PATTERN JURY INSTRUCTIONS

CRIMINAL CASES

U. S. FIFTH CIRCUIT
DISTRICT JUDGES ASSOCIATION

ST. PAUL, MINN.
WEST PUBLISHING CO.

PATTERN JURY INSTRUCTIONS

(Criminal Cases)

Prepared by
Committee on Pattern
Jury Instructions
District Judges Association
Fifth Circuit
1978

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1979

JUDICIAL COUNCIL
OF THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESOLUTION

Resolved, that the Committee on Pattern Jury Instructions of the District Judges Association of the Fifth Circuit is hereby authorized to distribute to the District Judges of the Circuit for their aid and assistance the Committee's Pattern Jury Instructions (Criminal Cases), and the Administrative Office of the United States Courts is requested to publish and reproduce those Instructions for that purpose; provided, however, that this Resolution shall not be construed as an adjudicative approval of the content of such instructions which must await case-by-case review by the Court.

CHIEF JUDGE
FOR THE COUNCIL

June 8, 1978

PREFACE

These Pattern Jury Instructions (Criminal Cases) have been prepared by a Committee of the District Judges Association of the Fifth Circuit appointed by Association President, James Lawrence King (S.D.Fla.), especially for that purpose.

In undertaking its assigned task the Committee attempted to accomplish two prime objectives:

1. To provide a body of brief, uniform jury instructions fully stating the law without needless repetition, and related in simple terms to enhance jury comprehension.

2. To organize the instructions in a special format designed to facilitate rapid assembly and reproduction of a complete jury charge in each case, suitable for submission to the jury in written form if desired.

I

It is a common frustration of District Judges that the jury instructions traditionally given in criminal cases tend to be repetitious and unduly complex, and are often delivered to blank-faced, uncomprehending jurors. In these Pattern Jury Instructions the most noticeable effort at simplification will be observed in: (a) the instruction on reasonable doubt; (b) the single, definitive instruction on willfullness (specific intent); and (c) the conspiracy instruction. Since the body of the work is presented without appended notes or citations, it is appropriate here to comment upon those three critical areas.

(a) *Reasonable Doubt.* The Committee's instruction on reasonable doubt (Basic Instruction, Page 3) is substantially similar to the instruction approved by the Fifth Circuit in *United States v. Prince,* 515 F.2d 564 (5th Cir. 1975), and is recommended as a full and fair statement of the law on this subject. See also *United States v. Clark,* 506 F.2d 416 (5th Cir.), *cert. denied,* 421 U.S. 967, 95 S.Ct. 1957 (1975), holding that if an instruction is legally sufficient, there is no error in refusing to elaborate upon it.

(b) *Willfullness.* Most Federal criminal statutes employ the terms "knowingly," or "knowingly and willfully" as the case might be, to describe the required state of mind which must be

established as an essential element of the proscribed offense. The word "knowingly" is used to require proof that the accused acted voluntarily and not because of mistake or accident; but "knowingly" alone does not require proof that the accused acted in bad faith with specific intent to disobey or disregard the law. It is use of the term "willfully" which adds the element of bad faith and requires a finding that the accused acted with specific intent to disobey or disregard the law. *United States v. Mekjian*, 505 F.2d 1320 (5th Cir. 1975); *Milentz v. United States*, 446 F. 2d 111 (5th Cir. 1971). The Committee's applicable instruction (Basic Instructions, Page 9) defines these terms in that manner, and such instruction is recommended as a full and fair statement of the law affording counsel ample basis for arguing the issue of intent without necessity of further elaboration in the instructions.

(c) *Conspiracy.* One of the longest and most complex instructions given with increasing frequency in Federal prosecutions is the instruction on conspiracy offenses. The Committee's instruction on this subject (Offense Instruction No. 3) represents its best effort to reduce the instruction to the shortest and most understandable form while fully and fairly explaining the necessary concepts in accordance with prevailing law.

II

The instructions have been arranged in four groups:

A. Basic Instructions
B. Special Instructions
C. Offense Instructions
D. Trial Instructions

A. The *Basic Instructions* cover in a logical sequence those topics which should normally be included in the Court's instructions in every case. They are contained within twelve numbered pages and have been carefully arranged so that each page pertains to a separate topic or subject; and, when necessary, alternative versions of the page are provided for use depending upon the presence of common variables as they may exist in the case at hand (such as single or multiple counts, single or multiple defendants, types of impeachment consummated during trial, etc.).

B. The *Special Instructions* have also been arranged so that each page (or group of pages) pertains to a separate topic which may or may not be germane depending upon the issues raised in

the particular case (such as Aiding and Abetting, Accomplices, Identification Testimony, the element of Possession, and the like; or theories of defense such as Alibi, Entrapment and Insanity, etc.).

C. The *Offense Instructions* cover fifty (50) of the most frequently prosecuted Federal offenses. A separate instruction is provided for each offense quoting the applicable statute, stating the essential elements of the offense, and defining the key words or phrases necessary to a proper understanding of those elements. Each instruction (combined, when appropriate, with any applicable Special Instructions on such topics as Aiding and Abetting, Possession, Lesser Included Offense, etc.) is designed to be a complete charge concerning the particular offense to which it relates.

D. The *Trial Instructions* are simply a collection of preliminary, explanatory or cautionary instructions frequently given during the trial itself.

Chief Judge Dan M. Russell, Jr. (S.D.Miss.)
Judge Jack M. Gordon (E.D.La.)
Chief Judge Anthony A. Alaimo (S.D.Ga.)
Judge Wm. Terrell Hodges (M.D.Fla.)
Judge James Hughes Hancock (N.D.Ala.)
Judge Tom Stagg (W.D.La.)
Judge William S. Sessions (W.D.Tex.)

Committee on Pattern Jury Instructions
District Judges Association, Fifth Circuit

*

DIRECTIONS FOR USE *

[Publisher's Note—See Accompanying Appendix for illustrative sets of instructions prepared by following directions given in Examples No. 1 and No. 2 set out below]

By developing and maintaining multiple file copies of *each page* of these Pattern Instructions (without the explanatory titles or headings appearing at the top of the pages in this master copy), a complete set of instructions can be assembled within minutes in *most* cases, individually tailored to the distinctive circumstances of the case, and in a "clean" form suitable for submission to the jury in writing if desired. (Sending written instructions to the jury is within the discretion of the District Judge. *McDaniel v. United States,* 343 F.2d 785, 789 (5th Cir. 1965)).

Example No. 1. Assume a simple one count indictment against a single defendant alleging a substantive mail fraud offense (18 USC § 1341). An expert witness testified for the Government, and another witness was impeached by admitting on cross examination that he was a convicted felon. The defendant did not testify, but did call witnesses who vouched for his good character. The case had no other distinctive features affecting the instructions to be given to the jury.

Refer to the Index of the Basic Instructions and, proceeding page-by-page, select the *version* of each page applicable to the case as follows:

Page

1. Face Page—Introduction
   (applicable in all cases)

2A. Duty to Follow Instructions, etc.
   (applicable in single defendant cases)

3B. Presumption of Innocence, Burden of Proof, Reasonable Doubt
   (applicable when any defendant does not testify)

4A. Evidence—Excluding Argument of Counsel
   (use alternative Page 4B if the Judge has admonished a lawyer, etc., so that a broader cautionary instruction is appropriate directing the jury to disregard comments by the Court)

* *Publisher's Note—Pagination as it appears on the bottom of each page should not be confused with the references to pages made by the Committee in the Directions for Use.*

DIRECTIONS FOR USE

Page

5. Evidence—Inferences—Direct and Circumstantial
(applicable in all cases)

6. Credibility of Witnesses
(applicable in all cases)

7B. Impeachment—Inconsistent Statements and Felony Conviction
(applicable page in view of impeachment of Government witness as a convicted felon)

8. Expert Witnesses
(applicable in view of Government's expert witness)

[Insert here Offense Instructions and Special Instructions pertaining to the Case]

Offense Instruction No. 23	Mail Fraud (18 USC § 1341)
Special Instruction No. 3	Character Evidence (applicable in view of defendant's character witnesses)

[Return to the Index of the Basic Instructions and resume, at Page 9, the selection of appropriate pages to complete the charge as a whole]

9A. On or About—Knowingly—Willfully
(applicable page when willfullness is an element)

10A. Caution—Punishment (Single Defendant—Single Count)
(applicable in single defendant, single count cases)

11. Duty to Deliberate
(applicable in all cases)

12A. Verdict (Single Verdict Form)
(applicable in single defendant cases involving single verdict form)

Example No. 2. Assume a four count indictment against six defendants. Count One alleged a conspiracy (21 USC § 846), and Counts Two, Three and Four, respectively, alleged substantive offenses (21 USC § 841(a)(1)) involving possession with intent to distribute marijuana and cocaine (the object of the conspiracy charged in Count One). One of the defendants entered into a plea agreement with the Government, pled guilty and testified as a witness for the prosecution. He was impeached as a previously convicted felon and as a person with a bad reputation for truth and veracity. The Government also called an

expert witness (a chemist). One of the defendants testified in his own behalf and was also impeached as a previously convicted felon.

Refer to the Index of the Basic Instructions and, proceeding page-by-page, select the *version* of each page applicable to the case as follows:

Page

1. Face Page—Introduction
(applicable in all cases)

2B. Duty to Follow Instructions, etc.
(applicable in case of multiple defendants)

3B. Presumption of innocence—Burden of Proof—Reasonable Doubt
(applicable when any defendant does not testify)

4A. Evidence—Excluding Argument of Counsel
(use alternative Page 4B if the Judge has admonished a lawyer, etc., so that a broader cautionary instruction is appropriate directing the jury to disregard comments by the Court)

5. Evidence—Inferences—Direct and Circumstantial
(applicable in all cases)

6. Credibility of Witnesses
(applicable in all cases)

7F. Impeachment—Felony Conviction (generally)—Defendant Testifies (with felony conviction)

7G. Impeachment—Inconsistent Statements and Bad Reputation For Truth
(Pages 7F and 7G would be applicable in tandem due to impeachment of the Government Witness as a felon also having a bad reputation for truth, and the fact that one defendant testified as a convicted felon)

[Insert here Special Instruction No. 2B, Accomplice—Co-Defendant—Plea Agreement, applicable due to co-defendant's appearance as a witness (modify and retype page if necessary)]

8. Expert Witnesses
(applicable in view of Government's expert witness)

[Insert here Offense Instructions and Special Instructions pertaining to case]

DIRECTIONS FOR USE

Offense Instruction No. 3	Conspiracy 21 USC § 846 (Use Page 3B—Alternate First Page when § 371 Not Involved)
Offense Instruction No. 45	Controlled Substances—Possession With Intent To Distribute 21 USC § 841(a)(1)
Special Instruction No. 8	Possession
Special Instruction No. 1	Aiding and Abetting (Agency) 18 USC § 2

[Return to the Index of the Basic Instructions and resume, at Page 9, the selection of appropriate pages to complete the charge as a whole]

Page	
9A.	On or About—Knowingly—Willfully (applicable page when Willfullness is an element)
10D.	Caution—Punishment (Multiple Defendants—Multiple Counts)
11.	Duty to Deliberate (applicable in all cases)
12B.	Verdict (Multiple Verdict Forms) (applicable in multiple defendant cases involving multiple verdict forms)

Note that the simpler of the two cases (Example No. 1) required no editing or modification whatever and the pattern instructions could have been sent to the jury exactly as drawn from the page files. With respect to the more complex case (Example No. 2), *some modification would be necessary* to produce a complete charge. Specifically, some editing might be necessary as to Special Instruction No. 2B (Accomplices, etc.) to fit the exact circumstances of the case; an introductory page should be prepared incident to the conspiracy instruction summarizing the nature of the conspiracy alleged and quoting from 21 USC § 846; and the Offense Instruction No. 45 (Controlled Substances) should be edited to refer to both marijuana and cocaine. Even assuming the necessity of these modifications, however, the required typing (or re-typing) should total no more than three pages.

PATTERN JURY INSTRUCTIONS

(Criminal Cases)

INDEX TO BASIC INSTRUCTIONS

PATTERN JURY INSTRUCTIONS

1

FACE PAGE—INTRODUCTION

UNITED STATES DISTRICT COURT
DISTRICT OF

COURT'S INSTRUCTIONS
TO THE JURY

Members of the Jury:

You have now heard all of the evidence in the case as well as the final arguments of the lawyers for the parties.

It becomes my duty, therefore, to instruct you on the rules of law that you must follow and apply in arriving at your decision in the case.

In any jury trial there are, in effect, two judges. I am one of the judges; the other is the jury. It is my duty to preside over the trial and to determine what testimony and evidence is relevant under the law for your consideration. It is also my duty at the end of the trial to instruct you on the law applicable to the case.

2A

DUTY TO FOLLOW INSTRUCTIONS, ETC. (SINGLE DEFENDANT)

You, as jurors, are the judges of the facts. But in determining what actually happened in this case—that is, in reaching your decision as to the facts—it is your sworn duty to follow the law I am now in the process of defining for you.

And you must follow all of my instructions as a whole. You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. That is, you must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I give it to you, regardless of the consequences.

By the same token it is also your duty to base your verdict solely upon the testimony and evidence in the case, without prejudice or sympathy. That was the promise you made and the oath you took before being accepted by the parties as jurors in this case, and they have the right to expect nothing less.

2B

DUTY TO FOLLOW INSTRUCTIONS, ETC. (MULTIPLE DEFENDANTS)

You, as jurors, are the judges of the facts. But in determining what actually happened in this case—that is, in reaching your decision as to the facts—it is your sworn duty to follow the law I am now in the process of defining for you. Unless otherwise stated you should consider each instruction to apply separately and individually to each Defendant on trial.

And you must follow all of my instructions as a whole. You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. That is, you must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I give it to you, regardless of the consequences.

By the same token it is also your duty to base your verdict solely upon the testimony and evidence in the case, without prejudice or sympathy. That was the promise you made and the oath you took before being accepted by the parties as jurors in this case, and they have the right to expect nothing less.

3A

PRESUMPTION OF INNOCENCE, BURDEN OF PROOF, REASONABLE DOUBT

The indictment or formal charge against a Defendant is not evidence of guilt. Indeed, the Defendant is presumed by the law to be innocent. The law does not require a Defendant to prove his innocence or produce any evidence at all. The Government has the burden of proving him guilty beyond a reasonable doubt, and if it fails to do so you must acquit him.

Thus, while the Government's burden of proof is a strict or heavy burden, it is not necessary that the Defendant's guilt be proved beyond all possible doubt. It is only required that the Government's proof exclude any "reasonable doubt" concerning the Defendant's guilt.

A "reasonable doubt" is a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the accused has been proved guilty beyond reasonable doubt, say so. If you are not convinced, say so.

3B

PRESUMPTION OF INNOCENCE, BURDEN OF PROOF, REASONABLE DOUBT (WHEN ANY DEFENDANT DOES NOT TESTIFY)

The indictment or formal charge against a Defendant is not evidence of guilt. Indeed, the Defendant is presumed by the law to be innocent. The law does not require a Defendant to prove his innocence or produce any evidence at all, and no inference whatever may be drawn from the election of a Defendant not to testify. The Government has the burden of proving him guilty beyond a reasonable doubt, and if it fails to do so you must acquit him.

Thus, while the Government's burden of proof is a strict or heavy burden, it is not necessary that the Defendant's guilt be proved beyond all possible doubt. It is only required that the Government's proof exclude any "reasonable doubt" concerning the Defendant's guilt. A "reasonable doubt" is a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the accused has been proved guilty beyond reasonable doubt, say so. If you are not convinced, say so.

4A

EVIDENCE—EXCLUDING ARGUMENT OF COUNSEL

As stated earlier it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice.

In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

4B

EVIDENCE—EXCLUDING ARGUMENT OF COUNSEL AND COMMENT OF COURT

As stated earlier it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you. Also, during the course of a trial I occasionally make comments to the lawyers, or ask questions of a witness, or admonish a witness concerning the manner in which he should respond to the questions of counsel. Do not assume from anything I may have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

5

EVIDENCE—INFERENCES—DIRECT AND CIRCUMSTANTIAL

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

You may also consider either direct or circumstantial evidence. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances indicating either the guilt or innocence of the Defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It requires only that you weigh all of the evidence and be convinced of the Defendant's guilt beyond a reasonable doubt before he can be convicted.

6

CREDIBILITY OF WITNESSES

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his testimony. In weighing the testimony of a witness you should consider his relationship to the Government or the Defendant; his interest, if any, in the outcome of the case; his manner of testifying; his opportunity to observe or acquire knowledge concerning the facts about which he testified; his candor, fairness and intelligence; and the extent to which he has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

7A

IMPEACHMENT—INCONSISTENT STATEMENT ONLY

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

7B

IMPEACHMENT—INCONSISTENT STATEMENT AND FELONY CONVICTION

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

The fact that a witness has previously been convicted of a felony, or a crime involving dishonesty or false statement, is also a factor you may consider in weighing the credibility of that witness. The fact of such a conviction does not necessarily destroy the witness' credibility, but is one of the circumstances you may take into account in determining the weight to be given to his testimony.

7C

IMPEACHMENT—INCONSISTENT STATEMENT ONLY—DEFENDANT TESTIFIES (WITH NO FELONY CONVICTION)

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

As stated earlier, a Defendant has a right not to testify. If a Defendant does testify, however, his testimony should be weighed and considered, and his credibility determined, in the same way as that of any other witness.

7D

IMPEACHMENT—INCONSISTENT STATEMENT ONLY—DEFENDANT TESTIFIES (WITH FELONY CONVICTION)

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

A Defendant has a right not to testify. If a Defendant does testify, however, his testimony should be weighed and considered, and his credibility determined in the same way as that of any other witness. Evidence of a Defendant's previous conviction of a crime is to be considered by you only insofar as it may affect the credibility of the Defendant as a witness, and must never be considered as evidence of guilt of the crime for which the Defendant is on trial.

7E

IMPEACHMENT—FELONY CONVICTION (GENERALLY)—DEFENDANT TESTIFIES (WITH NO FELONY CONVICTION)

(Use With A)

The fact that a witness has previously been convicted of a felony, or a crime involving dishonesty or false statement, is also a factor you may consider in weighing the credibility of that witness. The fact of such a conviction does not necessarily destroy the witness' credibility, but is one of the circumstances you may take into account in determining the weight to be given to his testimony.

As stated before, a Defendant has a right not to testify. If a Defendant does testify, however, his testimony should be weighed and considered, and his credibility determined, in the same way as that of any other witness.

7F

IMPEACHMENT—FELONY CONVICTION (GENERALLY)—DEFENDANT TESTIFIES (WITH FELONY CONVICTION)

(Use With A)

The fact that a witness has previously been convicted of a felony, or a crime involving dishonesty or false statement, is also a factor you may consider in weighing the credibility of that witness. The fact of such a conviction does not necessarily destroy the witness' credibility, but is one of the circumstances you may take into account in determining the weight to be given to his testimony.

