

## 2. INSTRUCTIONS FOR USE DURING TRIAL (Introductory Comment)

The instructions included in this section are those the Committee felt were most likely to be given *during* trial, to limit or explain evidence, to advise the jury of its duties, or to cure or avoid prejudice. An instruction bearing on the jury's duties during recesses is contained in Instruction 2.01. Instructions explaining various kinds of evidence include Instructions 2.02-2.07.

Limiting instructions must be given, if requested, where evidence is admissible for one purpose, but not for another purpose, or against one defendant but not another. Fed. R. Evid. 105. Although it may be the better practice to give such an instruction *sua sponte*, this circuit has made it clear that the district court is not required to give a limiting instruction unless counsel requests one. *Roth v. Black & Decker, U.S., Inc.*, 737 F.2d 779, 782-83 (8<sup>th</sup> Cir. 1984). *United States v. Perkins*, 94 F.3d 429, 435 (8<sup>th</sup> Cir. 1996). Generally, when neither party requests a limiting instruction, the trial court's failure to give a limiting instruction is reviewed for plain error. *Id.* A party who declines a district court's offer to provide a limiting instruction or who makes it clear that he does not want such a limiting instruction waives the issue on appeal and cannot complain that such a failure constituted plain error. *United States v. Haukass*, 172 F.3d 542, 545 (8<sup>th</sup> Cir. 1999); *Arkansas State Highway Comm'n v. Arkansas River Co.*, 27 F.3d 753, 760 (8<sup>th</sup> Cir. 2001) (when error invited, there can be no reversible error).

The district court has discretion in deciding whether to give limiting instructions, but when it does, it should instruct the jury as to the limited purpose for which the evidence is received. *United States v. Robinson*, 774 F.2d 261, 272 (8<sup>th</sup> Cir. 1985). *United States v. Larry Reid & Sons Partnership*, 280 F.3d 1212, 1215 (8<sup>th</sup> Cir. 2002). Limiting instructions include Instructions 2.08-2.19.

Curative instructions are used to avoid or cure possible prejudice that may arise from a variety of situations occurring during trial. *United States v. Flores*, 73 F.3d 826, 831 (8<sup>th</sup> Cir. 1996). *See, e.g., United States v. Waddington*, 233 F.3d 1067, 1077 (8<sup>th</sup> Cir. 2000) [reference to a co-defendant's conviction in the same underlying case]; *United States v. O'Dell*, 204 F.3d 1829, 1835 (8<sup>th</sup> Cir. 2000) [improper prosecutor's argument that the government cannot force someone to testify];

*United States v. Sopczak*, 742 F.2d 1119, 1122 (8th Cir. 1984) [witness mentioned defendant had changed plea from guilty to not guilty]; *United States v. Martin*, 706 F.2d 263, 266 (8th Cir. 1983) [court's reference to defendants as "pimps"]; *United States v. Singer*, 660 F.2d 1295, 1304-05 (8th Cir. 1981), *cert. denied*, 454 U.S. 1156 (1982) [prosecutor's comments during closing argument]; *United States v. Smith*, 578 F.2d 1227, 1236 (8th Cir. 1978) [codefendant's disruptive conduct at trial]; *United States v. Leach*, 429 F.2d 956, 963 (8th Cir. 1970), *cert. denied*, 402 U.S. 986 (1971) [witness characterized defendant's remark as "vulgar"]. Curative instructions include Nos. 2.20-2.22.

The court has discretion to refuse a curative instruction where the effect may be to amplify the event rather than dispel prejudice. ~~See, e.g., *United States v. Wyant*, 576 F.2d 1312, 1319 (8th Cir. 1978).~~ *Long v. Cottrell*, 265 F.3d 663, 665 (8<sup>th</sup> Cir. 2001).

Other Instructions dealing with evidentiary matters are found in Section 4. Any of those evidentiary instructions may easily be adapted for use during trial where appropriate. ~~Other examples of instructions which may be given during trial are in 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal §§ 11.01-11.15 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions §§ 5-8 (1988); Fifth Circuit Pattern Jury Instructions: Criminal Chapter 1 (1997); Ninth Cir. Crim. Jury Instr. 2.1-2.13 (1997).~~

~~————The Committee recommends that any instruction which is given during trial be repeated in the court's final instructions given at the end of trial, unless valid reasons are presented to the court for doing otherwise.~~

Instructions given during trial may be repeated at the conclusion of trial, if appropriate.

## 2.01 DUTIES OF JURY: RECESSES<sup>1</sup>

We are about to take [our first] [a] recess<sup>2</sup> and I remind you of the instruction I gave you earlier. During this recess or any other recess, you must not discuss this case with anyone, including your fellow the other jurors, members of your family, people involved in the trial, or anyone else. If anyone tries to talk to you about the case, please let me know about it immediately. [Do not read, watch or listen to any news reports of the trial. Finally, keep an open mind until all the evidence has been received and you have heard the views of your fellow jurors.

I may not repeat these things to you before every recess, but keep them in mind throughout the trial.]<sup>3</sup>

### Notes on Use

1. This instruction should be given before the first recess and at subsequent recesses within the discretion of the court.
2. This language should be modified for overnight or weekend recesses.
- ~~3. This language may be omitted for subsequent breaks during trial, but not for overnight or weekend recesses.~~

### Committee Comments

~~See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal §§ 11.01 and 11.02 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions § 5 (1988); Ninth Cir. Crim. Jury Instr. 2.1 (1997).~~

~~See also~~ Instruction 1.08, *supra*.

The court has considerable discretion to separate a jury before it has reached a verdict. *United States v. Williams*, 635 F.2d 744, 745 (8th Cir. 1980) and cases cited therein. *United States v. Dixon*, 913 F.2d 1305, 1312 (8th Cir. 1990) (distinguishing separation of jury prior to and after deliberations). However, the jury must be admonished as to their duties and responsibilities when not in court. Such an instruction may be given at the beginning of trial, before recesses and lunchtime, and most importantly before separating for the evening. *Id.* *United States v. Williams*, 635 F.2d 744, 745 (8th Cir. 1990). Although failure to give any instruction of this nature during the course of a trial which was completed in one day has been held harmless error, *Morrow v. United States*, 408 F.2d 1390 (8th Cir. 1969), it is prejudicial error to allow the jury to separate overnight without fail to give a cautionary instruction having been given at any stage of the trial prior to separation. *See United States v. Williams*, 635 F.2d at 746; *Cf.*, *United States v. Lashley*, 251 F.3d 706, 712 (8th Cir. 2001). The jurors mistakenly left early during deliberations. The court held it was not reversible error for the

trial judge to contact the jurors by telephone and admonish them not to speak to anyone about the case, where such admonition had been given during trial. However, the failure to give a cautionary instruction prior to an overnight separation was held not reversible error, absent any other claim of prejudice where the jury had been so cautioned on at least thirteen other occasions. *United States v. Weatherd*, 699 F.2d 959, 962 (8th Cir. 1983). *See also United States v. McGrane*, 746 F.2d 632 (8th Cir. 1984) holding that the jury was adequately cautioned when they were so instructed on ten occasions.

~~— See Instruction 3.12, *infra*, for final instructions on this topic.~~

## 2.03 STIPULATED FACTS

The government [prosecutor] and the defendant[s] have stipulated -- that is, they have agreed -- that certain facts are as counsel have just stated. You must therefore treat those facts as having been proved.

### Committee Comments

~~See Ninth Cir. Crim. Jury Instr. 2.4 (1997). See generally 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 12.03 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions § 12 (1988); Seventh Circuit Federal Jury Instructions: Criminal § 3.15 (1999); West Key # "Stipulations" 14(10). See also Committee Comments, Instruction 2.02, *supra*.~~

~~When parties enter into stipulations as to material facts, those facts will be deemed to have been conclusively proved, and the jury may be so instructed. When facts are stipulated, it is not error for the court to so instruct. *United States v. Sims*, 529 F.2d 10, 11 (8th Cir. 1976); *United States v. Houston*, 547 F.2d 104, 107 (9th Cir. 1976). See, e.g., *United States v. Steeves*, 525 F.2d 33, 35 (8th Cir. 1975). When the parties stipulate to an element of an offense, it is not error to instruct the jury as to that fact. "Stipulations of fact fairly entered into are controlling and conclusive and courts are bound to enforce them." *Osborne v. United States*, 351 F.2d 111, 120 (8th Cir. 1965).~~

A case may be submitted on an agreed statement of facts and the defendant may raise any defenses by stipulation. Such a practice, where the essential facts in the case are uncontested, has been approved as a practical and expeditious procedure. *United States v. Wray*, 608 F.2d 722, 724 (8th Cir. 1979), *cert. denied*, 444 U.S. 1048 (1980). When facts which tend to establish guilt are submitted on stipulation, the court must determine whether the consequences of the admissions are understood by the defendant and whether he consented to them. *Cox v. Hutto*, 589 F.2d 394, 396 (8th Cir. 1979) [(stipulation to prior convictions in habitual offender action)]; *United States v. Ferrack*, 515 F.2d 558, 560-61 (9th Cir. 1975) [whole case submitted on stipulated facts]. However, ~~the~~ An extensive examination before entry of a guilty plea under Rule 11 is ordinarily not required. *United States v. Stalder*, 696 F.2d 59, 62 (8th Cir. 1982). *Ferrack*, 515 F.2d at 560-61, and cases cited therein; *United States v. Miller*, 588 F.2d 1256, 1263-64 (9th Cir. 1978), *cert. denied*, 440 U.S. 947 (1979); *United States v. Schmidt*, 760 F.2d 828 (7th Cir.), *cert. denied*, 474 U.S. 827 (1985). However, when a stipulation is entered that leaves no fact to be tried, the court should determine that the stipulation was voluntarily and intelligently entered into, and that the defendant knew and understood the consequences of the stipulation. *Id.* ~~Guilty plea safeguards may be required, however, where and by such stipulation the defendant effectively admits guilt and waives trial on all issues.~~ *Schmidt*, 760 F.2d at 834.

By agreeing to a stipulation, a defendant waives any right to argue error on appeal. *United States v. Hawkins*, 215 F.3d 858, 860 (8th Cir. 2000) (citing *Ohler v. United States*, 529 U.S. 753,

756 (2000) (party introducing evidence cannot complain on appeal that the evidence was erroneously admitted). ; *United States v. Early*, 77 F.3d 242, 244 (8<sup>th</sup> Cir. 1996) (defendant who does not challenge stipulation is bound by it.) — *United States v. Ferreboeuf*, 632 F.2d 832, 836 (9th Cir. 1980), *cert. denied*, 450 U.S. 934 (1981), which held:

——— [W]hen a stipulation to a crucial fact is entered into the record in open court in the presence of the defendant, and is agreed to by defendant's acknowledged counsel, the trial court may reasonably assume that the defendant is aware of the content of the stipulation and agrees to it through his or her attorney. Unless a criminal defendant indicates objection at the time the stipulation is made, he or she is ordinarily bound by such a stipulation. [Case citations from Second, Seventh, Ninth and Tenth Circuits omitted.]

In *Ferreboeuf*, the stipulation was to one of the three necessary elements to establish the crime. *See also Loggins v. Frey*, 786 F.2d 364, 367-68 (8<sup>th</sup> Cir. 1986), upholding a stipulation that a witness was unavailable (which allowed his prior testimony to be read into evidence), where, although defendant's attorney did not consult him about the stipulation, it appeared from the record that defendant acquiesced in it and the stipulation was motivated by sound strategic reason.

## 2.05 WIRETAP OR OTHER TAPE-RECORDED EVIDENCE

[You are about to hear [have heard] tape recordings of conversations. These conversations were legally recorded, and you may consider the recordings just like any other evidence.]

### Committee Comments

See Federal Judicial Center, Pattern Criminal Jury Instructions § 13 (1988); Ninth Cir. Crim. Jury Instr. 2.8 (1997). See generally 18 U.S.C. §§ 2510-2520.

The Committee recommends that this instruction be given only if a question as to the propriety of the recording has been raised in the jury's presence.

Note that when a transcript of a tape is offered and the tape is available, the tape, rather than the transcript, controls. See Fed. R. Evid. 1002. *United States v. Martinez*, 951 F.2d 887, 889 (8<sup>th</sup> Cir. 1991). The trial court did not err in permitting the jury to listen to a tape, which was arguably unintelligible, and follow along with the transcript, when the court instructed the jury that only the tape and not the transcript was to be considered when weighing the evidence. This is covered in Instruction 2.06, *infra*. In situations where a transcript is utilized together with the recording, Instruction 2.06 should be given immediately after this instruction.

In *United States v. McMillan*, 508 F.2d 101 (8th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975), the Court set forth the foundation requirements for use of tape recordings as evidence. The *McMillan* foundation requirements are directed to the government's use of recording equipment, but not to a recording found in a defendant's possession. *United States v. O'Connell*, 841 F.2d 1408 (8th Cir.), *cert. denied*, 487 U.S. 1210 (1988); *United States v. Kandiel*, 865 F.2d 967 (8th Cir. 1989). If the requirements are satisfied, a tape may be admitted even if it is poor quality as long as the quality of the recording does not call into question the trustworthiness of the tape. *United States v. Munoz*, 324 F.3d 987, 992 (8<sup>th</sup> Cir. 2003); *Cf.*, *United States v. Le*, 272 F.3d 530, 532 (8<sup>th</sup> Cir. 2001). It is within the trial court's discretion to exclude a tape when its quality renders it untrustworthy.

## 2.06 TRANSCRIPT OF TAPE-RECORDED CONVERSATION

As you have [also] heard, there is a typewritten transcript of the tape recording [I just mentioned] [you are about to hear]. That transcript also undertakes to identify the speakers engaged in the conversation.

You are permitted to have the transcript for the limited purpose of helping you follow the conversation as you listen to the tape recording, and also to help you keep track of the speakers. The transcript, however, is not evidence. The tape recording itself is the primary evidence of its own contents.

[You are specifically instructed that whether the transcript correctly or incorrectly reflects the conversation or the identity of the speakers is entirely for you to decide based upon what you have heard here about the preparation of the transcript, and upon your own examination of the transcript in relation to what you hear on the tape recording. If you decide that the transcript is in any respect incorrect or unreliable, you should disregard it to that extent.]<sup>1</sup>

Differences in meaning between what you hear in the recording and read in the transcript may be caused by such things as the inflection in a speaker's voice. You should, therefore, rely on what you hear rather than what you read when there is a difference.

### Notes on Use

1. This language should be included if the accuracy of the transcript is an issue.

### Committee Comments

*See generally United States v. McMillan*, 508 F.2d 101 (8th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975) (specifies the procedures for use of transcripts at trial). *United States v. Bentley*, 706 F.2d 1498 (8th Cir. 1983), *cert. denied*, 467 U.S. 1209 (1984). *United States v. Calderin-Rodriquez*, 244 F.3d 979, 987 (8<sup>th</sup> Cir. 2001), held that transcripts which provide voice identification and date headings were properly admitted.

~~The transcript, absent stipulation of the parties, should not go to the jury room. *See United States v. Kirk*, 534 F.2d 1262 (8th Cir. 1976), *cert. denied*, 430 U.S. 906 (1977), 433 U.S. 907 (1977). Without specific allegations, the court must assume the transcript is accurate. *United States v. Britton*, 68 F.3d 262, 264 (8<sup>th</sup> Cir. 1995); *cf.* A jury may use transcripts of taped conversations during trial and jury deliberations. *United States v. Delpit*, 94 F.3d 1134, 1147-48 (8<sup>th</sup> Cir. 1996); *United States v. Foster*, 815 F.2d 1200, 1203 (8<sup>th</sup> Cir. 1987), where the court held it was not error~~

for the trial court to permit the transcripts to be sent to the jury during deliberations when the transcripts were admitted into evidence without objection, and the jury was instructed that the tape is controlling. If the accuracy of the transcript has been stipulated, the transcript may be admitted into evidence without limiting instructions. *See United States v. Crane*, 632 F.2d 663, 664 (6th Cir. 1980).

