

Criminal Tax Manual

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[JI-1]

18 U.S.C. § 2

GOVERNMENT PROPOSED JURY INST. NO. 18.2-1

Statutory Language

Section 2 of Title 18 of the United States Code provides, in part, as follows:

Section 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) 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.

18 U.S.C. § 2

GOVERNMENT PROPOSED JURY INST. NO. 18.2-2

Principal -- To Aid, Abet, Cause, etc.
(Single Defendant)

The guilt of a defendant may be established without proof that the accused personally did every act constituting the offense charged.

“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.”

In other words, every person who willfully participates in the commission of a crime may be found to be guilty of that offense. Participation is willful if done voluntarily and intentionally.

18 U.S.C. § 2

1A Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, §18.01 (6th ed. 2008)

Nye & Nissen v. United States, 336 U.S. 613, 618-20 (1949)
United States v. Hollis, 971 F.2d 1441, 1451-52 (10th Cir. 1992)
United States v. Horton, 847 F.2d 313, 321-22 (6th Cir. 1988)
United States v. Martin, 747 F.2d 1404, 1407 (11th Cir. 1984)

GOVERNMENT PROPOSED JURY INST. NO. 18.2-3

Principal -- To Aid, Abet, Cause, etc.
(Multiple Defendants)

In a case where two or more persons are charged with the commission of a crime, the guilt of any defendant may be established without proof that he personally did every act constituting the offense charged.

[JI-2]

“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.”

In other words, every person who willfully participates in the commission of a crime may be found to be guilty of that offense. Participation is willful if done voluntarily and intentionally.

18 U.S.C. § 2

1A Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 18.02 (6th ed. 2008)

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 190 (1994)

Nye & Nissen v. United States, 336 U.S. 613, 618-20 (1949)

United States v. Horton, 847 F.2d 313, 321-22 (6th Cir. 1988)

United States v. Martin, 747 F.2d 1404, 1407 (11th Cir. 1984)

GOVERNMENT PROPOSED JURY INST. NO. 18.2-4

"Aid and Abet" -- Explained

A person may violate the law even though he or she does not personally do each and every act constituting the offense if that person "aided and abetted" the commission of the offense.

Section 2(a) of Title 18 of the United States Code provides:

Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

Before a defendant may be held responsible for aiding and abetting others in the commission of a crime, it is necessary that the government prove beyond a reasonable doubt that the defendant knowingly and deliberately associated [himself] [herself] in some way with the crime charged and participated in it with the intent to commit the crime.

In order to be found guilty of aiding and abetting the commission of the crime charged in [Count___ of] the indictment, the government must prove beyond a reasonable doubt that the Defendant:

One, knew that the crime charged was to be committed or was being committed;

Two, knowingly did some act for the purpose of [aiding] [commanding] [encouraging] the commission of that crime; and

Three, acted with the intention of causing the crime charged to be committed.

Before Defendant may be found guilty as an aider or an abettor to the crime, the government must also prove, beyond a reasonable doubt, that someone committed each of the essential elements of the offense charged as detailed for you [in Instruction No. ____].

Merely being present at the scene of the crime or merely knowing that a crime is being committed or is about to be committed is not sufficient conduct for the jury to find that the defendant aided and abetted the commission of that crime.

[JI-3]

The government must prove that the Defendant knowingly [and deliberately] associated [himself] [herself] with the crime in some way as a participant -- someone who wanted the crime to be committed -- not as a mere spectator.

18 U.S.C. § 2

1A Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 18.01 (6th Ed. 2008)

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 190 (1994)

Nye & Nissen v. United States, 336 U.S. 613, 618-20 (1949)

United States v. Clifford, 979 F.2d 896, 899 (1st Cir. 1992)

United States v. Esparsen, 930 F.2d 1461, 1470 (10th Cir. 1991)

United States v. Singh, 922 F.2d 1169, 1173 (5th Cir. 1991)

United States v. Perez, 922 F.2d 782, 785 (11th Cir. 1991)

United States v. Labat, 905 F.2d 18, 23 (2d Cir. 1990)

United States v. Lindell, 881 F.2d 1313, 1323 (5th Cir. 1989)

United States v. Roan Eagle, 867 F.2d 436, 445 n.15 (8th Cir. 1989)

United States v. Lanier, 838 F.2d 281, 284 (8th Cir. 1988)

United States v. Torres, 809 F.2d 429, 433 (7th Cir. 1987)

United States v. Payne, 750 F.2d 844, 860 (11th Cir. 1985)

United States v. Lard, 734 F.2d 1290, 1298 (8th Cir. 1984)

GOVERNMENT PROPOSED JURY INST. NO. 18.2-5

Aiding and Abetting

Any person who knowingly aids, abets, counsels, commands, induces or procures the commission of a crime may be found guilty of that crime. However, that person must knowingly associate [himself][herself] with the criminal venture, participate in it, and try to make it succeed.