As stated before, a Defendant has a right not to testify. If a Defendant does testify, however, his testimony should be weighed and considered, and his credibility determined, in the same way as that of any other witness. Evidence of a Defendant's previous conviction of a crime is to be considered by you only insofar as it may affect the credibility of the Defendant as a witness, and must never be considered as evidence of guilt of the crime for which the Defendant is on trial.

7G

IMPEACHMENT—INCONSISTENT STATEMENT AND BAD REPUTATION FOR TRUTH

(Use with E or F)

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

A witness may also be discredited or impeached by evidence that the general reputation of the witness for truth and veracity is bad in the community where the witness now resides, or has recently resided. If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

7H

IMPEACHMENT—FELONY CONVICTION (GENERALLY) AND BAD REPUTATION FOR TRUTH

(Use With A, C or D)

The fact that a witness has previously been convicted of a felony, or a crime involving dishonesty or false statement, is a factor you may consider in weighing the credibility of that witness. The fact of such a conviction does not necessarily destroy the witness' credibility, but is one of the circumstances you may take into account in determining the weight to be given to his testimony.

A witness may also be discredited or impeached by evidence that the general reputation of the witness for truth and veracity is bad in the community where the witness now resides, or has recently resided. If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

8

EXPERT WITNESSES

The rules of evidence provide that if scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and state his opinion concerning such matters.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

9A

ON OR ABOUT—KNOWINGLY—WILLFULLY

You will note that the indictment charges that the offense was committed "on or about" a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

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

The word "willfully," as that term has been used from time to time in these instructions, means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law.

9B

ON OR ABOUT—KNOWINGLY (ONLY)

You will note that the indictment charges that the offense was committed "on or about" a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

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

10A

CAUTION—PUNISHMENT (SINGLE DEFENDANT—SINGLE COUNT)

I caution you, members of the Jury, that you are here to determine the guilt or innocence of the accused from the evidence in this case. The Defendant is not on trial for any act or conduct or offense not alleged in the indictment. Neither are you called upon to return a verdict as to the guilt or innocence of any other person or persons not on trial as a Defendant in this case.

Also, the punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the court or judge, and should never be considered by the jury in any way, in arriving at an impartial verdict as to the guilt or innocence of the accused.

10B

CAUTION—PUNISHMENT (SINGLE DEFENDANT—MULTIPLE COUNTS)

A separate crime or offense is charged in each count of the indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the Defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

I caution you, members of the Jury, that you are here to determine the guilt or innocence of the accused from the evidence in this case. The Defendant is not on trial for any act or conduct or offense not alleged in the indictment. Neither are you called upon to return a verdict as to the guilt or innocence of any other person or persons not on trial as a Defendant in this case.

Also, the punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the court or judge, and should never be considered by the jury in any way, in arriving at an impartial verdict as to the guilt or innocence of the accused.

10C

CAUTION—PUNISHMENT (MULTIPLE DEFENDANTS—SINGLE COUNT)

The case of each Defendant and the evidence pertaining to him should be considered separately and individually. The fact that you may find one of the Defendants guilty or not guilty should not control your verdict as to any other Defendant.

I caution you, members of the Jury, that you are here to determine the guilt or innocence of the accused from the evidence in this case. The Defendant is not on trial for any act or conduct or offense not alleged in the indictment. Neither are you called upon to return a verdict as to the guilt or innocence of any other person or persons not on trial as a Defendant in this case.

Also, the punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the court or judge, and should never be considered by the jury in any way, in arriving at an impartial verdict as to the guilt or innocence of the accused.

10D

CAUTION—PUNISHMENT (MULTIPLE DEFENDANTS—MULTIPLE COUNTS)

A separate crime or offense is charged against one or more of the Defendants in each count of the indictment. Each offense, and the evidence pertaining to it, should be considered separately. Also, the case of each Defendant should be considered separately and individually. The fact that you may find one or more of the accused guilty or not guilty of any of the offenses charged should not control your verdict as to any other offense or any other Defendant.

I caution you, members of the Jury, that you are here to determine the guilt or innocence of the accused from the evidence in this case. The Defendant is not on trial for any act or conduct or offense not alleged in the indictment. Neither are you called upon to return a verdict as to the guilt or innocence of any other person or persons not on trial as a Defendant in this case.

Also, the punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the court or judge, and should never be considered by the jury in any way, in arriving at an impartial verdict as to the guilt or innocence of the accused.

11

DUTY TO DELIBERATE

Any verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous.

It is your duty as jurors, to consult with one another, and to deliberate in an effort to reach agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are not partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

12A

VERDICT (SINGLE VERDICT FORM)

Upon retiring to the jury room you should first select one of your number to act as your foreman or forewoman who will preside over your deliberations and will be your spokesman here in court. A form of verdict has been prepared for your convenience.

[*Explain verdict*]

You will take the verdict form to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreman fill it in, date and sign it, and then return to the courtroom.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing signed by the foreman or forewoman, and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at the time.

12B

VERDICT (MULTIPLE VERDICT FORMS)

Upon retiring to the jury room you should first select one of your number to act as your foreman or forewoman who will preside over your deliberations and will be your spokesman here in court. Forms of verdicts have been prepared for your convenience.

[*Explain verdicts*]

You will take the verdict forms to the jury room and when you have reached unanimous agreement as to your verdicts, you will have your foreman fill in, date and sign them, and then return to the courtroom.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing signed by the foreman or forewoman, and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at the time.

*

SPECIAL INSTRUCTIONS

INDEX TO SPECIAL INSTRUCTIONS

Note: Where a yellow mark * appears in these Instructions it denotes a blank space (Usually relating to a count number) which must be filled in to tailor the instruction to the individual case. Similarly, the word "Sample" is conspicuously typed in the margin on some instructions denoting a passage which will require editing to fit the circumstances of each individual case.

* A dash has been added to replace yellow mark.

1

AIDING AND ABETTING (AGENCY)

(18 U.S.C. § 2)

The guilt of an accused in a criminal case may be established without proof that he personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by him through direction of another person as his agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.

Title 18, United States Code, Section 2, provides:

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

So, if the acts or conduct of an agent, employee or other associate of the Defendant are willfully directed or authorized by him, or if the Defendant aids and abets another person by willfully joining together with such person in the commission of a crime, then the law holds the Defendant responsible for the acts and conduct of such other persons just as though he had committed the acts or engaged in such conduct himself.

Notice, however, that before any Defendant may be held criminally responsible for the acts of others it is necessary that the accused willfully associate himself in some way with the criminal venture, and willfully participate in it as he would in something he wishes to bring

about; that is to say, that he willfully seek by some act or omission of his to make the criminal venture succeed.

Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a Defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the Defendant was a participant and not merely a knowing spectator.

In other words, you may not find any Defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the Defendant willfully participated in its commission.

2A

ACCOMPLICE—INFORMER—IMMUNITY

The testimony of an alleged accomplice, and the testimony of one who provides evidence against a Defendant as an informer for pay or for immunity from punishment or for personal advantage or vindication, must always be examined and weighed by the jury with greater care and caution than the testimony of ordinary witnesses. You, the jury, must decide whether the witness' testimony has been affected by any of those circumstances, or by his interest in the outcome of the case, or by prejudice against the Defendant, or by the benefits that he has received either financially, or as a result of being immunized from prosecution; and, if you determine that the testimony of such a witness was affected by any one or more of those factors, you should keep in mind that such testimony is always to be received with caution and weighed with great care.

You should never convict any Defendant upon the unsupported testimony of such a witness unless you believe that testimony beyond a reasonable doubt.

2B

ACCOMPLICE—CO-DEFENDANT—PLEA AGREEMENT

In this case the Government called as one of its witnesses an alleged accomplice, named as a co-Defendant in the indictment, with whom the Government has entered into a plea agreement providing for the dismissal of some charges and a lesser sentence than he would otherwise be exposed to for the offense to which he plead guilty. Such plea bargaining, as it's called, has been approved as lawful and proper, and is expressly provided for in the rules of this Court.

An alleged accomplice, including one who has entered into a plea agreement with the Government, does not thereby become incompetent as a witness. On the contrary, the testimony of such a witness may alone be of sufficient weight to sustain a verdict of guilty. However, the jury should keep in mind that such testimony is always to be received with caution and weighed with great care. You should never convict a Defendant upon the unsupported testimony of an alleged accomplice unless you believe that testimony beyond a reasonable doubt; and the fact that an accomplice has entered a plea of guilty to the offense charged is not evidence, in and of itself, of the guilt of any other person.

2C

ACCOMPLICE—ADDICTIVE DRUGS—IMMUNITY

The testimony of an alleged accomplice, the testimony of one who is shown to have used addictive drugs during the period of time about which he testified, and the testimony of one who provides evidence against a Defendant for pay or for immunity from punishment or for personal advantage or vindication, must always be examined and weighed by the jury with greater care and caution than the testimony of ordinary witnesses. You, the jury, must decide whether the witness' testimony has been affected by any of those circumstances, or by his interest in the outcome of the case, or by prejudice against the Defendant, or by the benefits that he has received either financially or as a result of being immunized from prosecution; and, if you determine that the testimony of such a witness was affected by any one or more of those factors, you should keep in mind that such testimony is always to be received with caution and weighed with great care.

You should never convict any Defendant upon the unsupported testimony of such a witness unless you believe that testimony beyond a reasonable doubt.

3

CHARACTER EVIDENCE

Where a Defendant has offered evidence of good general reputation for truth and veracity, or honesty and integrity, or as a law-abiding citizen, the jury should consider such evidence along with all the other evidence in the case.

Evidence of a Defendant's reputation, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt, since the jury may think it improbable that a person of good character in respect to those traits would commit such a crime.

The jury will always bear in mind, however, that the law never imposes upon a Defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

4A

CONFESSION—STATEMENT—VOLUNTARINESS (SINGLE DEFENDANT)

In determining whether any statement, claimed to have been made by a Defendant outside of court and after an alleged crime has been committed, was knowingly and voluntarily made, the jury should consider the evidence concerning such a statement with caution and great care, and should give such weight to the statement as the jury feels it deserves under all the circumstances.

The jury may consider in that regard such factors as the age, sex, training, education, occupation, and physical and mental condition of the Defendant, his treatment while under interrogation, and all the other circumstances in evidence surrounding the making of the statement.

4B

CONFESSION—STATEMENT—VOLUNTARINESS (MULTIPLE DEFENDANTS)

In determining whether any statement, claimed to have been made by a Defendant outside of court and after an alleged crime has been committed, was knowingly and voluntarily made, the jury should consider the evidence concerning such a statement with caution and great care, and should give such weight to the statement as the jury feels it deserves under all the circumstances.

The jury may consider in that regard such factors as the age, sex, training, education, occupation, and physical and mental condition of the Defendant, his treatment while under interrogation, and all the other circumstances in evidence surrounding the making of the statement.

Of course, any such statement should not be considered in any way whatever as evidence with respect to any other Defendant on trial.

5

ENTRAPMENT

The Defendant asserts that he was a victim of entrapment as to the offense charged in the indictment.

Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is a victim of entrapment, and the law as a matter of policy forbids his conviction in such a case.

On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that Government agents provide what appears to be a favorable opportunity is not entrapment. For example, it is not entrapment for a Government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to engage in an unlawful transaction.

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

On the other hand, if the evidence in the case should leave you with a reasonable doubt whether the Defendant had the previous intent or purpose to commit an offense of the character charged, apart from the inducement or persuasion of some officer or agent of the Government, then it is your duty to find him not guilty.

SPECIAL INSTRUCTIONS

6

IDENTIFICATION TESTIMONY

In any criminal case the Government must prove not only the essential elements of the offense or offenses charged, as hereafter defined, but must also prove, of course, the identity of the Defendant as the perpetrator of the alleged offense or offenses.

In evaluating the identification testimony of a witness you should consider all of the factors already mentioned concerning your assessment of the credibility of any witness in general, and should also consider, in particular, whether the witness had an adequate opportunity to observe the person in question at the time or times about which the witness testified. You may consider, in that regard, such matters as the length of time the witness had to observe the person in question, the prevailing conditions at that time in terms of visibility or distance and the like, and whether the witness had known or observed the person at earlier times.

You may also consider the circumstances surrounding the identification itself including, for example, the manner in which the Defendant was presented to the witness for identification, and the length of time that elapsed between the incident in question and the next opportunity the witness had to observe the Defendant.

If, after examining all of the testimony and evidence in the case, you have a reasonable doubt as to the identity of the Defendant as the perpetrator of the offense charged, you must find the Defendant not guilty.

7

SIMILAR ACTS

SAMPLE

During the course of the trial, as you know from the instruction I gave you at the time, testimony or evidence was received with respect to [certain vehicles allegedly stolen in Florida and not transported out of the state, or transported from any other state into this state. Such intrastate, as opposed to interstate transactions] would not constitute any Federal offense as charged in the indictment in this case, but would, at most, constitute evidence of "similar acts" in relation to those alleged in the indictment.

Evidence that an act was done at one time, or on one occasion, is not any evidence or proof whatever that a similar act was done at another time, or on another occasion. That is to say, evidence that a Defendant may have committed an act similar to the acts alleged in the indictment may not be considered by the jury in determining whether the accused in fact committed any act charged in the indictment.

Nor may evidence of some other act of a like nature be considered for any other purpose whatever, unless the jury first find that the other evidence in the case, standing alone, establishes beyond a reasonable doubt that the accused did the particular act charged in the particular count of the indictment then under deliberation.

If the jury should find beyond a reasonable doubt from other evidence in the case that the accused did the act charged in the particular count under deliberation, then the jury may consider evidence as to an alleged act of a like nature, in determining the state of mind or intent with which the accused did the act charged in the particular count. And where proof of an alleged act of a like nature is established by evidence which is clear and

conclusive, the jury may, but is not obliged to, draw the inference and find that, in doing the act charged in the particular count under deliberation, the accused acted willfully, and not because of mistake or accident or other innocent reason.

8

POSSESSION

The law recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

You may find that the element of possession as that term is used in these instructions is present if you find beyond reasonable doubt that the Defendant had actual or constructive possession, either alone or jointly with others.

9

LESSER INCLUDED OFFENSE

The law permits the jury to find an accused guilty of any lesser offense which is necessarily included in the crime charged in the indictment whenever such a course is consistent with the facts found by the jury from the evidence in the case and with the law as stated by the Court.

So, in this instance, with respect to the offenses charged in Counts _____ respectively, if the jury should find the accused "not guilty" of the offense as charged in the indictment and defined in these instructions, then the jury should proceed to determine the guilt or innocence of the accused as to any lesser offense which is necessarily included in the crime charged.

[The offense of damaging or destroying a vehicle used in interstate commerce or in activities affecting interstate commerce, by means of an explosive causing not only the damage or destruction of the vehicle but also personal injury to another, necessarily includes the lesser offense of damaging or destroying such a vehicle by means of an explosive but without causing personal injury to another.

With respect to the offenses charged in Count _____ then, if the jury should find the accused not guilty as to either or both of those offenses as charged, the jury must proceed to determine whether the accused is guilty or not guilty of the lesser included offense of damaging or destroying, by means of an explosive, a vehicle used in interstate commerce or in activities affecting interstate commerce, without causing personal injury to another. In other words, such lesser included offense would consist of proof beyond a reasonable doubt of each of the First, Second and Third elements, as defined above, but not the Fourth.]

10

INSANITY

There is an issue in this case concerning the sanity of the Defendant at the time of the acts or events alleged in the indictment.

The sanity of the Defendant at the time of an alleged offense must be established by the Government beyond a reasonable doubt because willful intent, as you have been instructed, is an essential element of the offense charged, and a person who is insane is not capable of forming such intent.

A person is insane within the meaning of these instructions, and is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

If, after consideration of all the evidence in the case, you have a reasonable doubt as to whether the Defendant was sane at the time of the alleged offense, you must find him not guilty.

11

ALIBI

Evidence has been introduced tending to establish an alibi—that the Defendant was not present at the time when, or at the place where, he is alleged to have committed the offense charged in the indictment.

It is, of course, the Government's burden to establish beyond a reasonable doubt each of the essential elements of the offense, including the involvement of the Defendant; and if, after consideration of all the evidence in the case, you have a reasonable doubt as to whether the Defendant was present at the time and place as alleged in the indictment, you must acquit him.

*

OFFENSE INSTRUCTIONS

INDEX TO OFFENSE INSTRUCTIONS

A. TITLE 18 OFFENSES

Note: Where a yellow mark ** appears in these Instructions it denotes a blank space (usually relating to a count number) which must be filled in to tailor the instruction to the individual case. Similarly, the word "Sample" is conspicuously typed in the margin on some instructions denoting a passage which will require editing to fit the circumstances of each individual case.

* If the conspiracy offense is not predicated upon 18 U.S.C. § 371 it will be necessary to prepare an instruction to precede the pattern charge explaining the nature of the alleged conspiracy and the applicable statute. Also, if no overt acts are alleged (See United States vs. Palacios, 556 F.2d 1359, 1364 fn. 9 (5th Cir. 1977), the pattern charge may require editing accordingly.

** A dash has been added to replace yellow mark.

† May require "Lesser Included Offense" Instruction. If so, see "Special Instructions."

Title 18 Section Number	Instruction Number	Nature of Offense
656	9	Theft or Embezzlement by Bank Employee.
659	10	Theft from Interstate Shipment (First Paragraph).†
751(a)	11	Escape.
752(a)	12	Instigating or Assisting Escape.
871	13	Threats Against the President.
876	14	Mailing Threatening Communications (Second Paragraph).
911	15	False Personation as a Citizen.
922(a)(1)	16	Dealing in Firearms Without License.††
922(a)(6)	17	False Statement to Firearms Dealer.††
1001	18	False Statement to Federal Agency.
1005	19	False Entry in Bank Records (Third Paragraph).
1014	20	False Statement to a Bank.
1084	21	Transmission of Wagering Information.
1201(a)(1)	22	Kidnapping.
1341	23	Mail Fraud.
1461	24	Mailing Obscene Material.*
1462	25	Interstate Transportation of Obscene Material (By Common Carrier*).
1465	26	Interstate Transportation of Obscene Material (For Purpose of Sale or Distribution).
1503	27	Obstruction of Justice. A. Corruptly Influencing a Witness.** B. Threatening a Witness.
1546	28	Use of False Visa (First Paragraph).
1581 and 1584	29	Involuntary Servitude and Peonage.
1623	30	False Declaration (Before Grand Jury).
1702	31	Obstruction of Correspondence.

† May require "Lesser Included Offense" Instruction. If so, see "Special Instructions."

†† Willfulness is not an essential element of this offense. Use page 9B of Basic Instructions.

* The last five (5) pages of Instruction No. 26 (dealing with knowledge and the definition of obscenity) must also be given with Instructions 24 and 25, respectively.