The trial court has broad discretion in the use of transcripts. *See e.g., United States v. Grajales-Montoya*, , 117 F.3d 356, 367 (8<sup>th</sup> Cir. 1997). The court held that the trial court did not abuse its discretion by admitting transcripts of certain translations of tape recorded conversations in Spanish. In *United States v. Delpit*, 94 F.3d 1134, 1147 (8<sup>th</sup> Cir. 1996), the court held it was not error for the trial court to allow the jury to use the transcripts of wire-tapped conversations during trial and deliberations which included the government's interpretation and translation, in brackets, of pig Latin codes used in tapes.

## 2.07 STATEMENT BY DEFENDANT

You have heard testimony that the defendant (name) made a statement to (name of person or agency). It is for you to decide:

First, whether the defendant (name) made the statement and

Second, if so, how much weight you should give to it. <sup>1</sup>

[In making these two decisions you should consider all of the evidence, including the circumstances under which the statement may have been made.] <sup>+2</sup>

### Notes on Use

1. In a multi defendant trial this instruction should be followed by Instruction 2.15, *infra*, unless the statement was made during the course of a conspiracy or was otherwise adoptive.

2. \_\_\_\_\_

### Committee Comments

~~See Ninth Cir. Crim. Jury Instr. 4.1 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal (Special) § 2.1 (1997). See also 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal §§ 14.03 and 14.04 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions § 36 (1988); Fifth Circuit Pattern Jury Instructions: Criminal § 1.26 (1997); Seventh Circuit Federal Jury Instructions: Criminal § 3.02 (1999). See generally 18 U.S.C. § 3501 and *United States v. Dickerson*, 530 U.S. 428 (2000); West Key # "Criminal Law" 405, 406 (1-3, 5-7), 409, 411, 412(1-6), 412.1(1-4), 412.2(1-5), 414, 781(1-6), 814(16), 815(8), 823(11).~~

The instruction uses the word "statement" in preference to the word "confession." Not all statements are "confessions," particularly from a lay person's point of view.

Pursuant to 18 U.S.C. § 3501(a), the trial judge must first make a determination as to the voluntariness of the statement (including compliance with applicable *Miranda* requirements), outside the presence of the jury. This may, of course, be done either pre-trial or out of the jury's presence during trial. If done during trial, no reference to the statement should be made in the jury's presence unless and until the trial judge has made a determination that the statement is admissible. If such a determination is made, the trial judge should then permit the jury to hear evidence on the issue of voluntariness and give the present instruction. The jury should *not* be advised that the trial judge has made an independent determination that the statement was voluntary. *United States v. Standing Soldier*, 538 F.2d 196, 203 (8th Cir.), *cert. denied*, 429 U.S. 1025 (1976); *United States v. Bear Killer*, 534 F.2d 1253, 1258-59 (8th Cir.), *cert. denied*, 429 U.S. 846 (1976). The Committee concludes that it is not necessary to instruct the jury with respect to the various specific factors enumerated in 18 U.S.C. § 3501(b).

The defendant may introduce evidence of the circumstances in which the statement is made. *Crane v. Kentucky*, 476 U.S. 683 (1986); *United States v. Blue Horse*, 856 F.2d 1037, 1039 n.3 (8th Cir. 1988).

If the voluntariness of the statement is not an issue, the defendant is not entitled to this instruction. *United States v. Blue Horse*, 856 F.2d at 1039.

Even though the defendant's failure to request an instruction such as this one may be a waiver of any error in the matter, *see United States v. Houle*, 620 F.2d 164, 166 (8th Cir. 1980), the Committee strongly recommends that if voluntariness is an issue, the instruction be given even absent a request.

"Informal" voluntary statements - that is, in the language of 18 U.S.C. § 3501(d), those made "without interrogation by anyone, or at any time at which the person . . . was not under arrest or other detention" - do not require any instruction. *See United States v. Houle*, 620 F.2d at 166.

## 2.09 DEFENDANT'S PRIOR SIMILAR ACTS (Where Introduced to Prove Identity) (Fed. R. Evid. 404(b))

You [are about to hear] [have heard] evidence that the defendant previously committed [an act] [acts] similar to [the one] [those] charged in this case. You may use this evidence to help you decide [manner in which the evidence will be used to prove identity - e.g., whether the similarity between the acts previously committed and the one[s] charged in this case suggests that the same person committed all of them].<sup>1</sup> [If you find that the evidence of other acts is not proven by a preponderance of the evidence, then you shall disregard such evidence. To prove something by a preponderance of the evidence is to prove that it is more likely true than not true. This is a lower standard than proof beyond a reasonable doubt.]<sup>2</sup>

~~Remember, however, that the mere fact that the defendant may have committed [a similar act] [similar acts] in the past is not evidence that [he] [she] committed such [an act] [acts] in this case. The defendant is on trial for the crime[s] charged and for [that] [those] crime[s] alone. You may not convict a person simply because you believe [he] [she] may have committed some act[s], even bad act[s], in the past.~~<sup>3</sup>

### Notes on Use

1. The language here should specify whether the evidence is to be considered to show a common pattern, scheme or plan or for another permissible purpose relating to proof of the acts charged.

2. See Note on Use 2 to Instruction 2.08

3. See Note on Use 3 to Instruction 2.08.

### Committee Comments

See S. Saltzburg & H. Perlman, FEDERAL CRIMINAL JURY INSTRUCTIONS § 2.14A (1985); Sand, et al., *Modern Federal Jury Instructions*, 5-26 (1994); see generally Fed. R. Evid. 404(b); West Key # "Criminal Law" 369.15, 372.

See also Introductory Comment, Section 2.00, *supra*, concerning limiting instructions.

Evidence of prior crimes or acts may be admissible in some cases to prove the crime charged. See, e.g., *United States v. Calvert*, 523 F.2d 895, 905-07 (8th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976); *United States v. Robbins*, 613 F.2d 688, 692-95 (8th Cir. 1979). For example, such evidence is admissible to prove identity when the theory for admitting the evidence is to show a

common scheme, pattern or plan between the prior acts and the present offense. *United States v. McMillian*, 535 F.2d 1035, 1038 (8th Cir. 1976), *cert. denied*, 434 U.S. 1074 (1978); *United States v. Davis*, 551 F.2d 233, 234 (8th Cir.), *cert. denied*, 431 U.S. 923 (1977); *United States v. Weaver*, 565 F.2d 129, 133-35 (8th Cir. 1977), *cert. denied*, 434 U.S. 1074 (1978); *United States v. Mays*, 822 F.2d 793, 797 (8th Cir. 1987). Such evidence is admissible where there is a "peculiar similarity" between the prior acts and the crime charged. *United States v. Garbett*, 867 F.2d 1132, 1135 (8th Cir. 1989). This instruction is not appropriate when evidence of similar crimes is introduced in sexual assault and child molestation cases covered by Fed. R. Evid. 413 and 414.

Because similar act evidence tends not only to prove the commission of the act but also has a tendency to show defendant's bad or criminal character, undue prejudice must be avoided. This instruction, which in effect tells the jury to consider the evidence only on the issue of identity and not on the issue of character, should be given on request. See *United States v. Danzey*, 594 F.2d 905, 914-15 (2d Cir.), *cert. denied*, 441 U.S. 951 (1979); see also *United States v. McMillian*, 535 F.2d at 1038-39.

Where similar act evidence may be admissible both on the issue of identity and for another proper purpose, Instruction 2.08, *supra*, and this Instruction 2.09 may need to be adapted to meet the particular situation.

## 2.10 CROSS-EXAMINATION OF DEFENDANT'S CHARACTER WITNESS

You will recall that after witness (name) testified about the defendant's [reputation for] [character for] [reputation and character for] (insert character trait covered by testimony), the ~~government attorney~~ prosecutor asked the witness some questions about whether [he] [she] knew that (Describe in brief terms the subject of the cross-examination on the character trait, e.g., defendant was convicted of fraud on an earlier occasion). Those questions were asked only to help you decide if the witness really knew about the defendant's [reputation for] [character for] [reputation and character for] (insert character trait covered by the testimony). The information developed by the ~~government attorney~~ prosecutor on that subject may not be used by you for any other purpose.

~~The possibility~~ That the defendant [committed] [may have committed] (e.g., committed fraud on an earlier occasion) is not evidence that [he] [she] committed the crime charged in this case.

### Committee Comments

~~— See Federal Judicial Center, Pattern Criminal Jury Instructions § 52 (1988); 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 11.15 (4th ed. 1992). See generally Fed. R. Evid. 405(a), West Key # "Criminal Law" 673(2), "Witnesses" 274(1).~~

*See also* Introductory Comment, Section 2.00, *supra*, concerning limiting instructions.

For a good treatment of this topic, *see Michelson v. United States*, 335 U.S. 469 (1948); *United States v. Monteleone*, 77 F.3d 1086, 1089-90 (8<sup>th</sup> Cir. 1996).

~~Character testimony is limited to the reputation of a defendant, not to specific instances of behavior. *United States v. Koessel*, 706 F.2d 271, 275 (8<sup>th</sup> Cir. 1983) (citing *Michelson*, 335 U.S. at 477).~~ Although character testimony is usually limited to the reputation of the defendant, the government may challenge a defendant's character witness by cross-examining the witness about the witness' knowledge of "relevant specific instances" of a defendant's conduct *United States v. Monteleone*, 77 F.3d at 1089-90. This type of cross-examination is discouraged, however, because it is fraught with danger and could form the basis for a miscarriage of justice. *United States v. Knapp*, 815 F.2d 1183, 1186 (8<sup>th</sup> Cir. 1989). The government may only use this type of cross-examination if two requirements are met: (1) a good faith factual basis for the incidents, which must be of a type likely to be a matter of general knowledge in the community; and (2) the incidents must be relevant to the character trait at issue. *United States v. Monteleone*, 77 F.3d at 1089-90. With respect to community reputation for a character trait, only reputation reasonably contemporaneous with the acts charged is relevant. *United States v. Curtis*, 644 F.2d 263, 268 (3<sup>d</sup> Cir. 1981), *cert. denied*, 459 U.S. 1018 (1982); *Mullins v. United States*, 487 F.2d 581, 590 (8<sup>th</sup> Cir. 1973). Cross-examination must be limited to the particular character trait placed in issue. *Michelson, v. United States*, 335 U.S.

at 475-76. *United States v. Curtis*, 644 F.2d at 268. Cf., *United States v. Smith*, 32 F.3d 1291, 1295 (8<sup>th</sup> Cir. 1994), in which the court held it was harmless error to permit cross-examination of defendant's character witness on defendant's prior marijuana conviction when the jury was instructed that the government's questions and the witness' responses were only to be used to challenge the character witness' knowledge of defendant's reputation.

## 2.11 DISMISSAL, DURING TRIAL, OF SOME CHARGES AGAINST SINGLE DEFENDANT

At the beginning of the trial I told you that the defendant was accused of (insert number) different crimes: (Briefly describe the offenses mentioned at the commencement of trial.)<sup>1</sup> Since the trial started, however, [one] [two, etc.] of these charges [has] [have] been disposed of, the one(s) having to do with (describe offenses disposed of).<sup>2</sup> [That charge] [Those charges] [is] [are] no longer before you, and the only crime[s] that the defendant is charged with now [is] [are] (describe remaining offenses). You should not guess about or concern yourselves with the reason for this disposition. You are not to consider this fact when deciding if the [government] [prosecutor] has proved, beyond a reasonable doubt, the count[s] which remain, which are (list remaining count[s]).

[The following evidence is now stricken by me, and is thus no longer before you and may not be considered by you: (Describe stricken evidence).]<sup>3</sup>

### Notes on Use

1. If one or more counts of the same offense have been disposed of and other counts of the same offense remain, the language of this instruction should be modified.
2. In some cases circumstances may require a more specific treatment of the reasons for dismissal.
3. If the evidence remains admissible the jury may be so instructed. *See United States v. D'Alora*, 585 F.2d 16 (1st Cir. 1978) which approved the following instruction:

~~For reasons which need not concern the jury, Count II has been withdrawn from your consideration. However, the evidence you heard relating to that count may be considered by you in your deliberations on the remaining counts—~~*United States v. Kelley*, 152 F.3d 886, 888 (8<sup>th</sup> Cir. 1998) (citing with approval 8<sup>th</sup> Cir. Model Crim. Jury Instruction 2.11).

### Committee Comments

~~See Federal Judicial Center, Pattern Criminal Jury Instructions § 16 (1988); Ninth Cir. Crim. Jury Instr. 2.12 (1997); *United States v. Beran*, 546 F.2d 1316, 1319-20 (8<sup>th</sup> Cir. 1976), cert. denied, 430 U.S. 916 (1977). See generally West Key # "Criminal Law" 750, 867, 1166.22(2).~~

*See also* Introductory Comment, Section 2.00, *supra*, concerning limiting instructions.

Such an instruction is appropriate only on rare occasions and should *not* be given unless requested by the defendant.

## 2.12 DISPOSITION, DURING TRIAL, OF ALL CHARGES AGAINST ONE OR MORE CODEFENDANT[S]

At the beginning of the trial I told you that (insert name[s]) [was] [were] [a] defendant[s] in this case. The charge[s] against defendant[s] (insert name[s]) [has] [have] been disposed of, and [he] [she] [they] [is] [are] no longer [a] [defendant[s] in this case. You should not guess about or concern yourselves with the reason for this disposition. You are not to consider this fact when deciding if the [government] [prosecutor] has proved, beyond a reasonable doubt, its case against defendant[s] (name remaining defendant[s]).

[The following evidence is now stricken by me, and is thus no longer before you and may not be considered by you (describe stricken evidence).]<sup>1</sup>

### Notes on Use

1. If the evidence remains admissible the jury may be so instructed. *See United States v. D'Alora*, 585 F.2d 16 (1st Cir. 1978). *United States v. Kelley*, 152 F.3d 886, 888 (8<sup>th</sup> Cir. 1998).

### Committee Comments

~~See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal §§ 12.16 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions § 17 (1988); Ninth Cir. Crim. Jury Instr. § 2.13 (1997); *United States v. Schmaltz*, 562 F.2d 558 (8th Cir.), cert. denied, 434 U.S. 957 (1977). See generally West Key # "Criminal Law" 768(1), 793.~~

~~See also~~ Introductory Comment, Section 2.00, *supra*, concerning limiting instructions.

Courts have split on the question of whether the jury should be told the reason for the codefendant's departure or told not to concern themselves with it. *See* discussion in *United States v. Barrientos*, 758 F.2d 1152, 1155-58 (7th Cir. 1985), cert. denied, 474 U.S. 1062 (1986). This instruction follows the holding of the Seventh Circuit in that case. However, *see Wood v. United States*, 279 F.2d 359, 362-63 (8th Cir. 1960) in which the court approved the trial court's advising the jury that certain co-defendants had pleaded guilty. The Eighth Circuit has held that the trial court properly instructed a jury that the absence of codefendants, who pled guilty after opening statements during trial, should have no bearing upon the case of the remaining defendant. Therefore a mistrial was not warranted due to the pleas of the codefendants. *United States v. Daniele*, 886 F.2d 1046, 1055 (8<sup>th</sup> Cir. 1989).

If the jury should become aware that a codefendant has pleaded guilty, it should be clearly instructed that it is not to consider or discuss the plea in deciding the case of the remaining defendant or defendants. *Wood, Id.*; *United States v. Phillips*, 640 F.2d 87, 91 n. 7 (7th Cir.), cert. denied, 451 U.S. 991 (1981). If a guilty plea of a codefendant is brought into trial, either directly or indirectly, a

trial court must ensure that it is not being offered as substantive evidence of a defendant's guilt. One factor in determining whether admission of such evidence is an abuse of a trial court's discretion is whether a limiting instruction is given. *United States v. Jones*, 145 F.3d 959, 963 (8<sup>th</sup> Cir. 1998). However, if the introduction of the evidence is invited by counsel or if defense counsel requests no limiting instruction, failure to give a limiting instruction may not constitute plain error. *Id.*; ~~the defense may elect to forego an instruction if it desires to avoid calling attention to the plea.~~ *United States v. Francisco*, 410 F.2d 1283, 1288-89 (8th Cir. 1969).