18 U.S.C. § 2

Federal Criminal Jury Instructions of the Seventh Circuit § 5.06 (1998 ed.) (modified)

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 190 (1994)

Nye & Nissen v. United States, 336 U.S. 613, 618-20 (1949)

United States v. Clifford, 979 F.2d 896, 899 (1st Cir. 1992)

United States v. Esparsen, 930 F.2d 1461, 1470 (10th Cir. 1991)

United States v. Singh, 922 F.2d 1169, 1173 (5th Cir. 1991)

United States v. Perez, 922 F.2d 782, 785 (11th Cir. 1991)

United States v. Labat, 905 F.2d 18, 23 (2d Cir. 1990)

United States v. Roan Eagle, 867 F.2d 436, 445 n.15 (8th Cir. 1989)

United States v. Lanier, 838 F.2d 281, 284 (8th Cir. 1988)

United States v. Torres, 809 F.2d 429, 433 (7th Cir. 1987)

GOVERNMENT PROPOSED JURY INST. NO. 18.2-6

Aiding and Abetting

A defendant may be found guilty of [name principal offense], even if the defendant personally did not commit the act or acts constituting the crime but aided and abetted in its commission. To prove a defendant guilty of aiding and abetting, the government must prove beyond a reasonable doubt:

[JI-4]

First, [principal offense] was committed by someone;

Second, the defendant knowingly and intentionally aided, counseled, commanded, induced or procured to commit each element of _____; and

Third, the defendant acted before the crime was completed.

It is not enough that the defendant merely associated with the person committing the crime, or unknowingly or unintentionally did things that were helpful to the principal, or was present at the scene of the crime.

The evidence must show beyond a reasonable doubt that the defendant acted with the knowledge and intention of helping commit the crime.

The government is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.

18 U.S.C. § 2

***Manual of Model Criminal Jury Instructions for the Ninth Circuit*, § 5.1 (2010 ed.)**

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 190 (1994)

Nye & Nissen v. United States, 336 U.S. 613, 619 (1949)

United States v. Clifford, 979 F.2d 896, 899 (1st Cir. 1992)

United States v. Abreu, 962 F.2d 1425, 1429 (1st Cir. 1992)

United States v. Esparsen, 930 F.2d 1461, 1470 (10th Cir. 1991)

United States v. Singh, 922 F.2d 1169, 1173 (5th Cir. 1991)

United States v. Perez, 922 F.2d 782, 785 (11th Cir. 1991)

United States v. Labat, 905 F.2d 18, 23 (2d Cir. 1990)

United States v. Roan Eagle, 867 F.2d 436, 445 n.15 (8th Cir. 1989)

United States v. Lanier, 838 F.2d 281, 284 (8th Cir. 1988)

United States v. Torres, 809 F.2d 429, 433 (7th Cir. 1987)

GOVERNMENT PROPOSED JURY INST. NO. 18.2-7

Aiding And Abetting (Agency)

The guilt of a defendant in a criminal case may be established without proof that the defendant 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 that person through direction of another person as his or her agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.

If another is acting under the direction of the defendant or if the defendant joins another person and performs acts with the intent to commit a crime, then the law holds the defendant responsible for the acts and conduct of such other persons just as though the defendant had committed the acts or engaged in such conduct.

Before any defendant may be held criminally responsible for the acts of others, it is necessary that the accused deliberately associate himself in some way with the criminal venture and participate in it with the intent to make the criminal venture succeed.

Of course, mere presence at the scene of a crime and knowledge that a crime is being committed

[**JI-5**] 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 voluntarily participated in its commission with the intent to bring about the crime.

18 U.S.C. § 2

Fifth Circuit Criminal Jury Instructions, § (2001 ed.), Section 2.06

Pattern Jury Instructions: Eleventh Circuit, Criminal Cases, SI 7 (2010 ed.)