** Willfulness is not an essential element of this offense. Use page 9B of Basic Instructions.

OFFENSE INSTRUCTIONS

Title 18 Section Number	Instruction Number	Nature of Offense
1708	32	Possession of Stolen Mail (Third Paragraph).
1951(a)	33	Interference With Commerce By Extortion (Hobbs Act—Racketeering).
1952(a)(3)	34	Interstate Travel in Aid of Racketeering (Travel Act).
1953	35	Interstate Transportation of Wagering Paraphernalia (Bookmaking).
1955	36	Illegal Gambling Business.
1962(b)	37	Racketeer Influenced Corrupt Organizations Act (RICO).
2113(a) and (d)	38	Armed Bank Robbery. A. When Subsections (a) and (d) Alleged in *Separate* Counts. B. When Subsections (a) and (d) Alleged in *Same* Count.
2312	39	Interstate Transportation of Stolen Motor Vehicle (Dyer Act).
2313	40	Sale or Receipt of Stolen Motor Vehicle.
2314	41	Interstate Transportation of Stolen Property (First Paragraph).
2315	42	Sale or Receipt of Stolen Property (First Paragraph).
3150	43	Failure to Appear (Bail Jumping).

B. OFFENSES IN OTHER TITLES

Title and Section Number	Instruction Number	Nature of Offense
8 U.S.C. § 1326	44	Illegal Entry by Deported Alien.
21 U.S.C. § 841(a)(1)	45	Controlled Substances (Possession With Intent to Distribute and Distribution).
26 U.S.C. § 5205(a)(2) and § 5604(a)(1)	46	Possession or Transfer of Non-Tax-Paid Distilled Spirits.†

† Willfulness is not an essential element of this offense. Use Page 9B of Basic Instructions.

PATTERN JURY INSTRUCTIONS

Title and Section Number	Instruction Number	Nature of Offense
26 U.S.C. § 5845 and § 5861	47	Possession of Unregistered Firearm.†
26 U.S.C. § 7201	48	Tax Evasion.
26 U.S.C. § 7203	49	Failure to File Tax Return.
26 U.S.C. § 7207	50	False Tax Return.

† Willfulness is not an essential element of this offense. Use Page 9B of Basic Instructions.

A. TITLE 18 OFFENSES

1

ASSAULTING A FEDERAL OFFICER

A. (Without Use of a Deadly Weapon)

(18 U.S.C. § 111)
(First Paragraph)

Title 18, United States Code, Section 111, provides that:

> "Whoever forcibly assaults, resists, opposes, impedes, intimidates or interferes with any [Federal officer or employee] designated in Section 1114 of this title while engaged in or on account of the performance of his official duties [shall be guilty of an offense against the United States]."

[You are instructed that a Special Agent of the Federal Bureau of Investigation is one of the Federal officers or employees referred to in that law, and that it is a part of the official duty of such an officer to execute arrest warrants issued by a Judge or Magistrate of this Court.]

Thus, to establish the offense of forcibly assaulting or resisting a Federal officer in the performance of his official duties as charged in the indictment, there are three essential elements which must be proved beyond a reasonable doubt:

> *First*: That the Defendant forcibly assaulted the person described in the indictment;
>
> *Second*: That the person assaulted was a Federal Officer, as described above, then engaged in the performance of his official duty, as charged; and

Third: That the Defendant did such acts willfully.

It is not necessary to show that the Defendant knew the person being forcibly assaulted was, at that time, a Federal officer carrying out an official duty so long as it is established beyond a reasonable doubt that the victim was, in fact, a Federal officer acting in the course of his duty and that the Defendant willfully committed a forcible assault upon him.

The term "forcible assault" means any willful attempt or threat to inflict injury upon someone else, when coupled with an apparent present ability to do so, and includes any intentional display of force that would give a reasonable person cause to expect immediate bodily harm even though the threat or attempt is not actually carried out and the victim is not actually injured.

1

ASSAULTING A FEDERAL OFFICER

B. (With Use of a Deadly Weapon)

(18 U.S.C. § 111)
(Second Paragraph)

Title 18, United States Code, Section 111, provides that:

> "Whoever forcibly assaults, resists, opposes, impedes, intimidates or interferes with any [Federal officer or employee] designated in Section 1114 of this title while engaged in or on account of the performance of his official duties [shall be guilty of an offense against the United States]."

The same provision of the law further provides that:

> "Whoever, in the commission of any such acts uses a deadly or dangerous weapon, [shall be punished as provided by law]."

[You are instructed that a Special Agent of the Federal Bureau of Investigation is one of the Federal officers or employees referred to in that law, and that it is a part of the official duty of such an officer to execute arrest warrants issued by a Judge or Magistrate of this Court.]

Thus, to establish the offense of forcibly assaulting or resisting a Federal officer, in the performance of his official duties, using a deadly or dangerous weapon as charged in the indictment, there are four essential elements which must be proved beyond a reasonable doubt:

> *First*: That the defendant forcibly assaulted the person described in the indictment;
>
> *Second*: That the person assaulted was a Federal officer, as described above, then en-

gaged in the performance of his official duty, as charged;

Third: That the Defendant did such acts willfully; and

Fourth: That in doing such acts the Defendant used a deadly or dangerous weapon.

It is not necessary to show that the Defendant knew the person being forcibly assaulted was, at that time, a Federal officer carrying out an official duty so long as it is established beyond a reasonable doubt that the victim was, in fact, a Federal officer acting in the course of his duty and that the Defendant willfully committed a forcible assault upon him.

The term "forcible assault" means any willful attempt or threat to inflict injury upon someone else, when coupled with an apparent present ability to do so, and includes any intentional display of force that would give a reasonable person cause to expect immediate bodily harm even though the threat or attempt is not actually carried out and the victim is not actually injured.

The term "deadly or dangerous weapon" includes any object capable of being readily used by one person to inflict severe bodily injury upon another person; and for such a weapon to have been "used," it must be proved that the Defendant not only possessed the weapon but that he intentionally displayed it in some manner while carrying out the forcible assault.

2

DEPRIVATIONS OF CIVIL RIGHTS

(18 U.S.C. § 242)

Title 18, United States Code, Section 242, provides in part that:

> "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States [shall be guilty of an offense against the United States.]"

The statute just read to you is one of the Civil Rights Acts enacted by the Congress under the Fourteenth Amendment to the Constitution of the United States. The Fourteenth Amendment provides that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In order to establish the offense of criminal deprivation of a person's civil rights under color of state law, there are three essential elements which the Government must prove beyond a reasonable doubt:

> *First*: That the Defendant committed the act of
> as charged in the indictment;

> *Second*: That in so doing the Defendant acted or purported to act under color of state law; and

Third: That in so doing the Defendant willfully exceeded and misused or abused his authority under state law.

The phrase "under color of state law" covers not only acts done by an official under color of any State law, as such, but also acts done by an official under color of any ordinance of any county or municipality of the State, as well as acts done under color of any regulation issued by any State or County or Municipal official, and even acts done by an official under color of some State or local custom.

To act "under color of state law" means to act beyond the bounds of lawful authority, but in such a manner that the unlawful acts were done while the official was purporting to act in the performance of his official duties. In other words, the unlawful acts must consist of an abuse or misuse of power which is possessed by the official only because he is an official.

A Defendant may be found guilty of the charges contained in the indictment, however, even though he is not an official or employee of the State, or of any county, city, or other governmental unit, if you find beyond a reasonable doubt that the essential elements of the offense charged have been established, as defined in these instructions, and that the Defendant was a willful participant with the state or its agents in the doing of such acts.

To be deprived of liberty "without due process of law" means to be deprived of liberty without authority of the law.

Before the jury can determine whether or not the alleged victim was deprived of any of his liberty under the Federal Constitution "without due process of law" as charged in the indictment, the jury must first determine from the evidence in the case whether the Defendant did any of the acts charged in the indictment. If you find that he did, you must next determine whether the Defend-

ant acted within or without the bounds of his lawful authority.

If you find that the Defendant acted within the limits of his lawful authority under State law, then the Defendant did not deprive the alleged victim of any liberty "without due process of law."

On the other hand, if the jury should find that the Defendant acted beyond the limits of his lawful authority under State law, then the jury may further find that the Defendant did deprive the alleged victim of liberty "without due process of law." And if the jury should so find, you must then proceed to determine whether, in so doing, the Defendant acted willfully, as charged.

3

CONSPIRACY

A. Regular Charge

(18 U.S.C. § 371)

Section 371 of Title 18, United States Code, provides that:

> "If two or more persons conspire . . . to commit any offense against the United States . . . , and one or more of such persons do any act to effect the object of the conspiracy, each [is guilty of an offense against the United States.] "

So, under this law a "conspiracy" is a combination or agreement of two or more persons to join together to attempt to accomplish some unlawful purpose. It is a kind of "partnership in criminal purposes" in which each member becomes the agent of every other member. The gist or essence of the offense is a combination or mutual agreement by two or more persons to disobey, or disregard, the law.

The evidence in the case need *not* show that the alleged members of the conspiracy entered into any express or formal agreement; *or* that they directly stated between themselves the details of the scheme and its object or purpose, *or* the precise means by which the object or purpose was to be accomplished. Similarly, the evidence in the case need *not* establish that *all* of the means or methods set forth in the indictment were in fact agreed upon to carry out the alleged conspiracy, *or* that all of the means or methods which *were* agreed upon were actually used or put into operation. Neither must it be proved that *all* of the persons charged to have been members of the conspiracy were such, *nor* that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

What the evidence in the case *must* show beyond a reasonable doubt is:

(1) That two or more persons in some way or manner, positively or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment;

(2) That the Defendant willfully became a member of such conspiracy;

(3) That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the means or methods (or "overt acts") described in the indictment; and

(4) That such "overt act" was knowingly committed at or about the time alleged in an effort to effect or accomplish some object or purpose of the conspiracy.

An "overt act" is any transaction or event, even one which may be entirely innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy.

One may become a member of a conspiracy without full knowledge of all of the details of the unlawful scheme or the names and identities of all of the other alleged conspirators. So, if a Defendant, with an understanding of the unlawful character of a plan, knowingly and willfully joins in an unlawful scheme on one occasion that is sufficient to convict him for conspiracy even though he had not participated at earlier stages in the scheme and even though he played only a minor part in the conspiracy.

Of course, mere presence at the scene of an alleged transaction or event, or mere similarity of conduct among various persons and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also, a

person who has no knowledge of a conspiracy, but who happens to act in a way which advances some object or purpose of a conspiracy, does not thereby become a conspirator.

In your consideration of the conspiracy offense as alleged in the indictment you should first determine, from all of the testimony and evidence in the case, whether or not the conspiracy existed as charged. If you conclude that a conspiracy *did* exist as alleged, you should next determine whether or not the Defendant under consideration willfully became a member of such conspiracy.

In determining whether a Defendant was a member of an alleged conspiracy, however, the jury should consider only that evidence, if any, pertaining to his own acts and statements. He is not responsible for the acts or declarations of other alleged participants until it is established beyond a reasonable doubt, *First*, that a conspiracy existed and, *Second*, from evidence of his own acts and statements, that the Defendant was one of its members.

On the other hand, if and when it *does* appear beyond a reasonable doubt from the evidence in the case that a conspiracy *did* exist as charged, *and* that the Defendant under consideration *was* one of its members, *then* the statements and acts knowingly made and done during such conspiracy and in furtherance of its objects, by any other proven member of the conspiracy, may be considered by the jury as evidence against the Defendant under consideration even though he was not present to hear the statement made or see the act done.

This is true because, as stated earlier, a conspiracy is a kind of "partnership" so that under the law each member is an agent or partner of every other member, and each member is bound by or responsible for the acts and statements of every other member made in pursuance of their unlawful scheme.

B. (Alternate First Page When § 371 Not Involved)

So, under this law a "conspiracy" is a combination or agreement of two or more persons to join together to attempt to accomplish some unlawful purpose. It is a kind of "partnership in criminal purposes" in which each member becomes the agent of every other member. The gist or essence of the offense is a combination or mutual agreement by two or more persons to disobey, or disregard, the law.

The evidence in the case need *not* show that the alleged members of the conspiracy entered into any express or formal agreement; *or* that they directly stated between themselves the details of the scheme and its object or purpose, *or* the precise means by which the object or purpose was to be accomplished. Similarly, the evidence in the case need not establish that all of the means or methods set forth in the indictment were in fact agreed upon to carry out the alleged conspiracy.

C. Multiple Conspiracies

You are further instructed, with regard to the alleged conspiracy offense, that proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges. What you must do is determine whether the single conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit the Defendants as to that charge. However, if you are satisfied that such a conspiracy existed, you must determine who were the members of that conspiracy.

If you find that a particular Defendant is a member of another conspiracy, not the one charged in the indictment, then you must acquit that Defendant. In other words, to find a Defendant guilty you must find that he was a member of the conspiracy charged in the indictment and not some other, separate conspiracy.

4

COUNTERFEITING

(18 U.S.C. § 471)

Title 18, United States Code, Section 471, provides as follows:

> "Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States [shall be guilty of an offense against the United States]."

There are two essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by this law:

> *First*: That the Defendant made counterfeit Federal Reserve Notes, as charged; and
>
> *Second*: That the Defendant did so willfully with intent to defraud.

To act with "intent to defraud" means to act with the specific intent to deceive or cheat, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self. It is not necessary, however, to prove that the United States or anyone else was in fact defrauded so long as it is established that the accused acted "with intent to defraud."

5

COUNTERFEITING

A. (Possession)

(18 U.S.C. § 472)

Title 18, United States Code, Section 472, provides that:

> "Whoever, with intent to defraud, . . . keeps in possession or conceals any falsely made [or] counterfeited obligation of the United States [shall be guilty of an offense against the United States.]"

So, in order to establish the offense proscribed by that statute the Government must prove beyond a reasonable doubt:

> *First*: That the Defendant possessed counterfeit Federal Reserve Notes as charged;
>
> *Second*: That the Defendant knew at the time that the notes were counterfeit; and
>
> *Third*: That the Defendant possessed the notes willfully and with intent to defraud.

To act "with intent to defraud" means to act with the specific intent to deceive or cheat, ordinarily for the purpose of causing some financial loss to another, or bringing about some financial gain to one's self. It is not necessary, however, to prove that the United States or anyone else was in fact defrauded so long as it is established that the accused acted "with intent to defraud."

B. (Uttering)

(18 U.S.C. § 472)

Title 18, United States Code, Section 472, provides that:

> "Whoever, with intent to defraud, passes [or] utters . . . any falsely made [or] counterfeited obligation of the United States [shall be guilty of an offense against the United States.]"

So, in order to establish the offense proscribed by that statute, the Government must prove beyond a reasonable doubt:

> *First*: That the Defendant passed or uttered a counterfeit Federal Reserve Note as charged;
>
> *Second*: That the Defendant knew at the time that the note was counterfeit; and
>
> *Third*: That the Defendant passed the note willfully and with intent to defraud.

To act "with intent to defraud" means to act with the specific intent to deceive or cheat, ordinarily for the purpose of causing some financial loss to another, or bringing about some financial gain to one's self. It is not necessary, however, to prove that the United States or anyone else was in fact defrauded so long as it is established that the accused acted "with intent to defraud."

6

FORGERY

A. (Endorsement of Government Check)

(18 U.S.C. § 495)
(First Paragraph)

Title 18, United States Code, Section 495, provides that:

> "Whoever falsely makes, alters, forges, or counterfeits any . . . writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money [shall be guilty of an offense against the United States]."

The term "any writing" as used in that law includes a check drawn on the Treasurer of the United States.

The term "forges," as used in that law, includes the writing of a payee's endorsement or signature on a check without the payee's permission or authority, and doing so with intent to defraud.

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self.

Thus, in order to establish the offense of forgery as alleged in the indictment, there are two essential elements which must be proved beyond a reasonable doubt:

> *First*: The act of forging the payee's endorsement on the United States Treasury check as charged;
>
> *Second*: Doing such act willfully and with intent to defraud, that is, to obtain, or to enable

some other person to obtain any sum of money directly or indirectly from the United States.

Since the gist of the offense is to willfully forge someone's endorsement with intent to defraud, it is not necessary to show that the Government was in fact defrauded or that anyone actually obtained money from the United States as a result of the alleged forgery.

B. (Uttering a Forged Government Check)

(18 U.S.C. § 495)
(Second Paragraph)

Title 18, United States Code, Section 495, provides that:

> "Whoever utters or publishes as true any . . . false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged or counterfeited [shall be guilty of an offense against the United States]."

The term "writing" as used in that law includes a check drawn on the Treasurer of the United States.

The term "forged" as used in that law includes the writing or signing of a payee's endorsement on a check without the payee's permission or authority.

To "utter or publish as true," as used in that law, means to exhibit and use or to attempt to use some writing, such as an attempt to cash a check or otherwise place it in circulation, and in so doing to state or imply, directly or indirectly, that the writing is genuine.

To act with "intent to defraud," as used in that law, means to act knowingly and with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self.

Thus, there are three essential elements which must be proved beyond a reasonable doubt in order to establish the offense of uttering a forged check as charged in the indictment:

> *First*: The act of uttering or attempting to circulate as true and genuine the United States Treasury check described in the indictment;

Second: Doing such act with knowledge that the payee's endorsement on such check was a forgery; and

Third: Doing such act willfully and with intent to defraud the United States.

Since the gist of the offense is willfully uttering or attempting to circulate the check as genuine with knowledge that the endorsement is forged and with intent to defraud, it is not necessary to show that the Government was in fact defrauded or that anyone actually obtained money from the United States as a result of the alleged uttering.

7

SMUGGLING

(18 U.S.C. § 545)
(First Paragraph)

Title 18, United States Code, Section 545, provides in part that:

> "Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced [shall be guilty of an offense against the United States]."

There are three essential elements which must be proved beyond a reasonable doubt in order to establish the offense of smuggling as charged in the indictment:

First: That the Defendant smuggled or clandestinely introduced merchandise into the United States without declaring such merchandise for invoicing as required under the customs laws and regulations;

Second: That the Defendant knew that the merchandise was of a type that should have been invoiced; and

Third: That the Defendant acted willfully with intent to defraud the United States.

The words "smuggle" and "clandestinely introduce" mean the same thing, that is, to bring something into the United States secretly or by fraud.

The phrase "merchandise which should have been invoiced" refers to the customs laws and regulations, and means any goods or articles required to be lawfully declared and disclosed to Customs officials upon entry into the United States whether or not they are subject to payment of a duty.

To act "with intent to defraud the United States" means to act with the specific intent to deceive or cheat the Government; but it is not necessary that the Government was in fact deceived or defrauded.

8

THEFT OF GOVERNMENT MONEY OR PROPERTY

(18 U.S.C. § 641)
(First Paragraph)

Title 18, United States Code, Section 641, provides in part that:

> "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another . . . any . . . money or thing of value of the United States [having a value in excess of the sum of $100] [shall be guilty of an offense against the United States]."

There are three essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by this law:

> *First*: That the money or property described in the indictment belonged to the United States and had a value in excess of $100 at the time alleged;
>
> *Second*: That the Defendant embezzled, stole or converted such money or property to his own use or to the use of another; and
>
> *Third*: That the Defendant did so knowingly and willfully with intent to deprive the owner of the use or benefit of the money or property so taken.

The word "value" means the face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

So, while it must be proved that the Government owned the money or property involved, that it had a value in excess of $100, and that the Defendant knowingly and

willfully embezzled, stole or converted it, it is not necessary to prove the Defendant knew that the Government owned the property at the time of the wrongful taking.

To "embezzle" means the wrongful or willful taking of money or property of someone else after the money or property has lawfully come within the possession or control of the person taking it.