## 2.13 DISPOSITION, DURING TRIAL, OF ONE OR MORE BUT LESS THAN ALL CHARGES AGAINST CODEFENDANT[S]

At the beginning of the trial I told you that [both] [all] defendants were charged, among other things, with the crimes of (describe crimes).<sup>1</sup> The charges of (describe disposed of charges), as against defendant[s], [has] [have] been disposed of, and [he] [she] [they] [is] [are] no longer [a] defendant[s] as to [that] [those] charge[s]. You should not guess about or concern yourselves with the reason for this disposition. You are not to consider this fact when deciding if the [government] [prosecutor] has proved beyond a reasonable doubt that defendant[s] (name remaining defendant[s]) committed any of the crimes with which [he] [she] [they] [is] [are] charged, or when deciding if the [government] [prosecutor] has proved beyond a reasonable doubt that defendant[s] (name remaining defendants) committed the remaining crime[s] with which [he] [she] [they] [is] [are] charged.

[The following evidence is now stricken by me, and is thus no longer before you and may not be considered by you: (describe stricken evidence).]<sup>2</sup>

[So far as this case is concerned, you will continue to be concerned with the following charges: (describe charges).]<sup>3</sup>

### Notes on Use

1. If one or more counts of the same offense have been disposed of and other counts of the same offense remain, the language of this instruction should be modified.

2. If the evidence remains admissible the jury may be so instructed. *See United States v. D'Alora*, 585 F.2d 16 (1st Cir. 1978) which approved the following instruction:

~~For reasons which need not concern the jury, Count II has been withdrawn from your consideration. However, the evidence you heard relating to that count may be considered by you in your deliberations on the remaining counts. *United States v. Kelley*, 152 F.3d 886, 888 (8<sup>th</sup> Cir. 1998).~~

3. Optional for use when there are a number of charges, and the court feels it would be helpful to "re-cap" those remaining for the jury.

## Committee Comments

~~—— See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 12.16 (4th ed. 1992); Ninth Cir. Crim. Jury Instr. § 2.13 (1997); *United States v.*~~

~~*Schmaltz*, 562 F.2d 558 (8th Cir.), cert. denied, 434 U.S. 957 (1977). See generally West Key # "Criminal Law" 750, 1166.22(2).~~

~~See also~~ Introductory Comment, Section 2.00, *supra*, and Committee Comments, Instruction 2.12, *supra*.

## 2.14 EVIDENCE ADMITTED AGAINST ONLY ONE DEFENDANT

As you know, there are (insert number) defendants on trial here: (name each defendant). Each defendant is entitled to have [his] [her] case decided solely on the evidence which applies to [him] [her]. Some of the evidence in this case is limited under the rules of evidence to one of the defendants, and cannot be considered against the others.

The [testimony] [exhibit about which] you [are about to hear] [just heard], (describe testimony or exhibit), can be considered only in the case against defendant (name). You must not consider that evidence when you are deciding if the [government] [prosecutor] has proved, beyond a reasonable doubt, its case against the defendant[s] (name[s]).

### Committee Comments

~~See 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 12.14 (4th ed. 1992); Federal Judicial Center, Pattern Criminal Jury Instructions § 19 (1988); Ninth Cir. Crim. Jury Instr. § 1.4 (1997); *United States v. Leach*, 429 F.2d 956, 961 (8th Cir. 1970), *cert. denied*, 402 U.S. 986 (1971). See generally West Key # "Criminal Law" 673(2).~~

~~See also~~ Introductory Comment, Section 2.00, *supra*, concerning limiting instructions.

~~Giving this type of instruction each time evidence limited to one or more defendants is admitted is an appropriate method to guard against prejudice, however such interim instructions are not required and it is within the discretion of the trial judge to determine when interim instructions are necessary. *United States v. Oxford*, 735 F.2d 276, 280 (7th Cir. 1984). In particularly complex cases, the judge might consider marshaling evidence at the end of the trial, thereby identifying the limited evidence available against a particular defendant. Cf. *United States v. Kelly*, 349 F.2d 720, 757 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966). Limiting instructions informing the jury of proper use of the evidence are sufficient, unless the defendant shows that his defense is irreconcilable with the other defendants' defenses or the jury cannot compartmentalize the evidence. *United States v. Bordeaux*, 84 F.3d 1544, 1547 (8th Cir. 1996). A district court, in admitting Rule 404(b) type evidence, need not issue a limiting instruction *sua sponte*. *United States v. Perkins*, 94 F.3d 429, 435-36 (8th Cir. 1996). In the absence of a specific defense request, no limiting instruction is required where the evidence is relevant to an issue in the case. *United States v. Conley*, 523 F.2d 650, 654 n.7 (8th Cir. 1975). Where evidence was admissible against one defendant but not admissible to three other defendants, a trial court did not err in failing to give a limiting instruction where none was requested by defense counsel and before retiring, the jury was instructed that "[e]ach defendant is entitled to have his case decided solely on the evidence which applies to him." *United States v. Ortiz*, 125 F.3d 630, 633 (8th Cir. 1997). *United States v. Bell*, 99 F.3d 870, 881 (8th Cir. 1996).~~

~~An exhibit admissible against only one defendant may go to the jury room if adequate cautionary instructions are given. *United States v. Martinez*, 428 F.2d 86 (6th Cir.), *cert. denied*, 400 U.S. 881 (1970).~~

## 2.15 STATEMENT OF ONE DEFENDANT IN MULTI-DEFENDANT TRIAL

You may consider the statement of defendant (name) only in the case against [him] [her], and not in the case against the other defendant[s]. ~~What that means is that you may consider defendant (name)'s statement in the case against [him] [her] and for that purpose rely on it as much or as little as you think proper, but y~~ You may not consider or discuss that statement in any way when you are deciding if the [government] [prosecutor] has proved, beyond a reasonable doubt, its case against the other defendant[s].

### Committee Comments

~~See Federal Judicial Center, Pattern Criminal Jury Instructions § 37 (1988). See also 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 14.04 (4th ed. 1992); Seventh Circuit Federal Jury Instructions: Criminal § 3.02 (1999). See generally West Key # "Criminal Law" 673(4).~~

~~See also~~ Introductory Comment, Section 2.00, *supra*, concerning limiting instructions.

~~The standard codefendant confession instruction is not as important as it once was due to the Bruton rule.~~ *Bruton v. United States*, 391 U.S. 123 (1968), ~~Bruton~~ held that nontestifying codefendant confessions used in a joint trial which implicate another defendant on their face are so "devastating" that their effect cannot be limited by jury instructions to consider that confession only against the codefendant. Unless directly admissible, *Bruton* holds such confessions to be barred by the Confrontation Clause. The *Bruton* rule has been extended to apply to a nontestifying codefendant's confession in cases in which the confession of the defendant has been admitted, even where the confessions are "interlocking," *Cruz v. New York*, 481 U.S. 186, 191-93 (1987). However the fact that the confessions "interlock" may be considered in assessing whether the statements are supported by sufficient indicia of reliability to be directly admissible against the defendant. *Id.* at 193-94.

In some cases, a nontestifying codefendant's confession may be admitted with a proper limiting instruction where the confession is redacted to eliminate the defendant's name and any reference to his or her existence or where the statement provides only "evidentiary linkage" to the defendant on trial. See *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

This instruction should *not* be used in connection with coconspirator declarations admitted under Fed. R. Evid. 801(d)(2)(E). See, e.g., *United States v. Roth*, 736 F.2d 1222, 1229 (8th Cir. ); *cert. denied*, 469 U.S. 1058 (1984), or in any other situation in which the codefendant's statement may be directly admissible against the defendant. See *Cruz v. New York*, 481 U.S. at 193-94 (citing *Lee v. Illinois*, 476 U.S. 530 (1986)). However, a limiting instruction is appropriate when an out-of-court statement of a co-conspirator is admitted not for the truth of the matter stated but rather to explain the actions of an agent. *Garrett v. United States*, 78 F.3d 1296, 1303 (8<sup>th</sup> Cir. 1995). ("We have

previously noted that ‘if a conspirator statement is both permissible background and highly prejudicial, otherwise hearsay, fairness demands that the government find a way to get the background into evidence without hearsay. (Citations omitted.) The trial court should instruct the jury as to the limited purpose of any hearsay statements that cannot be avoided. Without such procedures, there is a strong risk that while the statement may be offered as background for the agents’ actions, they will inevitably be used as direct evidence of the defendant’s guilt.’”

## 2.16 DEFENDANT'S TESTIMONY: IMPEACHMENT BY PRIOR CONVICTION

You [are about to hear] [have heard] evidence that the defendant (name) was previously convicted of [a] crime[s]. You may use that evidence only to help you decide whether to believe [his] [her] testimony and how much weight to give it. That evidence does not mean that [he] [she] committed the crime charged here, and you must not use that evidence as any proof of the crime charged in this case.

[That evidence may not be used in any way at all in connection with the other defendant[s]].<sup>1</sup>

### Notes on Use

1. For use in a multiple defendant case.

### Committee Comments

~~See Ninth Cir. Crim. Jury Instr. 4.6 (1997). See also 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 15.08 (4th ed. 1992); Seventh Circuit Federal Jury Instructions: Criminal § 3.05 (1999); Federal Judicial Center, Pattern Criminal Jury Instructions § 41 (1988). See generally West Key # "Criminal Law" 786(6), "Witnesses" 337(1-6).~~

~~See also~~ Introductory Comment, Section, 2.00, *supra*, concerning limiting instructions.

If past crimes of the defendant are to be used to establish intent, motive or other mental element, and not for the purpose of impeachment, Instruction 2.08 should be used rather than this Instruction. If the past crimes are to be used to show a common pattern, scheme or plan as between the prior acts and present offense, or to show the defendant's identity, Instruction 2.09, *supra*, should be used. For impeachment by prior conviction of a witness other than the defendant, *see* Instruction 2.18, *infra*.

## 2.17 DEFENDANT'S TESTIMONY: IMPEACHMENT BY OTHERWISE INADMISSIBLE STATEMENT (*Harris v. New York*)

There has been evidence that the defendant (name) was questioned at a time prior to trial, and made certain statements. You may use that evidence only to help you decide if whether [he] [she] said something different earlier, made a statement before trial and if whether what [he] [she] said here in court was true. You must not, however, consider what was said earlier as any proof or evidence of the defendant (name)'s guilt.

### Committee Comments

~~— See Federal Judicial Center, Pattern Criminal Jury Instructions § 42 (1988). See generally West Key # "Witnesses" 390.~~

~~See also~~ Introductory Comment, Section 2.00, *supra*, concerning limiting instructions.

A statement obtained in violation of *Miranda* may constitutionally be used for impeachment purposes if it was voluntary and trustworthy. *Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971); *Clark v. Wood*, 823 F.2d 1241, 1246 (8th Cir.), *cert. denied*, 484 U.S. 945 (1987). The trial judge should stress that the government cannot use the prior statement to prove the defendant's guilt; it can only use it to impeach. ~~Of course,~~ The statement can only be used if the defendant takes the stand and testifies contrary to the prior statement. Where the statement is used for impeachment, the standard for admissibility is voluntariness. *Oregon v. Elstad*, 470 U.S. 298, 307-08 (1985). If the defendant raises a voluntariness issue with respect to the prior statement, it will also be necessary upon defendant's request to instruct the jury appropriately on that issue (*see* Committee Comments, Instruction 2.07, *supra*). However, absent a request and a clear invocation of 18 U.S.C. § 3501(a) at trial, such an instruction is not required. *United States v. Diop*, 546 F.2d 484, 485-86 (2d Cir. 1976). Presumably in those circumstances it would also be necessary, pursuant to 18 U.S.C. § 3501, for the trial judge to conduct a hearing out of the presence of the jury, and make a finding on the issue, before allowing the prior statement to be used even for impeachment purposes.

Use of a defendant's voluntary statement to an agent may be used for impeachment purposes if a proper limiting instruction is given. *United States v. Tucker*, 137 F.3d 1016, 1035 (8<sup>th</sup> Cir. 1998).

## 2.18 IMPEACHMENT OF WITNESS: PRIOR CONVICTION

You have heard evidence that the witness (name) was once convicted of a crime. You may use that evidence only to help you decide whether to believe the witness and how much weight to give [his] [her] testimony.

### Committee Comments

~~— See Federal Judicial Center, Pattern Criminal Jury Instructions § 30 (1988); Ninth Cir. Crim. Jury Instr. § 4.08 (1997). See also 1 Edward J. Devitt, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil and Criminal § 15.07 (4th ed. 1992); Fifth Circuit Pattern Jury Instructions: Criminal § 1.11 (1997); Seventh Circuit Federal Jury Instructions: Criminal § 3.11 (1999). See generally Fed. R. Evid. 609; West Key # "Witnesses" 344(1-5), 345(1-4).~~

*See also* Introductory Comment, Section 2.00, *supra*, concerning limiting instructions.

Where the witness is the defendant, Instruction 2.16, *supra*, should be used.

## 2.19 WITNESS WHO HAS PLEADED GUILTY

You have heard evidence that the witness (name) has [pled] [pleaded] guilty to a crime which arose out of the same events for which the defendant is on trial here. You must not consider that guilty plea as any evidence of this defendant's guilt. You may consider that witness's guilty plea only for the purpose of determining how much, if at all, to rely upon that witness's testimony.<sup>1</sup>

### Notes on Use

1. Such evidence may also be used to show the witness' acknowledgment of participation in the offense. *United States v. Roth*, 736 F.2d 1222, 1226 (8th Cir.), *cert. denied*, 469 U.S. 1058 (1984). If admitted for that purpose, the instruction should be so modified .

### Committee Comments

~~See generally West Key # "Criminal Law" 655(1), 673(3), 1170 ½(1), 1173.2(9).~~

See ~~also~~ Introductory Comment, Section 2.00, *supra*, and Committee Comments, Instruction 2.12, *supra*, concerning a codefendant's guilty plea.

Evidence that a codefendant has pleaded guilty may not be used as substantive proof of a defendant's guilt. However, such evidence is admissible to impeach, to show the witness's acknowledgment of participation in the offense, or to reflect on his credibility. In such circumstances the jury should be instructed that the evidence is received for one or more of these purposes alone, and that the jurors are not to infer the guilt of the defendant. *United States v. Lundrum*, 898 F.2d 635, 640 fn. 10 (8<sup>th</sup> Cir. 1990) (noting with approval 8<sup>th</sup> Cir. Model Crim. Jury Instruction 2.19); *United States v. Roth*, 736 F.2d 1222, 1226 (8th Cir.), *cert. denied*, 469 U.S. 1058 (1984). See also *Gerberding v. United States*, 471 F.2d 55, 60 (8th Cir. 1973); *United States v. Wiesle*, 542 F.2d 61, 62-63 (8th Cir. 1976); *Wallace v. Lockhart*, 701 F.2d 719, 725-26 (8th Cir.), *cert. denied*, 464 U.S. 934 (1983).

However, the admission of such evidence without a limiting instruction is not reversible error if defense counsel did not request an instruction and if the evidence was introduced and used for a proper purpose. *Gerberding v. United States*, 471 F.2d at 60; *United States v. Wiesle*, 542 F.2d at 63; *United States v. Roth*, 736 F.2d at 1226-27. In *Roth* it was held that a proper purpose of disclosing the plea agreement and cooperation is to diffuse any attempt to show bias on cross-examination.

For a discussion of impeachment of a witness by a prior inconsistent statement which also incriminates the defendant and appropriate limiting instructions, see *United States v. Rogers*, 549 F.2d 490, 494-98 (8th Cir. 1976), *cert. denied*, 431 U.S. 918 (1977).

## 6.18.471 COUNTERFEITING (18 U.S.C. § 471)

The crime of counterfeiting, as charged in [Count \_\_\_] of the indictment, has two essential elements, which are:

*One*, the defendant [falsely made] [forged] [counterfeited] [altered] a (specify U.S. obligation or security); and

*Two*, the defendant did so with intent to defraud.

