, an additional instruction may be necessary. The Seventh Circuit has determined that a defendant who furnishes supplies or services to someone engaged in a conspiracy is not guilty of conspiracy even though the supply of goods or services may have furthered the object of a conspiracy if the defendant had no knowledge of the conspiracy. See *United States v. Manjarrez*, 258 F.3d 618, 626-27 (7th Cir. 2001).

“*Mere association*” instruction (subpart (c)). Subpart (c) mirrors an instruction that is included as part of Instruction 5.10, concerning membership in a conspiracy. Because, however, the concept that association with someone involved in a crime is not enough by itself to establish criminal responsibility is not confined to conspiracy cases, a more generalized version of the instruction is included here.

### **5.08(A) CONSPIRACY – OVERT ACT REQUIRED**

[The indictment charges defendant[s] with; Count[s] \_\_ of the indictment charge[s] the defendant with] conspiracy. In order for you to find the defendant guilty of this charge, the government must prove each of the [three] following things beyond a reasonable doubt:

1. The conspiracy as charged in Count [\_\_\_] existed;
2. The defendant knowingly became a member of the conspiracy with an intent to advance the conspiracy; and
3. One of the conspirators committed an overt act in an effort to advance [a; the] goal[s] of the conspiracy [on or before \_\_\_\_].

An overt act is any act done to carry out [a; the] goal[s] of the conspiracy. The government is not required to prove all of the overt acts charged in the indictment. The overt act may itself be a lawful act.

If you find from your consideration of all the evidence that the government has proved each of these propositions beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these propositions beyond a reasonable doubt, then you should find the defendant not guilty.

#### **Committee Comment**

(a)

*Usage of 5.08(A) vs. 5.08(B).* Instructions 5.08(A) and 5.08(B) are alternative instructions. Instruction 5.08(A) should be used if the particular conspiracy charge requires proof of an overt act. Instruction 5.08(B) should be used if the conspiracy charge does not require proof of an overt act. The definition of “overt act” in the last paragraph of instruction 5.08(A) is taken from the general conspiracy statute, 18 U.S.C. § 371 (“any act to effect the object of the conspiracy”). *See also United States v. Hickok*, 77 F.3d 992, 1005-06 (7th Cir. 1996) (affirming the action of the trial court in defining “overt act” pursuant to 18 U.S.C. § 371 in response to a question from the jury).

(b)

*Additional explanatory instructions to be given with this instruction and with Instruction 5.08(B).* The Seventh Circuit has cautioned trial judges to provide juries adequate guidance on the nuances of conspiracy law. *See United States v. Tolliver*, 454 F.3d 660, 668 n.5 (7th Cir. 2006); *United States v. Stotts*,

323 F.3d 520, 522 (7th Cir. 2003). These points are covered by Instructions 5.09, 5.10, and, in appropriate circumstances, 5.10(A) and 5.10(B). The Committee recommends that the trial judge give those instructions in addition to 5.08(A) or (B), making deletions only when it is clear that the jury has heard no evidence on the point covered by the material to be deleted.

(c)

*Supplemental instruction regarding proof of existence of conspiracy.* In some cases, it may be appropriate to provide the jury with a further definition of how existence of a conspiracy is proved. In such cases, the Committee recommends that the following additional instruction be provided:

To prove that a conspiracy existed, the government must prove beyond a reasonable doubt that the defendant had an agreement or mutual understanding with at least one other person to [fill in description of the substantive offense, e.g., distribute heroin].

(d)

*Unanimity regarding overt act.* Recent Seventh Circuit authority indicates that there is no requirement that the jury agree unanimously on which particular overt act was committed in furtherance of the conspiracy. *United States v. Griggs*, 569 F.3d 341, 344 (7th Cir. 2009). There may, however, be some conflicting authority on this point. See *United States v. Matthews*, 505 F.3d 698, 709-10 (7th Cir. 2007) (“[I]f either party had requested a unanimity instruction or special verdict form on the overt acts, unanimity would not have been an issue in this case. Counsel should seriously consider making such requests in the future.”).

(e)

*Unanimity regarding object of multiple-object conspiracy.* When the indictment charges a multiple-object conspiracy, an instruction may be required regarding the need for jury unanimity regarding the particular object(s) proven. See Instruction 4.04 and its commentary, as well as *Griggs*, 569 F.3d at 344, which uses a multiple-object conspiracy as an example of a situation in which the jury must be unanimous as to particulars of an indictment. See also, *United States v. Hughes*, 310 F.3d 557, 560-61 (7th Cir. 2002). In such a case, this instruction should be supplemented accordingly.

(f)

*Interaction with statute of limitations.* Proof that a conspiracy continued into the period of limitations and that an overt act in furtherance of the conspiracy was performed within that period is an element of the offense of conspiracy under 18 U.S.C. § 371. See, e.g., *Grunewald v. United States*, 353 U.S. 391, 396-97 (1957) (“where substantiation of a conspiracy charge requires

proof of an overt act, it must be shown both that the conspiracy still subsisted [within the limitations period] . . . and that at least one overt act in furtherance of the conspiratorial agreement was performed within the period”); *United States v. Curley*, 55 F.3d 254, 257 (7th Cir. 1995); *United States v. Read*, 658 F.2d 1225, 1232-33 (7th Cir. 1981); *United States v. Greichunos*, 572 F. Supp. 220, 226 (N.D. Ill. 1983) (defendant entitled to new trial because jury instruction on conspiracy failed to inform the jury that the government had to show an overt act committed in furtherance of the conspiracy within the five years preceding the indictment).

## 5.08(B) CONSPIRACY – NO OVERT ACT REQUIRED

[The indictment charges defendant[s] with; Count[s] \_\_ of the indictment charge[s] the defendant with] conspiracy. In order for you to find the defendant guilty of this charge, the government must prove each of the [three] following things beyond a reasonable doubt:

1. The conspiracy as charged in [Count \_\_\_] existed; and
2. The defendant knowingly became a member of the conspiracy with an intent to advance the conspiracy.

If you find from your consideration of all the evidence that the government has proved each of these propositions beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these propositions beyond a reasonable doubt, then you should find the defendant not guilty.

### Committee Comment

(a)

*Usage of 5.08(B) vs. 5.08(A).* Instruction 5.08(B) should be used if the particular conspiracy charge does not require proof of an overt act. Instruction 5.08(B) will most commonly be used in drug conspiracy cases under 21 U.S.C. § 846. See *United States v. Corson*, 579 F.3d 804, 810 (7th Cir. 2009); *United States v. Shabani*, 513 U.S. 10, 11 (1994). Instruction 5.08(B) likewise should be given in cases involving other statutes that do not require overt acts. See, e.g., *Whitfield v. United States*, 543 U.S. 209 (2005) (money laundering conspiracy); *United States v. Salinas*, 522 U.S. 52 (1997) (RICO); *Singer v. United States*, 323 U.S. 338, 340 (1945) (Selective Service Act); *Nash v. United States*, 229 U.S. 373 (1913) (antitrust conspiracy). See also *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007) (government conceded that the overt act requirement applied to an attempt to reenter the United States illegally, but successfully defended the indictment's failure to allege a specific overt act on grounds that the attempt described in the indictment implicitly described an overt act).

*Incorporation of comments to Instruction 5.08(A).* When Instruction 5.08(B) is used, counsel and the court should consult the Committee Comment to Instruction 5.08(A), which includes a number of points that apply to conspiracy charges in which no overt act is required.

## 5.09 CONSPIRACY – DEFINITION OF CONSPIRACY

A conspiracy is an agreement between two or more persons to commit a crime. A conspiracy may be proven even if its goal[s] [was; were] not accomplished.