United States v. Ortiz, 447 F.3d 28, 32-33 (1st Cir. 2006)

United States v. Burgos, 94 F.3d 849, 869 (4th Cir. 1996)

United States v. Morrow, 977 F.2d 222, 230-31 (6th Cir. 1992) (*en banc*)

United States v. Esparsen, 930 F.2d 1461, 1470 (10th Cir. 1991)

United States v. Perez, 922 F.2d 782, 785 (11th Cir. 1991)

United States v. Ivey, 915 F.2d 380, 384 (8th Cir. 1990)

United States v. Lindell, 881 F.2d 1313, 1323 (5th Cir. 1989)

United States v. Roan Eagle, 867 F.2d 436, 445 n.15 (8th Cir. 1989)

United States v. Payne, 750 F.2d 844, 860 (11th Cir. 1985)

United States v. Lard, 734 F.2d 1290, 1298 (8th Cir. 1984)

United States v. Burrell, 496 F.2d 609, 610 (3d Cir. 1974)

United States v. Walker, 621 F.2d 163 (5th Cir. 1980) (approving nearly identical instruction)

GOVERNMENT PROPOSED JURY INST. NO. 18.2-8

“Mere Presence” -- Defined

Merely being present at the scene of a crime or merely knowing that a crime is being committed or is about to be committed is not sufficient conduct to find that Defendant [name] committed that crime.

In order to find the defendant guilty of the crime, the government must prove, beyond a reasonable doubt, that in addition to being present or knowing about the crime, Defendant knowingly [and deliberately] associated [himself] [herself] with the crime in some way as a participant -- someone who wanted the crime to be committed -- not as a mere spectator.

18 U.S.C. § 2

1A Kevin F. O’Malley et al., *Federal Jury Practice and Instructions*, § 16.09 (6th Ed. 2008)

United States v. Ortiz, 447 F.3d 28, 32-33 (1st Cir. 2006)

United States v. Burgos, 94 F.3d 849, 869 (4th Cir. 1996)

United States v. Morrow, 977 F.2d 222, 230-31 (6th Cir. 1992) (*en banc*)

United States v. Esparsen, 930 F.2d 1461, 1470 (10th Cir. 1991)

United States v. Ivey, 915 F.2d 380, 384 (8th Cir. 1990)

United States v. Lindell, 881 F.2d 1313, 1323 (5th Cir. 1989)

United States v. Payne, 750 F.2d 844, 860 (11th Cir. 1985)

United States v. Lard, 734 F.2d 1290, 1298 (8th Cir. 1984)

United States v. Burrell, 496 F.2d 609, 610 (3d Cir. 1974)

[JI-6]

GOVERNMENT PROPOSED JURY INST. NO. 18.2-9

Aiding and Abetting Engaging in a Monetary Transaction in Property Derived from Specified Unlawful Activity

Count ____ of the indictment charges the defendant with aiding and abetting engaging in a monetary transaction in violation of federal law.

For you to find Defendant [*name*] guilty of this offense, it is not necessary for you to find that[he] [she] personally committed the crime [himself] [herself]. You may also find [him] [her] guilty if [he] [she] intentionally helped someone else to commit the crime. A person who does this is called an aider and abettor.

A person may be found guilty of engaging in a monetary transaction in property derived from a specified unlawful activity even if [he] [she] personally did not do every act constituting the offense charged. But for you to find Defendant [*name*] guilty of engaging in a monetary transaction in property derived from a specified unlawful activity as an aider and a better, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

- (A) First, that the crime of engaging in a monetary transaction in property derived from a specified unlawful activity was committed;
- (B) Second, that the defendant helped to commit the crime; and
- (C) Third, that the defendant intended to help commit the crime.

Proof that the defendant may have known about the crime, even if [he] [she] was there when it was committed, is not enough for you to find [him] [her] guilty. You can consider this in deciding whether the government has proved that [he] [she] was an aider and abettor, but without more it is not enough.

What the government must prove is that the defendant intentionally did something to cause the act(s) to be committed.

If you are convinced that the government has proved all of these elements, you may say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you cannot find the defendant guilty of engaging in a monetary transaction in property derived from a specified unlawful activity as an aider and abettor.