To "steal" or "convert" means the wrongful or willful taking of money or property belonging to someone else with intent to deprive the owner of its use or benefit either temporarily or permanently. No particular type of movement or carrying away is required to constitute a "taking," as that word is used in these instructions.

Any appreciable change of the location of the property with the requisite willful intent constitutes a stealing whether or not there is an actual removal of it from the owner's premises.

9

THEFT OR EMBEZZLEMENT BY BANK EMPLOYEE

(18 U.S.C. § 656)

Title 18, United States Code, Section 656, provides in part as follows:

> "Whoever, being an officer . . . or employee of . . . any national bank or insured bank . . . embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank . . . or intrusted to the custody or care of such bank [shall be guilty of an offense against the United States]."

There are three essential elements which must be proved beyond a reasonable doubt to establish the offense proscribed by that law:

> *First*: That the Defendant was an officer or employee of the bank described in the indictment;
>
> *Second*: That the bank was a national bank or an insured bank; and
>
> *Third*: That the Defendant, being an officer or employee, knowingly and willfully embezzled or misapplied funds or credits belonging to the bank or intrusted to its care.

A "national bank" includes any national banking association organized under the national banking law; and "insured bank" includes any bank, state or national, the deposits of which are insured by the Federal Deposit Insurance Corporation.

To "embezzle" means the wrongful or willful taking of money or property of someone else after the money or

property has lawfully come within the possession or control of the person taking it; and to "take" money or property means to knowingly and willfully deprive the owner of its use and benefit by converting it to one's own use with intent to defraud the bank. However, no particular type of moving or carrying away is required to constitute a "taking." Any appreciable change of the location of the property with the requisite willful intent constitutes a taking whether or not there is an actual removal of it from the owner's premises.

To "misapply" a bank's money or property means a willful conversion or taking by a bank employee of such money or property to his own use and benefit, or the use and benefit of another, whether or not such money or property has been intrusted to his care, and with intent to defraud the bank.

To act with "intent to defraud" means to act with intent to deceive or cheat, ordinarily for the purpose of causing a financial loss to someone else or bringing about a financial gain to one's self.

10

THEFT FROM INTERSTATE SHIPMENT

(18 U.S.C. § 659)
(First Paragraph)

(Note: May require Lesser Included Offense Instruction. See Special Instructions.)

Title 18, United States Code, Section 659, provides in part that:

> "Whoever embezzles, steals, or unlawfully takes [or] carries away . . . from any . . . railroad car . . . motor truck, or other vehicle, . . . with intent to convert to his own use any goods or chattels [having a value in excess of $100, and] moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express or other property [shall be guilty of an offense against the United States.]"

There are three essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by this law:

First: That the Defendant knowingly and willfully embezzled or stole the property described in the indictment, as charged;

Second: That such property then had a value in excess of $100; and

Third: That such property was then moving as, or was a part of, an interstate or foreign shipment of freight or express.

The word "value" means the face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

To "embezzle" means the wrongful or willful taking of the goods or property of someone else after such property has lawfully come within the possession or control of the person taking it.

To "steal" or "unlawfully take" means the wrongful or willful taking of goods or property, belonging to someone else, with intent to deprive the owner of the use and benefit of such property and to convert it to one's own use or the use of another.

An "interstate or foreign shipment" means goods or property which is moving as a part of interstate or foreign commerce. Interstate commerce includes the movement of transportation of goods from one state into another state; and foreign commerce includes the movement or transportation of goods from the United States to any foreign country, or from a foreign country into the United States.

The interstate or foreign character of a shipment begins when the property is first identified and set aside for the shipment and comes into the possession of those who commence its movement in the course of its interstate or foreign transportation; and the interstate or foreign character of the shipment continues until the shipment arrives at its destination and is there delivered.

Section 659 of Title 18, United States Code, further provides that:

> "To establish the interstate or foreign commerce character of any shipment . . . the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made."

"Prima facie evidence" means sufficient evidence, unless outweighed by other evidence in the case. In other words, waybills, or bills of lading, or other shipping documents such as invoices, if proved, are sufficient to show

the interstate or foreign commerce character of the shipment, in the absence of evidence in the case which leads the jury to a different or contrary conclusion.

So, while the interstate or foreign character of the shipment must be proved as an essential element of the offense, it is not necessary to show that the Defendant actually knew that the goods constituted a part of such a shipment at the time of the alleged embezzlement or stealing.

11

ESCAPE

(18 U.S.C. § 751(a))

Title 18, United States Code, Section 751(a) provides in part that:

> "Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate, or from the custody of any officer or employee of the United States pursuant to lawful arrest, [shall be guilty of an offense against the United States]."

There are two essential elements which must be proved beyond a reasonable doubt in order to establish the offense of escape:

> *First*: That the Defendant willfully escaped from custody, as charged; and
>
> *Second*: That at the time of the escape the Defendant was in the custody of a Federal officer pursuant to a lawful arrest, or was in custody under judicial process issued by a Federal Judge or Magistrate.

To "escape" means to flee or depart from custody, knowingly and willfully, with intent to avoid further confinement.

"Custody" means, simply, the detention of an individual's person by virtue of lawful process or authority.

12
INSTIGATING OR ASSISTING ESCAPE
(18 U.S.C. § 752(a))

Title 18, United States Code, Section 752(a), provides in part as follows:

> "Whoever rescues or attempts to rescue or instigates, aids or assists the escape, or attempt to escape, of any person arrested upon a warrant or other process issued under any law of the United States, or committed to the custody of the Attorney General or to any institution or facility by his direction [shall be guilty of an offense against the United States]."

There are two essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by this law:

> *First*: That the person named in the indictment was in the custody of the Attorney General or some other Federal officer under judicial process; and
>
> *Second*: That the Defendant knowingly and willfully rescued that person, or attempted to rescue that person, or instigated, aided or assisted the escape or attempt to escape of that person from such custody.

"Custody" means, simply, the detention of an individual's person by virtue of lawful process or authority.

To "escape" means to flee or depart from custody, knowingly and willfully, with intent to avoid further confinement.

To "rescue" means to do something, knowingly and willfully, for the purpose of freeing someone from custody, or to aid and assist someone in escaping from custody.

13

THREATS AGAINST THE PRESIDENT

(18 U.S.C. § 871)

Title 18, United States Code, Section 871, provides in part that:

> "Whoever knowingly and willfully deposits for conveyance in the mail . . . any letter . . . or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States . . . or knowingly and willfully otherwise makes any such threat against the President [shall be guilty of an offense against the United States]."

There are three essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by this law:

> *First*: That the Defendant uttered the words alleged to constitute the threat against the President as charged in the indictment;
>
> *Second*: That the Defendant understood and meant the words used as a true threat; and
>
> *Third*: That the Defendant uttered the words knowingly and willfully.

A "threat" is a statement expressing an intention to kill or injure the President; and a "true threat" means a serious threat as distinguished from words uttered as mere political argument, idle talk or jest.

The essence of the offense is the knowing and willful making of a true threat. So, if it is proved beyond a reasonable doubt that the Defendant knowingly made a true threat against the President, willfully intending that

it be understood by others as a serious threat, then the offense is complete; it is not necessary to prove that the Defendant actually intended to carry out the threat.

14

MAILING THREATENING COMMUNICATIONS

(18 U.S.C. § 876)
(Second Paragraph)

Title 18, United States Code, Section 876, provides in part as follows:

> "Whoever, with intent to extort from any person any money or other thing of value, [deposits in any post office or authorized depository for mail matter, or causes to be delivered by the Postal Service], any communication containing any threat to kidnap any person or any threat to injure the person of the addressee or of another [shall be guilty of an offense against the United States]."

There are three essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by that law:

> *First*: That the Defendant knowingly deposited or caused to be deposited in the mail, for delivery by the Postal Service, a threatening communication;
>
> *Second*: That the nature of the threat was to kidnap or injure the person of someone; and
>
> *Third*: That the Defendant made the threat willfully and with intent to extort money or other thing of value.

A "threat," under this law, is a statement expressing an intention to kidnap someone (that is, to steal and carry away someone's person), or to inflict bodily injury upon someone; and it means a real or serious threat as distinguished from idle talk or jest.

To "extort" means to induce someone else to pay money or something of value by willfully threatening a kidnaping or injury if such payment is not made.

So, the essence of the offense is the knowing conveyance through the mail of a threat to kidnap or injure the person of someone, willfully made with intent to extort money or other thing of value; and it is not necessary to prove that any money or other thing of value was actually paid *or* that the accused actually intended to carry out the threat made.

15
FALSE PERSONATION AS A CITIZEN
(18 U.S.C. § 911)

Title 18, United States Code, Section 911, provides as follows:

> "Whoever falsely and willfully represents himself to be a citizen of the United States [shall be guilty of an offense against the United States]."

There are three essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by this law:

> *First*: That the Defendant was an alien at the time alleged in the indictment;
>
> *Second*: That the Defendant falsely represented himself to be a citizen of the United States, as charged; and
>
> *Third*: That the Defendant made such false representation willfully.

American citizenship is acquired by birth within the United States, or through judicial proceedings known as "naturalization." One is also a citizen, even though born outside the United States, if both of his parents were citizens and one of them had a residence in the United States prior to the birth.

An "alien" is any person who is not a citizen of the United States.

The Immigration and Naturalization Service is the agency having jurisdiction, supervision and control over the entry of aliens into the United States, and officers of that agency have the right to administer oaths, and to take and consider evidence, pertaining to the right or privilege of any alien to enter, re-enter, pass through or remain in the United States.

16

DEALING IN FIREARMS WITHOUT LICENSE

(18 U.S.C. § 922(a)(1))

(Note: Willfulness not an essential element.)

Title 18, United States Code, Section 922(a)(1) provides in part as follows:

> "(a) It shall be unlawful—
>
> (1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of . . . dealing in firearms or ammunition . . ."

Title 18, United States Code, Section 923, establishes a licensing procedure under which anyone desiring to engage in business as a firearms or ammunition importer, manufacturer or dealer must apply for and obtain a Federal license to do so.

Thus, there are two essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by this law:

> *First*: That the Defendant engaged in the business of dealing in firearms or ammunition as charged;
>
> *Second*: That the Defendant engaged in such business without a license issued under Federal law.

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

For a person to "engage in the business of dealing in firearms," as the phrase is used in the statute and in these instructions, it is not necessary that buying and

CONTINUED

1 OF 3

selling firearms constitutes such person's primary source of income; nor must it be shown that such person has made any prescribed number of sales; *or* that he has made a prescribed dollar volume of sales; *or* that he has actually earned a profit.

What the Government must prove beyond a reasonable doubt, is that the accused engaged in a regular course of conduct or series of transactions involving time, attention and labor devoted to the sale of firearms for profit, rather than casual, isolated or sporadic transactions.

The essence of the offense is to engage in business as a firearms dealer without having the required Federal license, and the offense is complete when that occurs; it is not necessary to prove that the Defendant knew that the license was required.

17

FALSE STATEMENT TO FIREARMS DEALER

(18 U.S.C. § 922(a)(6))

(Note: Willfulness not an essential element.)

Title 18, United States Code, Section 922(a)(6), provides in part as follows:

> "(a) It shall be unlawful—
>
> (6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer . . . manufacturer . . . dealer . . . or . . . collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition . . ."

There are three essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by this law:

> *First*: That the Defendant acquired or attempted to acquire a firearm from a Federally licensed firearms importer, manufacturer, dealer or collector, as charged;
>
> *Second*: That in so doing the Defendant knowingly made a false or fictitious statement, orally or in writing, or knowingly furnished or exhibited a false or fictitious identification, likely to deceive; and

Third: That the subject matter of the false statement or identification was material to the lawfulness of the sale.

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

A statement or identification is "false or fictitious" if it was untrue when made and was then known to be untrue by the person making it.

A false statement or identification is "likely to deceive" if the nature of the statement or identification, considering all of the surrounding circumstances at the time it is made, is such that a reasonable person of ordinary prudence would have been actually deceived or misled.

The "materiality" of the matter involved in the alleged false statement or identification is not a matter with which you are concerned, but rather is a question for the Court to decide. You are instructed that the alleged false statement or identification described in the indictment did relate to a material fact.

18

FALSE STATEMENT TO FEDERAL AGENCY

(18 U.S.C. § 1001)

Title 18, United States Code, Section 1001, provides in part as follows:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry [shall be guilty of an offense against the United States.]"

There are three essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by this law:

> *First*: That the Defendant knowingly made a false statement, or made or used a false document, in relation to a matter within the jurisdiction of a department or agency of the United States, as charged;
>
> *Second*: That the false statement or false document related to a material matter; and
>
> *Third*: That the Defendant acted willfully and with knowledge of the falsity.

A statement or document is "false" when made or used if it is untrue and is then known to be untrue by the person making or using it. It is not necessary to show, however, that the Government agency was in fact deceived or misled.

[The Immigration and Naturalization Service, Department of Justice, is an "agency of the United States," and the filing of documents with that agency to effect a change in the immigration status of an alien is a matter within the jurisdiction of that agency.]

The making of a False statement or use of a false document is not an offense unless the falsity relates to a "material" fact. The issue of materiality, however, is not submitted to you for your decision but is a matter to be determined by the Court. You are instructed that the alleged facts, charged in the indictment as having been falsified, would be material facts.

19

FALSE ENTRY IN BANK RECORDS

(18 U.S.C. § 1005)
(Third Paragraph)

Title 18, United States Code, Section 1005, provides in part as follows:

> "Whoever makes any false entry in any book, report, or statement of [an insured bank] with intent to injure or defraud such bank . . . or to deceive any officer of such bank, or the Comptroller of the currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank [shall be guilty of an offense against the United States]."

There are two essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by this law:

> *First*: That the Defendant knowingly made a false entry concerning a material fact in a book or record of an insured bank, as charged;
>
> *Second*: That the Defendant made such entry willfully, with knowledge of its falsity and with the intent of defrauding or deceiving the person named in the indictment.

An "insured bank" means any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

An entry in a book or record is "false" when made if it relates to a material fact and it is untrue, and is then known to be untrue by the person making it. An entry is "material" if it has the capacity to defraud or deceive.

The essence of the offense is the willful making of a materially false entry with intent to defraud, and it is not necessary to prove that anyone was in fact deceived or defrauded.

To act "with intent to defraud" means to act willfully with intent to deceive or cheat, ordinarily for the purpose of causing financial loss to another or bringing about financial gain to one's self.

20

FALSE STATEMENT TO A BANK

(18 U.S.C. § 1014)

Title 18, United States Code, Section 1014, provides in part as follows:

> "Whoever knowingly makes any false statement or report, or willfully over-values any land, property or security, for the purpose of influencing in any way the action of . . . a Federal Savings and Loan Association [or] any bank the deposits of which are insured by the Federal Deposit Insurance Corporation . . . upon any application, advance . . . commitment, or loan, or any change or extension of any of the same [shall be guilty of an offense against the United States]."

There are two essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by this law:

> *First*: That the Defendant knowingly made a false statement or report concerning a material fact to a Federal Savings and Loan Association or insured bank, as charged;
>
> *Second*: That the Defendant made the false statement or report willfully and with intent to influence the action of the Federal Savings and Loan Association or insured bank upon an application, advance, commitment or loan, or any change or extension thereof.

An "insured bank" means any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

A statement or report is "false" when made if it relates to a material fact and is untrue, and is then known to be untrue by the person making it.

A fact is "material" if it is relevant to the decision to be made by the officers or employees of the institution involved and has the capacity of influencing them in making that decision.

It is not necessary, however, to prove that the institution involved was, in fact, influenced or misled. The gist of the offense is an attempt to influence such an institution by willfully making a false statement or report concerning a material fact.

21

TRANSMISSION OF WAGERING INFORMATION

(18 U.S.C. § 1084)

Title 18, United States Code, Section 1084, provides in part as follows:

> "Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest [shall be guilty of an offense against the United States]."

There are three essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by this law:

> *First*: That the Defendant was engaged in the business of betting or wagering, as charged;
>
> *Second*: That, as a part of such business, he knowingly used a wire communication facility to transmit in interstate or foreign commerce bets or wagers, or information assisting in the placing of bets or wagers, on any sporting event or contest; and
>
> *Third*: That he did so willfully.

To be "engaged in the business of betting or wagering" it is not necessary that making bets or wagers or dealing in wagering information constitutes a person's primary source of income; nor must it be shown that such person has made any prescribed number of bets; or that he has made a prescribed dollar volume of bets; or that he has actually earned a profit. What must be shown beyond a reasonable doubt is that the accused engaged in a regular course of conduct or series of trans-

actions involving time, attention and labor devoted to betting or wagering for profit, rather than casual, isolated or sporadic transactions.

A "wire communication facility" would include long distance telephone facilities; and information conveyed or received by telephone from one state into another state, or between the United States and a foreign country, would constitute a transmission in interstate or foreign commerce, respectively.

22

KIDNAPPING

(18 U.S.C. § 1201(a)(1))

Title 18, United States Code, Section 1201, provides in part that:

> "Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person [and willfully transports such person in interstate or foreign commerce] [shall be guilty of an offense against the United States]."

There are three essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by this law:

> *First*: That the Defendant knowingly and willfully seized, confined, inveigled and kidnapped the person described in the indictment, as charged;
>
> *Second*: That the Defendant held such person for ransom or reward or other benefit which the Defendant intended to derive from the kidnapping; and
>
> *Third*: That such person was thereafter transported in interstate commerce while so confined, inveigled or kidnapped.

To "inveigle" a person means to lure, or entice, or lead the person astray by false representations or promises, or other deceitful means.

To "kidnap" a person means to forcibly and unlawfully hold, keep, detain and confine the person against his will. So, involuntariness or coercion in connection with the victim's detention is an essential element of the offense.

It need not be proved, however, that a kidnapping was carried out for ransom or personal monetary gain so long as it is proved that the accused acted willfully, intending to derive some benefit from his actions.

"Interstate commerce" means commerce or travel between one state and another state. A person is transported in interstate commerce whenever he moves across state lines from one state into another state.

23

MAIL FRAUD

(18 U.S.C. § 1341)

Section 1341 of Title 18, United States Code, provides in part that:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, [shall be guilty of an offense against the laws of the United States.]"

In order to establish that a Defendant is guilty of mail fraud, the Government must prove beyond a reasonable doubt that:

1. The Defendant willfully and knowingly devised a scheme or artifice to defraud, or for obtaining money or property by means of false pretenses, representations or promises, and

2. The Defendant used the United States Postal Service by mailing, or by causing to be mailed, some matter or thing for the purpose of executing the scheme to defraud.

The words "scheme" and "artifice" include any plan or course of action intended to deceive others, and to obtain, by false or fraudulent pretenses, representations, or promises, money or property from persons so deceived.

A statement or representation is "false" or "fraudulent" within the meaning of this statute if it relates to a material fact and is known to be untrue or is made with

reckless indifference as to its truth or falsity, and is made or caused to be made with intent to defraud. A statement or representation may also be "false" or "fraudulent" when it constitutes a half truth, or effectively conceals a material fact, with intent to defraud. A "material fact" is a fact that would be important to a reasonable person in deciding whether to engage or not engage in a particular transaction.