In deciding whether the charged conspiracy existed, you may consider all of the circumstances, including the words and acts of each of the alleged participants.

### Committee Comment

(a)

*Usage.* This definitional instruction should be given in conjunction with Instruction 5.08(A) or (B).

(b)

*Consideration of co-conspirator declarations.* Under *United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1978), the trial judge must preliminarily determine whether statements by a co-conspirator of the defendant will be admissible at trial under Federal Rule of Evidence 801(d)(2)(e). In making this determination the judge must decide “if it is more likely than not that the declarant and the defendant were members of a conspiracy when the hearsay statement was made, and that the statement was in furtherance of the conspiracy . . . .” *Id.* at 1143 (quoting *United States v. Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977)); see also *United States v. Hoover*, 246 F.3d 1054, 1060 (7th Cir. 2001). If the trial judge determines the statements are admissible, the jury may consider them as it considers all other evidence. See also *United States v. Cox*, 923 F.2d 519, 526 (7th Cir. 1991); *United States v. Wesson*, 33 F.3d 788, 796 (7th Cir. 1994).

Under *Santiago*, the government must make a preliminary offer of evidence to show: 1) a conspiracy existed; 2) the defendant and declarant were members of the conspiracy; and 3) the statements sought to be admitted were made during and in furtherance of the conspiracy. *Santiago*, 582 F.2d at 1134-35; see also, e.g., *United States v. Alviar*, 573 F.3d 526, 540 (7th Cir. 2009). According to *Bourjaily v. United States*, 483 U.S. 171, 176-81 (1987), the court can consider the statements in question (the statements seeking to be admitted) to determine whether the three *Santiago* criteria have been met. Seventh Circuit cases construing *Bourjaily* have held that properly admitted hearsay, including statements admitted under the co-conspirator exception to the hearsay rule (Federal Rule of Evidence 801(d)(2)(E)), may be used to prove what another person did or said that may demonstrate their membership in the conspiracy. *United States v. Loscalzo*, 18 F.3d 374, 383 (7th Cir. 1994) (“[W]hile only the defendant’s acts or statements could be used to prove that

defendant's membership in a conspiracy, evidence of the defendant's acts or statements may be provided by the statements of co-conspirators."); *United States v. Martinez de Ortiz*, 907 F.2d 629, 633 (7th Cir. 1990) (en banc).

Based on these cases, the Committee recommends that this instruction be given in conjunction with the conspiracy "elements" instruction in appropriate cases. The Seventh Circuit has strongly recommended that "trial judges give the instruction in appropriate cases, such as where the evidence that the defendant committed the crime of conspiracy is based largely on the declarations of coconspirators." *United States v. Stotts*, 323 F.3d 520, 522 (7th Cir. 2003) (citing *Martinez de Ortiz*, 907 F.2d at 635). In this context, the Seventh Circuit has further noted that it has repeatedly "cautioned trial judges to provide sufficient guidance to juries on the nuanced principles of conspiracy." *Id.* at 522 (listing cases).

## 5.10 CONSPIRACY – MEMBERSHIP IN CONSPIRACY

To be a member of a conspiracy, [the/a] defendant does not need to join it at the beginning, and he does not need to know all of the other members or all of the means by which the illegal goal[s] of the conspiracy was to be accomplished. The government must prove beyond a reasonable doubt that the defendant [you are considering] was aware of the illegal goal[s] of the conspiracy and knowingly participated in it.

[A defendant is not a member of a conspiracy just because he knew and/or associated with people who were involved in a conspiracy, knew there was a conspiracy, and/or was present during conspiratorial discussions.]

In deciding whether [a particular] [the] defendant joined the charged conspiracy, you must base your decision only on what [that] [the] defendant did or said. To determine what [that] [the] defendant did or said, you may consider [that] [the] defendant's own words or acts. You may also consider the words or acts of other persons to decide what [that] [the] defendant did or said, and you may use those words or acts to help you understand what [that] [the] defendant did or said.

### Committee Comment

(a)

*Consideration of co-conspirator declarations.* See Committee Comment to Instruction 5.08(C) for a discussion of the consideration of co-conspirator statements, *United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1978), and *Bourjaily v. United States*, 483 U.S. 171, 176-81 (1987).

(b)

*Authority.* A defendant does not need to join a conspiracy at its beginning, know all of its members, or know all of the means by which the goal of the conspiracy was to be accomplished in order to be a member of the conspiracy. *United States v. James*, 540 F.3d 702, 708 (7th Cir. 2008); *United States v. Bolivar*, 523 F.3d 699, 603-04 (7th Cir. 2008). The Seventh Circuit has made clear, however, that the defendant's mere knowledge of or association with other members of the conspiracy is insufficient to prove membership in the conspiracy. *United States v. Useni*, 516 F.3d 634, 646 (7th Cir. 2008). See also Instruction 5.07 and its commentary.

## 5.10(A) BUYER/SELLER RELATIONSHIP

A conspiracy requires more than just a buyer-seller relationship between the defendant and another person. In addition, a buyer and seller of [name of drug] do not enter into a conspiracy [to distribute [name of drug]; possess [name of drug] with intent to distribute] simply because the buyer resells the [name of drug] to others, even if the seller knows that the buyer intends to resell the [name of drug].

To establish that a [buyer; seller] knowingly became a member of a conspiracy with a [seller; buyer] [to distribute [name of drug]; possess [name of drug] with intent to distribute], the government must prove that the buyer and seller had the joint criminal objective of distributing [name of drug] to others.

### Committee Comment

A routine buyer-seller relationship, without more, does not equate to conspiracy. *United States v. Johnson*, 592 F.3d 749 (7th Cir. 2010); *United States v. Colon*, 549 F.3d 565, 567 (7th Cir. 2008). This issue may arise in drug conspiracy cases. In *Colon*, the Seventh Circuit reversed the conspiracy conviction of a purchaser of cocaine because there was no evidence that the buyer and seller had engaged in a joint criminal objective to distribute drugs. *Id.* at 569-70; citing *Direct Sales Co. v. United States*, 319 U.S. 703, 713 (1943) (distinguishing between conspiracy and a mere buyer-seller relationship); see also *United States v. Kincannon*, 593 F.3d 893, 897 (7th Cir. 2009) (regular and repeated purchases of narcotics on standardized terms, even in distribution quantities, does not make a buyer and seller into conspirators); *United States v. Lechuga*, 994 F.2d 346, 47 (7th Cir. 1993) (en banc) (drug conspiracy conviction cannot be sustained by evidence of only large quantities of controlled substances being bought or sold).

In *Colon*, the Seventh Circuit was critical of the previously-adopted pattern instruction on this point, which included a list of factors to be considered. The Committee has elected to simplify the instruction so that it provides a definition, leaving to argument by counsel the weight to be given to factors shown or not shown by the evidence.

Some cases have indicated that particular combinations of factors permit an inference of conspiracy. See, e.g., *United States v. Vallar*, --- F.3d. ---, 2011 WL 488877 (7th Cir. Feb. 14, 2011) (repeated purchases on credit, combined with standardized way of doing business and evidence that purchaser paid seller only after reselling the drugs); *United States v. Kincannon*, 567 F.3d 893 (7th Cir. 2009). The Committee considered and rejected the possibility of drafting an instruction that would zero in on particular factors, out of concern that this would run afoul of *Colon* and due to the risk that the instruction might be viewed by jurors as effectively directing a verdict.

The instruction should be used only in cases in which a jury reasonably could find that there was only a buyer-seller relationship rather than a conspiracy.

## **5.10(B) SINGLE CONSPIRACY VS. MULTIPLE CONSPIRACIES**

Count [x] charges that there was a single conspiracy. The defendant contends that [there was more than one conspiracy; add other defense contention].