Pattern Jury Instructions of the Sixth Circuit, Criminal Cases, § 4.01 (2011 ed.)
(modified)

18 U.S.C. § 286

GOVERNMENT PROPOSED JURY INST. NO. 18.286-1

Conspiracy to Defraud the Government With Respect to Claims (Elements)

To sustain the charge of conspiracy to defraud the government with respect to claims, the government must prove the following propositions:

First, the defendant entered into a conspiracy to [obtain payment; allowance; aid in obtaining payment; aid in obtaining allowance]¹ of a claims against the United States Department of Treasury, a department of the United States, for tax refunds;²

[JI-7]

Second, the claim was false, fictitious, or fraudulent; and

Third, the defendant knew at the time that the claim was false, fictitious, or fraudulent.

Fourth, that the defendant acted with the intent to defraud.

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

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

Federal Criminal Jury Instructions of the Seventh Circuit, 18 U.S.C. § 286, at p.136 (1998 ed.) (modified)

¹ Insert language to reflect the charges in the case.

² Insert language to reflect the charges in the case.

18 U.S.C. § 287

GOVERNMENT PROPOSED JURY INST. NO. 18.287-1

False Claim -- Offense Charged

The indictment sets forth _____ counts or charges.

Count _____ charges that on or about the _____ day of _____, 20____, in the _____ District of _____, the defendant, _____, a resident of _____, made and presented to the United States Treasury Department a claim against the United States for payment, which he [she]knew to be false, fictitious, or fraudulent, by [e.g., preparing and causing to be prepared, and filing and causing to be filed, what purported to be a federal income tax return],³ which was presented to the United States Treasury Department, through the Internal Revenue Service, wherein he [she] claimed [e.g., a refund of taxes]⁴ in the amount of \$_____, knowing that claim to be false, fictitious, or fraudulent.

Count II charges that * * *.

All in violation of Title 18, United States Code, Section 287.

[JI-8]

COMMENT

1 When the false claim charged was filed electronically, the prosecutor should insure that the indictment and instructions do not charge either the signing or the filing of a federal income tax return unless the paper Form 8453 relating to each false claim has been retrieved from the IRS and can be introduced into evidence along with the electronic portion of the return or the defendant used a self-selected personal identification number (PIN) in accordance with IRS instructions when filing the return. Without the Form 8453 or the use of a PIN, the government cannot prove that a "tax return" was filed. For further information, see "Prosecuting Electronic Fraud" (distributed to all U.S. Attorneys on February 6, 1993, and available from the Tax Division).

³ The instruction should be drafted so as to reflect the charge and basis for venue as set forth in the indictment.

⁴ The instruction should be drafted so as to reflect the charge as set forth in the indictment.

GOVERNMENT PROPOSED JURY INST. NO. 18.287-2

Statutory Language -- Section 287

Section 287 of Title 18 of the United States Code provides, in part, as follows:

Section 287. False, fictitious or fraudulent claims.

Whoever makes or presents to any person . . . in the civil . . . service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be . . . [guilty of an offense against the laws of the United States].

18 U.S.C. § 287

GOVERNMENT PROPOSED Jury Inst. No. 18.287-3

18 U.S.C. 287 -- Purpose of the Statute

The objective of Congress in enacting section 287 was to assure the integrity of claims and vouchers submitted to the government and thereby protect the funds and property of the government from fraudulent claims, regardless of the particular form of the claim or the particular function of the government department or agency against which the claim is made. Congress intended to prevent any deception that would impair, obstruct or defeat the lawful, authorized functions of government departments or agencies.

1 Leonard B. Sand et al., *Modern Federal Jury Instructions - Criminal*, Instruction 18-2 (2008 rev. ed.)

Rainwater v. United States, 356 U.S. 590 (1958)

United States v. Maher, 582 F.2d 842 (4th Cir. 1978)

GOVERNMENT PROPOSED Jury Inst. No. 18.287-4

Elements of the Offense

In order to prove the crime of making a false claim, the government must establish beyond a reasonable doubt each of the following facts:

First, that on or about [insert date], the defendant knowingly made or presented a claim to [the United States Department of Treasury] [or insert (1) name of person or officer in the civil or military service of the United States].

[JI-9]

Second, that the claim which was made or presented was a claim against the United States or a department or agency of the United States.

Third, that the claim was false, fictitious, or fraudulent.

Fourth, that the false statement contained in the claim was material.¹

Fifth, that the defendant knew that the claim was false, fictitious, or fraudulent.