To act with "intent to defraud" means to act with the intent to deceive or cheat, for the purpose of causing some financial loss to another or bringing about some financial gain to the defendant or another. It is not necessary, however, to prove that the United States or anyone else was in fact defrauded.<sup>1</sup>

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

### Notes on Use

1. *See United States v. Hall*, 801 F.2d 356, 357-60 (8<sup>th</sup> Cir. 1986); 1A 2 Kevin F. O'Malley, et al., *Federal Jury Practice and Instructions: Criminal* §§ 16.07-32.01-.13 (5th ed. 2000) and *Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 12* (1997) (intent to defraud). The definition of "intent to defraud," for financial gain, is noted with approval in *United States v. Speaks*, 453 F.2d 966, 969 n.9 (1st Cir.), *cert. denied*, 405 U.S. 1071 (1972).

### Committee Comments

~~— *See* Seventh Circuit Federal Jury Instructions: Criminal, at 169 (1999); Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 12 (1997); 2 Kevin F. O'Malley, et al., *Federal Jury Practice and Instructions: Criminal* §§ 17.02, 32.01-.13 (5th ed. 2000).~~

Whether or not a specific security or obligation is an obligation or security of the United States is a question of law and is to be decided by the trial court. *See* 18 U.S.C. § 8; *United States v. Anzalone*, 626 F.2d 239, 242 (2d Cir. 1980).

The generally accepted definition of counterfeit is found in *United States v. Lustig*, 159 F.2d 798, 802 (3d Cir. 1947); *rev'd on the other grounds*, 338 U.S. 74 (1949). The test is whether there is such a likeness to genuine currency as is calculated to deceive an honest, sensible, and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest. *See also United States v. Brunson*, 657 F.2d 110, 114 (7th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982) (same definition used) and 2 Kevin F. O'Malley, et al., *Federal Jury Practice and Instructions: Criminal* § 32.12 (5th ed. 2000), which provides:

———“The term “counterfeit” means made in order to bear such a likeness or resemblance to something (a genuine obligation of the United States) (currency of the United States) that it is calculated to deceive an honest, sensible, and unsuspecting person of ordinary observation and care when dealing with a person who is (presumed) (believed) (supposed) to be honest and upright.” See *United States v. Hall*, 801 F.2d 356, 357-60 (8<sup>th</sup> Cir. 1986); 2 Kevin F. O’Malley, et al., *Federal Jury Practice and Instructions*: Criminal § 32.11 (5th ed. 2000). ~~Should~~ If a fact issue exist as to whether the instrument meets this test, a separate instruction should be submitted.

See *United States v. Hall*, 801 F.2d at 358, for a discussion of “altered.”

An intent to defraud unknown third parties is sufficient. *United States v. Pitts*, 508 F.2d 1237, 1240 (8<sup>th</sup> Cir. 1974), *cert. denied*, 421 U.S. 967 (1975).

## 6.18.472 PASSING COUNTERFEIT OBLIGATIONS (18 U.S.C. § 472)

The crime of [passing] [selling] [attempting to [pass] [sell]]<sup>1</sup> counterfeit obligations, as charged in [Count \_\_\_ of] the indictment, has three essential elements, which are:

*One*, the defendant [passed] [sold] [attempted to [pass] [sell]] (specify the security or obligation involved, e.g., three counterfeit ten dollar bills);

*Two*, the defendant knew that (describe security or obligation, e.g., the ten dollar bills) were counterfeit when [he] [she] [passed] [sold] [attempted to [pass] [sell]] them; and

*Three*, the defendant did so with intent to defraud.

To act with "intent to defraud" means to act with the intent to deceive or cheat, for the purpose of causing some financial loss to another or bringing about some financial gain to defendant or another. It is not necessary, however, to prove that the United States or anyone else was in fact defrauded.<sup>2</sup>

(Insert paragraph describing Government's burden of proof; *see* Instruction 3.09, *supra*.)

### Notes on Use

1. Section 472 of Title 18 U.S.C. specifically provides that an attempt to commit the act constitutes a violation of law just as when the act has been completed. The Committee is of the opinion that the statutory terms "utter" and "publish" are adequately covered by "passing" or "attempting to pass." It may be appropriate in some circumstances to define "attempt." *United States v. Joyce*, 693 F.2d 838 (8th Cir. 1982).

~~2. See 1A Kevin F. O'Malley, et al., *Federal Jury Practice and Instructions: Criminal* § 16.07 (5th ed. 2000) and *Eleventh Circuit Pattern Jury Instructions: Criminal (Offense)* § 13.1 (1997). The definition of "intent to defraud," for financial gain, is noted with approval in *United States v. Speaks*, 453 F.2d 966, 969 n.9 (1st Cir.), *cert. denied*, 405 U.S. 1071 (1972).~~

### Committee Comments

~~See *United States v. Armstrong*, 16 F.3d 289, 292 (8th Cir. 1994); *United States v. Hall*, 801 F.2d 356, 357-60 (8th Cir. 1986); 2 Kevin F. O'Malley, et al., *FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal* § 32.06 (5th ed. 2000). ~~*Eleventh Circuit Pattern Jury Instructions: Criminal (Offense)* § 12 (1997); *Ninth Cir. Crim. Jury Instr.* 8.6.2 (1997); *Seventh Circuit Federal Jury Instructions: Criminal* at 170 (1999). See also *United States v. Tucker*, 820 F.2d 234, 236 (7th Cir. 1987).~~~~

~~Whether or not a specific security or obligation is an Only obligations or securities of the United States is a question of law and is to be decided by the trial court. See~~ are covered by the

statute, and are defined by 18 U.S.C. § 8. *See United States v. Anzalone*, 626 F.2d 239, 242 (2d Cir. 1980).

The generally accepted definition of a counterfeit is found in *United States v. Lustig*, 159 F.2d 798, 802 (3d Cir. 1947), *rev'd on other grounds*, 338 U.S. 74 (1949). The test is whether there is such a likeness to genuine currency as is calculated to deceive an honest, sensible, and unsuspecting person supposed to be upright and honest. *See also United States v. Brunson*, 657 F.2d 110, 114 (7th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982) [same definition used] and 2 Kevin F. O'Malley, et al., *Federal Jury Practice and Instructions: Criminal* § 32.12 (5th ed. 2000), which provides:

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The term "counterfeit" means made in order to bear is an item bearing such a likeness or resemblance to something genuine currency that it as is calculated to deceive an honest, sensible, and unsuspecting person of ordinary observation and using care when dealing with a person who is presumed supposed to be honest and upright. *See United States v. Hall*, 801 F.2d 356, 357-60 (8th Cir. 1986). Should a fact issue exist as to whether the instrument meets this test, a separate instruction should be submitted.

An intent to defraud unknown third parties is sufficient. *United States v. Pitts*, 508 F.2d 1237, 1240 (8th Cir. 1974), *cert. denied*, 421 U.S. 967 (1975). The cases do not require that the recipient think that the bills are true and genuine. *See United States v. Berry*, 599 F.2d 267, 268 (8th Cir. 1979) (recipients immediately noticed bills were "funny"). Thus, a defendant can be convicted of passing to a recipient who knows of the bills' counterfeit character where the bills will eventually be put into circulation. *United States v. Patterson*, 739 F.2d 191, 196 (5th Cir. 1984); *United States v. Hagan*, 487 F.2d 897 (5th Cir. 1973); *United States v. Wolfe*, 307 F.2d 798 (7th Cir. 1962), *cert. denied*, 372 U.S. 945 (1963).

Knowledge of the counterfeit character of the obligation is an essential element of the offense. *See, e.g., United States v. Carll*, 105 U.S. 611, 613 (1881); *United States v. Baker*, 650 F.2d 936, 937 (8th Cir. 1981); *United States v. Pitts*, 508 F.2d at 1240; *United States v. Tucker*, 820 F.2d at 236-37. Knowledge may be shown by circumstantial evidence. *United States v. Armstrong*, 16 F.3d at 292; *United States v. Berry*, 599 F.2d 267, 268-69 (8th Cir. ), *cert. denied*, 444 U.S. 862 (1979). A mere attempt to pass a bill does not support an inference that the defendant knew it was counterfeit. *United States v. Armstrong*, 16 F.3d at 292; *United States v. Castens*, 462 F.2d 391, 393 (8th Cir. 1972). Depending on the circumstances, however, the appearance of a bill may be sufficient to prove the defendant's guilty knowledge. *United States v. Baker*, 650 F.2d at 937. A critical factor concerning the issue of guilty knowledge is whether the defendant is in possession of or has passed more than one counterfeit obligation. *See* Acts from which guilty knowledge may be inferred include a rapid series of passings, the passing of counterfeit money at different establishments (even though the accused is not positively identified at other places in the vicinity), the use of large counterfeit bills for small purchases rather than change received in prior purchases, and the segregation of counterfeit bills from genuine bills. *United States v. Armstrong*, 18 F.3d at 292; *United States v. Olson*, 697 F.2d 273, 275 (8th Cir. 1983). Mere possession of a counterfeit obligation will not sustain a conviction. *United States v. Olson*, 697 F.2d 273, 275 (8th Cir. 1983), on appeal after remand,

730 F.2d 544 (8<sup>th</sup> Cir. 1984). The naked act of possessing and passing counterfeit money, without knowledge that it is counterfeit, does not establish the requisite knowledge essential to the crime of passing or the requisite intent to defraud. *United States v. Bishop*, 534 F.2d 214 (10th Cir. 1976).

"Passing" and "uttering" are sometimes treated as synonymous. See ~~Eleventh Circuit Pattern Jury Instructions: Criminal (Offense) § 12 (1997): "To 'pass' or 'utter' a counterfeit note includes any attempt to spend the note or otherwise place it in circulation."~~ However, "passing" does not require any declaration that the note is good or any attempt to circulate, nor does it require an attempt to place it in circulation. "Uttering" may require either or both of these additional elements. See 2 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Criminal § 32.06 (5th ed. 2000); Committee Comments, Instruction 6.18.495B, *infra*. This question was left open in *United States v. DeFilippis*, 637 F.2d 1370, 1373-74 (9th Cir. 1981), an unusual case on the facts in which the defendants exchanged "raised" notes for good ones with merchants, claiming the merchants had mistakenly given them altered currency in change. In that case the court held that the evidence supported "passing" and uttering instructions were not appropriate since there was no declaration that the raised note was good nor any attempt to circulate it.

It is not necessary to allege or prove that anything of value was actually received for the counterfeit currency. *United States v. Holmes*, 453 F.2d 950, 952 (10th Cir. ), *cert. denied*, 406 U.S. 908 (1972) (citing *Rader v. United States*, 288 F.2d 452, 453 (8th Cir. ), *cert. denied*, 368 U.S. 851 (1961)), a forgery case under 18 U.S.C. § 500.

**6.18.1503A CORRUPTLY ENDEAVORING TO INFLUENCE A JUROR  
(18 U.S.C. § 1503)**

The crime of corruptly endeavoring to influence a juror<sup>1</sup>, as charged in [Count \_\_\_\_\_ of] the indictment, has three essential elements, which are:

*One*, (name of juror) was a [grand] juror in (describe judicial proceeding);<sup>2</sup>

*Two*, the defendant knew that (describe judicial proceeding) was pending; [and]

*Three*, the defendant corruptly<sup>3</sup> endeavored<sup>4,3</sup> to [influence] [intimidate] [impede] (name of juror) in the discharge of his duty as a [grand] juror; [and]

[Four, (state the sentencing fact that triggers a higher maximum sentence,<sup>4</sup> e.g., the crime under consideration by the juror was (name the Class A or Class B felony charged<sup>5</sup>).]

The phrase “corruptly endeavored” means that defendant voluntarily and intentionally (describe obstructive act)<sup>6</sup> and that in doing so, acted with the intent<sup>7</sup> to [influence (judicial) (grand jury) proceedings so as to benefit himself or another] [subvert or undermine the due administration of justice].<sup>8</sup> [The endeavor need not have been successful, but it must have had at least a reasonable tendency to impede the [grand] juror in the discharge of his duties.]

(Insert paragraph describing government's burden of proof; *see* Instruction 3.09, *supra*.)

**Notes on Use**

1. This clause of the statute also applies to officers of the court and certain officials.
2. The instruction is designed for the usual case in which the pendency of a judicial proceeding is undisputed. If this question is disputed, it should be submitted to the jury under proper definitional instructions. *See United States v. Vesich*, 724 F.2d 451, 454 (5th Cir.), *reh. denied*, 726 F.2d 168 (5th Cir. 1984). Section 1503 typically applies “after the commencement of formal judicial proceedings.” *United States v. Werlinger*, 894 F.2d 1015, 1016 n.3 (8<sup>th</sup> Cir. 1990). A criminal action remains “pending” during the one-year period within which to file a motion to reduce sentence pursuant to Federal Rule of Criminal Procedure 35(b). *United States v. Novak*, 217 F.3d 566, 572-73 (8<sup>th</sup> Cir. 2000), or until disposition of defendant’s direct appeal. *United States v. Johnson*, 605 F.2d 729 (4<sup>th</sup> Cir. 1979).
3. The jury should be instructed on the meaning of “corruptly endeavored” in this as used by the statute. As the discussion in the Committee Comments, *infra*, illustrates, no one definition has been agreed on and different definitions may apply to different factual situations. The court of appeals “prefer[s] instructions phrased not in abstract legalisms, but rather in concrete terms that intelligibly

describe the actual evidence or contentions of the parties." *United States v. Feldhacker*, 849 F.2d 293, 297 (8th Cir. 1988).

A definition which best suits the case should be formulated and used. At a minimum, there should be an intent to act and knowledge that obstruction would or could result from such act. *United States v. Aguilar*, 515 U.S. 593, \_\_\_, 115 S. Ct. 2357, 2362 (1995). The Committee recommends that in formulating a definition, words such as "knowingly," "willfully" and "specific intent" not be used in favor of words which precisely describe the mental state involved. See Instructions 7.01-.03, *infra*.

4. ~~The jury should be instructed on the meaning of "endeavor." See the Committee Comments, *infra*, for possible definitions.~~ Section 1503(b) creates enhanced penalties where a juror is killed, where an attempt on the life of a juror failed, or where the offense was committed against a petit juror, in a case in which a class A or B felony was charged. In *Jones v. United States*, 526 U.S. 227 (1999), dealing with a carjacking offense under 18 U.S.C. § 2119, the Supreme Court stated, in footnote 6, "[u]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." The Supreme Court made clear in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that the principle it enunciated in *Jones* was a rule of constitutional law applicable to all prosecutions.

5. If a killing or attempted killing is charged, see Instructions 6.18.1111, 6.18.1112, and 8.01 (attempt).

6. See *United States v. Frank*, 354 F.3d 910, 921 (8<sup>th</sup> Cir. 2004) for a discussion of whether section 1503 requires commission of an overt act.

7. The government need not prove that the defendant's only or even main purpose was to obstruct the due administration of justice. See *United States v. Machi*, 811 F.2d 991, 996-97 (7<sup>th</sup> Cir. 1987).

8. This definition is a generic one. If the circumstances of the case call for a more specific definition, the Committee Comments on the "endeavor" and "corruptly" requirements of the statute should aid in fashioning one.

### Committee Comments

See Fifth Circuit Pattern Jury Instructions: Criminal § 2.67 (1997); 2A Kevin F. O'Malley, et al., *Federal Jury Practice and Instructions: Criminal* § 48.03 (5th ed. 2000); ~~*United States v. Fasolino*, 586 F.2d 939 (2d Cir. 1978); *United States v. Jackson*, 607 F.2d 1219, 1222 (8th Cir. 1979), cert. denied, 444 U.S. 1080 (1980); *United States v. Capo*, 791 F.2d 1054, 1070 (2d Cir. 1986).~~

The first two clauses of section 1503, covered by Instructions 6.18.1503A and B, relate to interference with or injury to actual grand jurors, petit jurors, or court officers in the discharge of their duties. *United States v. Aguilar*, 515 U.S. 593, 598 (1995). The third clause referred to as the “Omnibus Clause,” and covered by Instruction 6.18.1503C, is a catchall provision which, *inter alia*, prohibits persons from corruptly endeavoring to influence, obstruct, or impede the due administration of justice. *Id.* These instructions apply to courts alleging that defendant endeavored to obstruct justice, not to counts alleging actual obstruction.