If you find that there was more than one conspiracy and that the defendant was a member of one or more of those conspiracies, then you may find the defendant guilty of Count [n] only if the [conspiracy; conspiracies] of which he was a member was a part of the conspiracy charged in Count [x].

### **Committee Comment**

The previous pattern instructions did not include a standard “multiple conspiracy” instruction. Because such an instruction is often requested, the Committee believed it would be beneficial to provide a standardized version.

This instruction is appropriate only “when the evidence presented at trial could tend to prove the existence of several distinct conspiracies.” *United States v. Mims*, 92 F.3d 461, 467 (7th Cir. 1996). A defendant is not entitled to this instruction if the evidence at trial shows only one, uninterrupted conspiracy. *United States v. Ogle*, 425 F.3d 471, 472 (7th Cir. 2005). One example of a case in which a multiple conspiracy instruction may be necessary is a case in which “a defendant is a low-level player in a major drug-selling enterprise and evidence has been presented at trial concerning a wide range of the enterprise’s activities.” *Mims*, 92 F.3d at 467; *see also*, *United States v. Westmoreland*, 122 F.3d 431, 434 (7th Cir. 1997). Another example is a case involving a “hub-and-spokes” conspiracy in which a defendant serves as a hub connected to each of his co-conspirators by a spoke. To prove the existence of a single conspiracy, a rim must connect the spokes together; otherwise the conspiracy is not one but many. *United States v. Avila*, 557 F.3d 809, 814 (7th Cir. 2009).

To convict a defendant of conspiracy, the government is not required to prove the exact conspiracy charged in the indictment, so long as it proves that the defendant was a member of a smaller conspiracy contained within the charged conspiracy. It is not necessary to provide a unanimity instruction in this situation, because it is not necessary for the jurors to agree on the precise parameters of the conspiracy, so long as they all agree that the defendant joined a conspiracy that was within the ambit of the conspiracy alleged in the indictment. *See United States v. Campos*, 541 F.3d 735, 743-45 (7th Cir. 2008).

### **5.11 CONSPIRATOR'S LIABILITY FOR SUBSTANTIVE CRIMES COMMITTED BY CO-CONSPIRATORS; CONSPIRACY CHARGED – ELEMENTS**

Count [x] of the indictment charges defendant[s] [name] with a crime that the indictment alleges was committed by other members of the conspiracy. In order for you to find the defendant guilty of this charge, the government must prove each of the following things beyond a reasonable doubt:

1. The defendant [is guilty of the charge of conspiracy as alleged in Count [y]] or [was a member of the conspiracy [alleged in Count [y]] when the crime was committed]; and

2. [Another member/Other members] of the same conspiracy committed the crime charged in Count [x] during the time that the defendant was also a member of the conspiracy; and

3. The other conspirator[s] committed the crime charged in Count [x] to advance the goals of the conspiracy; [and]

[4. It was reasonably foreseeable to the defendant that other conspirators would commit this type of crime in order to advance the goals of the conspiracy. The government is not required to prove that the defendant actually knew about the crime charged in Count [x] or that the defendant actually realized that this type of crime would be committed as part of the conspiracy.]

If you find from your consideration of all the evidence that the government has proved each of these propositions beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these propositions beyond a reasonable doubt], then you should find the defendant not guilty.

#### **Committee Comment**

*See Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946); *United States v. Wantuch*, 525 F.3d 505, 518-20 (7th Cir. 2008). *See also United States v. Redwine*, 715 F.2d 315, 322 (7th Cir. 1983), cert. denied, 467 U.S. 1216 (1984); *United States v. Kimmons*, 917 F.2d 1011, 1017 (7th Cir. 1990); *United States v. Villagrana*, 5 F.3d 1048, 1052 (7th Cir. 1993); *United States v. Chairez*, 33 F.3d 823 (7th Cir. 1994) (court found a co-conspirator vicariously liable under *Pinkerton* despite his claim that he did not know or suspect the presence of a gun in the vehicle).

The Seventh Circuit has emphasized that for a *Pinkerton* instruction to be adequate, it must “advise the jury that the government bears the burden of proving all elements of the [*Pinkerton*] doctrine beyond a reasonable doubt.” *United States v. Stott*, 245 F.3d 890, 908 (7th Cir. 2001) (citing *United States v. Sandoval-Curiel*, 50 F.3d 1389, 1394-95 (7th Cir. 1995)); *see also United States v. Elizondo*, 920 F.2d 1308, 1317 (7th Cir. 1990). One of the elements that must be proved beyond a reasonable doubt in order to hold a defendant liable for his co-conspirator’s crimes is that the crimes must have been committed in furtherance of the conspiracy. *Stott*, 245 F.3d at 908-09.

If the government pursues alternative theories of direct responsibility and *Pinkerton* responsibility, the trial judge should describe in this instruction that it is offered as an alternate basis for the particular charge.

**5.12 CONSPIRATOR’S LIABILITY FOR SUBSTANTIVE  
CRIMES COMMITTED BY CO-CONSPIRATORS; CONSPIRACY  
NOT CHARGED IN THE INDICTMENT – ELEMENTS**

Count [x] of the indictment charges defendant [name] with a crime that the indictment alleges was committed by other persons who are claimed to have been members of a conspiracy along with defendant [name]. In order for you to find the defendant guilty of this charge, the government must prove each of the following things beyond a reasonable doubt:

1. The defendant knowingly joined a conspiracy. A conspiracy is an agreement between two or more persons to commit a crime.

2. [Another member/Other members] of the same conspiracy committed the crime charged in Count [x] during the time that the defendant was also a member of the conspiracy; and

3. The other conspirator[s] committed the crime charged in Count [x] to advance the goals of the conspiracy; [and]

[4. It was reasonably foreseeable to the defendant that the other conspirator[s] would commit this type of crime in order to advance the goals of the conspiracy. The government is not required to prove that the defendant actually knew about the crime charged in Count [x] or that the defendant actually realized that this type of crime would be committed as part of the conspiracy.]

If you find from your consideration of all the evidence that the government has proved each of these propositions beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these propositions beyond a reasonable doubt], then you should find the defendant not guilty.

**Committee Comment**

The Committee regards this instruction as one rarely given.

*See Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946); *United States v. Redwine*, 715 F.2d 315, 322 (7th Cir. 1983), *cert. denied*, 467 U.S. 1216 (1984); *United States v. Kimmons*, 917 F.2d 1011, 1017 (7th Cir. 1990); *United States v. Villagrana*, 5 F.3d 1048, 1052 (7th Cir. 1993); *United States v. Chairez*, 33 F.3d 823 (7th Cir. 1994) (court found a co-conspirator vicariously liable under *Pinkerton* despite his/her claim that he/she did not know or suspect the presence of a gun in the vehicle); *United States v. Rawlings*, 341

F.3d 657, 660 (7th Cir. 2003); *United States v. Haynes*, 582 F.3d 686, 707 (7th Cir. 2009).

If the government pursues alternative theories of direct responsibility and *Pinkerton* responsibility, the trial judge should describe in this instruction that it is offered as an alternate basis for the particular charge.

### 5.13 CONSPIRACY -- WITHDRAWAL

A defendant is not responsible for crimes committed by other people, if, before the commission of a crime, the defendant has taken some affirmative act in an attempt to defeat or disavow the goal[s] of the conspiracy by:

(a) [completely undermining his earlier acts in support of the commission of the crime so that these acts no longer could support or assist the commission of the crime], or

(b) [alerting the proper law enforcement authorities early enough that they had the opportunity to stop the crime or crimes], or

(c) [performing an affirmative act that is inconsistent with the goal[s] of the conspiracy and is done in such a way that the co-conspirators are reasonably likely to know about it before they carry through with additional acts of the conspiracy], or

(d) [making a genuine effort to prevent the commission of the crime],  
or

(e) [communicating to each of his co-conspirators that he has abandoned the conspiracy and its goals].