¹ Leonard B. Sand et al., *Modern Federal Jury Instructions: Criminal*, Instruction 18-3 (2008 rev. ed.) (modified)

¹ The circuits are divided as to whether materiality is an element of 18 U.S.C. § 287. However, in light of the Supreme Court’s decision in *United States v. Neder*, 527 U.S. 1, 20-25 (1999) (holding that materiality is an element of bank fraud, wire fraud, and mail fraud, the safer course of action is to include an instruction on materiality). *See also United States v. Foster*, 229 F.3d1196, 1196 & n.1 (5th Cir. 2000) (while expressly not deciding the issue, Fifth Circuit reads *Neder* to require a materiality instruction and states that “the better practice would be to give the instruction in a § 28[7] false claim offense”). *See § 22.04[2][b]*, *supra*.

GOVERNMENT PROPOSED Jury Inst. No. 18.287-5

First Element -- Submission of Claim

The first element that the government must establish beyond a reasonable doubt is that the defendant knowingly made or presented a claim to the United States Department of Treasury.

1 Leonard B. Sand et al., *Modern Federal Jury Instructions: Criminal*, Instruction 18-4 (2008 rev. ed.) (modified)

GOVERNMENT PROPOSED Jury Inst. No. 18.287-6

Second Element -- Claim Against the United States

The second element the government must prove beyond a reasonable doubt is that the claim was made or presented upon or against the United States or a department or agency of the United States.

If you find that the claim received by an agency or department of the United States was one which the agency or department was expected to pay, then this element of the offense is satisfied.

1 Leonard B. Sand et al., *Modern Federal Jury Instructions: Criminal*, Instruction 18-6 (2008 rev. ed.) (modified)

GOVERNMENT PROPOSED Jury Inst. No. 18.287-7

Third Element -- Claim was False, Fictitious or Fraudulent

The third element you must find beyond a reasonable doubt is that the claim was false, fictitious, or fraudulent.

[JI-10]

A claim is false if it was untrue when made and was then known to be untrue by the person making it or causing it to be made.

A claim is fictitious if it is not real or if it does not correspond to what actually happened.

A claim is fraudulent if it was falsely made or caused to be made with the specific intent to deceive.

The question you must focus on is whether the claim in question contained any entry which you find from the evidence was false, fictitious, or fraudulent. You need not find that all of the entries on the claim were false, fictitious, or fraudulent, so long as you find that there was one entry which was false, fictitious, or fraudulent.

1 Leonard B. Sand et al., *Modern Federal Jury Instructions: Criminal*, Instruction 18-7 (2008 rev. ed.) (modified)

GOVERNMENT PROPOSED Jury Inst. No. 18.287-8

Fourth Element -- False Statement in Claim Was Material

The fourth element the government must prove beyond a reasonable doubt is that the false statement contained in the claim was material.

A statement or representation is "material" if it has a natural tendency to influence or is capable of influencing a decision or action of the Internal Revenue Service.

To be "material" it is not necessary that the statement or representation, in fact, influence or deceive.

Kungys v. United States, 485 U.S. 759, 770 (1988)

GOVERNMENT PROPOSED Jury Inst. No. 18.287-9

Fifth Element -- Knowledge that Claim Was False

The fifth element the government must prove beyond a reasonable doubt is that the defendant had knowledge that the claim was false or fictitious or fraudulent.

An act is not done unlawfully or with knowledge of its false or fictitious or fraudulent character if it is done by mistake, carelessness, or other innocent reason.

It is not necessary, however, that the government proves that the defendant had exact knowledge of the relevant criminal provisions governing his conduct. You need only find that the defendant acted with knowledge that the claim was false, fictitious, or fraudulent.¹

¹ Leonard B. Sand et al., *Modern Federal Jury Instructions: Criminal*, Instruction 18-7 (2008 rev. ed.) (modified)

[JI-11]

¹ CAUTION: The courts have debated whether the government must prove that the defendant acted "willfully" (i.e., that the defendant knew he was violating the law) or that there was an intent to cause the government a loss. You should check the law of your circuit.

GOVERNMENT PROPOSED Jury Inst. No. 18.287-10

False Claims Against the Government

Title 18, United States Code, Section 287, makes it a crime to knowingly make a false claim against any department or agency of the United States. The United States Department of Treasury is a department or agency of the United States within the meaning of that law.