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self.

It is not necessary that the Government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme; or that the material mailed was itself false or fraudulent; or that the alleged scheme actually succeeded in defrauding anyone; or that the use of the mail was intended as the specific or exclusive means of accomplishing the alleged fraud.

What must be proved beyond a reasonable doubt is that the accused knowingly and willfully devised or intended to devise a scheme to defraud substantially the same as the one alleged in the indictment; and that the use of the U. S. mail was closely related to the scheme in that the accused either mailed something or caused it to be mailed in an attempt to execute or carry out the scheme. To "cause" the mails to be used is to do an act with knowledge that the use of the mails will follow in the ordinary course of business or where such use can reasonably be foreseen.

Each separate use of the mails in furtherance of a scheme to defraud constitutes a separate offense.

24

MAILING OBSCENE MATERIAL

(18 U.S.C. § 1461)

(Note: Should also include last five (5) pages of Instruction No. 26.)

Title 18, United States Code, Section 1461, provides in part as follows:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device or substance . . .
>
> Is declared to be nonmailable matter and shall not be conveyed in the mails [and] . . .
>
> Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared . . . to be nonmailable [shall be guilty of an offense against the United States]."

There are three essential elements which must be established beyond a reasonable doubt in order to establish the offense proscribed by this law:

> *First*: That the Defendant knowingly and willfully used the mails for the conveyance or delivery of certain articles, as charged;
>
> *Second*: That the Defendant knew at the time of such mailing the general nature of the content of the matter so mailed; and
>
> *Third*: That the matter so mailed was "obscene" as hereafter defined.

25

INTERSTATE TRANSPORTATION OF OBSCENE MATERIAL (BY COMMON CARRIER)

(18 U.S.C. § 1462)

(Note: Should also include last five (5) pages of Instruction No. 26.)

Title 18, United States Code, Section 1462, provides in part as follows:

> "Whoever . . . knowingly uses any express company or other common carrier, for carriage in interstate . . . commerce—
>
> (a) Any obscene . . . motion picture film [shall be guilty of an offense against the United States.]"

So, in order to establish the offense prohibited by that section, the Government must prove each of the following elements beyond a reasonable doubt:

First: That the defendant knowingly and willfully used an express company or common carrier to transport certain articles in interstate commerce, as charged;

Second: That the defendant knew, at the time of such transportation, the general nature of the content of the articles; and

Third: That the articles were "obscene" as hereafter defined.

An "express company or other common carrier" includes any person or corporation engaged in the business

of carting, hauling or transporting goods and commodities for members of the public for hire.

The term "interstate commerce" includes any movement of goods or articles from one state into another state.

26

INTERSTATE TRANSPORTATION OF OBSCENE MATERIAL (FOR PURPOSE OF SALE OR DISTRIBUTION)

(18 U.S.C. § 1465)

Title 18, United States Code, Section 1465, provides in part as follows:

> "Whoever knowingly transports in interstate commerce for the purpose of sale or distribution any obscene . . . picture [or] film [shall be guilty of an offense against the United States]."

In order to establish the offense prohibited by that section, the Government must prove each of the following elements beyond a reasonable doubt:

> *First*: That the defendant knowingly and willfully transported in interstate commerce certain articles, as charged;
>
> *Second*: That the defendant transported such articles for the purpose of selling or distributing them;
>
> *Third*: That the defendant knew, at the time of such transportation, the general nature of the content of the articles; and
>
> *Fourth*: That the articles were "obscene" as hereafter defined.

The term "interstate commerce" includes any movement of goods or articles from one state into another state.

To transport "for the purpose of sale or distribution" means to transport, not for personal use, but with the intent to ultimately transfer possession of the articles

involved to another person or persons, with or without any financial interest in the transaction.

The transportation of two or more copies of any publication or two or more of any article of the character described in the indictment, or a combined total of five such publications and articles, creates a presumption that such publications or articles are intended for sale or distribution, but such presumption is rebuttable.

One of the essential elements the Government must prove is the element of *scienter* or knowledge; that is, that the defendant knew the general nature of the contents of the articles which were transported in interstate commerce. The Government does not have the obligation of showing that the defendant knew that such articles were in fact legally obscene.

Therefore, if you find beyond a reasonable doubt that the defendant transported in interstate commerce the articles in question, and that he knew the general nature of the articles, that is, he knew what they actually were, and if you find beyond a reasonable doubt that the articles were in fact "obscene" within the meaning of these instructions, then you may find that the defendant had the requisite knowledge, or *scienter* as we call it in the law.

Freedom of expression is fundamental to our system, and has contributed much to the development and well being of our free society. In the exercise of the constitutional right to free expression which all of us enjoy, sex may be portrayed and the subject of sex may be discussed, freely and publicly. Material is not to be condemned merely because it contains passages or sequences that are descriptive of sexual activity. However, the constitutional right to free expression does not extend to that which is "obscene."

For something to be "obscene" it must be shown that the average person, applying contemporary community

standards and viewing the material as a whole, would find (1) that the work appeals predominantly to prurient interest; (2) that it depicts or describes sexual conduct in a patently offensive way; and (3) that it lacks serious literary, artistic, political or scientific value.

An appeal to prurient interest is an appeal to a morbid, degrading and unhealthy interest in sex, as distinguished from a mere candid interest in sex.

The first test to be applied, therefore, in determining whether given material is obscene, is whether the predominant theme or purpose of the material, when viewed as a whole and not part by part, and when considered in relation to the intended and probable recipients, is an appeal to the prurient interest of the average person of the community as a whole, or the prurient interest of members of a deviant sexual group, as the case might be.

The "predominant theme or purpose of the material, when viewed as a whole," means the main or principal thrust of the material when assessed in its entirety and on the basis of its total effect, and not on the basis of incidental themes or isolated passages or sequences.

Whether the predominant theme or purpose of the material is an appeal to the prurient interest of the "average person of the community as a whole" is a judgment which must be made in light of contemporary standards as would be applied by the average person with an average and normal attitude toward, and interest in, sex. Contemporary community standards, in turn, are set by what is accepted in the community as a whole; that is to say, by society at large or people in general. So, obscenity is not a matter of individual taste and the question is not how the material impresses an individual juror; rather, as stated before, the test is how the average person of the community as a whole would view the material.

In addition to considering the average or normal person, the prurient appeal requirement may also be as-

sessed in terms of the sexual interest of a clearly defined deviant sexual group if you find, beyond a reasonable doubt, that the material was intended to appeal to the prurient interest of such a group as, for example, homosexuals.

An appeal to prurient interest, as stated before, is an appeal to a morbid, degrading and unhealthy interest in sex as distinguished from a candid interest in sex.

The second test to be applied in determining whether given material is obscene is whether it depicts or describes, in a patently offensive way, sexual conduct such as ultimate sexual acts, normal or perverted, actual or simulated; masturbation; excretory functions; or lewd exhibition of the genitals. In making that judgment, however, you must not condemn by your own standards, if you believe them to be stricter than those generally held; and you must not excuse by your own standards, if you believe them to be more tolerant than those generally held. Rather, you must measure whether the material is patently offensive by contemporary community standards; that is, whether it so exceeds the generally accepted limits of candor as to be clearly offensive.

Contemporary community standards, as stated before, are those established by what is generally accepted in the community as a whole; that is to say, by society at large or people in general, and not by what some groups of persons may believe the community as a whole ought to accept or refuse to accept. It is a matter of common knowledge that customs change and that the community as a whole may from time to time find acceptable that which was formerly unacceptable.

The third test to be applied in determining whether given material is obscene is whether the material, taken as a whole, lacks serious literary, artistic, political or scientific value. An item may have serious value in one or more of these areas even though it portrays explicit

sexual conduct, and it is for you to say whether the material in this case has such value.

All three of these tests must be met before the material in question can be found to be obscene. If any one of them is not met the material would not be obscene within the meaning of the law.

27

OBSTRUCTION OF JUSTICE

A. (Corruptly Influencing a Witness)

(18 U.S.C. § 1503)

(Note: "Corruptly" not willfulness is essential element.)

Title 18, United States Code, Section 1503, provides in part as follows:

> "Whoever corruptly . . . endeavors to influence, intimidate or impede any witness in any court of the United States . . . on account of his attending or having attended such court . . . or on account of his testifying . . . therein [shall be guilty of an offense against the United States]."

There are three essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by this law:

> *First*: That the person described in the indictment was a witness, or scheduled to be a witness in this court as alleged;
>
> *Second*: That the Defendant endeavored to influence, intimidate or impede such person on account of his attending or having attended the court as a witness; and
>
> *Third*: That the Defendant's acts were done knowingly and corruptly.

To endeavor to "influence, intimidate or impede" a witness means to take some action for the purpose of swaying or changing or preventing the testimony of the witness. It is not necessary for the Government to prove, however, that the testimony of the witness was in fact swayed or changed or prevented in any way.

To act "corruptly" means to act knowingly and dishonestly with the specific intent to subvert or undermine the integrity of the court proceeding in which the witness appeared or was scheduled to appear.

B. (Threatening a Witness)

(18 U.S.C. § 1503)

Title 18, United States Code, Section 1503, provides in part as follows:

> "Whoever . . . by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States . . . on account of his attending or having attended such court . . . or on account of his testifying . . . therein [shall be guilty of an offense against the United States]."

There are three essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by this law:

> *First*: That the person described in the indictment was a witness, or scheduled to be a witness in this court, as alleged;
>
> *Second*: That the Defendant knowingly endeavored to influence, intimidate or impede such witness by threats or force, or by threatening letter or communication; and
>
> *Third*: That the Defendant did so willfully.

To endeavor to "influence, intimidate or impede" a witness means to take action by means of threat or force for the purpose of swaying or changing or preventing the testimony of the witness. It is not necessary for the Government to prove, however, that the testimony of the witness was in fact swayed or changed or prevented.

28

USE OF FALSE VISA

(18 U.S.C. § 1546)
(First Paragraph)

Title 18, United States Code, Section 1546, provides in part that:

> "Whoever knowingly . . . utters, uses [or] attempts to use . . . any . . . visa, permit, or document [required for entry into the United States] knowing it to be forged, counterfeited, altered or falsely made, or to have been procured by means of any false claim or statement, [shall be guilty of an offense against the United States]."

There are two essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by this law:

> *First*: That the Defendant uttered or used, or attempted to use, a visa, permit or document required for entry into the United States as charged; and
>
> *Second*: That in so doing the Defendant acted willfully and with knowledge that such visa, permit or document had been forged, counterfeited, altered or falsely made, or had been procured by means of a false claim or statement.

To "utter or use" a document simply means to exhibit or display it to someone else.

29

INVOLUNTARY SERVITUDE AND PEONAGE

(18 U.S.C. §§ 1581 and 1584)

Title 18, United States Code, Section 1584, the involuntary servitude statute, provides in pertinent part as follows:

> Whoever knowingly and willfully holds to involuntary servitude . . . any other person for any term [shall be guilty of an offense against the United States].

Thus, in order to establish the offense of holding another to involuntary servitude as charged in the indictment, the Government must prove each of the following elements beyond a reasonable doubt.

> *First*: The existence of involuntary servitude.
>
> *Second*: A holding of the named individual to such involuntary servitude by the defendant.
>
> *Third*: Such holding must have been accomplished by the defendant knowingly and willfully.
>
> *Fourth*: Such holding must have been for a term.

"Involuntary servitude" means a condition of compulsory service or labor performed by one person, against his will, for the benefit of another due to force, threats, intimidation or other similar means of coercion and compulsion directed against him.

In considering whether service or labor was performed by someone against his will or involuntarily, it makes no difference that the person may have initially agreed, voluntarily, to render the service or perform the work. If such a person later desires to withdraw but is

then forced to remain and perform work against his will, his service becomes involuntary. Similarly, whether a person is paid a salary or wage is not determinative of the question as to whether that person has been held in involuntary servitude. In other words, if a person is forced to labor against his will, his service is involuntary even though he is paid for his work.

It is necessary, however, to constitute the offense of holding another to involuntary servitude, that the "master" knowingly and willfully take action, by way of force, threats, intimidation or other form of coercion, causing the "servant" to reasonably believe that he has no way to avoid continued service—that he is confronted by the existence of a superior and overpowering authority, constantly present and threatening to the extent that his will is completely subjugated.

In determining whether a particular person reasonably believed that he had no way to avoid continued service, you should consider the method or form of compulsion exercised against him, if any, in relation to his particular station in life including his physical and mental condition, his age, education, training, experience, and intelligence; and also any reasonable opportunities he may have had to escape. Servitude cannot be "involuntary" under the law unless the means of compulsion used was sufficient in kind and degree to completely subjugate the will of an ordinary person having the same general station in life as that of the "servant," causing him to believe that he had no reasonable means of escape and no choice except to remain in the "master's" service.

It must also be shown that a person held to involuntary servitude was so held for a "term." It is not necessary, however, that any specific period of time be proved so long as the "term" of the involuntary service was not wholly insubstantial or insignificant.

Title 18, United States Code, Section 1581(a), the peonage statute cited in the indictment, provides in pertinent part as follows:

> Whoever [knowingly and willfully] holds any person to a condition of peonage [shall be guilty of an offense against the United States].

The elements which must be proved beyond a reasonable doubt in order to establish the offense of peonage under this statute include each and all of the four elements constituting involuntary servitude as previously stated and explained in these instructions, *plus* a fifth element; namely, that the involuntary servitude was compelled by the defendant in order to satisfy a real or imagined debt regardless of amount.

30

FALSE DECLARATION (BEFORE GRAND JURY)

Title 18, United States Code, Section 1623, provides in pertinent part as follows:

> "Whoever under oath in any proceeding before . . . any grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration [shall be guilty of an offense against the United States.]"

So, to establish the offense proscribed by that statute, the Government must prove each of the following elements beyond a reasonable doubt:

> *First*: That the testimony was given, or the described record or document was used, while the Defendant was under oath before the Grand Jury of this Court as charged;
>
> *Second*: That such testimony, or such record or document, was false in one or more of the respects charged as to some material matter in such Grand Jury proceedings; and
>
> *Third*: That such false testimony, or record or document, was knowingly and willfully given or used by the Defendant as charged.

A declaration is "false" if it was untrue when made and was then known to be untrue by the person making it. A declaration contained within a document is false if it was untrue when used and was then known to be untrue by the person using it.

The "materiality" of the matter involved in the alleged false testimony, or false record or document, is not a matter with which you are concerned, but rather is a question for the Court to decide. You are instructed that the questions asked the Defendant, as alleged, and the record or document as described in the indictment, constituted material matters in the Grand Jury proceedings referred to in the indictment.

In reviewing the testimony which is alleged to have been false, you should consider such testimony in the context of the sequence of questions asked and answers given, and the words used should be given their common and ordinary meaning unless the context clearly shows that a different meaning was mutually understood by the questioner and the witness.

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

31

OBSTRUCTION OF CORRESPONDENCE

(18 U.S.C. § 1702)

Title 18, United States Code, Section 1702, provides in part that:

> "Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter . . . before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence [shall be guilty of an offense against the United States]."

There are two essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by this law:

> *First*: That the Defendant knowingly took mail out of a post office, or an authorized depository for mail matter, before delivery to the person to whom it was directed, as charged; and
>
> *Second*: That in so doing the Defendant acted willfully with design to obstruct the correspondence.

A private mail box or mail receptacle is an "authorized depository for mail matter," and mail has not been delivered until it has been removed from such a depository by the addressee or someone acting in his behalf.

To "take" mail with "design to obstruct the correspondence" means to seize or steal such mail and convert it to one's own use or the use of another, thereby preventing or obstructing its delivery to the person to whom it was directed.

32

POSSESSION OF STOLEN MAIL

(18 U.S.C. § 1708)
(Third Paragraph)

Title 18, United States Code, Section 1708, provides in part that:

> "Whoever . . . unlawfully has in his possession, any letter . . . or mail, or any article or thing contained therein, which has been . . . stolen, taken, embezzled, or abstracted [from or out of any mail receptacle or other authorized depository for mail matter], knowing the same to have been stolen, taken, embezzled or abstracted [shall be guilty of an offense against the United States]."

There are three essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by this law:

> *First*: That the letter or mail matter described in the indictment was stolen from an authorized depository for mail matter;
>
> *Second*: That the Defendant thereafter had such mail matter in his possession, as charged; and
>
> *Third*: That the Defendant possessed such mail matter willfully and with knowledge that it had been stolen from the mail.

A private mail box or mail receptacle is an "authorized depository for mail matter."

Mail matter is "stolen" when it has been willfully taken from an authorized depository for mail matter with intent to deprive the owner of its use and benefit, and to convert it to one's own use or the use of another.

Since the essence of the offense is willful possession of mail matter previously stolen, it is not necessary to prove the identity of the person or persons who may have stolen such mail.

33

INTERFERENCE WITH COMMERCE BY EXTORTION (HOBBS ACT—RACKETEERING)

(18 U.S.C. § 1951(a))

Title 18, United States Code, Section 1951(a), provides in part that:

> "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce . . . by extortion [shall be guilty of an offense against the United States]."

There are three essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by this law:

> *First*: That the Defendant induced the person described in the indictment to part with property;
>
> *Second*: That the Defendant did so knowingly and willfully by means of "extortion"; and
>
> *Third*: That the extortionate transaction delayed, interrupted or adversely affected interstate commerce.

"Extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right.

The term "property" includes not only money and other tangible things of value, but also includes any intangible right considered as a source or element of income or wealth.

The term "fear" means a state of anxious concern, alarm or apprehension of harm, and it includes fear of economic loss or damage as well as fear of physical violence.

Extortion "under color of official right" is the wrongful taking by a public officer of money or property not due to him or his office, whether or not the taking was accomplished by force, threats, or use of fear. In other words, the wrongful use of otherwise valid official power may convert dutiful action into extortion. So, if a public official threatens to take or withhold official action for the wrongful purpose of inducing a victim to part with property, such a threat would constitute extortion, even though the official was already duty bound to take or withhold the action in question.

The term "wrongful" means the obtaining of property unfairly and unjustly by one having no lawful claim thereto.

While it is not necessary to prove that the Defendant specifically intended to interfere with interstate commerce, it is necessary as to this issue that the Government prove that the natural consequences of the acts alleged in the indictment would be to delay, interrupt or adversely affect "interstate commerce," which means the flow of commerce or business activities between two or more states.

You are instructed that you may find the requisite affect upon interstate commerce if you find beyond a reasonable doubt that [the banks described in the indictment were formed for the purpose of doing business both within and without the State of Florida, and actually did business outside the State of Florida.]

34

INTERSTATE TRAVEL IN AID OF RACKETEERING

(18 U.S.C. § 1952(a)(3))

Title 18, United States Code, Section 1952(a)(3) provides that:

> "Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce . . . with intent to—
>
> (3) . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on of any unlawful activity [and thereafter performs or attempts to perform any act to promote, manage, establish or carry on such unlawful activity] [shall be guilty of an offense against the United States]."