Merely ceasing active participation in the conspiracy is not sufficient to evidence withdrawal.

The government has the burden of proving beyond a reasonable doubt that the defendant did not withdraw from the conspiracy.

#### **Committee Comment**

This instruction appears to apply only in the Pinkerton context, in other words, when the government seeks to impose criminal liability upon a defendant for a substantive offense committed by other members of the conspiracy of which the defendant is claimed to have been a member. See *United States v. U. S. Gypsum Co.*, 438 U.S. 422, 463-65 (1978). Withdrawal from a conspiracy inside the statute of limitations is not a defense to a charge of conspiracy; rather, withdrawal is a defense to a charge of conspiracy only if the defendant withdrew outside of the statute of limitations, a situation covered by the following instruction.

In *U.S. Gypsum*, the Supreme Court held that an unnecessarily confining instruction on the issue of withdrawal from a conspiracy constituted reversible error. *U.S. Gypsum*, 438 U.S. at 463-65. Thus, when a defendant requests that specific actions introduced at trial which are inconsistent with the object of the

conspiracy be included in the withdrawal instruction, the court should instruct the jury accordingly.

Once the defendant has presented sufficient evidence of withdrawal from the conspiracy as to warrant this instruction, the government has the burden of proving beyond a reasonable doubt that the defendant did not withdraw from the conspiracy. *United States v. Read*, 658 F.2d 1225 (7th Cir. 1981). In *Read*, the Seventh Circuit held that the defendant has the burden of initially going forward with the evidence that he/she withdrew from the conspiracy, but once the defendant produces such evidence, the burden of persuasion is on the government to disprove withdrawal beyond a reasonable doubt and the jury should be so instructed. *Id.* at 1236; *see also United States v. Starnes*, 14 F.3d 1207, 1210-11 (7th Cir.1994) (“Although the defendant bears the burden of coming forward with evidence of withdrawal, once the defendant advances sufficient evidence of some act to disavow or defeat the purpose of the conspiracy, the prosecution must disprove the defense of withdrawal beyond a reasonable doubt.”) (internal quotation omitted).

With regard to subsection (e) of the instruction (“communicating to each of his/her co-conspirators that he/she has abandoned the conspiracy and its goals”), the Seventh Circuit has repeatedly announced in dicta this manner of demonstrating withdrawal from a conspiracy. *See, e.g., United States v. Vaughn*, 433 F.3d 917, 922 (7th Cir. 2006) (“Withdrawal requires an affirmative act to either defeat or disavow the purposes of the conspiracy, such as making a full confession to the authorities or communicating to co-conspirators that one has abandoned the enterprise.”) (internal citation omitted); *Sax*, 39 F.3d at 1386 (“Withdrawal requires an affirmative act on the part of the conspirator; he must either make a full confession to the authorities, or communicate to each of his coconspirators that he abandoned the conspiracy and its goals.”); citing *United States v. DePriest*, 6 F.3d 1201, 1206 (7th Cir. 1993). The Committee, however, has found no case defining or applying this section of the instruction.

## 5.14 CONSPIRACY – WITHDRAWAL – STATUTE OF LIMITATIONS

[Defendant's name] cannot be found guilty of the conspiracy charge if he/she withdrew from the conspiracy more than five years before the indictment was returned. The indictment in this case was returned on [date]. Thus, the government must prove beyond a reasonable doubt that [defendant's name] did not withdraw from the conspiracy prior to [date].

In order to withdraw, [defendant's name] must have taken some affirmative act in an attempt to defeat or disavow the goal[s] of the conspiracy by

(a) [completely undermining his earlier acts in support of the commission of the crime so that these acts no longer could support or assist the commission of the crime], or

(b) [alerting the proper law enforcement authorities early enough that they had the opportunity to stop the crime or crimes], or

(c) [performing an affirmative act that is inconsistent with the goal[s] of the conspiracy and is done in such a way that the co-conspirators are reasonably likely to know about it before they carry through with additional acts of the conspiracy], or

(d) [making a genuine effort to prevent the commission of the crime], or

(e) [communicating to each of his co-conspirators that he has abandoned the conspiracy and its goals].

Merely ceasing active participation in the conspiracy is not sufficient to evidence withdrawal.

### Committee Comment

(a)

*What constitutes withdrawal from a conspiracy.* Simply ceasing to participate in a conspiracy, even for an extended period or periods of time, is insufficient to constitute withdrawal from the conspiracy. Rather, withdrawal requires an affirmative act to defeat or disavow the criminal aim of the conspiracy. *United States v. Julian*, 427 F.3d 471 (7th Cir. 2005).

Withdrawal from a conspiracy is only effective prospectively; it is not a defense to a conspiracy count directed at the period prior to withdrawal. *United States v. Dallas*, 229 F.3d 105, 110-11 (7th Cir. 2000). On the other hand, withdrawal from a conspiracy outside the statute of limitations is a

defense because it negates an element of the offense; namely, membership in the conspiracy within the statute of limitations. *United States v. Read*, 658 F.2d 1225 (7th Cir. 1981).

(b)

*Burden of proving/disproving withdrawal.* The *Read* court further held that the burden is on the prosecution to disprove the defense of withdrawal beyond a reasonable doubt. However, the defendant has the burden of initially going forward with the evidence that he/she withdrew prior to the statute of limitations. Once the defendant produces sufficient evidence of withdrawal outside of the statute of limitations, the burden of persuasion is on the government to disprove withdrawal beyond a reasonable doubt and the jury should be so instructed. *United States v. Nava-Salazar*, 30 F.3d 788 (7th Cir. 1994); *United States v. Starnes*, 14 F.3d 1207 (7th Cir. 1994).

Some later cases, however, appear to place the burden of showing withdrawal on the defendant. See, e.g., *Julian*, 427 F.3d at 483; *United States v. Hall*, 212 F.3d 1016, 1024 (7th Cir. 2004) (citing *United States v. Schweiths*, 971 F.2d 1302, 1322-23 (7th Cir. 1992)). Other cases, consistent with *Read*, appear to place the burden of disproving withdrawal on the government. See, e.g., *United States v. Wren*, 363 F.3d 654, 663-64 (7th Cir. 2004), overruled on other grounds, *Yarbor v. United States*, 543 U.S. 1101 (1995); *United States v. Curley*, 55 F.3d 254, 257 (7th Cir. 1995).

Resolution of this apparent conflict is beyond the scope of this Committee's responsibilities. We have noted the conflict so that the issue may be litigated in cases in which the point is in issue.

(c)

*Factors to be considered.* In *United States v. United States Gypsum Co.*, 438 U.S. 422, 463-65 (1978), the Supreme Court held that an instruction unnecessarily limiting the type of actions that may constitute withdrawal from a conspiracy is reversible error. Thus, this instruction should be tailored to the specific actions introduced by the defendant at trial that are inconsistent with the object of the conspiracy. With regard to subsection (e) of the instruction ("communicating to each of his/her co-conspirators that he/she has abandoned the conspiracy and its goals"), the Seventh Circuit has repeatedly announced in dicta this manner of demonstrating withdrawal from a conspiracy. See, e.g., *United States v. Vaughn*, 433 F.3d 917, 922 (7th Cir. 2006) ("Withdrawal requires an affirmative act to either defeat or disavow the purposes of the conspiracy, such as making a full confession to the authorities or communicating to co-conspirators that one has abandoned the enterprise.") (internal citation omitted); *Sax*, 39 F.3d at 1386 ("Withdrawal requires an affirmative act on the part of the conspirator; he must either make a full

confession to the authorities, or communicate to each of his coconspirators that he abandoned the conspiracy and its goals.”); citing *United States v. DePriest*, 6 F.3d 1201, 1206 (7th Cir. 1993). The Committee, however, has found no case defining or applying this section of the instruction.