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

First: That the defendant knowingly presented to an agency of the United States a false or fraudulent claim against the United States; and¹

Second: That the defendant knew that the claim was false or fraudulent;

A claim is “false” or “fraudulent” if it is untrue at the time it is made and is then known to be untrue by the person making it.

Third: That the false or fraudulent claim was material.

A claim is “material” if it has a natural tendency to influence, or is capable of influencing, the agency to which it was addressed. It is not necessary to show, however, that the government agency was in fact deceived or misled.

To make a claim, the defendant need not directly submit the claim to an employee or agency of the United States. It is sufficient if the defendant submits the claim to a third party knowing that the third party will submit the claim or seek reimbursement from the United States (or a department or agency thereof).

Fifth Circuit Criminal Jury Instructions, § 2.19 (2001 ed.) (modified)

¹ Although this jury instruction only mentions “false or fraudulent” claims, prosecutors should take note that 18 U.S.C. s 287 makes it a crime to knowingly make a “false, fictitious, or fraudulent” claim upon or against the United States. Therefore, when charging all three adjectives in the conjunctive, prosecutors should recognize which adjective(s) applies to the claim at issue in the case. The definitions of “false,” “fictitious,” and “fraudulent” are available at Government Proposed Jury Inst. No. 18-287-7.

GOVERNMENT PROPOSED JURY INST. NO. 18.287-11

False, Fictitious, Or Fraudulent Claims (Elements)

To sustain the charge of making a false claim, the government must prove the following propositions:

First, that the defendant (made or presented) a claim upon or against (the United States or a department or agency of the United States);

Second, that the claim was (false, fictitious, or fraudulent);

Third, that the defendant knew the claim was (false, fictitious, or fraudulent); and

Fourth, that the defendant submitted the claim with intent to defraud.¹

[Fifth, that a false or fraudulent statement in the claim was material.]²

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

[JI-12]

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

Federal Criminal Jury Instructions of the Seventh Circuit, 18 U.S.C. § 287, at p.137 (1998 ed.) (modified)

¹ The Fourth and the Ninth Circuits have held that it is not necessary to prove an intent to defraud when the charge is that the defendant filed a false claim for a refund. *United States v. Blecker*, 657 F.2d 629 (4th Cir. 1981); *United States v. Milton*, 602 F.2d 231, 233 (9th Cir. 1979). See also [§ 22.04\[3\]](#), *supra*.

² The circuits are divided as to whether materiality is an element of 18 U.S.C. § 287. However, in light of the Supreme Court's decision in *United States v. Neder*, 527 U.S. 1, 20-25 (1999), holding that materiality is an element of bank fraud, wire fraud, and mail fraud, the safer course of action is to include an instruction on materiality. See also *United States v. Foster*, 229 F.3d 1196, 1196 & n.1 (5th Cir. 2000) (while expressly not deciding the issue, Fifth Circuit reads *Neder* to require a materiality instruction and states that "the better practice would be to give the instruction in a § 28[7] false claim offense"). See [§ 22.04\[2\]\[b\]](#), *supra*.

GOVERNMENT PROPOSED Jury Inst. No. 18.287-12

False, Fictitious, Or Fraudulent Claims
(Claims Submitted to Third Parties)

To make a claim, the defendant need not directly submit the claim to an employee or agency of the United States. It is sufficient if the defendant submits the claim to a third party knowing that the third party will submit the claim or seek reimbursement from the United States (or a department or agency thereof).

Federal Criminal Jury Instructions of the Seventh Circuit, 18 U.S.C. § 287, at p.139 (1998 ed.)

GOVERNMENT PROPOSED Jury Inst. No. 18.287-13

Making a False Claim Against the United States

The crime of making a [false] [fictitious] [fraudulent] claim against the United States, as charged in [Count _____] of the indictment, has four elements, which are:

One, the defendant [made] [presented] to (name of U.S. officer or agency) a claim against [the United States] [(name of department or agency of the United States)];

Two, the claim was [false] [fictitious] [fraudulent] in that (describe how claim was false, etc.);

Three, the defendant knew the claim was [false] [fictitious] [fraudulent]; and

Four, the [false] [fictitious] [fraudulent] matter was material¹ to (name of U.S. officer or agency).

[A claim is “false” or “fictitious” if any part of it is untrue when made, and then known to be untrue by the person making it or causing it to be made.] [A claim is “fraudulent” if any part of it is known to be untrue, and made or caused to be made with the intent to deceive the governmental agency to which submitted.]