There are three essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by this law:

> *First*: That the Defendant traveled in interstate commerce on or about the time, and between the places, charged in the indictment;
>
> *Second*: That the Defendant engaged in such travel with the specific intent to promote, manage, establish or carry on an "unlawful activity," as hereafter defined; and
>
> *Third*: That the Defendant thereafter knowingly and willfully committed an act to promote, manage, establish or carry on such "unlawful activity."

The term "interstate commerce" means transportation or movement between one state and another state,

and while it must be proved that the Defendant traveled in interstate commerce with the specific intent to promote, manage, establish or carry on an "unlawful activity," it need not be proved that such purpose was the only reason or motive prompting the travel.

The term "unlawful activity" includes any "business enterprise" involving gambling offenses in violation of the laws of the state in which they are committed.

[You are instructed that under Florida law engaging "in any game at cards . . . or other game of chance . . . for money or other thing of value" is unlawful.]

To constitute a "business enterprise" it is not necessary that the alleged illegal activity be engaged in for any particular length of time, nor must it be proved that such activity constituted the primary pursuit or occupation of the accused or that it actually returned a profit. What must be proved beyond a reasonable doubt is that the Defendant engaged in a continuous course of conduct or series of transactions for profit rather than casual, sporadic or isolated activity.

The indictment charges that the Defendant traveled in interstate commerce with the intent to promote, manage, establish and carry on an unlawful activity. However, the law is worded in the disjunctive, that is, the various modes or methods of violating the statute are separated by the word "or." So, if you find beyond a reasonable doubt that any one method or mode of violating the law occurred, that is sufficient so long as you agree unanimously upon the particular mode or method involved.

35

INTERSTATE TRANSPORTATION OF WAGERING PARAPHERNALIA (BOOKMAKING)

(18 U.S.C. § 1953)

Title 18, United States Code, Section 1953, provides in part that:

> "Whoever . . . knowingly carries or sends in interstate . . . commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used . . . in bookmaking [shall be guilty of an offense against the United States]."

There are three essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by this law:

First: That the Defendant carried or sent, or caused to be sent, in interstate commerce, the items described in the indictment, as charged;

Second: That the items so carried or sent were used, or were intended to be used, in "bookmaking"; and

Third: That the Defendant acted knowingly and willfully.

"Interstate commerce" means commerce between one state and another state, and embraces all transportation between states including the mail.

"Bookmaking" refers to the business of establishing certain terms and conditions applicable to given bets or wagers, usually called a line or odds, and then accepting bets from customers on either side of the wagering proposition with a view toward making a profit not from betting itself, but from a percentage or commission collected from the customers for the privilege of placing the bets.

36

ILLEGAL GAMBLING BUSINESS

(18 U.S.C. § 1955)

Title 18, United States Code, Section 1955, provides in part as follows:

> "Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business [shall be guilty of an offense against the United States]."

An "illegal gambling business," within the meaning of this law, is defined to be a gambling business which:

> (1) Is a violation of the law of the state in which it is conducted;
>
> (2) Involves five or more persons who conduct, finance, manage, supervise, direct or own all or part of such business; and
>
> (3) Has been or remains in substantially continuous operation for a period in excess of thirty days, or has a gross revenue of $2,000 in any single day.

So, there are three essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by this law:

> *First*: That five or more persons, including the Defendant, knowingly and willfully conducted, financed, managed, supervised, directed or owned all or part of a gambling business, as charged;
>
> *Second*: That such gambling business violated the laws of the state of Florida; and
>
> *Third*: That such gambling business was in substantially continuous operation for a peri-

od of thirty days or more, or, alternatively, had a gross revenue of $2,000 or more on any one day.

"Bookmaking" is a form of gambling, and involves the business of establishing certain terms and conditions applicable to given bets or wagers, usually called a line or odds, and then accepting bets from customers on either side of the wagering proposition with a view toward making a profit not from betting itself, but from a percentage or commission collected from the bettors or customers for the privilege of placing the bets.

You are instructed that "bookmaking" is unlawful in the state of Florida.

The words "finances, manages, supervises, directs or owns" are all used in their ordinary sense and include those who finance or manage or supervise a business; but the word "conduct" is a broader term and would include anyone working in the business enterprise as a servant or employee with or without a voice in management or a share in profits. A mere bettor or customer, however, would not be participating in the "conduct" of the business.

While it must be proved, as previously stated, that five or more people conducted, financed or supervised an illegal gambling business that remained in substantially continuous operation for at least thirty days, or had a gross revenue of at least $2,000 on any single day, it need *not* be shown that five or more people have been charged with an offense; *nor* that the same five people, including the Defendant, owned, financed or conducted such gambling business throughout a thirty day period; *nor* that the Defendant even knew the names or identities of any given number of people who might have been so involved. Neither must it be proved that bets were accepted every day over a thirty day period, *nor* that such activity constituted the primary business or employment of the Defendant.

37

RACKETEER INFLUENCED CORRUPT ORGANIZATIONS ACT

(18 U.S.C. § 1962)

Count _____ of the indictment alleges that from on or about _____ and continuously thereafter up to and including the date of the filing of the indictment on _____ in the Middle District of Florida and elsewhere, the defendants _____ and other named individuals, being persons associated with an "enterprise" as defined by Title 18, United States Code, Section 1961(4), which enterprise was engaged in and the activities of which affected interstate commerce, knowingly and willfully participated in the conduct of such enterprise's affairs "through a pattern of racketeering activity" in violation of Title 18, United States Code, Sections 1961 and 1962 (c).

The term "enterprise" as defined by 18 U.S.C. § 1961(4) includes any "partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

The term "racketeering activity" as defined by 18 U.S.C. § 1961(1) includes "any act or threat involving _____ which is chargeable under State law," and any act in violation of the United States Code relating to _____.

The term "pattern" of racketeering activity as defined by 18 U.S.C. § 1961(5) requires at least two acts of "racketeering activity" within ten years of each other, one of which must have occurred after October 15, 1970.

The "pattern of racketeering activity" charged in Count _____ in this case involves allegations of _____ in violation of Florida Statutes _____ and the separate Federal offenses charged in Counts _____ respectively, of the indictment.

Under the provisions of the Florida laws just mentioned:

> [*Murder* is "the unlawful killing of a human being, when perpetrated from a premeditated design to affect the death of the person killed . . . ," and whoever "attempts to commit [murder] and in such attempt does any act toward the commission of such an offense but fails in the perpetration . . . commits the offense of criminal attempt . . . ." Florida Statutes, 782.04(1)(a) and 77.04(1).
>
> *Robbery* is "the taking of money or other property . . . from the person or custody of another by force, violence, assault or putting in fear." Florida Statute 812.13.]

So, in order to establish that the Defendants named in Count _____ of the indictment, or any of them, committed the offense charged in that Count, the Government must prove each of the following elements beyond a reasonable doubt:

> *First*: That the Defendant was associated with an "enterprise" as defined in these instructions.
>
> *Second*: That the Defendant knowingly and willfully committed, or knowingly and willfully aided and abetted the commission of at least *two* of the offenses hereafter specified.
>
> *Third*: That the two offenses allegedly committed by the Defendant occurred within ten (10) years of each other; that one of such offenses occurred after October 15, 1970; and that such offenses were connected with each other by some common scheme, plan or motive so as to constitute a pattern and not merely a series of isolated or disconnected acts.

Fourth: That through the commission of the two or more connected offenses, the Defendant conducted or participated in the conduct of the "enterprise's" affairs.

Fifth: That the "enterprise was engaged in, or that its activities affected, interstate commerce."

[With respect to the Second element defined above, insofar as defendant Diecidue is concerned, the Government must prove beyond a reasonable doubt that he committed, or knowingly and willfully aided and abetted the commission, of *both* of the following offenses (as alleged in paragraphs 2a.(1) and (2) of Count Two of the indictment): the attempted murder of Jose Manuel Garcia, in or about June 1975, utilizing a destructive device.

With respect to the Second element, insofar as the Defendant Gispert is concerned, the Government must prove beyond a reasonable doubt that he committed, or knowingly and willfully aided and abetted the commission, of *any two* of the following offenses (as alleged in paragraphs 2a.(1), (2), (3) and (4) of Count Two of the indictment): The attempted murder of Jose Manuel Garcia, in or about June 1975, utilizing a shotgun; the attempted murder of Jose Manuel Garcia, on or about June 29, 1975, utilizing a destructive device; the attempted murder of Bernard Dempsey on or about July 30, 1975; and the attempted murder of Cesar Rodriguez on or about July 31, 1975.

With respect to the Second element, insofar as the Defendant Antone is concerned, the Government must prove beyond a reasonable doubt that he committed, or knowingly and willfully aided and abetted the commission, or *any two* of the following offenses: The attempted murder of Jose Manuel Garcia on or about June 29, 1975; the attempted murder of Bernard Dempsey on or about July 30, 1975; the attempted murder of Cesar Rodriguez on or about July 31, 1975; the attempted murder of

Cesar Rodriguez on or about September 17, 1975; the murder of Richard Cloud on or about October 23, 1975 (as alleged in paragraphs 2a.(2), (3), (4), (5), and (6) of Count Two of the indictment; the offense alleged in Count Nine, the offense alleged in Count Ten or the offense alleged in Count Twelve of the indictment.

With respect to the Second element, insofar as the Defendant Miller is concerned, the Government must prove beyond a reasonable doubt that he committed, or knowingly and willfully aided and abetted the commission, of *both* of the following offenses: the robbery of Marina Fawcett on or about October 15, 1975 (as alleged in paragraph 2b.(1) of Count Two of the indictment), and the offense alleged in Count Eleven of the indictment.

With respect to the Fifth element defined above—the requirement that the "enterprise" was engaged in, or that its activities affected, interstate commerce—the Government contends that in conducting the affairs of the enterprise the Defendants utilized interstate communications facilities by engaging in long distance telephone conversations with each other; that they destroyed an automobile or automobiles which were being used in activities affecting interstate commerce; that they received, in Florida, dynamite which had been manufactured outside the state; and that they unlawfully possessed cocaine, a controlled substance. You are instructed, in this regard, that if you find beyond a reasonable doubt that these transactions or events occurred, and that the same occurred in, or as a direct result of, the conduct of the affairs of the alleged enterprise, the requisite effect upon interstate commerce has been established. If you do not so find, the requisite effect upon interstate commerce has not been established.]

38

ARMED BANK ROBBERY

A. (When Subsections (a) and (d) Alleged in Separate Counts)

(18 U.S.C. § 2113(a) and (d))

Title 18, United States Code, Section 2113(a) provides:

> "Whoever, by force and violence, or by intimidation, takes or attempts to take from the person or presence of another any property or money . . . belonging to . . . or in the possession of any bank . . . or savings and loan association [shall be guilty of an offense against the United States]."

Subsection (d) of the statute provides:

> "Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device [shall be punished as provided by law]."

Three essential elements are required to be proved beyond a reasonable doubt in order to establish the offense alleged in Count _____ of the indictment:

First: The act or acts of taking, from the person or presence of another, any property or money belonging to, or in the possession of a bank or a savings and loan association as charged;

Second: The act or acts of taking such property or money by force or violence, or by means of intimidation; and

Third: Doing such act or acts willfully.

As used in this law a "bank" means any bank the deposits of which are insured by the Federal Deposit Insurance Corporation; and a "savings and loan association" means any Federal savings and loan association.

To take "by means of intimidation" is to say or do something for the purpose of causing another person to fear bodily harm if resistance is offered.

To be the result of intimidation such fear must be caused by willful conduct on the part of the accused rather than some mere timidity of the intended victim, but the behavior of the accused need not be so violent as to cause terror, panic or hysteria. Also, since the essential element is intimidating conduct on the part of the accused, it is not necessary to show that the victim was actually frightened.

What must be shown is that the accused willfully said or did something, in such a manner and under such circumstances, as would normally cause a person of ordinary sensibilities to be fearful of bodily harm.

In order to establish the offense alleged in Count _____ of the indictment, the Government must prove beyond a reasonable doubt each of the three essential elements constituting the offense charged in Count _____ as previously stated in these instructions, plus a fourth element, namely:

> The act or acts of willfully assaulting, or of putting in jeopardy the life of any person by the use of a dangerous weapon or device, while engaged in stealing property or money from the bank or savings and loan association as charged.

An "assault" may be committed without actually striking or injuring another person. So, an assault occurs whenever one person makes a willful attempt or threat to injure another and also has an apparent, present ability to carry out the threat as by flourishing or pointing a dangerous weapon or device at the other.

A "dangerous weapon or device" includes anything capable of being readily operated or wielded by one person to inflict severe bodily harm or injury upon another person.

To "put in jeopardy the life of any person by the use of a dangerous weapon or device" means, then, to expose such person to a risk of death by the use of such dangerous weapon or device.

B. (When Subsections (a) and (d) Alleged in Same Count)

(18 U.S.C. § 2113(a) and (d))

Title 18, United States Code, Section 2113(a) provides:

> "Whoever, by force and violence, or by intimidation, takes or attempts to take from the person or presence of another any property or money . . . belonging to . . . or in the possession of any bank . . . or savings and loan association [shall be guilty of an offense against the United States]."

Subsection (d) of the statute provides:

> "Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device [shall be punished as provided by law]."

Four essential elements are required to be proved beyond a reasonable doubt in order to establish the armed robbery offense alleged in the indictment:

First: The act or acts of taking, from the person or presence of another, any property or money belonging to, or in the possession of a bank or savings and loan association as charged;

Second: The act or acts of taking such property or money by force or violence, or by means of intimidation;

Third: The act or acts of assaulting, or of putting in jeopardy the life of any person by the use of a dangerous weapon or device, while en-

gaged in stealing such property or money, as charged; and

Fourth: Doing such act or acts willfully.

As used in this law a "bank" means any bank the deposits of which are insured by the Federal Deposit Insurance Corporation; and a "savings and loan association" means any Federal savings and loan association.

To take "by means of intimidation" is to say or do something for the purpose of causing another person to fear bodily harm if resistance is offered.

To be the result of intimidation such fear must be caused by willful conduct on the part of the accused rather than some mere timidity of the intended victim, but the behavior of the accused need not be so violent as to cause terror, panic or hysteria. Also, since the essential element is intimidating conduct on the part of the accused, it is not necessary to show that the victim was actually frightened.

What must be shown is that the accused willfully said or did something, in such a manner and under such circumstances, as would normally cause a person of ordinary sensibilities to be fearful of bodily harm.

If you should find beyond a reasonable doubt that the accused committed the act of robbery by force or violence, or by means of intimidation, as charged, you must then proceed to determine whether the accused also assaulted or put in jeopardy the life of a person by the use of a dangerous weapon or device as charged.

An "assault" may be committed without actually striking or injuring another person. So, an assault occurs whenever one person makes a willful attempt or threat to injure another and also has an apparent, present ability to carry out the threat by flourishing or pointing a dangerous weapon or device at the other.

A "dangerous weapon or device" includes anything capable of being readily operated or wielded by one person to inflict severe bodily harm or injury upon another person.

To "put in jeopardy the life of any person by the use of a dangerous weapon or device" means, then, to expose such person to a risk of death by the use of such dangerous weapon or device.

The law permits the jury to find the accused guilty of any lesser offense which is necessarily included in the crime charged in the indictment, whenever such a course is consistent with the facts found by the jury from the evidence in the case, and with the law as given in the instructions of the Court.

So, if the jury should unanimously find the accused "Not Guilty" of the crime charged in the indictment, then the jury must proceed to determine the guilt or innocence of the accused as to any lesser offense which is necessarily included in the crime charged.

The crime of robbery of a bank, accompanied by an assault, or the putting in jeopardy of the life of another by the use of a dangerous weapon or device, as charged in the indictment, necessarily includes the lesser offense of robbery of a bank, without an assault or the putting in jeopardy of the life of another by the use of a dangerous weapon or device.

With respect to the offense charged in the indictment, then, if the jury should find the accused not guilty as charged, the jury must proceed to determine whether the accused is guilty or not guilty of the lesser included offense of robbery of a bank, without either committing an assault, or putting in jeopardy the life of another by the use of a dangerous weapon or device.

39

INTERSTATE TRANSPORTATION OF STOLEN MOTOR VEHICLE

(18 U.S.C. § 2312)

Title 18, United States Code, Section 2312, provides as follows:

> Whoever transports in interstate . . . commerce a motor vehicle . . . , knowing the same to have been stolen, [shall be guilty of an offense against the United States.]

Thus, to establish the offense of interstate transportation of a stolen vehicle, there are two essential elements which must be proved beyond a reasonable doubt:

> *First*: The act or acts of transporting, or causing to be transported, in interstate commerce, a stolen motor vehicle, as described in the indictment; and
>
> *Second*: Doing such act or acts willfully, and with knowledge that the motor vehicle had been stolen.

The offense is complete when the two elements just stated are established beyond a reasonable doubt by the evidence in the case. The proof need not show who may have stolen the motor vehicle.

The term "interstate commerce" means commerce between one state and another state. If a motor vehicle is driven under its own power across state lines from one state to another it has been transported in interstate commerce.

The word "stolen" as used in the statute includes all wrongful and dishonest takings of motor vehicles with the intent to deprive the owner of the rights and benefits of ownership.

40

SALE OR RECEIPT OF STOLEN MOTOR VEHICLE

(18 U.S.C. § 2313)

Title 18, United States Code, Section 2313, provides as follows:

> Whoever receives, conceals, stores . . . , sells or disposes of any motor vehicle . . . moving as, or which is a part of, or which constitutes interstate . . . commerce, knowing the same to have been stolen, [shall be guilty of an offense against the United States.]

Thus, to establish the offense proscribed by that statute, there are two essential elements which must be proved beyond a reasonable doubt:

> *First*: The act or acts of willfully receiving or concealing or storing or selling or disposing of a stolen motor vehicle, as described in the indictment, with knowledge that the motor vehicle had been stolen; and
>
> *Second*: That at the time of such act or acts the motor vehicle was moving as, or constituted a part of, interstate commerce.

The indictment alleges that certain Defendants received, concealed, stored, sold *and* disposed of certain motor vehicles. The statute specifies these several, alternative ways in which an offense can be committed, and it is not necessary for the Government to prove that all of such acts were in fact committed. The Government must prove beyond a reasonable doubt that the Defendant or Defendants *either* received, concealed, stored, sold *or* disposed of the motor vehicles; and, in order to return a verdict of guilt you must agree unanimously upon the way or manner in which the offense was committed.

Also, in order to commit an offense under Title 18, Section 2313, a Defendant must know that the vehicle had been stolen, but he need not know that the vehicle in question was moving as, or constituted a part of, interstate commerce. It is sufficient if the vehicle has recently moved from one state into another state as a result of a transaction or a series of related transactions which have not been fully completed or consummated at the time of the act or acts alleged in the indictment.

41

INTERSTATE TRANSPORTATION OF STOLEN PROPERTY

(18 U.S.C. § 2314)
(First Paragraph)

Title 18, United States Code, Section 2314, provides as follows:

> "Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud [shall be guilty of an offense against the United States]."

There are three essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by this law:

> *First*: That the Defendant transported or caused to be transported, in interstate commerce, items of stolen property as described in the indictment;
>
> *Second*: That such items had a value in excess of $5,000; and
>
> *Third*: That the Defendant acted knowingly and willfully.