## 6.01 SELF DEFENSE/DEFENSE OF OTHERS

A person may use force when he reasonably believes that force is necessary to defend [himself/another person] against the imminent use of unlawful force. [A person may use force that is intended or likely to cause death or great bodily harm only if he reasonably believes that force is necessary to prevent death or great bodily harm to [himself/someone else].

### Committee Comment

As with any affirmative defense, a defendant is entitled to a self defense instruction only if he presents sufficient evidence to require its submission to the jury. *United States v. Sahakian*, 453 F.3d 905, 909 (7th Cir. 2006); *United States v. Ebert*, 294 F.3d 896, 899 (7th Cir. 2002). This includes evidence that there were no reasonable legal alternatives to the use of force, such as retreat or similar steps to avoid injury. *Sahakian*, 453 F.3d at 909; *United States v. Tokash*, 282 F.3d 962, 969 (7th Cir. 2002). These notions are captured in the imminence and necessity requirements of the self-defense instruction. The Seventh Circuit has stated, however, that “the defense is reserved for extraordinary circumstances which require nothing less than immediate emergency.” *Sahakian*, 452 F.3d at 910 (citation omitted).

In *United States v. Talbott*, 78 F.3d 1183, 1185-86 (7th Cir. 1996) (per curiam), the Seventh Circuit concluded that the trial judge had erred in instructing the jury that the defendant charged with being a felon in possession of a firearm had the burden of proving self defense.

It is unclear whether *Talbott* remains good law. In *Dixon v. United States*, 548 U.S. 1 (2006), the Supreme Court held that there is no constitutional requirement that the government disprove beyond a reasonable doubt an affirmative defense that controvert an element of an offense. Rather, the allocation of the burden of proof on defenses is a matter of statute, or in the absence of a statute, common law. When a federal crime is at issue, courts are to presume that Congress intended to follow established common law rules regarding the allocation of the burden of proof on defenses. When a state crime is at issue (as it is, for example, under the Assimilated Crimes Act, 18 U.S.C. § 13), the allocation of the burden of proof is a matter of state law. At least one Circuit has held, since *Dixon*, that when self-defense is asserted in a federal felon-in-possession case, the defendant has the burden of proving self-defense by a preponderance of the evidence. See *United States v. Leahy*, 473 F.3d 401, 405-08 (1st Cir. 2007). In addition, the Seventh Circuit has recognized that *Jumah* recognized that the Supreme Court’s decision in *Dixon* applies beyond the duress defense at issue in that case. *United States v. Jumah*, 493 F.3d 868, 873 n.2 (7th Cir. 2007) (“Although the facts of *Dixon* . . . , related to the affirmative defense of duress, it is clear that the Court's holding was not limited to this defense. The Court cited our decision in *United States v. Talbott*, 78

F.3d 1183 (7th Cir.1996) (per curiam), as an exemplar of cases in conflict with the decision of the Fifth Circuit. . . . *Talbott* itself did not involve the affirmative defense of duress. Rather, the defense raised in *Talbott* was self-defense.”). Because the Seventh Circuit has not yet determined which side bears the burden of proving self defense under any particular federal statutes, the Committee takes no position on the current state of the law in that regard.

## 6.02 INSANITY

You must find the defendant not guilty by reason of insanity if you find that he has proven by clear and convincing evidence that at the time he committed the offense, he had a severe mental disease or defect that rendered him unable to appreciate the nature and quality of what he was doing, or that rendered him unable to appreciate that what he was doing was wrong [that is, contrary to public morality and contrary to law.]

[If you find the defendant not guilty by reason of insanity, then the court will commit the defendant to a suitable facility until the court finds that he is eligible to be released.]

### Committee Comment

18 U.S.C. § 17 establishes the parameters of the defense of insanity, as well as the burden of proof. Pursuant to Fed. R. Evid. 704(b), the issue of legal insanity is to be decided by the trier of fact. Pursuant to 18 U.S.C. § 4242(b), the court must provide the jury with a special verdict form that allows a verdict of “not guilty only by reason of insanity.”

Section 17 does not define what it means for a defendant to “understand that what he was doing was wrong.” In *United States v. Ewing*, 494 F.3d 607, 618 (7th Cir. 2007), the court held that the term still carries the same meaning as that set forth in *M’Naghten’s Case*, 8 Eng. Rep. 718 (1843), that is, as based upon objective societal standards of morality. Defining “wrongfulness” as “contrary to law” is too narrow, and defining it as “subjective personal morality” is too broad. *Ewing*, 494 F.3d at 618. The court cautioned, however, that not every case involving an insanity defense requires the court to instruct the jury on the distinction between moral and legal wrongfulness. *Id.* at 621-22. Therefore, the court should use the bracketed language in the first paragraph of the instruction only when the evidence warrants it. *Id.* at 622.

18 U.S.C. § 4243(a) provides that if a defendant is found not guilty only by reason of insanity, then the court shall commit him to a suitable facility until he is found eligible for release under the statutory scheme. The court may instruct the jury on this automatic commitment requirement, but only to counteract inaccurate or misleading information presented to the jury during trial. *Shannon v. United States*, 512 U.S. 579 (1994); *United States v. Diekhoff*, 535 F.3d 611, 620-21 (7th Cir. 2008); *United States v. Wagner*, 319 F.3d 962, 966 (7th Cir. 2003).

### **6.03 DEFENDANT’S PRESENCE**

You have heard evidence that the defendant was not present at the time and place where the government alleges he committed the offense charged in Count [n]. The government must prove beyond a reasonable doubt that the defendant was present at the time and place of the offense.

#### **Committee Comment**

The “alibi” instruction has been re-titled because of widespread negative connotations associated with the word “alibi.” The Committee recommends that courts that provide juries with instruction headings use the new title rather than the former title.

This defense is based on the physical impossibility of a defendant’s guilt by placing the defendant in a location other than the scene of the crime charged. *United States v. White*, 443 F.3d 582, 587 (7th Cir. 2006). The court should provide this instruction only when it presents an actual defense to the crime charged. For example, a defendant does not necessarily have to be present at the scene to aid and abet a crime. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 190-92 (2007).

Although this instruction might seem unnecessary in light of the government’s obligation in every case to prove that the defendant actually is the person who committed the charged crime, it still is considered a theory of defense, and the court should provide a presence instruction if it has some support in the evidence. *White*, 443 F.3d at 587.

## 6.04 ENTRAPMENT -- ELEMENTS

The government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped by [identify the actor[s]: e.g., government agent, informant, law enforcement officers]. The government must prove either:

1. Law enforcement officers and their agents did not persuade or otherwise induce the defendant to commit the offense; or

2. The defendant was predisposed to commit the offense before he had contact with law enforcement officers or their agents. If the defendant was predisposed, then he was not entrapped, even though law enforcement officers or their agents provided a favorable opportunity to commit the offense, made committing the offense easier, or participated in acts essential to the offense.