The following discussion relates to all three clauses of section 1503, but most particularly to the Omnibus Clause, which, because it is the most general in nature, presents the most issues.

*Pendency of judicial proceedings.* Except where retaliation is charged, a prerequisite to prosecution under all clauses of section 1503 is a *pending* judicial proceeding. *United States v. Riskin*, 788 F.2d 1361, 1368 (8th Cir.), *cert. denied*, 479 U.S. 923 (1986); ~~*United States v. Johnson*, 605 F.2d 729, 730 (4th Cir. 1979), *cert. denied*, 444 U.S. 1020 (1980).~~ (In *United States v. Novak*, 217 F.3d 566, 572 (8<sup>th</sup> Cir. 2000), the court questioned this prerequisite, noting that “there is nothing on the face of § 1503 requiring a pending proceeding,” but assumed, *arguendo*, the existence of the requirement.) A grand jury proceeding is ~~included~~ considered a pending proceeding. *Riskin*. The question of when a grand jury investigation commences for the purposes of section 1503 is addressed in *United States v. Vesich*, 724 F.2d 451, 454-55 (5th Cir. 1984), *reh. denied*, 726 F.2d 168 (5th Cir. 1984). *See also United States v. Nelson*, 852 F.2d 706, 709-11 (3d Cir.), *cert. denied*, 488 U.S. 909 (1988); *United States v. Steele*, 241 F.3d 302 (3d Cir. 2001). A term of supervised release also can constitute a pending proceeding, if the obstructive conduct occurs ““within the time after sentencing for filing a request for reduction of sentence pursuant to Rule 35(b).”” *United States v. Novak*, 217 F.3d at 572.

The defendant must know of the pendency of a judicial proceeding. *Pettibone v. United States*, 148 U.S. 197, 206-07 (1893); *United States v. Vesich*, 724 F.2d at 457. Such knowledge may be inferred from the circumstances and need not be detailed. *Id.* The defendant need not know that the proceeding is federal in nature. *United States v. Ardito*, 782 F.2d 358, 360-62 (2d Cir.), *cert. denied*, 475 U.S. 1141 (1986). In *United States v. McKnight*, 799 F.2d 443, 447 (8th Cir. 1986), the court held it was not plain error where the court had not specifically instructed the jury that defendant must have had knowledge of the judicial proceeding. The court had instructed the jury that the defendant must have acted “knowingly.” The Committee recommends that the precise knowledge be set forth in the instruction. *See Essential Element Two, supra.*

*“Corruptly endeavor” requirement.* Although courts often define the words “corruptly” and “endeavor” separately, the Committee believes that to define them as a single phrase would result in less confusion and overlap. The following is a summary of caselaw as to the meaning of each word.

*“Endeavor” requirement.* ~~In~~ As the Supreme Court stated in *United States v. Russell*, ~~the Court held:~~

The word of the section is "endeavor" and by using it the section got rid of the technicalities which might be urged as besetting the word "attempt" and it describes any effort or essay to accomplish the evil purpose that the section was enacted to prevent.

255 U.S. at 143; *Osborn v. United States*, 385 U.S. 323, 332-33 (1966). "[A]n 'endeavor' under § 1503 does not require proof that would support a charge of attempt, i.e., an 'endeavor' is less than an attempt." *United States v. Buffalano*, 727 F.2d 50, 53 (2d Cir. 1984). See also *United States v. Fasolino*, 586 F.2d 939, 940-41 (2d Cir. 1978). However, the endeavor

must have a relationship in time, causation, or logic with the judicial proceedings. . . . [It] must have the "natural and probable effect" of interfering with the due administration of justice. (citations omitted).

*United States v. Aguilar*, 515 U.S. at 599. Therefore, a judge's making of false statements to an FBI agent did not constitute obstruction in the absence of evidence the judge knew those false statements would be given to the grand jury. *Id.* at 600. On the other hand, submission to a sentencing judge of a false letter seeking leniency constituted obstruction, even though the government did not prove that the court's sentencing decision was actually affected by the letter, because the letter was of the type normally received and relied upon by the judge. *United States v. Collis*, 128 F.3d 313 (6<sup>th</sup> Cir. 1997).

Success is not a prerequisite to conviction under any of the clauses of section 1503. All that must be proved is that the defendant "corruptly endeavored" to obstruct justice. *United States v. Aguilar*, 515 U.S. 593, 599 (1995); *United States v. Russell*, 255 U.S. 138, 143 (1921); *United States v. Jackson*, 607 F.2d 1219, at 1222-23 (8<sup>th</sup> Cir. 1979), *cert. denied*, 444 U.S. 1080 (1980); *United States v. McCarty*, 611 F.2d 220, 224 (8<sup>th</sup> Cir. 1979), *cert. denied*, 445 U.S. 930 (1980); *United States v. Ogle*, 613 F.2d 233, 239 (10<sup>th</sup> Cir. 1979), *cert. denied*, 449 U.S. 825, *reh. denied*, 449 U.S. 1026 (1980); *United States v. Neiswender*, 590 F.2d 1269, 1275 (4<sup>th</sup> Cir.), *cert. denied*, 441 U.S. 963 (1979). It does not matter if the result intended by the defendant was impossible to obtain. *United States v. Nicosia*, 638 F.2d 970, 975 (7<sup>th</sup> Cir. 1980), *cert. denied*, 452 U.S. 961 (1981).

*Endeavor defined.*

The Seventh Circuit Model Instructions include the following definitions of endeavor:

*Influencing - Definition of Endeavor.* The word endeavor describes any effort or act to influence [a witness, a juror, an officer in or of any court of the United States]. The endeavor need not be successful, but it must have at least a reasonable tendency to impede the [witness, juror, officer] in the discharge of his duties.

*Obstruction of Justice Generally - Definition of Endeavor.* The word endeavor describes any effort or act to influence, obstruct, or impede the due administration of justice. The endeavor need not be successful, but it must have at least a reasonable tendency to influence, obstruct, or impede the due administration of justice.

Seventh Circuit Federal Jury Instructions Criminal, 1999.

In *United States v. Cioffi*, 493 F.2d 1111, 1119 (2d Cir.), *cert. denied*, 419 U.S. 917 (1974), "endeavor" was defined for the jury as "any effort or any act, however contrived, to obstruct, impede or interfere . . . ."

In *United States v. Silverman*, 745 F.2d 1386, 1396 n.12 (11th Cir. 1984), the definition of endeavor was altered to correspond to that case's definition of "corruptly":

[E]ndeavor means to undertake an act or to attempt to effectuate an arrangement or to try to do something, the natural and probable consequences of which is to influence, obstruct or impede the due administration of justice.

~~See subsection "c." of these Comments for a further discussion of *Silverman*.~~

**"Corruptly" requirement.** The defendant must have acted "corruptly" in order to violate the first and last clauses of section 1503. "Corruptly" applies as an alternative to threats or force or threatening letter or communication. *See United States v. Cioffi*, 493 F.2d 1111, 1118 n.2 (2d Cir. 1974). This Instruction 6.18.1503A covers corrupt endeavors to influence jurors and Instruction 6.18.1503B, *infra*, covers threats and force. Instruction 6.18.1503C, *infra*, covers conduct violating the last or "omnibus" clause of section 1503.

~~No consistent definition of "corruptly" as used in this statute has developed in case law, and for this reason, no definition is suggested here.~~ C The "corruptly" requirement incorporates the scienter element of the statute. That said, courts have defined the mental state required by the word "corruptly" within at least four different, but often overlapping, categories: a. intent to influence or obstruct justice; b. intent to do the act which results in obstruction; c. wicked or evil purpose; and d. "per se" corruption. As the court noted in *United States v. Brady*, 168 F.3d 574, 578 (1<sup>st</sup> Cir, 1999), a case involving a refusal to testify,:

The scienter element in the obstruction statute is the subject of more confusing case law than can be described in brief compass. In part, this results from the promiscuous use in the cases of the ambiguous word, "intent," which can mean either *knowledge* (of consequences) or *purpose* (to achieve them); in part, it results from the great range of varying motives that can underlie a refusal to testify (e.g., loyalty of various kinds, concern as to reputation, fear of reprisal, concern about self-incrimination.) Further, cases that purport to be setting legal standards are often instead concerned with the inferences to be drawn from particular facts.

~~a. *Wicked or Evil Purpose.* Several cases have held that "corruptly" means that a defendant acted with an improper motive or with an evil or wicked purpose. *See United States v. Partin*, 552 F.2d 621, 641 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977); *United States v. Ryan*, 455 F.2d 728, 734 (9th Cir. 1971); *United States v. Haldeman*, 559 F.2d 31, 115 n.229 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933, *reh. denied*, 433 U.S. 916 (1977). "'Corruptly' applies to the ends of an actor's conduct rather than the means, so that any act, whether lawful or unlawful on its face, may~~

abridge § 1503 if performed with a corrupt motive." *United States v. Cintolo*, 818 F.2d 980, 991-93 (1st Cir.), *cert. denied*, 484 U.S. 913 (1987).

— The Eighth and Tenth Circuits have held that a trial court properly denied a defendant's request to have corruptly defined for the jury in terms of improper motive or bad, evil or wicked purpose. *United States v. Jackson*, 607 F.2d 1219, 1221-22 (8th Cir. 1979), *cert. denied*, 444 U.S. 1080 (1980); *United States v. Ogle*, 613 F.2d at 242.

— In the cases which have approved such a definition of "corruptly," the definition has often been further modified to fall within one of the other categories. In *Partin*, the instruction defining "corruptly" further stated: "Any endeavor to influence or intimidate or impede a witness falls within the meaning of the word corruptly." 552 F.2d at 641. Likewise, in *Haldeman*, the instruction defining "corruptly" further stated:

— In terms of proof, in order to convict any Defendant of obstruction of justice, you must be convinced beyond a reasonable doubt that the Defendant made some effort to impede or obstruct the Watergate investigation or the trial of the original Watergate defendants.

— If you find, for example, that a Defendant participated in the payment of money to the original Watergate defendants *for the purpose of keeping them quiet*, you would be justified in finding that a corrupt endeavor to obstruct the due administration of justice occurred.

559 F.2d at 115 n.229.

— In *Ryan*, it was further held: "Specific intent to impede the administration of justice is an essential element of the offense." 455 F.2d at 734.

— b. *Intent to Influence or Obstruct.* The act must be done with the intent to influence judicial or grand jury proceedings. *United States v. Aguilar*, 515 U.S. at 599. In an obstruction case, "if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct." *Id.* However, intent can be inferred where the obstruction is a natural consequence of another intended act. *Pettibone v. United States*, 148 U.S. at 207; *United States v. Jackson*, 607 F.2d at 1221; *United States v. Buffalano*, 727 F.2d at 53-54; *United States v. Petzold*, 788 F.2d 1478, 1485 (11th Cir. 1986).

— Many jurisdictions define "corruptly" in terms of acting with a "purpose" to influence a juror or obstruct justice or otherwise bring about a prohibited result.

— "We hold that the word 'corruptly' as used in the statute means that the act must be done with the purpose of obstructing justice." *United States v. Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981), *cert. denied*, 454 U.S. 1157 (1982). See also *United States v. Jeter*, 775 F.2d 670, 679 (6th Cir. 1985), *cert. denied*, 475 U.S. 1142 (1986); *United States v. Machi*, 811 F.2d 991, 997 (7th Cir. 1987). See also *Haldeman*, 559 F.2d at 115 n.229, quoted above.

— See also *United States v. Ogle*, which held:

~~[T]he term "corruptly" does not superimpose a special and additional element on the offense such as a desire to undermine the moral character of a juror. Rather, it is directed at an effort to bring about a particular result such as affecting the verdict . . . .~~

~~613 F.2d at 238.~~

~~The use of the word "purpose" is a good substitute for the use of the phrase "specific intent" which the Committee is recommending no longer be used in jury instructions. See Instruction 7.01, *infra*."~~

The term "specific intent" is found in many definitions of "corruptly," including one approved by this the Eighth Circuit:

In this case, the word "corruptly" means willfully, knowingly and with specific intent to influence a juror to abrogate his or her legal duties as petit juror.

*United States v. Jackson*, 607 F.2d at 1221-22. See also *United States v. Quinn*, 543 F.2d 640, 647 (8th Cir. 1976). But see *United States v. Gage*, 183 F.3d 711, 718-19 (7<sup>th</sup> Cir. 1999) (Chief Judge Posner, concurring) (§ 1503 does not require specific intent).

The most common formulation of a definition of "corruptly" includes language that the obstructive act must be done with the intent to influence judicial or grand jury proceedings. As stated in *United States v. Aguilar*, 515 U.S. at 616, "[corruptly] denotes '[a]n act done with an intent to give some advantage inconsistent with official duty and the rights of others. . . . It includes bribery but is more comprehensive; because an act may be corruptly done though the advantage to be derived from it be not offered by another.'" (J. Scalia, joined by J. Kennedy and Thomas, concurring, in part, and dissenting, in part) (internal cites omitted).

"[I]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct." *Id.* Intent can be inferred where the obstruction is a natural consequence of another intended act. *Pettibone v. United States*, 148 U.S. at 207; *United States v. Jackson*, 607 F.2d at 1221.

Vol. 2A Kevin F. O'Malley, et al., *Federal Jury Practice and Instructions: Criminal* § 48.04 (5th ed. 2000), provides the following definition:

To act "corruptly" as that word is used in these instructions means to act voluntarily and deliberately and for the purpose of improperly influencing, or obstructing, or interfering with the administration of justice.

The Seventh Circuit has approved the following instruction:

Corruptly means to act with the purpose of obstructing justice. The United States is not required to prove that the defendant's only or even main purpose was to obstruct the due administration of justice. The government only has to establish that the defendant should have reasonably seen that the natural and probable consequences of his acts was the obstruction of

justice. Intent may be inferred from all of the surrounding facts and circumstances. Any act, by any party, whether lawful or unlawful on its face, may violate section 1503 if performed with a corrupt motive.

*United States v. Cueto*, 151 F.3d 620, 630-31 (7<sup>th</sup> Cir. 1998).