The offense is complete when the three elements just stated are proved beyond a reasonable doubt. The proof need not show who may have stolen the property involved.

The word "stolen" includes all wrongful and dishonest takings of property with the intent to deprive the owner of the rights and benefits of ownership.

The word "value" means the face, par, or market value, or cost price, either wholesale or retail whichever is greater.

The term "interstate commerce" includes any movement or transportation of goods, wares, merchandise, securities or money from one state into another state.

42

SALE OR RECEIPT OF STOLEN PROPERTY

(18 U.S.C. § 2315)
(First Paragraph)

Title 18, United States Code, Section 2315, provides in part as follows:

> "Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, merchandise, securities or money of the value of $5,000 or more . . . moving as, or which are a part of . . . interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted or taken [shall be guilty of an offense against the United States]."

There are four essential elements which must be proved beyond reasonable doubt in order to establish the offense proscribed by this law:

> *First*: That the Defendant received or concealed or stored or disposed of items of stolen property as described in the indictment;
>
> *Second*: That such items were moving as, or constituted a part of, interstate commerce;
>
> *Third*: That such items had a value in excess of $5,000; and
>
> *Fourth*: That the Defendant acted knowingly and willfully.

The indictment alleges that the Defendant received, concealed, stored, sold *and* disposed of certain stolen property. The statute specifies these several, alternative ways in which an offense can be committed, and it is not necessary for the Government to prove that all of such acts were in fact committed. The Government must

prove beyond a reasonable doubt that the Defendant *either* received, concealed, stored, sold *or* disposed of the stolen property; and, in order to return a verdict of guilt you must agree unanimously upon the way or manner in which the offense was committed.

Also, in order to commit the offense charged a Defendant must know that the property had been stolen, but he need not know that it was moving as, or constituted a part of, interstate commerce. It is sufficient if the property has recently moved from one state into another state as a result of a transaction or a series of related transactions which have not been fully completed or consummated at the time of the act or acts alleged in the indictment.

The word "value" means the face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

43

FAILURE TO APPEAR (BAIL JUMPING)

(18 U.S.C. § 3150)

Title 18, United States Code, Section 3150, provides that:

> "Whoever, having been released [on bail], willfully fails to appear before any court or judicial officer as required [shall be guilty of an offense against the United States]."

There are three essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by the law:

> *First*: That the Defendant had been admitted to bail pursuant to an order given by a Judge or Magistrate of this Court as charged;
>
> *Second*: That the Defendant thereafter failed to appear before a Judge or Magistrate of this Court as required; and
>
> *Third*: That the Defendant did so knowingly and willfully.

B. OFFENSES IN OTHER TITLES

44

ILLEGAL ENTRY BY DEPORTED ALIEN

(8 U.S.C. § 1326)

Title 8, United States Code, Section 1326, provides in part that:

> "Any alien who . . . has been arrested and deported . . . and thereafter . . . enters . . . or is at any time found in the United States . . . shall be guilty [of an offense against the laws of the United States.]"

In order to establish the offense of being an alien in the United States without authorization after being arrested and deported, there are three essential elements which the Government must prove beyond a reasonable doubt:

> *First*: That the Defendant was an alien at the times alleged in the indictment;
>
> *Second*: That the Defendant had previously been arrested and deported from the United States; and
>
> *Third*: That thereafter the Defendant was found unlawfully present in the United States.

An alien is any person who is not a natural-born or naturalized citizen, or a national of the United States. The term "national of the United States" includes not only a citizen, but also a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

If the jury should find from the evidence in the case that, at any time before the alleged offense charged in the indictment, the Defendant stated or admitted that he was born outside the territorial limits of the United States, such statement alone may be considered as sufficient to support a finding that the Defendant was an alien at the time he made the admission, if you should further find beyond a reasonable doubt that the admission was voluntarily and intentionally made.

If you find that the Defendant was an alien at some time prior to the time of the alleged offense charged in the indictment, then you may draw the inference that the status of the Defendant as an alien continued up to and including the time alleged in the indictment. However, such an inference is not required.

45

CONTROLLED SUBSTANCES (POSSESSION WITH INTENT TO DISTRIBUTE AND DISTRIBUTION)

(21 U.S.C. § 841(a)(1))

Title 21, United States Code, Section 841(a)(1), cited in the indictment, provides in pertinent part as follows:

> "[I]t shall be unlawful for any person knowingly or intentionally—
>
> (1) to . . . possess with intent to . . . distribute, a controlled substance . . ."

_____ is a controlled substance within the meaning of the law.

In order to establish the offense proscribed by that statute the Government must prove each of the following elements beyond a reasonable doubt:

> *First*: That the Defendant knowingly and willfully possessed _____ as charged; and
>
> *Second*: That he possessed the substance with the intent to distribute it.

To "possess with intent to distribute" simply means to possess with intent to deliver or transfer possession of a controlled substance to another person, with or without any financial interest in the transaction.

46

POSSESSION OR TRANSFER OF NON-TAX-PAID DISTILLED SPIRITS

(Note: Willfulness not an essential element.)

Title 26, United States Code, Section 5205(a)(2), provides that:

> "No person shall—transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof is stamped by a stamp evidencing the determination of the tax or indicating compliance with the provisions of this chapter [imposing a tax upon the manufacture of distilled spirits]."

Title 26, United States Code, Section 5604(a)(1), provides that:

> "Any person who shall—transport, possess, buy, sell, or transfer any distilled spirits, required to be stamped under the provisions of Section 5205(a)(2), unless the immediate container thereof has affixed thereto a stamp as required by such section [shall be guilty of an offense against the United States]."

There are two essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by these laws:

> *First*: That the Defendant knowingly transported, possessed, bought, sold or transferred distilled spirits, as charged; and
>
> *Second*: That the immediate containers of the distilled spirits did not have affixed thereto a stamp evidencing the determination of the tax or indicating compliance with the Internal Revenue laws.

47

POSSESSION OF UNREGISTERED FIREARM

(26 U.S.C. § 5845 and § 5861)

(Note: Willfulness not an essential element.)

Title 26, United States Code, Section 5861, provides in part that:

> "It shall be unlawful for any person . . . to . . . possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record . . ."

Title 26, United States Code, Section 5845, defines "firearm" as including _____.

In order to establish, the offense prohibited by this statute there are two essential elements which the Government must prove beyond a reasonable doubt.

> *First*: The Defendant at the time and place charged in the indictment knowingly possessed a _____

> *Second*: The _____ was not then registered to the Defendant in the National Firearms Register and Transfer Record.

It is not necessary for the Government to prove that the Defendant knew that the item described in the indictment was a "firearm" which the law requires to be registered. What must be proved beyond a reasonable doubt is that the Defendant knowingly possessed the item as charged, that such item was a "firearm" as defined above, and that it was not then registered to the Defendant in the National Firearms Register and Transfer Record.

48

TAX EVASION

(26 U.S.C. § 7201)

Section 7201 of the Internal Revenue Code (26 U.S.C. § 7201) provides in part:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title [shall be guilty of an offense against the United States.]"

The gist of the offense prohibited by the statute is a willful attempt on the part of the Defendant to evade and defeat the tax imposed by the income tax law. In order to establish that offense the Government must prove both of the following elements beyond a reasonable doubt:

> *First*: That substantial income tax was due and owing from the Defendant in addition to that declared in his tax return; and
>
> *Second*: That the Defendant knowingly and willfully attempted to evade or defeat such tax.

The proof need not show the precise amount or all of the additional tax due as alleged in the indictment, but it must be established beyond a reasonable doubt that the accused knowingly and willfully attempted to evade or defeat some substantial portion of such additional tax as charged.

The word "attempt" contemplates that the Defendant had knowledge and understanding that, during the particular tax year involved, he had income which was taxable, and which he was required by law to report; but that he nevertheless attempted to evade or defeat the tax, or a substantial portion of the tax on that income by willfully failing to report all the income which he knew he had during that year.

49

FAILURE TO FILE TAX RETURN

(26 U.S.C. § 7203)

Title 26, United States Code, Section 7203, provides in part as follows:

> "Any person required [by law or regulation] to make a return . . . who willfully fails to . . . make such return . . . at the time . . . required by law or regulations [shall be guilty of an offense against the United States.]"

In order to establish the offense of failure to make a return, there are three essential elements which the Government must prove beyond a reasonable doubt.

> *First:* The Defendant was required by law or regulation to make a return of his income for the taxable year charged;
>
> *Second*: The Defendant failed to make such return at the time required by law; and
>
> *Third*: The Defendant's failure to make the return was willful.

A person is required to make a federal income tax return for any tax year in which he has gross income in excess of _____.

Gross income includes the following: [(1) Compensation for services, including fees, commissions and similar items; (2) Gross income derived from business; (3) Gains derived from dealing in property; (4) Interest; (5) Rents; (6) Royalties; (7) Dividends; (8) Alimony and separate maintenance payments; (9) Annuities; (10) Income from life insurance and endowment contracts; (11) Pensions; (12) Income from discharge of indebtedness; (13) Distributive share of partnership

gross income; (14) Income in respect of a decedent; and (15) Income from an interest in an estate or trust.]

The Defendant is a person required to file a return if his gross income for any calendar year exceeds _____ even though he may be entitled to deductions from that income in sufficient amount so that no tax is due. The Government is not required to show that a tax is due and owing, nor that the accused intended to evade or defeat payment of taxes.

50

FALSE TAX RETURN

(26 U.S.C. § 7207)

Title 26, United States Code, Section 7207, provides in part that:

> "Any person who willfully delivers or discloses to the Secretary [of the Treasury] any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter [shall be guilty of an offense against the United States.]"

In order to establish the offense of filing a false return, there are two essential elements which the Government must prove beyond a reasonable doubt.

> *First*: That the Defendant filed an income tax return which was false in the respects charged in the indictment; and
>
> *Second*: That the Defendant did so willfully, as charged.

It is not necessary, however, that the Government be deprived of any tax by reason of the filing of the return or that it be shown that additional tax is due to the Government.

A declaration is "false" if it was untrue when made and was then known to be untrue by the person making it. A declaration contained within the document is "false" if it was untrue when used and was then known to be untrue by the person using it.

The "materiality" of the allegedly false statements is not a matter with which you are concerned, but rather is a question for the Court to decide. You are instructed that the false statements charged, if they were made, were material statements.

*

TRIAL INSTRUCTIONS

INDEX OF TRIAL INSTRUCTIONS

1

PRELIMINARY INSTRUCTION (BEFORE OPENING STATEMENTS)

Members of the Jury:

You have now been sworn as the jury to try this case. By your verdict(s) you will decide the disputed issues of fact. I will decide all questions of law that arise during the trial, and before you retire to deliberate at the close of the case, I will instruct you on the rules of law that you must follow and apply in deciding upon your verdict(s).

You should give careful attention to the testimony and evidence presented for your consideration during the trial, but you should not form or express any opinion about the case one way or the other until you have heard *all* of the evidence *and* have had the benefit of the closing arguments of the lawyers and my instructions on the applicable law.

During the trial you must not discuss the case in any manner among yourselves or with anyone else, and you must not permit anyone to attempt to discuss it with you or in your presence; and, insofar as the lawyers are concerned, as well as others whom you may come to recognize as having some connection with the case, you are instructed that, in order to avoid even the appearance of impropriety, you should have no conversation whatever with those persons while you are serving on the jury.

You must also avoid reading any newspaper articles that might be published about the case now that the trial is in progress, and you must also avoid listening to or observing any broadcast news program on either television or radio because of the possibility that mention might be made of this case during such a broadcast.

The reason for these cautions, of course, lies in the fact that it will be your duty to decide this case solely on the basis of the testimony and evidence presented during trial without consideration of any other matters whatever.

From time to time during the trial I may be called upon to make rulings of law on motions or objections made by the lawyers. You should not infer or conclude from any ruling I may make that I have any opinions on the merits of the case favoring one side or the other. And if I sustain an objection to a question that goes unanswered by the witness, you should not speculate on what answer might have been given, nor should you draw any inferences or conclusions from the question itself.

During the trial it may be necessary for me to confer with the lawyers from time to time out of your hearing concerning questions of law or procedure that require consideration by the Court alone. On some occasions you may be excused from the courtroom as a convenience to you and to us while I discuss such matters with the lawyers. We will try to limit such interruptions as much as possible, but you should remember at all times the importance of the matter you are here to determine and should be patient even though the case may seem to go slowly.

Now, we will begin by affording the lawyers for each side an opportunity to make opening statements in which they may explain the issues in the case and summarize the facts they expect the evidence will show. After all the testimony and evidence has been presented, the lawyers will then be given another opportunity to address you and make their summations or final arguments in the case. The statements that the lawyers make now, as well as the arguments they present at the end of the trial, are not to be considered by you *either* as evidence in the case (which comes only from the witnesses and exhibits) *or* as your instruction on the law (which will come

only from me). Nevertheless, these statements and arguments are intended to help you understand the issues and the evidence as it comes in, as well as the positions taken by both sides. So I ask that you now give the lawyers your close attention as I recognize them for the purpose of making an opening statement.

2

CAUTIONARY INSTRUCTION DURING TRIAL CONSPIRACY—HEARSAY

Under the law a "conspiracy" is a combination or agreement of two or more persons to join together to attempt to accomplish some unlawful purpose. It is a kind of "partnership in criminal purposes" in which each member becomes the agent of every other member. The gist or essence of the offense is a combination or mutual agreement by two or more persons to disobey, or disregard, the law.

With respect to the conspiracy offense as alleged in the indictment you should *first* determine, from all of the testimony and evidence in the case, whether or not the conspiracy existed as charged. If you conclude that a conspiracy *did* exist as alleged, you should next determine whether the defendant under consideration willfully became a member of such conspiracy. In determining whether a defendant was a member of an alleged conspiracy, however, the jury should consider *only* that evidence, if any, pertaining to his *own* acts and statements. He cannot be bound by the acts or statements of other alleged participants until it is established, beyond a reasonable doubt, *First*, that a conspiracy existed; and, *Second*, from evidence of his *own* acts and statements, that the defendant under consideration *was* one of its members.

On the other hand, if and when it *does* appear, if it should so appear, beyond a reasonable doubt from the evidence in the case that a conspiracy did exist as charged, *and* that the defendant under consideration *was* one of its members, *then* the statements and acts knowingly made and done, during the conspiracy and in furtherance of its objects, by any other proven member of the conspiracy, *may* be considered as evidence against the

defendant under consideration even though he was not present to hear the statements made or see the acts done.

This is true because, as stated earlier, a conspiracy is a kind of "partnership" under the law so that each member is an agent of every other member, and each member is bound by or responsible for the acts and statements of every other member made in pursuance of their unlawful scheme.

3

CAUTIONARY INSTRUCTION DURING TRIAL SIMILAR ACT

Evidence or testimony that an accused committed an act at one time or on one occasion is *not* evidence or proof whatever that such person did a similar act at another time or on another occasion.

In other words, testimony that a defendant may have committed, at some other time, an act *similar* to the act or acts alleged in the indictment in this case, may *not* be considered by the jury in determining whether the accused in fact committed any act alleged in the indictment.

Indeed, evidence or testimony concerning an act of a similar nature allegedly committed at some time or place, not charged in the indictment, may not be considered for any purpose whatsoever unless the jury *first* finds that the *other* evidence in the case, standing alone, establishes beyond a reasonable doubt, that the accused did the particular act charged in the [particular count of the] indictment under deliberation.

On the other hand, if the jury *should* find beyond a reasonable doubt from *other* evidence in the case that the accused did the act charged in the indictment, *then* the jury *may* consider evidence as to some other act of a similar or like nature, on the part of the accused, in determining the state of mind or *intent* with which the accused did the act charged in the indictment. And, where proof of an alleged similar act done at some other time or place is clear and conclusive, the jury may, but is not obliged to, draw the inference and find that, in doing the act charged in the indictment, the accused acted willfully and not because of mistake or accident or other innocent reason.

4

CAUTIONARY INSTRUCTION DURING TRIAL TRANSCRIPT OF TAPE RECORDED CONVERSATION

As you have heard, Exhibit _____ has been identified as a typewritten transcript [and partial translation from Spanish into English] of the oral conversation which can be heard on the tape recording received in evidence as Exhibit _____. The transcript also purports to identify the speakers engaged in such conversation.

I have admitted the transcript for the limited and secondary purpose of aiding you in following the content of the conversation as you listen to the tape recording, [particularly those portions spoken in Spanish,] and also to aid you in identifying the speakers.

However, you are specifically instructed that whether the transcript correctly or incorrectly reflects the content of the conversation or the identity of the speakers is entirely for you to determine based upon your own evaluation of the testimony you have heard concerning the preparation of the transcript, and from your own examination of the transcript in relation to your hearing of the tape recording itself as the primary evidence of its own contents; and, if you should determine that the transcript is in any respect incorrect or unreliable, you should disregard it to that extent.

5

EXPLANATORY INSTRUCTION DURING TRIAL PRIOR STATEMENTS AND/OR TESTIMONY OF A WITNESS

When a witness is questioned about an earlier statement he may have made, or earlier testimony he may have given, such questioning is permitted in order to aid you in evaluating the truth or accuracy of his testimony *at the trial.*

In other words, unless they were made under oath and subject to the penalty of perjury, evidence of earlier statements made by a witness are not received as evidence of the truth or accuracy of *such* statements, but for the purpose of aiding you in your determination concerning the credibility or weight to be given to the witness' testimony before you *at trial.*

Whether or not such prior statements of a witness are, in fact, consistent or inconsistent with his trial testimony is entirely for you to determine.

I will of course give you additional instructions at the end of the trial concerning a number of matters you may consider in determining the credibility of the witnesses and the weight to be given to their testimony, but I wanted you to know at this point the purpose of examining a witness concerning prior statements or testimony so that you might better understand and follow the presentation of the evidence.

6

INSTRUCTION DURING TRIAL
MODIFIED "ALLEN" CHARGE

Members of the Jury:

I am going to ask that you continue your deliberations in an effort to agree upon a verdict and dispose of this case; and I have a few additional comments I would like for you to consider as you do so.

This is an important case. The trial has been expensive in time, effort and money to both the defense and the prosecution. If you should fail to agree on a verdict the case is left open and must be tried again. Obviously, another trial would only serve to increase the cost to both sides, and there is no reason to believe that the case can be tried again by either side better or more exhaustively than it has been tried before you.

Any future jury must be selected in the same manner and from the same source as you were chosen, and there is no reason to believe that the case could ever be submitted to 12 men and women more conscientious, more impartial, or more competent to decide it, or that more or clearer evidence could be produced.

If a substantial majority of your number are for a conviction, each dissenting juror ought to consider whether a doubt in his or her own mind is a reasonable one since it appears to make no effective impression upon the minds of the others. On the other hand, if a majority or even a lesser number of you are for acquittal, the other jurors ought seriously to ask themselves again, and most thoughtfully, whether they do not have a reason to doubt the correctness of a judgment which is not shared by several of their fellow jurors, and whether they should distrust the weight and sufficiency of evidence which fails to convince several of their fellow jurors beyond a reasonable doubt.