### Committee Comment

See generally *Jacobson v. United States*, 503 U.S. 540, 548-49 (1992); *United States v. Russell*, 411 U.S. 423, 436 (1973); *Sherman v. United States*, 356 U.S. 369 (1958). To warrant an entrapment instruction, there must be evidence supporting each of the two prongs of entrapment: government inducement of the crime and lack of predisposition by the defendant to engage in the crime. If there is sufficient evidence that the defendant was predisposed to commit the crime, then the court may reject the entrapment defense without inquiry into government inducement. *United States v. Al-Shahin*, 474 F.3d 941, 948 (7th Cir. 2007). For an entrapment defense to be proper, a defendant must show an extraordinary inducement, “the sort of promise that would blind the ordinary person to his legal duties.” If a defendant takes advantage of a “simple, ordinary opportunity” to commit a crime, then he has not been induced. *United States v. Haddad*, 462 F.3d 783, 790 (7th Cir. 2006). A defendant who denies committing the crime still may have the jury instructed on entrapment if he makes his required preliminary showing of lack of predisposition and government inducement. *Mathews v. United States*, 485 U.S. 58, 59-60 (1988).

If the defendant makes a sufficient preliminary showing, then the burden shifts to the government to prove beyond a reasonable doubt the absence of entrapment. *Haddad*, 462 F.3d at 790. This requires the court to add entrapment-negation in the elements instruction. The court should provide Instruction 6.04 as the following instruction.

The Committee considered whether *United States v. Dixon*, 548 U.S. 1, 15 (2006), concerning the defense of duress, indicates that the defendant should bear the burden of proving entrapment. No support for this proposition exists in post-*Dixon* decisions concerning entrapment, so the Committee proposes no change in the burden, particularly because *Jacobson*, a relatively recent

Supreme Court decision, squarely places the burden of disproving entrapment on the government. *See Jacobson*, 503 U.S. at 549.

## 6.05 ENTRAPMENT – FACTORS

In deciding whether the government has proved that it did not entrap the defendant, you may consider all of the circumstances, including:

1. The defendant’s background[, including his prior criminal history];
2. Whether [government agents; government informants; law enforcement officers] first suggested the criminal activity;
3. Whether the defendant engaged in the criminal activity for profit;
4. Whether the defendant was reluctant to engage in criminal activity;
5. Whether law enforcement officers or their agents merely invited or solicited the defendant to commit the offense;
6. The nature and extent of any pressure or persuasion used by law enforcement officers or their agents; [and]
7. Whether law enforcement officers or their agents offered the defendant an ordinary opportunity to commit a crime or instead offered the defendant exceptional profits or persuasion. [and]
- [8. The defendant’s ability to commit the crime without the assistance of law enforcement officers or their agents .]

It is up to you to determine the weight to be given to any of these factors and any others that you consider.

### Committee Comment

*See, e.g., United States v. Millet*, 510 F.3d 668, 675-76 (7th Cir. 2007); *United States v. Bek*, 493 F.3d 780, 790 (7th Cir. 2007); *United States v. Al-Shahin*, 474 F.3d 941, 948 (7th Cir. 2007). The last, bracketed factor is taken from *United States v. Lopeztegui*, 230 F.3d 1000, 1003 (7th Cir. 2000), in which the court stated that “predisposition [for entrapment purposes] goes beyond the mere willingness to commit the crime, and also includes some consideration of the defendant’s ability to carry it out.” *Id.* at 1003 (citing *United States v. Hollingsworth*, 27 F.3d 1196, 1200 (7th Cir. 1994)).

Part (a) of prior Pattern Instruction 6.06 has been eliminated because it has been incorporated into this Instruction.

Part (b) of prior Pattern Instruction 6.06 has been removed because it appears to be an inaccurate statement of the law. The prior instruction stated,

In addition to being ready and willing, the defendant must have had the ability by reason of previous training, experience, occupation, or acquaintances to commit the crime even if the government had not provided the opportunity to do so. Where the defendant is not in a position to become involved in the crime without the government's help, the defendant is not predisposed.

For this proposition, the prior instruction cited *United States v. Hollingsworth*, 27 F.3d 1196 (7th Cir. 1994). The principle in the instruction, however, is not expressed in *Hollingsworth*. Indeed, the court in *Hollingsworth* stated that its decision should not be “understood as holding that lack of present means to commit a crime is alone enough to establish entrapment if the government supplies the means.” *Id.* at 1202. The court more recently reaffirmed this statement, by quoting it, in *United States v. Lopeztegui*, 230 F.3d 1000, 1003 (7th Cir. 2000). Indeed, in *Lopeztegui* the court characterized the defendant's argument that “without [the government agent's] intervention, he would not have had the physical ability” to commit the crime as “a major misreading of the meaning of ‘predisposition.’” *Id.*

## 6.06 RELIANCE ON PUBLIC AUTHORITY

The defendant claims that he acted in reliance on public authority. A defendant who commits an offense in reliance on public authority does not act [knowingly; insert other level of intent required for conviction] and should be found not guilty.

The defendant must prove the following [three] things are more likely than not:

1. An [agent; representative; official; or insert name] of the [United States] government [requested; directed; authorized] the defendant to engage in the conduct charged against the defendant in Count[s] [n]; and
2. This [agent; representative; official; or insert name] had the actual authority to grant authorization for the defendant to engage in this conduct; and
3. In engaging in this conduct, the defendant reasonably relied on the [agent's; representative's; official's; or insert name] authorization.

In deciding whether it was reasonable for the defendant to rely on the directive of the government official, you should consider all the circumstances, including the identity of the official, the nature of what the official directed defendant to do, the explanation provided by the official in support of [his/her] directive, and how closely the defendant followed the official's directions.

### Committee Comment

The defendant bears the burden to prove the defense of reliance on public authority by a preponderance of the evidence. *United States v. Jumah*, 493 F.3d 868, 875 (7th Cir. 2007). This defense is closely related to the defense of entrapment by estoppel. Although the court in *Jumah* questions the meaningfulness of the difference between the two, it offers this distinction: in the case of a public authority defense, the defendant, acting at the request of a government official, engages in conduct that the defendant knows to be otherwise illegal, while in the case of a defense of entrapment by estoppel, the defendant does not believe that his conduct constitutes a crime, based on the statements of a government official. *Id.* at 874 n.4. *See also United States v. Strahan*, 565 F.3d 1047, 1051 (7th Cir. 2009) (“the public-authority defense requires reasonable reliance by a defendant on a public official’s directive to engage in behavior that the defendant knows to be illegal”); *United States v. Baker*, 438 F.3d 749, 753 (7th Cir. 2006). The instruction is worded to require that the official had the actual authority to authorize the conduct. The Seventh Circuit has not definitively decided, however, whether the actual authority is required or whether, as with the defense of entrapment by estoppel, apparent authority suffices. *See Baker*, 438 F.3d at 754. The Committee takes no

position on whether actual authority is required. *See also* Fed. R. Crim. P. 12.3(a)(1).

## 6.07 ENTRAPMENT BY ESTOPPEL

The defendant contends that he engaged in the conduct charged against him in Count[s] [n] in reasonable reliance on [name the government agent]'s assurance that this conduct was lawful. A defendant who commits an offense in reasonable reliance on such an official assurance does not act [knowingly; insert other level of intent required for conviction] and should be found not guilty.

The defendant must prove the following [three] things are more likely than not:

1. An official of the United States government, with actual or apparent authority over the matter, told the defendant that his conduct would be lawful; and

2. The defendant actually relied on what this official told him in taking this action; and

3. The defendant's reliance on what the official told him was reasonable. In deciding this, you should consider all of the relevant circumstances, including the identity of the government official, what that official said to the defendant, and how closely the defendant followed any instructions the official gave.