~~c. *Intent to do an Act which Results in Obstruction.* Some courts have moved away from a two-step analysis of intent, in which the jury is charged first with finding an intent to obstruct and second that such intent can be inferred from certain circumstances, to a one-step approach which defines the required intent as an intent to do an act with knowledge that obstruction will result. See *United States v. Neiswender*. That case recognized that the same result would be arrived at by either approach, but preferred to shift the analysis away from one which involved making inferences.~~

~~Thus we hold that a defendant who intentionally undertakes an arrangement, the reasonable foreseeable consequence of which is to obstruct justice, violates § 1503 even if his hope is that the judicial machinery will not be seriously impaired.~~

~~590 F.2d at 1274.~~

~~Likewise the Eleventh Circuit has held that a requirement that the jury find an intent to obstruct is "too demanding":~~

~~One violates section 1503 by knowingly and purposefully undertaking an act, the natural and probable consequences of which is to influence, obstruct or impede due administration of justice:~~

*United States v. Silverman*, 745 F.2d 1386, 1396 (11<sup>th</sup> Cir. 1984):

~~And in *Knight v. United States*, 310 F.2d 305 (5<sup>th</sup> Cir. 1962), it was held: "This specific intent [to violate § 1503] must be to do some act or acts which tend to impede or influence, obstruct or impede the due administration of justice." 310 F.2d at 307.~~

~~d. *"Per se" corruption.* Although it is generally held that the question of whether an endeavor is corrupt is for the jury, *United States v. Fasolino*, 586 F.2d at 941; *Knight v. United States*, 310 F.2d at 307-08, in many of these cases, the court has further instructed the jury or held that any endeavor to obstruct is "per se" corrupt. See *United States v. Partin*, as quoted in these Comments; *United States v. Ogle*, in which the court held "corruptly":~~

~~really means unlawful . . . [A]n endeavor to influence a juror in the performance of his or her duty or to influence, obstruct or impede the due administration of justice is per se unlawful and is tantamount to doing the act corruptly:~~

~~613 F.2d at 242. See also *United States v. Cioffi*, 493 F.2d 1111, 1119 (2<sup>d</sup> Cir. 1974) in which the trial court instructed the jury that any endeavor, as defined, was corrupt. The definition given for endeavor in that case could be construed to encompass intent.~~

~~———— In other cases, courts have instructed the jury that particular conduct charged was corrupt. In *United States v. Fasolino*, the court instructed the jury that it could find appellant's intent to be corrupt if it determined that appellant knew that an attorney (Messina) had no personal knowledge about a defendant (Quaranta) or information relevant to his sentencing and that appellant "knew or thought that Mr. Messina had some friendship or special relationship or special association with Judge Curtin which [appellant] thought would, by itself, be persuasive with Judge Curtin." 586 F.2d at 941.~~

~~———— Most often, bribery or other payment of money has been defined as corrupt. See *United States v. Haldeman*, in which the court first defined "corruptly," then instructed the jury that the payment of money to persons to keep them quiet would be corrupt. See language quoted previously in these Comments. Such instructions are consistent with the cases which have held as a general rule that bribery is corrupt. See, e.g., *United States v. Rasheed*, 663 F.2d at 852.~~

**6.18.1962A RICO-PARTICIPATION IN THE AFFAIRS THROUGH A  
PATTERN OF RACKETEERING ACTIVITY (18 U.S.C. § 1962(c))**

The crime of participating in a racketeering enterprise<sup>1</sup> as charged in [Count \_\_\_\_] of the indictment has five essential elements, which are:

*One*, an enterprise existed as alleged in the indictment;<sup>2</sup>

*Two*, the enterprise [was engaged in] [had some affect on] interstate commerce;<sup>3</sup>

*Three*, the defendant was [associated with] [employed by]<sup>4</sup> the enterprise;

*Four*, the defendant participated, either directly or indirectly, in the conduct of the affairs of the enterprise<sup>5</sup>; and

*Five*, the defendant's participation was through a pattern of racketeering activity,<sup>6</sup> and consisted of the [knowing] [willful]<sup>7</sup> commission of at least two racketeering acts.

The term "racketeering activity," as used in [the] [this] Instruction[s] includes the acts charged as separate crimes in Counts \_\_\_\_, \_\_\_\_, and \_\_\_\_. The element of the crimes charged in Count \_\_\_\_, \_\_\_\_, and \_\_\_\_ are defined in Instructions \_\_\_\_, \_\_\_\_, and \_\_\_\_. [If the predicate acts are not charged in separate counts, instructions on the elements of each racketeering activity must be given as part of the racketeering charge.]<sup>8</sup>

For you to find [a] defendant guilty of this crime the government must prove all of these essential elements beyond a reasonable doubt [as to that defendant]; otherwise you must find [that] [the] defendant not guilty.<sup>9</sup>

**Notes on Use**

1. If the violation of section 1962 (c) is through the collection of an unlawful debt, substitute "collection of an unlawful debt" for "pattern of racketeering activity." An unlawful debt is defined at 18 U.S.C. § 1961(6). *See* Committee Comments, *infra*.

2. The jury should be instructed on the meaning of "enterprise." *See, infra*, Instruction D.

3. The racketeering activity must have some effect on interstate commerce. However, the element may be satisfied when the predicate acts form a nexus with interstate commerce; when the interstate commerce is affected by either the enterprise or its activities. *See United States v. Muskovsky*, 863 F.2d 1319 (7th Cir. 1988), *cert. denied*, 489 U.S. 1067 (1989); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985); *United States v. Barton*, 647 F.2d 224 (2d Cir.), *cert. denied*, 454 U.S. 857 (1981).

4. Proof of association-in-fact enterprise requires evidence that a group of persons associated together for a common purpose of engaging in a course of conduct. *United States v. Turkette*, 452 U.S. 576 (1981). The enterprise element may also be satisfied if the entity has a legal existence. *United States v. Kirk*, 844 F.2d 660 (9th Cir.), *cert. denied*, 488 U.S. 890 (1988); *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

5. A defendant's participation must be in the conduct of the affairs of the enterprise which means either some participation in the operation or management of the enterprise itself. *Reves v. Ernst & Young*, 507 U.S. 170, (1993); *United States v. Darden*, 70 F.3d 1507, 1518 (8th Cir. 1995). Participation may be direct or indirect. *See e.g., United States v. Martino*, 648 F.2d 367 (5th Cir. 1981); *United States v. Starnes*, 644 F.2d 673 (7th Cir.), *cert. denied*, 454 U.S. 826 (1981).

6. The jury should be instructed on the meaning of "pattern of racketeering." *See, infra*, Instruction E.

7. The RICO statute does not require any *mens rea* beyond that necessary for the predicate acts. The Instruction should be modified to conform to the *mens rea* requirement contained within the statute governing the predicate act.

8. "Racketeering activity" is defined at 18 U.S.C. § 1961 (1).

9. The jury must be instructed that in order to convict, the government must prove beyond a reasonable doubt each element of the charge. It is recommended that the burden of proof paragraph be included in the element instruction. *See United States v. Fairchild*, 122 F.3d 605, 612 (8th Cir. 1997); Instruction 3.09, *supra*.

### **Committee Comments**

*See* Fifth Circuit Pattern Jury Instructions: Criminal § 2.72 (1997); Ninth Circ. Crim. Jury Instr. 8.34.3, 8.34.4 (1997); Eleventh Circuit Pattern Jury Instructions: Criminal § 61.1 (1997); Modern Federal Jury Instructions, Criminal, 52-21; 2B Kevin F. O'Malley, et al., *Federal Jury Practice and Instructions*: Criminal § 56.03 (5th ed. 2000); Federal Criminal Jury Instructions § 60.06; *United States v. Ellison*, 793 F.2d 942 (8th Cir.), *cert. denied*, 479 U.S. 937 (1986).

A violation of section 1962 may occur either by a defendant engaging in a "pattern of racketeering activity" or "collection of an unlawful debt." An unlawful debt is defined in 18 U.S.C. § 1961(6). *See, e.g., United States v. Wong*, 40 F.3d 1347 (2d Cir. 1994), *cert. denied*, 516 U.S. 870 (1995); *United States v. Oreto*, 37 F.3d 739 (1st Cir. 1994), *cert. denied*, 513 U.S. 1177 (1995); *United States v. DiSalvo*, 34 F.3d 1204 (3d Cir. 1994); *United States v. Aucoin*, 964 F.2d 1492 (5th Cir. 1992), *cert. denied*, 506 U.S. 1023 (1992); *United States v. Tripp*, 782 F.2d 38 (6th Cir.), *cert. denied*, 475 U.S. 1128 (1986).

RICO requires proof of the conduct of an enterprise effecting commerce through a pattern of racketeering activity involving two or more predicate acts. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985); *United States v. Ellison*, 793 F.2d 942 (8th Cir.), *cert. denied*, 479 U.S. 937 (1986).

*See also Salinas v. United States*, 522 U.S. 52, \_\_\_\_, 118 S. Ct. 469, 476 (1997) (discussing elements of substantive RICO violation). A RICO defendant does not have to be convicted of each racketeering activity before a substantive RICO offense may be charged, as long as the racketeering activity is indictable under an applicable criminal statute. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. at 488. While a minimum of two predicate acts are necessary, more than two may be required to establish a RICO violation. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). 18 U.S.C. § 1961(1) describes those state and federal crimes which constitute racketeering activity.

A conviction under RICO requires no proof of a connection between organized crime and the defendant. *See Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982), *modified*, 710 F.2d 1361 (8th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1008 (1983); *Moss v. Morgan Stanley Inc.*, 719 F.2d 5 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984); *Schact v. Brown*, 711 F.2d 1343 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983).

The RICO statute does not specify any *mens rea* beyond that specified in the predicate acts. *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981). It is recommended that the elements of the offense instruction clearly set out the *mens rea* requirement of the predicate acts in that portion which pertains to the predicate acts.

To prove the existence of an enterprise, the government must prove (1) a common purpose; (2) a formal or informal organization of the participants in which they function as a unit; and (3) an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity. *United States v. Kehoe*, 310 F.3d 579, 586 (8<sup>th</sup> Cir. 2002); *United States v. Darden*, 70 F.3d 1507 (8th Cir. 1995), *cert. denied*, 517 U.S. 1149 (1996); *United States v. Bledsoe*, 674 F.2d 647 (8th Cir.), *cert. denied*, 459 U.S. 1040 (1982). The enterprise element may be satisfied upon a showing either that the entity has a legal existence or proof of an association in fact. *United States v. Turkette*, 452 U.S. 576 (1981). The enterprise must have an existence entirely separate and independent of the racketeering activity. *See also United States v. Console*, 13 F.3d 641 (3d Cir. 1993), *cert. denied*, 511 U.S. 1076 (1994); *United States v. Masters*, 924 F.2d 1362 (7th Cir.), *cert. denied*, 500 U.S. 919 (1991); *United States v. Tillett*, 763 F.2d 628 (4th Cir. 1985).

Section 1962(c) requires a relationship between the pattern of racketeering and the enterprise. Conduct forms a pattern of racketeering activity if it embraces criminal acts that have the same or similar purpose, results, participants, victims or methods of commission or are inextricably intertwined and not isolated events. *United States v. Ellison*, 793 F.2d 942 (8th Cir.), *cert. denied*, 479 U.S. 937 (1986). The necessary nexus only exists when the defendant's predicate acts "rise to the level" of participation in the management or operation of the enterprise. *Reves v. Ernst & Young*, 507 U.S. 170 (1993). Mere participation in the predicate offenses in conjunction with a RICO enterprise may be insufficient to support a RICO charge. *Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982), *modified*, 710 F.2d 1361 (en banc), *cert. denied*, 464 U.S. 1008 (1983). An enterprise may be "operated" or "managed" by others "associated with" the enterprise who exert control of the enterprise. *Reves v. Ernst & Young*, 507 U.S. 170 (1993). A person may also be liable under section 1962(c) even though he had no control of the enterprise but participated or operated in the conduct of the enterprise.

*United States v. Darden*, 70 F.3d 1507, 1518 (8th Cir. 1995). Yet the Eighth Circuit has held that Congress did not mean for 1962(c) to penalize all who are employed by or associated with a RICO enterprise, but only those, who by virtue of their association of employment, play a part in directing the enterprise's affairs. *Handeen v. Lemaire*, 112 F.3d 1339, 1347 (8th Cir. 1997). An attorney or other professional does not conduct an enterprise's affairs through run-of-the-mill professional services. *Id.*

The government need not prove that the racketeering activity benefitted the enterprise but only that the predicate acts affected the enterprise. *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984). The same piece of evidence may establish both pattern and enterprise elements. *United States v. Darden*, 70 F.3d 1507, 1521 (8th Cir. 1995).

Isolated predicate acts do not constitute a pattern. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). In order to prove a pattern of racketeering activity, the government must show both relationship and continuity as separate elements. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). Generally continuity over a close period is not met when the predicate acts extend less than one year. *Primary Care Investors, Seven, Inc. v. PHP Healthcare Corp.*, 986 F.2d 1208 (8th Cir. 1993); *see also, Uni\*Quality, Inc. v. Infotronx, Inc.*, 974 F.2d 918 (7th Cir. 1992); *Aldridge v. Lily-Tulip Inc. Salary Retirement Plan*, 961 F.2d 224 (11th Cir. 1992); *Hughes v. Consolidated Pennsylvania Coal Co.*, 945 F.2d 594 (3d Cir. 1991), *cert. denied*, 504 U.S. 955 (1992). Generally pattern requires a showing of a relationship plus continuity. However, determining what constitutes a pattern is ultimately a question of fact. *Diamonds Plus, Inc. v. Kolber*, 960 F.2d 765 (8th Cir. 1992); *Atlas Pile Driving Co. v. DiCon Finanical Co.*, 886 F.2d 986 (8th Cir. 1989).

Courts have provided a broad interpretation to the interstate commerce requirement. *See e.g., United States v. Robertson*, 514 U.S. 669 (1995) (purchase of equipment and supplies from out of state as well as employment of out of state persons to work mine constituted interstate commerce); *see also, United States v. Qaoud*, 777 F.2d 1105 (6th Cir. 1985), *cert. denied*, 475 U. S. 1098 (1986) (activities of United States District Court constituted interstate commerce.)

The jury must be unanimous that predicate acts had been committed and the defendant committed at least two of the predicate acts. It is recommended that the instructions require the jury to be unanimous as to which acts have specifically been committed by the defendant. *United States v. Flynn*, 87 F.3d 996 (8th Cir. 1996); *see also, United States v. Kragness*, 830 F.2d 842 (8th Cir. 1987); 2B Kevin F. O'Malley, et al., *Federal Jury Practice and Instructions: Criminal* § 56.03 (5th ed. 2000).

## 6.18.1962D ENTERPRISE - DEFINITION

An enterprise includes any individual, partnership, corporation, association, or other legal entity, in any union or group of individuals associated in fact, although not a legal entity.<sup>1</sup>

The term “enterprise,” as used in these instructions, may include a group of people associated in fact, even though this association is not recognized as a legal entity.<sup>2</sup> A group or association of people can be an enterprise if these individuals have joined together for the purpose of engaging in a common course of conduct. This group of people, in addition to having a common purpose, must have personnel who function as a continuing unit. This group of people does not have to be a legally recognized entity, such as a partnership or corporation.<sup>3</sup> Such an association of individuals may retain its status as an enterprise even though the membership of the association changes by adding or losing individuals during the course of its existence.

If you find that this was, in fact, a legal entity such as a partnership, corporation, or association, then you may find that an enterprise existed.<sup>4</sup>

The government must also prove that the association had a structure distinct from that necessary to conduct the pattern of racketeering activity.<sup>5</sup>

### Notes on Use

1. The first paragraph of the instruction includes the entire definition of enterprise provided by Congress and found at 18 U.S.C. § 1961(4).

2. *United States v. Kragness*, 830 F.2d 842 (8th Cir. 1987) (approved jury instruction as to definition of enterprise and RICO drug prosecution, which included the definition of the term “enterprise” as including any group of individuals associated in fact, although not a legal entity).

3. Associations, in fact, may include legal entities. *See* 18 U.S.C. § 1961(4); *United States v. Darden*, 70 F.3d 1507, 1541 (8<sup>th</sup> Cir. 1995). *See also* Seventh Circuit Federal Jury Instructions: Criminal at 315-23 (1999). Thus, the group may be organized for a legitimate and lawful purpose or may be organized for an unlawful purpose.

4. Courts have provided broad interpretation as to the term “legal entity” in the enterprise requirement. Courts have held that various enterprise categories listed in the RICO statute are illustrative but not exhaustive. *See United States v. Aimone*, 715 F.2d 822 (3d Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984). The enterprise concept can encompass a combination of entities. *See, e.g., United States v. Stolfi*, 889 F.2d 378 (2d Cir. 1989); *United States v. Feldman*, 853 F.2d 648 (9th Cir. 1988), *cert. denied*, 489 U.S. 1030 (1989).

5. The Fourth and Eighth Circuits have held that the government must prove that the association or enterprise exists separate and apart from the pattern of racketeering in which it engages. *See United States v. Leisure*, 844 F.2d 1347 (8th Cir.), *cert. denied*, 488 U.S. 932 (1988); *United States v. Lemm*, 680 F.2d 1193 (8th Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983).

### Committee Comments

*See* Fifth Circuit Pattern Jury Instructions: Criminal § 2.78 (1997); Ninth Cir. Crim. Jury Instr. 8.34.3; 8.34.4 (1997); Modern Federal Jury Instructions; Criminal 52.22; 2B Kevin F. O'Malley, et al., *Federal Jury Practice and Instructions: Criminal* § 56.04 (5th ed. 2000); Federal Criminal Jury Instructions § 60.02.