Remember at all times that no juror is expected to yield a conscientious conviction he or she may have as to the weight or effect of the evidence. But remember also that, after full deliberation and consideration of the evidence in the case, it is your duty to agree upon a verdict if you can do so without surrending your conscientious conviction. You must also remember that if the evidence in the case fails to establish guilt beyond a reasonable doubt the accused should have your unanimous verdict of Not Guilty.

You may be as leisurely in your deliberations as the occasion may require and should take all the time which you may feel is necessary.

I will ask now that you retire once again and continue your deliberations with these additional comments in mind to be applied, of course, in conjunction with all of the instructions I have previously given to you.

*

APPENDIX

EXAMPLE NO. 1

The attached set of jury instructions relate to the hypothetical case designated as Example No. 1 in the *Directions for Use.* The set represents the result obtained by following the directions given as to that example, and it constitutes a complete jury charge tailored to the case and assembled from the pattern instructions without necessity of preparing new material or modifying and retyping any page. It also demonstrates the form in which the instructions could be sent to the jury in writing if desired.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

UNITED STATES OF AMERICA
-vs-
JOHN DOE

CASE NO. 1

COURT'S INSTRUCTIONS
TO THE JURY

Members of the Jury:

You have now heard all of the evidence in the case as well as the final arguments of the lawyers for the parties.

It becomes my duty, therefore, to instruct you on the rules of law that you must follow and apply in arriving at your decision in the case.

In any jury trial there are, in effect, two judges. I am one of the judges; the other is the jury. It is my duty to preside over the trial and to determine what testimony and evidence is relevant under the law for your consideration. It is also my duty at the end of the trial to instruct you on the law applicable to the case.

You, as jurors, are the judges of the facts. But in determining what actually happened in this case—that is, in reaching your decision as to the facts—it is your sworn duty to follow the law I am now in the process of defining for you.

And you must follow all of my instructions as a whole. You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. That is, you must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I give it to you, regardless of the consequences.

By the same token it is also your duty to base your verdict solely upon the testimony and evidence in the case, without prejudice or sympathy. That was the promise you made and the oath you took before being accepted by the parties as jurors in this case, and they have the right to expect nothing less.

The indictment or formal charge against a Defendant is not evidence of guilt. Indeed, the Defendant is presumed by the law to be innocent. The law does not require a Defendant to prove his innocence or produce any evidence at all, and no inference whatever may be drawn from the election of a Defendant not to testify. The Government has the burden of proving him guilty beyond a reasonable doubt, and if it fails to do so you must acquit him.

Thus, while the Government's burden of proof is a strict or heavy burden, it is not necessary that the Defendant's guilt be proved beyond all possible doubt. It is only required that the Government's proof exclude any "reasonable doubt" concerning the Defendant's guilt. A "reasonable doubt" is a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the accused has been proved guilty beyond reasonable doubt, say so. If you are not convinced, say so.

As stated earlier it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice.

In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

You may also consider either direct or circumstantial evidence. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances indicating either the guilt or innocence of the Defendant. The law makes no distinc-

tion between the weight to be given to either direct or circumstantial evidence. It requires only that you weigh all of the evidence and be convinced of the Defendant's guilt beyond a reasonable doubt before he can be convicted.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his testimony. In weighing the testimony of a witness you should consider his relationship to the Government or the Defendant; his interest, if any, in the outcome of the case; his manner of testifying; his opportunity to observe or acquire knowledge concerning the facts about which he testified; his candor, fairness and intelligence; and the extent to which he has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

The fact that a witness has previously been convicted of a felony, or a crime involving dishonesty or false statement, is also a factor you may consider in weighing the credibility of that witness. The fact of such a conviction does not necessarily destroy the witness' credibility, but is one of the circumstances you may take into account in determining the weight to be given to his testimony.

The rules of evidence provide that if scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and state his opinion concerning such matters.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

Section 1341 of Title 18, United States Code, provides in part that:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, [shall be guilty of an offense against the laws of the United States.]

In order to establish that a Defendant is guilty of mail fraud, the Government must prove beyond a reasonable doubt that:

1. The Defendant willfully and knowingly devised a scheme or artifice to defraud, or for obtaining money or property by means of false pretenses, representations or promises, and

2. The Defendant used the United States Postal Service by mailing, or by causing to be mailed, some matter or thing for the purpose of executing the scheme to defraud.

The words "scheme" and "artifice" include any plan or course of action intended to deceive others, and to obtain, by false or fraudulent pretenses, representations, or promises, money or property from persons so deceived.

A statement or representation is "false" or "fraudulent" within the meaning of this statute if it relates to a material fact and is known to be untrue or is made with reckless indifference as to its truth or falsity, and is made or caused to be made with intent to defraud. A statement or representation may also be "false" or "fraudulent" when it constitutes a half truth, or effectively conceals a material fact, with intent to defraud. A "material fact" is a fact that would be important to a reasonable person in deciding whether to engage or not engage in a particular transaction.

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self.

It is not necessary that the Government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme; or that the material mailed was itself false or fraudulent; or that the alleged scheme actually succeeded in defrauding anyone; or that the use of the mail was intended as the spe-

cific or exclusive means of accomplishing the alleged fraud.

What must be proved beyond a reasonable doubt is that the accused knowingly and willfully devised or intended to devise a scheme to defraud substantially the same as the one alleged in the indictment; and that the use of the U. S. mail was closely related to the scheme in that the accused either mailed something or caused it to be mailed in an attempt to execute or carry out the scheme. To "cause" the mails to be used is to do an act with knowledge that the use of the mails will follow in the ordinary course of business or where such use can reasonably be foreseen.

Each separate use of the mails in furtherance of a scheme to defraud constitutes a separate offense.

Where a Defendant has offered evidence of good general reputation for truth and veracity, or honesty and integrity, or as a law-abiding citizen, the jury should consider such evidence along with all the other evidence in the case.

Evidence of a Defendant's reputation, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt, since the jury may think it improbable that a person of good character in respect to those traits would commit such a crime.

The jury will always bear in mind, however, that the law never imposes upon a Defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

You will note that the indictment charges that the offense was committed "on or about" a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the of-

fense was committed on a date reasonably near the date alleged.

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

The word "willfully," as that term has been used from time to time in these instructions, means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law.

I caution you, members of the Jury, that you are here to determine the guilt or innocence of the accused from the evidence in this case. The Defendant is not on trial for any act or conduct or offense not alleged in the indictment. Neither are you called upon to return a verdict as to the guilt or innocence of any other person or persons not on trial as a Defendant in this case.

Also, the punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the court or judge, and should never be considered by the jury in any way, in arriving at an impartial verdict as to the guilt or innocence of the accused.

Any verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous.

It is your duty as jurors, to consult with one another, and to deliberate in an effort to reach agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesistate to re-examine your own views and change your opinion if convinced it is erroneous. But do not sur-

render your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are not partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Upon retiring to the jury room you should first select one of your number to act as your foreman or forewoman who will preside over your deliberations and will be your spokesman here in court. A form of verdict has been prepared for your convenience.

[*Explain verdict*]

You will take the verdict form to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreman fill it in, date and sign it, and then return to the courtroom.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing signed by the foreman or forewoman, and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at the time.

EXAMPLE NO. 2

The attached set of jury instructions relate to the hypothetical case designated as Example No. 2 in the *Directions for Use*. The set represents the result obtained by following the directions given as to that example, and it constitutes a complete jury charge. One page of new material was prepared (the introductory page preceding the conspiracy instruction—Offense Instruction No. 3—summarizing the nature of the conspiracy alleged); and the first page of Offense Instruction No. 45 (Controlled Substances) was retyped after being edited to refer to both marijuana and cocaine. Except for those two pages the set was as-

sembled entirely from the pattern instructions. It also demonstrates the form in which the instructions could be sent to the jury in writing if desired.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

UNITED STATES OF AMERICA -vs- JOHN DOE, et al.	CASE NO. 2

COURT'S INSTRUCTIONS
TO THE JURY

Members of the Jury:

You have now heard all of the evidence in the case as well as the final arguments of the lawyers for the parties.

It becomes my duty, therefore, to instruct you on the rules of law that you must follow and apply in arriving at your decision in the case.

In any jury trial there are, in effect, two judges. I am one of the judges; the other is the jury. It is my duty to preside over the trial and to determine what testimony and evidence is relevant under the law for your consideration. It is also my duty at the end of the trial to instruct you on the law applicable to the case.

You, as jurors, are the judges of the facts. But in determining what actually happened in this case—that is, in reaching your decision as to the facts—it is your sworn duty to follow the law I am now in the process of defining for you. Unless otherwise stated you should consider each instruction to apply separately and individually to each Defendant on trial.

And you must follow all of my instructions as a whole. You have no right to disregard or give special attention to any one instruction, or to question the wisdom

or correctness of any rule I may state to you. That is, you must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I give it to you, regardless of the consequences.

By the same token it is also your duty to base your verdict solely upon the testimony and evidence in the case, without prejudice or sympathy. That was the promise you made and the oath you took before being accepted by the parties as jurors in this case, and they have the right to expect nothing less.

The indictment or formal charge against a Defendant is not evidence of guilt. Indeed, the Defendant is presumed by the law to be innocent. The law does not require a Defendant to prove his innocence or produce any evidence at all, and no inference whatever may be drawn from the election of a Defendant not to testify. The Government has the burden of proving him guilty beyond a reasonable doubt, and if it fails to do so you must acquit him.

Thus, while the Government's burden of proof is a strict or heavy burden, it is not necessary that the Defendant's guilt be proved beyond all possible doubt. It is only required that the Government's proof exclude any "reasonable doubt" concerning the Defendant's guilt. A "reasonable doubt" is a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the accused has been proved guilty beyond reasonable doubt, say so. If you are not convinced, say so.

As stated earlier it is your duty to determine the facts, and in so doing you must consider only the evidence

I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice.

In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

You may also consider either direct or circumstantial evidence. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances indicating either the guilt or innocence of the Defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It requires only that you weigh all of the evidence and be convinced of the Defendant's guilt beyond a reasonable doubt before he can be convicted.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his testimony. In weighing the testimony of a witness you should consider his relationship to the Government or the Defendant; his interest, if any, in the outcome of the case; his manner of testifying; his opportunity to observe or acquire knowledge concerning the facts about which he testified; his candor, fairness and intelligence; and the extent to which he has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

A witness may also be discredited or impeached by evidence that the general reputation of the witness for truth and veracity is bad in the community where the witness now resides, or has recently resided. If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

The fact that a witness has previously been convicted of a felony, or a crime involving dishonesty or false statement, is also a factor you may consider in weighing the credibility of that witness. The fact of such a conviction does not necessarily destroy the witness' credibility, but

is one of the circumstances you may take into account in determining the weight to be given to his testimony.

As stated before, a Defendant has a right not to testify. If a Defendant does testify, however, his testimony should be weighed and considered, and his credibility determined, in the same way as that of any other witness. Evidence of a Defendant's previous conviction of a crime is to be considered by you only insofar as it may affect the credibility of the Defendant as a witness, and must never be considered as evidence of guilt of the crime for which the Defendant is on trial.

In this case the Government called as one of its witnesses an alleged accomplice, named as a co-Defendant in the indictment, with whom the Government has entered into a plea agreement providing for the dismissal of some charges and a lesser sentence than he would otherwise be exposed to for the offense to which he plead guilty. Such plea bargaining, as it's called, has been approved as lawful and proper, and is expressly provided for in the rules of this Court.

An alleged accomplice, including one who has entered into a plea agreement with the Government, does not thereby become incompetent as a witness. On the contrary, the testimony of such a witness may alone be of sufficient weight to sustain a verdict of guilty. However, the jury should keep in mind that such testimony is always to be received with caution and weighed with great care. You should never convict a Defendant upon the unsupported testimony of an alleged accomplice unless you believe that testimony beyond a reasonable doubt; and the fact that an accomplice has entered a plea of guilty to the offense charged is not evidence, in and of itself, of the guilt of any other person.

The rules of evidence provide that if scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact

in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and state his opinion concerning such matters.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

In this case, as you know, the indictment alleges four separate offenses called "counts." I will not read it to you at length because a copy of the indictment will be available to you for study during your deliberations.

Count One charges that the Defendants knowingly and willfully conspired together to possess with intent to distribute certain controlled substances, namely marijuana and cocaine, in violation of Title 21, United States Code, Section 841(a)(1). Counts Two, Three and Four, respectively, allege so-called substantive offenses, that is, that the Defendants actually possessed, knowingly and willfully, and with intent to distribute, the controlled substances marijuana and cocaine in violation of Title 21, United States Code, Section 841(a)(1), the same provision of the law mentioned in Count One as the object of the alleged conspiracy. I will explain that law and the essential elements of the substantive offenses in a moment.

First, however, as to Count One, you will note that the Defendants are not charged in that Count with violating Section 841(a)(1) as such; rather, they are charged with having conspired to do so—a separate offense in violation of Title 21, United States Code, Section 846.

So, under this law a "conspiracy" is a combination or agreement of two or more persons to join together to attempt to accomplish some unlawful purpose. It is a kind of "partnership in criminal purposes" in which each member becomes the agent of every other member. The gist or essence of the offense is a combination or mutual agreement by two or more persons to disobey, or disregard, the law.

The evidence in the case need *not* show that the alleged members of the conspiracy entered into any express or formal agreement; *or* that they directly stated between themselves the details of the scheme and its object or purpose, *or* the precise means by which the object or purpose was to be accomplished. Similarly, the evidence in the case need not establish that all of the means or methods set forth in the indictment were in fact agreed upon to carry out the alleged conspiracy, *or* that all of the means or methods which *were* agreed upon were actually used or put into operation. Neither must it be proved that *all* of the persons charged to have been members of the conspiracy were such, *nor* that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

What the evidence in the case *must* show beyond a reasonable doubt is:

(1) That two or more persons in some way or manner, positively or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment;

(2) That the Defendant willfully became a member of such conspiracy;

(3) That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the means or methods (or "overt acts") described in the indictment; and

(4) That such "overt act" was knowingly committed at or about the time alleged in an effort to effect or accomplish some object or purpose of the conspiracy.

An "overt act" is any transaction or event, even one which may be entirely innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy.

One may become a member of a conspiracy without full knowledge of all of the details of the unlawful scheme or the names and identities of all of the other alleged conspirators. So, if a Defendant, with an understanding of the unlawful character of a plan, knowingly and willfully joins in an unlawful scheme on one occasion that is sufficient to convict him for conspiracy even though he had not participated at earlier stages in the scheme and even though he played only a minor part in the conspiracy.

Of course, mere presence at the scene of an alleged transaction or event, or mere similarity of conduct among various persons and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some object or purpose of a conspiracy, does not thereby become a conspirator.

In your consideration of the conspiracy offense as alleged in the indictment you should first determine, from all of the testimony and evidence in the case, whether or not the conspiracy existed as charged. If you conclude that a conspiracy *did* exist as alleged, you should next determine whether or not the Defendant under consideration willfully became a member of such conspiracy.

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In determining whether a Defendant was a member of an alleged conspiracy, however, the jury should consider only that evidence, if any, pertaining to his own acts and statements. He is not responsible for the acts or declarations of other alleged participants until it is established beyond a reasonable doubt, *First*, that a conspiracy existed and, *Second*, from evidence of his own acts and statements, that the Defendant was one of its members.

On the other hand, if and when it *does* appear beyond a reasonable doubt from the evidence in the case that a conspiracy *did* exist as charged, *and* that the Defendant under consideration *was* one of its members, *then* the statements and acts knowingly made and done during such conspiracy and in furtherance of its objects, by any other proven member of the conspiracy, may be considered by the jury as evidence against the Defendant under consideration even though he was not present to hear the statement made or see the act done.

This is true because, as stated earlier, a conspiracy is a kind of "partnership" so that under the law each member is an agent or partner of every other member, and each member is bound by or responsible for the acts and statements of every other member made in pursuance of their unlawful scheme.

Title 21, United States Code, Section 841(a)(1), cited in the indictment, provides in pertinent part as follows:

> "[I]t shall be unlawful for any person knowingly or intentionally—
>
> (1) to . . . possess with intent to . . . distribute, a controlled substance . . ."

Marijuana and cocaine are controlled substances within the meaning of this law.

In order to establish the offense proscribed by that statute the Government must prove each of the following elements beyond a reasonable doubt:

> *First*: That the Defendant knowingly and willfully possessed marijuana or cocaine as charged; and
>
> *Second*: That he possessed the substance with the intent to distribute it.

To "possess with intent to distribute" simply means to possess with intent to deliver or transfer possession of a controlled substance to another person, with or without any financial interest in the transaction.

The law recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

You may find that the element of possession as that term is used in these instructions is present if you find beyond reasonable doubt that the Defendant had actual or constructive possession, either alone or jointly with others.

The guilt of an accused in a criminal case may be established without proof that he personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything a person can do for himself

may also be accomplished by him through direction of another person as his agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.

Title 18, United States Code, Section 2, provides:

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

So, if the acts or conduct of an agent, employee or other associate of the Defendant are willfully directed or authorized by him, or if the Defendant aids and abets another person by willfully joining together with such person in the commission of a crime, then the law holds the Defendant responsible for the acts and conduct of such other person just as though he had committed the acts or engaged in such conduct himself.

Notice, however, that before any Defendant may be held criminally responsible for the acts of others it is necessary that the accused willfully associate himself in some way with the criminal venture, and willfully participate in it as he would in something he wishes to bring about; that is to say, that he willfully seek by some act or omission of his to make the criminal venture succeed.

Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a Defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the Defendant was a participant and not merely a knowing spectator.

In other words, you may not find any Defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the Defendant willfully participated in its commission.

You will note that the indictment charges that the offense was committed "on or about" a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

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

The word "willfully," as that term has been used from time to time in these instructions, means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law.

A separate crime or offense is charged against one or more of the Defendants in each count of the indictment. Each offense, and the evidence pertaining to it, should be considered separately. Also, the case of each Defendant should be considered separately and individually. The fact that you may find one or more of the accused guilty or not guilty of any of the offenses charged should not control your verdict as to any other offense or any other Defendant.

I caution you, members of the Jury, that you are here to determine the guilt or innocence of the accused from the evidence in this case. The Defendant is not on trial for any act or conduct or offense not alleged in the indictment. Neither are you called upon to return a ver-

dict as to the guilt or innocence of any other person or persons not on trial as a Defendant in this case.

Also, the punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the court or judge, and should never be considered by the jury in any way, in arriving at an impartial verdict as to the guilt or innocence of the accused.

Any verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous.

It is your duty as jurors, to consult with one another, and to deliberate in an effort to reach agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are not partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Upon retiring to the jury room you should first select one of your number to act as your foreman or forewoman who will preside over your deliberations and will be your spokesman here in court. Forms of verdicts have been prepared for your convenience.

[*Explain verdicts*]

You will take the verdict forms to the jury room and when you have reached unanimous agreement as to your

verdicts, you will have your foreman fill in, date and sign them, and then return to the courtroom.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing signed by the foreman or forewoman, and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at the time.

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