### Committee Comment

The defense of entrapment by estoppel is closely related to the defense of reliance on public authority. See Committee Comment to Instruction 6.06. The defendant has the burden to prove estoppel by a preponderance of the evidence. A federal official's apparent authority to authorize the defendant's conduct can support this defense; actual authority is not required. *United States v. Baker*, 438 F.3d 749, 754 (7th Cir. 2006). The defense does not apply when the defendant claims to have been misled by a state or local official into committing a federal crime. *Id.* at 755. Entrapment by estoppel is a narrow defense requiring that the government actively misled the defendant and that the defendant actually and reasonably relied on the representations by the government official or agent. *Id.* at 755-56.

The official need not have *actual* authority to authorize the defendant's conduct; apparent authority suffices.

## **6.08 COERCION/DURESS**

The defendant contends that he committed the offense charged against him in Count [n] because he was coerced. A person who is coerced into committing an offense should be found not guilty of that offense.

To establish that he was coerced, the defendant must prove both of the following things are more likely than not:

1. He reasonably feared that [identify person or group] would immediately kill or seriously injure [him; specified third person] if he did not commit the offense; and
2. He had no reasonable opportunity to refuse to commit the offense and avoid the threatened harm.

### **Committee Comment**

The defendant bears the burden of proving the defense of coercion by a preponderance of the evidence. *United States v. Dixon*, 548 U.S. 1, 15 (2006). To be entitled to a coercion instruction, the defendant must make a sufficient evidentiary showing. If the defendant had a reasonable alternative to violating the law, then the defense does not apply. A defendant's fear of death or serious injury is generally insufficient without more; there must be evidence that the threatened harm was present, immediate, or impending. If the defendant committed a continuing crime (such as conspiracy), he must have ceased committing the crime as soon as the claimed duress lost its coercive force. *United States v. Sawyer*, 558 F.3d 705, 710-11 (7th Cir. 2009).

## 6.09 VOLUNTARY INTOXICATION

You have heard evidence that the defendant was voluntarily intoxicated by [name intoxicant(s)] at the time of the commission of the offenses charged in Count[s] [n]. You may consider this evidence in determining whether the defendant was capable of [insert element of crime at issue, e.g., acting with intent to commit murder, acting with intent to defraud, corruptly influencing the due administration of justice].

### Committee Comment

Voluntary intoxication is not generally a defense to a general intent crime, that is, one that is done “knowingly.” *United States v. Smith*, 606 F.3d 1270, 1281-82 (10th Cir. 2010). But it can negate the intent required to prove crimes with a specific intent element. To warrant a voluntary intoxication instruction, the defendant must produce some evidence that he was intoxicated enough “to completely lack the capacity to form the requisite [specific] intent.” *United States v. Nacotee*, 159 F.3d 1073, 1076 (7th Cir. 1998). “A high degree of intoxication can conceivably, under limited circumstances, render the defendant incapable of attaining the required state of mind to commit the crime.” *United States v. Boyles*, 57 F.3d 535, 541 (7th Cir. 1995). (Note that Federal Rule of Evidence 704(b) limits a defendant’s ability to prove this point at trial by means of expert testimony. *Id.* at 543.)

Where the defense only applies to certain counts in a multi-count indictment, the court should specifically reference those counts to which it does apply. *United States v. Kenyon*, 481 F.3d 1054, 1070-71 (8th Cir. 2007).

## 6.10 GOOD FAITH

If the defendant acted in good faith, then he lacked the [intent to defraud; willfulness; etc.] required to prove the offense[s] of [identify the offenses] charged in Count[s] [n]. The defendant acted in good faith if, at the time, he honestly believed the [truthfulness; validity; insert other specific term] that the government has charged as being [false; fraudulent; insert term used in charge].

The defendant does not have to prove his good faith. Rather, the government must prove beyond a reasonable doubt that the defendant acted [with intent to defraud; willfully; etc.] as charged in Counts [n].

[A defendant's honest and genuine belief that he will be able to perform what he promised is not a defense to fraud if the defendant also knowingly made false and fraudulent representations.]

### Committee Comment

The Seventh Circuit has questioned whether a good faith instruction provides any useful information beyond that contained in the pattern instruction defining “knowledge.” See *United States v. Prude*, 489 F.3d 873, 882 (7th Cir. 2007); *United States v. Mutuc*, 349 F.3d 930, 935-36 (7th Cir. 2003). For this reason, as a general rule, this instruction should not be used in cases in which the government is required only to prove that the defendant acted “knowingly.” Rather, it should be used only in cases in which the government must prove some form of “specific intent,” e.g., intent to defraud or willfulness.

The third paragraph of the instruction should be given only when warranted by the evidence. As the court observed in *United States v. Caputo*, 517 F.3d 935, 942 (7th Cir. 2008). “A person who tells a material lie to a federal agency can’t say ‘yes, but I thought it would all work out to the good’ or some such thing. Intentional deceit on a material issue is a crime, whether or not the defendant thought that he had a good excuse for trying to deceive the federal agency or the potential customers.” See also *United States v. Radziszewski*, 474 F.3d 480, 485-86 (7th Cir. 2007). Indeed, in this situation, it is arguable that no good faith instruction should be given at all. See *Caputo*, 517 F.3d at 942.

## **6.11 GOOD FAITH: TAX AND OTHER TECHNICAL STATUTE CASES**

A person does not act willfully if he believes in good faith that he is acting within the law, or that his actions comply with the law. Therefore, if the defendant actually believed that what he was doing was in accord with the [tax; currency structuring] laws, then he did not willfully [evade taxes; fail to file tax returns; make a false statement on a tax return; etc.]. This is so even if the defendant's belief was not objectively reasonable, as long as he held the belief in good faith. However, you may consider the reasonableness of the defendant's belief, together with all the other evidence in the case, in determining whether the defendant held the belief in good faith.

### **Committee Comment**

When a defendant is accused of violating a complex and technical statute, such as a criminal tax statute, the term "willfully" has been construed to require proof that the defendant acted with knowledge that his conduct violated a legal duty. *Ratzlaf v. United States*, 510 U.S. 135, 144-46 (1994); *Cheek v. United States*, 498 U.S. 192, 201 (1991); *United States v. Wheeler*, 540 F.3d 683, 689 (7th Cir. 2008); *United States v. Murphy*, 469 F.3d 1130, 1138 (7th Cir. 2006).

## 6.12 RELIANCE ON ADVICE OF COUNSEL

If the defendant relied in good faith on the advice of an attorney that his conduct was lawful, then he lacked the [intent to defraud; willfulness; etc.] required to prove the offense[s] of [identify the offenses] charged in Count[s] [n].

The defendant relied in good faith on the advice of counsel if:

1. Before taking action, he in good faith sought the advice of an attorney whom he considered competent to advise him on the matter; and
2. He consulted this attorney for the purpose of securing advice on the lawfulness of his possible future conduct; and
3. He made a full and accurate report to his attorney of all material facts that he knew; and
4. He then acted strictly in accordance with the advice of this attorney.

[You may consider the reasonableness of the advice provided by the attorney when determining whether the defendant acted in good faith.]

The defendant does not have to prove his good faith. Rather, the government must prove beyond a reasonable doubt that the defendant acted [with intent to defraud; willfully; etc.] as charged in Counts [n].

### **Committee Comment**

*See United States v. Van Allen*, 524 F.3d 814, 823 (7th Cir. 2008); *United States v. Al-Shahin*, 474 F.3d 941, 947 (7th Cir. 2007); *United States v. Urfer*, 287 F.3d 663, 664-65 (7th Cir. 2002).

## 7.01 JURY DELIBERATIONS

Once you are all in the jury room, the first thing you should do is choose a [foreperson; presiding juror]. The [foreperson; presiding juror] should see to it that your discussions are carried on in an organized way and that everyone has a fair chance to be heard. You may discuss the case only when all jurors are present.