Courts have given a broad reading to the term “enterprise.” Congress has mandated a liberal construction of the RICO statute in order to effectuate its remedial purpose. Therefore, courts have held that the various enterprise categories listed in the RICO statute are illustrative but not exhaustive. *United States v. Aimone*, 715 F.2d 822 (3d Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984). The definition of the term “enterprise” is of a necessity, a shifting one given the fluid nature of criminal associations. *United States v. Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979).

A RICO enterprise is a group of persons associated together for a common purpose in a course of conduct. *United States v. Turkette*, 452 U.S. 576 (1981). A RICO enterprise must exhibit three basic characteristics: (1) a common or shared purpose; (2) some continuity of structure and personnel; and (3) an ascertainable structure distinct from that in a pattern of racketeering. *United States v. Kehoe*, 310 F.3d 579, 586 (8<sup>th</sup> Cir. 2002); *United States v. Nabors*, 45 F.3d 238 (8th Cir. 1995); *see also United States v. Perholtz*, 842 F.2d 343 (D.C. Cir.), *cert. denied*, 488 U.S. 821 (1988); *United States v. Mazzei*, 700 F.2d 85 (2d Cir.), *cert. denied*, 461 U.S. 945 (1983).

The enterprise element is satisfied upon a showing that the entity has a legal existence. *See, e.g., United States v. Kirk*, 844 F.2d 660 (9th Cir.), *cert. denied*, 488 U.S. 890 (1988); *United States v. Cauble*, 706 F.2d 1322 (5th Cir.), *cert. denied*, 465 U.S. 1005 (1984). Proof of an association in fact enterprise requires proof that a group of persons associated together for a common purpose of engaging in a course of conduct. *United States v. Turkette*, 452 U.S. 576 (1981). While the enterprise in existence of a racketeering activity are distinct elements of a RICO charge, the proof needed to establish either can consist of the same evidence. *United States v. Turkette*, 452 U.S. 576 (1981). However, more than proof of a pattern of racketeering activity is necessary to establish the existence of an enterprise. An enterprise must have an existence entirely separate and independent of the racketeering activity. *See Bennett v. Berg*, 685 F.2d 1053 (8th Cir.), *modified*, 710 F.2d 1361 (en banc), *cert. denied*, 464 U.S. 1008 (1983). The government must demonstrate that the alleged enterprise functions as a continuing unit has an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity and has associates who have a common or shared purpose. *Id.*; *United States v. Bledsoe*, 674 F.2d 647 (8th Cir.), *cert. denied*, 459 U.S. 1040 (1982).

Several circuits have refused to distinguish between legal and non-legal entity categories. *See, e.g., United States v. Perholtz*, 842 F.2d 343 (D.C. Cir.), *cert. denied*, 488 U.S. 821 (1988); *McCullough v. Suter*, 757 F.2d 142 (7th Cir. 1985); *United States v. Navarro-Ordas*, 770 F.2d 959 (11th Cir. 1985); *United States v. Aimone*, 715 F.2d 822 (3d Cir. 1983), *cert. denied by Dentico v. United States*, 468 U.S. 1217 (1984); *see also United States v. Turkette*, 452 U.S. 576 (1981) (rejects claim that RICO only reaches entities performing illegal acts).

Actions brought under section 1962(a) or (b) do not require a separate RICO defendant and enterprise. *See Bennett v. Berg*, 685 F.2d 1053, *modified*, 710 F.2d 1361 (en banc), *cert. denied*, 464 U.S. 1008 (1983). However, section 1962(c) requires the person liable to be separate from the enterprise which has its affairs conducted through a pattern of racketeering. *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986 (8th Cir. 1989).

**Greater and lesser included offense - short version**

**6.21.841A.1 (short) CONTROLLED SUBSTANCES - POSSESSION  
WITH INTENT TO DISTRIBUTE (21 U.S.C. § 841(a)(1))  
APPRENDI-AFFECTED POSSESSION**

The crime of possession of (describe substance (and amount), e.g., [a controlled substance] [name of controlled substance] [~~over~~500 grams or more of a mixture or substance containing methamphetamine) with intent to distribute, as charged in [Count \_\_\_\_\_ of] the indictment, has four essential elements, which are:

*One*, the defendant possessed [a controlled substance] [describe substance, e.g., a mixture or substance containing methamphetamine];

*Two*, the defendant [knew that he] [intended to] possess[ed] [a controlled substance] [describe substance, e.g., a mixture or substance containing methamphetamine];

*Three*, the defendant intended to distribute<sup>1</sup> [the controlled substance] [describe substance, e.g., some or all of the mixture or substance containing methamphetamine]<sup>2</sup>; and

*Four*, (describe aggravating element,<sup>3</sup> e.g., [the amount defendant possessed with intent to distribute was ~~over~~500 grams or more of a mixture or substance containing methamphetamine] [the amount involved in the offense was ~~over~~500 grams or more of a mixture or substance containing methamphetamine], [or if that is not proved, that (describe lesser included but still aggravated crime, e.g. [the amount defendant possessed with intent to distribute was ~~over~~50 grams or more but less than 500 grams of a mixture or substance containing methamphetamine] [the amount involved in the offense was ~~over~~50 grams or more but less than 500 grams of a mixture or substance containing methamphetamine]]).

If you find these four elements unanimously and beyond a reasonable doubt, [and if you find unanimously and beyond a reasonable doubt that the defendant was not [entrapped] [coerced] [as defined in Instruction No. \_\_\_\_]], then you must find the defendant guilty of the crime of (describe crime). Record your determination on the Verdict Form which will be submitted to you with these instructions.

If you do not find the defendant guilty of this crime [under Count \_\_\_\_], go on to consider whether defendant possessed with intent to distribute some amount of (describe controlled substance). If you find the first three elements set forth above unanimously and beyond a reasonable doubt, [and if you find unanimously and beyond a reasonable doubt that the defendant was not [entrapped] [coerced] [as defined in Instruction No. \_\_\_\_]], you must find the defendant guilty of the crime of possession with intent to distribute (describe controlled substance, e.g., a mixture or substance containing methamphetamine). Otherwise, you must find the defendant not guilty. Record your determination on the Verdict Form.

(Instruction 3.09, *supra*, which describes the Government's burden of proof, has already been incorporated in this instruction and should not be repeated.)

### Notes on Use

1. In *United States v. Shurn*, 849 F.2d 1090 (8th Cir. 1988), the court approved the following instruction on "intent to distribute."

I instruct you that possession of a large quantity of heroin supports an inference of an intent to distribute.

Thus, in determining whether the defendant possessed heroin with the specific intent to distribute it, you should consider whether the defendant possessed a large quantity of heroin. If you believe that he did, then you may infer that he had the specific intent to distribute.

849 F.2d at 1095 n.6.

When such an instruction is used, care must be used that the instruction not be phrased in a manner which indicates the jury must make an inference. Likewise, "specific" should be omitted as modifying intent. The Committee recommends that such an instruction be rephrased as suggested in Instruction 4.13, *supra*.

"Distribute" may be defined if the meaning is unclear in the context of the case. The statute also makes it unlawful to manufacture, dispense or possess with intent to manufacture, distribute or dispense. If one of these alternatives has been charged, this element should be changed accordingly.

2. It is uncertain whether, in section 841(a)(1) possession with intent to distribute cases, drugs intended only for personal use are included in the drug quantity. In *United States v. Williams*, 247 F.3d 353, 357 (2d Cir. 2001) and *United States v. Rodriguez-Sanchez*, 23 F.3d 1488, 1494-96 (9<sup>th</sup> Cir. 1994), the courts held that such amounts are not included. The Eighth Circuit has not ruled on the precise issue; however, in *United States v. Fraser*, 243 F.3d 473, 476 (8<sup>th</sup> Cir. 2001), it concluded that in determining relevant conduct under the guidelines for a section 841(a)(1) offense, drugs

possessed for solely personal use should not be included. The phrase "some or all" therefore should be used with care.

3. Any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *United States v. Aguayo-Delgado*, 220 F.3d 926 (8<sup>th</sup> Cir. 2000); *United States v. Sheppard*, 219 F.3d 766 (8<sup>th</sup> Cir. 2000). Under the section 841(b) sentencing provisions, some of the facts that may raise the statutory maximum are the quantity of drugs involved in the offense, whether death or serious bodily injury results from use of the drugs involved, or whether defendant has a prior felony drug conviction. In *United States v. Sheppard*, 219 F.3d at 768-69, the panel suggested that the district court's submission of drug quantity to the jury in a special interrogatory rather than as an element of the offense was harmless error. However, in *United States v. Harris*, 310 F.3d 1105 (8<sup>th</sup> Cir. 2002), the Court, without mentioning *Sheppard*, explicitly held that it was not an *Apprendi* error to submit the issue of drug quantity to the jury by use of a special interrogatory. The Committee believes, therefore, that submission of drug quantity either as a formal element, as is done in 6.21.841A.1 (short) and 6.21.841A.1 (long) or by special interrogatory is permissible. See 11.03 for a verdict form with special interrogatories.

In *Apprendi*, 530 U.S. at 488, the majority left open the possibility that it might revisit the issue of whether a defendant's prior conviction(s) must be submitted to the jury and found beyond a reasonable doubt before an enhanced punishment based on prior convictions is appropriate. Unless and until the Court does so, prior convictions used to enhance a sentence need not be submitted to the jury and proven beyond a reasonable doubt. *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998); *United States v. Peltier*, 276 F.3d 1003, 1006 (8<sup>th</sup> Cir. 2002); *United States v. Abernathy*, 277 F.3d 1048, 1050 (8<sup>th</sup> Cir. 2002). In *Harris v. United States*, 536 U.S. 545 (2002), the Supreme Court declined to extend *Apprendi* to facts increasing the statutory minimum sentence, reaffirming its earlier decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). Therefore, such facts need not be submitted to the jury.

Suggested wording for the aggravating facts listed in the above paragraph are:

a) the crime involved ~~in excess of~~ [describe substance and amount] or more. [This alternative is to be used where the amount of drugs increasing the maximum sentence is not in dispute. Where the offense involves two or more controlled substances, and the indictment alleges quantities of each substance sufficient to raise the maximum sentence, an additional element should be submitted to the jury for a finding on each controlled substance.]

b) a death resulted from use of the [describe substance]. [In *United States v. McIntosh*, 236 F.3d 968, 972 (8<sup>th</sup> Cir. 2001), the Eighth Circuit held that the "death resulting" charge is a strict liability one - the court may not impose "a foreseeability or proximate cause requirement." *Accord, United States v. Soler*, 275 F.3d 146 (1<sup>st</sup> Cir. 2002)].

## **Committee Comments**

*See* Committee Comments to 6.21.841A.

**Greater and lesser included offense - long version**

**6.21.841A.1 (long) CONTROLLED SUBSTANCES - POSSESSION  
WITH INTENT TO DISTRIBUTE (21 U.S.C. § 841(a)(1))  
APPRENDI-AFFECTED POSSESSION**

The crime of possession of (describe substance (and amount), e.g., [a controlled substance] [name of controlled substance] [~~over~~500 grams or more of a mixture or substance containing methamphetamine) with intent to distribute, as charged in [Count \_\_\_\_ of] the indictment, has four essential elements, which are:

*One*, the defendant possessed [a controlled substance] [describe substance, e.g., a mixture or substance containing methamphetamine];

*Two*, the defendant [knew that he] [intended to] possess[ed] [a controlled substance] [describe substance, e.g., a mixture or substance containing methamphetamine];

*Three*, the defendant intended to distribute<sup>1</sup> [the controlled substance] [describe substance, e.g., some or all of the mixture or substance containing methamphetamine]<sup>2</sup>; and

*Four*, (describe aggravating element,<sup>3</sup> e.g. [the amount defendant possessed with intent to distribute was ~~over~~500 grams or more of a mixture or substance containing methamphetamine] [the amount involved in the offense was ~~over~~500 grams or more of a mixture or substance containing methamphetamine]).

If you find these four elements unanimously and beyond a reasonable doubt, [and if you find unanimously and beyond a reasonable doubt that the defendant was not [entrapped] [coerced] [as defined in Instruction No. \_\_\_\_]], then you must find the defendant guilty of the crime of (describe crime). Record your determination on the Verdict Form which will be submitted to you with these instructions.

[If you do not find the defendant guilty of this crime [under Count \_\_\_\_], go on to consider whether (describe lesser aggravating element, e.g. [the amount defendant possessed with intent to distribute was ~~over~~50 grams or more but less than 500 grams of a mixture or substance containing

methamphetamine] [the crime involved ~~over~~ 50 grams or more but less than 500 grams of a mixture or substance containing methamphetamine].

If you find unanimously and beyond a reasonable doubt:

The first three elements set forth above; and

Fourth, that (describe lesser aggravating element, e.g. [defendant possessed with intent to distribute ~~over~~ 50 grams or more but less than 500 grams of a mixture or substance containing methamphetamine] [the crime involved ~~over~~ 50 grams or more but less than 500 grams of a mixture or substance containing methamphetamine]

[and if you find unanimously and beyond a reasonable doubt that the defendant was not [entrapped] [coerced] [as defined in Instruction No. \_\_\_\_]], then you must find the defendant guilty of (describe crime). Record your determination on the Verdict Form.]

If you do not find the defendant guilty of this crime [under Count \_\_\_\_], go on to consider whether defendant possessed with intent to distribute some amount of (describe controlled substance).

If you find the first three elements set forth above unanimously and beyond a reasonable doubt, [and if you find unanimously and beyond a reasonable doubt that the defendant was not [entrapped] [coerced] [as defined in Instruction No. \_\_\_\_]] you must find the defendant guilty of the crime of (describe crime). Otherwise, you must find the defendant not guilty. Record your determination on the Verdict Form.

(Instruction 3.09, *supra*, which describes the Government's burden of proof, has already been incorporated in this instruction and should not be repeated.)

#### **Notes on Use**

1. In *United States v. Shurn*, 849 F.2d 1090 (8th Cir. 1988), the court approved the following instruction on "intent to distribute."

I instruct you that possession of a large quantity of heroin supports an inference of an intent to distribute.

Thus, in determining whether the defendant possessed heroin with the specific intent to distribute it, you should consider whether the defendant possessed a large quantity of heroin. If you believe that he did, then you may infer that he had the specific intent to distribute.

849 F.2d at 1095 n.6.

When such an instruction is used, care must be used that the instruction not be phrased in a manner which indicates the jury must make an inference. Likewise, "specific" should be omitted as modifying intent. The Committee recommends that such an instruction be rephrased as suggested in Instruction 4.13, *supra*.

"Distribute" may be defined if the meaning is unclear in the context of the case. The statute also makes it unlawful to manufacture, dispense or possess with intent to manufacture, distribute or dispense. If one of these alternatives has been charged, this element should be changed accordingly.

2. It is uncertain whether, in section 841(a)(1) possession with intent to distribute cases, drugs intended only for personal use are included in the drug quantity. In *United States v. Williams*, 247 F.3d 353, 357 (2d Cir. 2001) and *United States v. Rodriguez-Sanchez*, 23 F.3d 1488, 1494-96 (9<sup>th</sup> Cir. 1994), the courts held that such amounts are not included. The Eighth Circuit has not ruled on the precise issue; however, in *United States v. Fraser*, 243 F.3d 473, 476 (8<sup>th</sup> Cir. 2001), it concluded that in determining relevant conduct under the guidelines for a section 841(a)(1) offense, drugs possessed for solely personal use should not be included. The phrase "some or all" therefore should be used with care.