Once you start deliberating, do not communicate about the case or your deliberations with anyone except other members of your jury. You may not communicate with others about the case or your deliberations by any means. This includes oral or written communication, as well as any electronic method of communication, such as by telephone, cell phone, smart phone, iPhone, Blackberry, computer, text messaging, instant messaging, the Internet, chat rooms, blogs, websites, or services like Facebook, MySpace, LinkedIn, YouTube, Twitter, or any other method of communication.

If you need to communicate with me while you are deliberating, send a note through the [marshal; court security officer]. The note should be signed by the [foreperson; presiding juror], or by one or more members of the jury. To have a complete record of this trial, it is important that you do not communicate with me except by a written note. I may have to talk to the lawyers about your message, so it may take me some time to get back to you. You may continue your deliberations while you wait for my answer. [Please be advised that I cannot provide you with a transcript of any of the trial testimony.]

If you send me a message, do not include the breakdown of your votes. In other words, do not tell me that you are split 6-6, or 8-4, or whatever your vote happens to be.

### Committee Comment

See Amer. Bar Ass'n Standards for Criminal Justice, Trial By Jury, Standard 15-4.1(b) ("The court should require a record to be kept of all communications received from a juror or the jury after the jury has been sworn, and he or she should not communicate with a juror or the jury on any aspect of the case itself (as distinguished from matters relating to physical comforts and the like), except after notice to all parties and reasonable opportunity for them to be present."); *id.* Standard 15-4.3(a) ("All communications between the judge and members of the jury panel, from the time of reporting to the courtroom for voir dire until dismissal, should be in writing or on the record in open court. Counsel for each party should be informed of such communication and given the opportunity to be heard.").

"[B]ecause the defendant has a right to be present 'at every trial stage,' Fed. R. Crim. P. 43(a)(2), he must be present during the discussion of jury

notes as well.” *United States v. Willis*, 523 F.3d 762, 775 (7th Cir. 2008). Thus, when the jury sends the court a note, “the jury's message should [be] answered in open court and . . . [the defendant's] counsel should have . . . an opportunity to be heard before the trial judge respond[s].” *Rogers v. United States*, 422 U.S. 35, 39 (1975), quoted in *Willis*, 523 F.3d at 775. This does not necessarily apply to notes regarding housekeeping matters such as lunch arrangements and the like. See, e.g., *Love v. City of Chicago Bd. of Educ.*, 241 F.3d 564, 572 (7th Cir. 2001), abrogated in part on other grounds, *Spiegla v. Hull*, 371 F.3d 928, 941-42 (7th Cir. 2004). If, however, a communication regarding scheduling arguably impacts the length of the jury’s deliberations, it is error not to disclose the communication to the defendant and counsel. See *United States v. Blackmon*, 839 F.2d 900, 915 (2d Cir. 1988) (error found harmless in particular case). The safer and better practice is for the trial judge to disclose and seek comments on all communications to or from the jury. See *DeGrave v. United States*, 820 F.2d 870, 872 (7th Cir. 1987) (“We note that the court’s practice of permitting ex parte communications with the jury presents problems.”); see also *United States v. Widgery*, 778 F.2d 325, 327 (7th Cir. 1985) (“To answer a note without consulting counsel may spoil a perfectly good trial for several reasons – not only because it denies the defendant a procedural right but also because consultation may help the court to cure a general problem in the deliberations before it is too late.”).

## **7.02 VERDICT FORM**

[A verdict form has been; Verdict forms have been] prepared for you. You will take [this form; these forms] with you to the jury room.

[Read the verdict form[s].]

When you have reached unanimous agreement, your [foreperson; presiding juror] will fill in, date, and sign the [appropriate] verdict form[s].

- or -

When you have reached unanimous agreement, your [foreperson; presiding juror] will fill in and date the [appropriate] verdict form, and each of you will sign it.

Advise the [Marshal; court security officer] once you have reached a verdict. When you come back to the courtroom, [I; the clerk] will read the verdict[s] aloud.

### **Committee Comment**

The last sentence of the instruction advises jurors that they will not have to read the verdict, a common assumption, to prevent any concern or fear on the part of the presiding juror/foreperson.

### 7.03 UNANIMITY/DISAGREEMENT AMONG JURORS

The verdict must represent the considered judgment of each juror. Your verdict, whether it is guilty or not guilty, must be unanimous.

You should make every reasonable effort to reach a verdict. In doing so, you should consult with each other, express your own views, and listen to your fellow jurors' opinions. Discuss your differences with an open mind. Do not hesitate to re-examine your own view and change your opinion if you come to believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of evidence just because of the opinions of your fellow jurors or just so that there can be a unanimous verdict.

The twelve of you should give fair and equal consideration to all the evidence. You should deliberate with the goal of reaching an agreement that is consistent with the individual judgment of each juror.

You are impartial judges of the facts. Your sole interest is to determine whether the government has proved its case beyond a reasonable doubt [and whether the defendant has proved [insert defense] [by a preponderance of the evidence; by clear and convincing evidence]].

#### **Committee Comment**

This instruction is derived from *United States v. Silvern*, 484 F.2d 879 (7th Cir. 1973), with changes only to improve syntax. The final, bracketed sentence is included to cover situations in which the trial court has instructed the jury on an affirmative defense on which the defendant bears the burden of proof, such as coercion or insanity.

There are two situations in which a *Silvern* instruction may be appropriate: (1) the initial charge to the jury and (2) a deadlocked jury. The trial court may give the instruction to a deadlocked jury only if it has given the instruction in the initial charge. *United States v. Brown*, 634 F.2d 1069, 1070 (7th Cir. 1980) (“A deadlock instruction given along with other instructions before there is a minority of jurors to feel pressured, has less danger of being coercive than a deadlock instruction first given when deadlock occurs.”). If, however, the defendant definitively expresses his consent to the *Silvern* instruction, despite its exclusion in the initial charge, the district court may find waiver and issue the instruction. *United States v. Collins*, 223 F.3d 502, 509 (7th Cir. 2000).

The trial judge has discretion to repeat the *Silvern* instruction twice after the initial charge. *United States v. Sanders*, 962 F.2d 660, 677 (7th Cir. 1992). Before repeating the instruction, however, the judge must first conclude that the jury is deadlocked. *United States v. Willis*, 523 F.3d 762, 775 (7th Cir. 2008). In determining whether the jury is deadlocked, the judge may consider

factors such as the length of deliberations compared with the length of the trial and the communication by the jury to the judge. *United States v. Taylor*, No. 07-4013, 2009 WL 1811787, at \*3 (7th Cir. June 26, 2009); *Sanders*, 962 F.2d at 676. There is no requirement, however, that the trial judge repeat the instruction automatically whenever it appears that a jury is deadlocked. The trial judge has the discretion to determine whether repetition of the instruction would help the jury reach a verdict. See *United States v. Medansky*, 486 F.2d 807, 813 n.6 (7th Cir. 1973).

The Seventh Circuit concluded that the previously-approved *Silvern* instruction, which this instruction does not modify substantively, has “no plausible potential for coercing a jury.” *United States v. Beverly*, 913 F.2d 337, 352 (7th Cir. 1990). If a variation on the approved instruction is given, “[t]he relevant inquiry, under *Silvern*, . . . is whether the court’s communications pressured the jury to surrender their honest opinions for the mere purpose of returning a verdict. *Sanders*, 962 F.2d at 676 (internal citations omitted). Use of the approved instruction as the exclusive instruction of this type is highly recommended to avoid inadvertently coercive substitutes and to head off argument about reversible error.