3. Any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *United States v. Aguayo-Delgado*, 220 F.3d 926 (8<sup>th</sup> Cir. 2000); *United States v. Sheppard*, 219 F.3d 766 (8<sup>th</sup> Cir. 2000). Under the section 841(b) sentencing provisions, some of the facts that may raise the statutory maximum are the quantity of drugs involved in the offense, whether death or serious bodily injury results from use of the drugs involved, or whether defendant has a prior felony drug conviction. In *United States v. Sheppard*, 219 F.3d at 768-69, the panel suggested that the district court's submission of drug quantity to the jury in a special interrogatory rather than as an element of the offense was harmless error. However, in *United States v. Harris*, 310 F.3d 1105, 1110 (8<sup>th</sup> Cir. 2002), the Court, without mentioning *Sheppard*, explicitly held that it was not an *Apprendi* error to submit the issue of drug quantity to the jury by use of a special interrogatory. The Committee believes, therefore, that submission of drug quantity either as a formal element, as is done in 6.21.841A.1 (short) and 6.21.841A.1 (long) or by special interrogatory is permissible. See ~~44-03~~ 6.21.841A.1(b) for a verdict form with special interrogatories.

In *Apprendi*, 530 U.S. at 488, the majority left open the possibility that it might revisit the issue of whether a defendant's prior conviction(s) must be submitted to the jury and found beyond a reasonable doubt before an enhanced punishment based on prior convictions is appropriate. Unless and until the Court does so, prior convictions used to enhance a sentence need not be submitted to the jury and proven beyond a reasonable doubt. *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998); *United States v. Peltier*, 276 F.3d 1003, 1006 (8<sup>th</sup> Cir. 2002); *United States v. Abernathy*, 277 F.3d 1048, 1050 (8<sup>th</sup> Cir. 2002). In *Harris v. United States*, 536 U.S. 545 (2002), the Supreme Court declined to extend *Apprendi* to facts increasing the statutory minimum sentence, reaffirming its earlier decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). Therefore, such facts need not be submitted to the jury.

Suggested wording for the aggravating facts listed in the above paragraph are:

a) the crime involved ~~in excess of~~ [describe substance and amount] or more. [This alternative is to be used where the amount of drugs increasing the maximum sentence is not in dispute. Where the offense involves two or more controlled substances, and the indictment alleges quantities of each substance sufficient to raise the maximum sentence, an additional element should be submitted to the jury for a finding on each controlled substance.]

b) a death resulted from use of the [describe substance] [In *United States v. McIntosh*, 236 F.3d 968, 972 (8<sup>th</sup> Cir. 2001), the Eighth Circuit held that the "death resulting" charge is a strict liability one - the court may not impose "a foreseeability or proximate cause requirement." Accord, *United States v. Soler*, 275 F.3d 146 (1<sup>st</sup> Cir. 2002)].

### **Committee Comments**

See Committee Comments to 6.21.841A.

**6.21.841A.1(a) VERDICT FORM; WITH LESSER INCLUDED OFFENSE**

VERDICT

We, the jury, find the defendant (name) \_\_\_\_\_ of the crime of (insert brief [guilty/not guilty] description, e.g., possession with intent to distribute ~~over~~ 500 grams or more of a mixture or substance containing methamphetamine) [as charged in Count \_\_\_\_\_ of the indictment] [under Instruction No. \_\_\_\_\_].

\_\_\_\_\_  
Foreperson

\_\_\_\_\_  
(Date)

If you unanimously find defendant (name) guilty of the above crime, have your foreperson write "guilty" in the above blank space, sign and date this verdict form. Do not consider the following verdict form.

If you unanimously find the defendant (name) not guilty of the above charge, have your foreperson write "not guilty" in the above blank space. You then must consider whether the defendant is guilty of (specify lesser included offense) on the following verdict form.

If you are unable to reach a unanimous decision on the above charge, leave the space blank and decide whether the defendant is guilty of (specify lesser included offense, e.g., possession with intent to distribute ~~over~~ 50 grams or more of a mixture or substance containing methamphetamine) as follows:

**[LESSER INCLUDED OFFENSE]**

[We, the jury, find the defendant (name) \_\_\_\_\_ of the crime of (insert brief [guilty/not guilty] description, e.g., possession with intent to distribute ~~over~~ 50 grams or more of a mixture or substance containing methamphetamine) [as charged in Count \_\_\_\_\_ of the indictment] [under Instruction No. \_\_\_\_\_].

\_\_\_\_\_  
Foreperson

\_\_\_\_\_  
(Date)

If you unanimously find defendant (name) guilty of the above crime, have your foreperson write "guilty" in the above blank space, sign and date this verdict form. Do not consider the following verdict form.

If you unanimously find the defendant (name) not guilty of the above charge, have your foreperson write "not guilty" in the above blank space. You then must consider whether the defendant is guilty of (specify lesser included offense) on the following verdict form.

If you are unable to reach a unanimous decision on the above charge, leave the space blank and decide whether the defendant is guilty of (specify lesser included offense) as follows:]

**LESSER INCLUDED OFFENSE**

We, the jury, find the defendant (name) \_\_\_\_\_ of the crime of (insert brief [guilty/not guilty] description, e.g., possession with intent to distribute a mixture or substance containing methamphetamine)) [as charged in Count \_\_\_\_\_ of the indictment] [under Instruction No. \_\_\_\_\_ ].

\_\_\_\_\_  
Foreperson

\_\_\_\_\_  
(Date)

**6.21.841A.1(b) SPECIAL VERDICT FORM  
(INTERROGATORIES TO FOLLOW FINDING OF GUILT)**

**VERDICT**

We, the jury, find defendant (name) \_\_\_\_\_ of possession of a controlled  
(guilty/not guilty)  
substance with intent to distribute [as charged in Count \_\_\_\_\_ of the indictment] [under Instruction No.  
\_\_\_\_\_ ].

If you find defendant "guilty," you must answer the following:

The quantity of (describe substance, e.g. [a mixture or substance containing a detectable  
amount of][name controlled substance]) defendant possessed with intent to distribute was:

- a. \_\_\_\_\_ (describe substance and the highest applicable quantity range, e.g. 5 kilograms or more  
of a mixture or substance containing a detectable amount of cocaine);
- b. \_\_\_\_\_ (describe substance and next lower quantity range, e.g. 500 grams or more but less  
than 5 kilograms of a mixture or substance containing a detectable amount of cocaine.)
- c. \_\_\_\_\_ (describe substance and lowest quantity range, e.g., less than 500 grams of a mixture or  
substance containing cocaine).

Check the drug quantity which the jury unanimously agrees was involved in the offense. If you  
are unable to agree, check [b][c](the entry for the lowest drug quantity).

\_\_\_\_\_  
Foreperson

\_\_\_\_\_  
(Date)

**6.21.846A.1 CONSPIRACY (21 U.S.C. § 846)**  
**APPRENDI-AFFECTED CONSPIRACY**

The crime of conspiracy as charged in [Count \_\_ of] the indictment, has four essential elements, which are:

*One*, on or about [insert date, e.g., between January 1, 1998, and October 1, 2000], two [or more] persons reached an agreement or came to an understanding to (describe offense, e.g., distribute a mixture or substance containing methamphetamine [and a mixture or substance containing cocaine]<sup>1</sup>);

*Two*, the defendant voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached or at some later time while it was still in effect;

*Three*, at the time the defendant joined in the agreement or understanding, [he] [she] knew the purpose of the agreement or understanding; and

*Four*, describe aggravating element,<sup>2</sup> e.g. [the agreement or understanding involved ~~in excess of 500 grams~~ or more of a mixture or substance containing methamphetamine<sup>3</sup> [and ~~in excess of 500 grams~~ 5 kilograms or more of a mixture or substance containing cocaine]]<sup>4</sup>).

If you find these four elements unanimously and beyond a reasonable doubt, [and if you find unanimously and beyond a reasonable doubt that the defendant was not [entrapped] [coerced] [as defined in Instruction No. \_\_\_\_\_]], then you must find the defendant guilty of the crime of conspiracy (describe offense, e.g. [to distribute ~~in excess of 500 grams~~ or more of a mixture or substance containing methamphetamine [and ~~in excess of 500 grams~~ 5 kilograms or more of a mixture or substance containing cocaine]]). Record your determination on the Verdict Form which will be submitted to you with these instructions.

[If you do not find the defendant guilty of this crime [under Count \_\_], go on to consider whether defendant conspired (describe lesser offense, e.g. [to distribute ~~in excess of 5-50 grams~~ or more of a mixture or substance containing methamphetamine [and any amount of cocaine]])].

If you find unanimously and beyond a reasonable doubt:

The first three elements set forth above; and

Fourth, you find that (describe lesser offense, e.g. [the agreement or understanding involved in ~~excess of 50 grams or more~~ of a mixture or substance containing methamphetamine [and any amount of cocaine]]),

[and if you find unanimously and beyond a reasonable doubt that the defendant was not [entrapped] [coerced] [as defined in Instruction No. \_\_\_\_\_]], then you must find the defendant guilty of the crime of conspiracy to distribute (describe substance and amount, e.g., ~~in excess of 50 grams or more~~ of a mixture or substance containing methamphetamine [and any amount of cocaine]). Record your determination on the Verdict Form.]

If you do not find the defendant guilty of this crime [under Count \_\_\_], go on to consider whether defendant conspired to distribute (describe substance, e.g., some amount of methamphetamine and cocaine). If you find the first three elements unanimously and beyond a reasonable doubt, [and if you find unanimously and beyond a reasonable doubt that the defendant was not [entrapped] [coerced] [as defined in Instruction No. \_\_\_\_\_]], you must find the defendant guilty of the crime of conspiracy to distribute (describe substance, e.g., methamphetamine and cocaine). Otherwise, you must find the defendant not guilty. Record your determination on the Verdict Form.

[The quantity of controlled substances involved in the agreement or understanding includes the controlled substances the defendant possessed for personal use<sup>5</sup> or distributed or agreed to distribute. The quantity also includes the controlled substances fellow conspirators distributed or agreed to distribute, if you find that those distributions or agreements to distribute were a necessary or natural consequence of the agreement or understanding and were reasonably foreseeable by the defendant.]<sup>6</sup>

### Notes on Use

1. In cases where the indictment conjunctively alleges multiple objects of a conspiracy, e.g., a conspiracy to distribute cocaine and marijuana, the Eighth Circuit has approved instructions advising the jury that they may convict upon proof that there was a conspiracy to distribute one or both of the controlled substances. *United States v. Davila*, 964 F.2d 778, 783 (8th Cir. 1992); *United States v. Lueth*, 807 F.2d 719, 732-34 (8th Cir. 1986).

2. In *Apprendi*, 530 U.S. at 488, the majority left open the possibility that it might revisit the issue of whether a defendant's prior conviction(s) must be submitted to the jury and found beyond a reasonable doubt before an enhanced punishment based on prior convictions is appropriate. Unless and until the Court does so, prior convictions used to enhance a sentence need not be submitted to the

jury and proven beyond a reasonable doubt. *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998); *United States v. Peltier*, 276 F.3d 1003, 1006 (8<sup>th</sup> Cir. 2002); *United States v. Abernathy*, 277 F.3d 1048, 1050 (8<sup>th</sup> Cir. 2002).

3. Under the section 841(b) sentencing provisions, some of the facts that may raise the statutory maximum are the quantity of drugs involved in the offense, whether death or serious bodily injury results from use of the drugs involved, or whether defendant has a prior felony drug conviction .

Suggested wording for the aggravating facts listed in the above paragraph are:

a) the crime involved ~~in excess of~~ [describe substance and amount] or more. [This alternative is to be used where the amount of drugs increasing the maximum sentence is not in dispute. Where the offense involves two or more controlled substances, and the indictment alleges quantities of each substance sufficient to raise the maximum sentence, an additional element should be submitted to the jury for a finding on each controlled substance.]

b) a death resulted from use of the [describe substance]. [In *United States v. McIntosh*, 236 F.3d 968, 972 (8<sup>th</sup> Cir. 2001), the Eighth Circuit held that the "death resulting" charge is a strict liability one - the court may not impose "a foreseeability or proximate cause requirement." *Accord, United States v. Soler*, 275 F.3d 146 (1<sup>st</sup> Cir. 2002)].

4. Where the conspiracy involves two or more controlled substances, and the indictment alleges quantities of each substance sufficient to raise the maximum sentence, the jury should make a finding on each controlled substance. *See* the last sentence of 5.06F.

5. The amount of drugs attributable to a defendant in a conspiracy includes drugs purchased for personal use. *United States v. Jimenez-Villasenor*, 270 F.3d 554, 562 (8<sup>th</sup> Cir. 2001).

6. Whether *Apprendi* and sections 841(b) and 846 require a jury finding of reasonable foreseeability for each coconspirator has not yet been decided. In *United States v. Jones*, 965 F.2d 1507 (8<sup>th</sup> Cir. 1992), the court, without explicitly stating the basis for its decision, determined that before a district court may impose a mandatory minimum upon a defendant based upon the activities of other defendants, it must find that those activities were in furtherance of the conspiracy and were known to the defendant or reasonably foreseeable to him. *Id.*, at 1517. Other circuits have explicitly stated that section 846 requires such a foreseeability determination, and that the foreseeability determination is governed by the relevant conduct provisions of the Sentencing Guidelines. *See, e.g., United States v. Martinez*, 987 F.2d 920, 924-26 (2d Cir. 1993); *United States v. Irwin*, 2 F.3d 72, 77 (4<sup>th</sup> Cir. 1993); *United States v. Swiney*, 203 F.3d 397, 405-06 (6<sup>th</sup> Cir. 2000). Although these decisions occurred in the context of guideline sentencing by the court, because they are based on statutory construction of sections 846 and 841(b), they arguably establish foreseeability as an element of the offense. However, the Eighth Circuit in *United States v. McIntosh*, 236 F.3d 968, 974 (8<sup>th</sup> Cir. 2001), indicated that the issue is in doubt, noting that "[i]f the government seeks to enhance a conspiracy defendant's sentence . . . based solely on conduct of a coconspirator, a foreseeability

analysis *may* be required in determining whether Congress intended, under § 846, that the defendant be held accountable for the conduct of a coconspirator” (emphasis in the original).

The Committee believes that until the issue is decided, the district court should instruct the jury on foreseeability, unless the defendant agrees to an *Apprendi* waiver.

### **Committee Comments**

*See* Committee Comments and Notes on Use, Instructions 5.06A-I, *supra*. This instruction omits the overt act element of Instruction 5.06A of this Manual. Section 846 does not require proof of an overt act. *United States v. Shabani*, 513 U.S. 10 (1994).

The penalty for conspiracy under 21 U.S.C. § 846 is the same as for the substantive offense committed. Thus, the quantity of the drugs involved or other facts may affect the maximum punishment authorized for the offense. Any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to the jury as an element of the offense, and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *United States v. Aguayo-Delgado*, 220 F.3d 926 (8<sup>th</sup> Cir. 2000); *United States v. Sheppard*, 219 F.3d 766 (8<sup>th</sup> Cir. 2000). Under the section 841(b) sentencing provisions, some of the facts that may raise the statutory maximum are the quantity of drugs involved in the offense, or whether death or serious bodily injury results from use of the drugs involved. *See* Notes 2 and 3, *supra*. In *Harris v. United States*, 536 U.S. 545 (2002), the Supreme Court declined to extend *Apprendi* to facts increasing the statutory minimum sentence, reaffirming its earlier decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). Therefore, such facts need not be submitted to the jury.

In *United States v. Sheppard*, 219 F.3d 766 (8<sup>th</sup> Cir. 2000), the panel suggested that the district court’s submission of drug quantity to the jury in a special interrogatory rather than treating it as an element of the offense was harmless error. However, in *United States v. Harris*, 310 F.3d 1105 (8<sup>th</sup> Cir. 2002), the Court, without mentioning *Sheppard*, explicitly held that it was not an *Apprendi* error to submit the issue of drug quantity to the jury by use of a special interrogatory. The Committee believes, therefore, that submission of drug quantity either as a formal element, as is done in 6.21.841A.1 (short) and 6.21.841A.1 (long) or by special interrogatory is permissible. *See* 11.03 for a verdict form with special interrogatories.

The verdict forms provided for 6.21.841A.1(a) and (b) offenses may be modified for use in conspiracy cases.