[JI-13]

A claim is “material” if it has a natural tendency to influence, or is capable of influencing the (name of U.S. officer or agency). [However, whether a claim is “material” does not depend on whether (name of U.S. officer or agency) was actually deceived.]¹

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, § 6.18.287 (2012 ed.)

¹ The circuits are divided as to whether materiality is an element of 18 U.S.C. § 287. However, in light of the Supreme Court’s decision in *United States v. Neder*, 527 U.S. 1, 20-25 (1999), holding that materiality is an element of bank fraud, wire fraud, and mail fraud, the safer course of action is to include an instruction on materiality. *See also United States v. Foster*, 229 F.3d 1196, 1196 & n.1 (5th Cir. 2000) (while expressly not deciding the issue, Fifth Circuit reads *Neder* to require a materiality instruction and states that “the better practice would be to give the instruction in a § 28[7] false claim offense”). *See § 22.04[2][b]*, *supra*.

GOVERNMENT PROPOSED Jury Inst. No. 18.287-14

Definition of Knowingly

When the word “knowingly” is used in these instructions, it means that the defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake or accident. [Knowledge may be proved by the defendant's conduct and by all the facts and circumstances surrounding the case.]

Federal Criminal Jury Instructions of the Seventh Circuit, § 4.06 (1998 ed.)
(modified).

GOVERNMENT PROPOSED Jury Inst. No. 18.287-15

False Claims against the Government

Title 18, United States Code, Section 287, makes it a Federal crime or offense for anyone to knowingly make a false claim against any department or agency of the United States.

You are instructed that the [insert name of department or agency, e.g., Internal Revenue Service] is a department or agency of the United States within the meaning of that law.

The defendant can be found guilty of the offense of making a false claim against the government only if all of the following facts are proved beyond a reasonable doubt:

First: That the defendant knowingly presented to an agency of the United States a false and fraudulent claim against the United States¹;

Second: the claim was based on a false or fraudulent material fact; and

Third: the defendant acted intentionally and knew that the claim was false and fraudulent

A claim is "false" or "fraudulent" if it is untrue at the time it is made and is then known to be untrue by the person making it. It is not necessary to show, however, that the government agency was in fact deceived or misled.

The making of a false or fraudulent claim is not an offense unless the falsity or fraudulent aspect of the claim relates to a "material" fact. A misrepresentation is "material" if it contains an important fact, as distinguished from some unimportant or trivial detail, and has a natural

[**JI-14**] tendency to influence, or was capable of influencing, the decision of the department or agency in making a determination required to be made.

Pattern Jury Instructions: Eleventh Circuit, Criminal Cases, OI 11.2 (2010 ed.)
(modified)

¹ ¹ Although this jury instruction only mentions "false or fraudulent" claims, prosecutors should take note that 18 U.S.C. s 287 makes it a crime to knowingly make a "false, fictitious, or fraudulent" claim upon or against the United States. Therefore, when charging all three adjectives in the conjunctive, prosecutors should recognize which adjective(s) applies to the claim at issue in the case. The definitions of "false," "fictitious," and "fraudulent" are available at Government Proposed Jury Inst. No. 18-287-7.

GOVERNMENT PROPOSED Jury Inst. No. 18.287-16

Knowledge of Falsehood
(Deliberate Ignorance)

The government may prove that Defendant _____ acted “knowingly” by proving, beyond a reasonable doubt, that this defendant deliberately closed [his] [her] eyes to what would otherwise have been obvious to [him] [her]. No one can avoid responsibility for a crime by deliberately ignoring what is obvious. In order to infer knowledge, you must find that two things have been established:

First, that the defendant was aware of a high probability of [the fact in question].

Second, that the defendant consciously and deliberately took actions to avoid learning about the existence of that fact.

It is entirely up to you as to whether you find any deliberate ignorance or deliberate closing of the eyes and any inferences to be drawn from any such evidence.

You may not conclude that the defendant had knowledge, however, from proof of a mistake, negligence, or carelessness. You may not conclude that defendant had knowledge if the defendant did not actually believe in the existence of that fact. There must be an awareness of a high probability of the existence of the fact and a deliberate effort to remain ignorant of the fact.

1A Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 17.09 (6th ed. 2008) (modified);

Pattern Criminal Jury Instructions for the District Courts of the First Circuit, § 2.16 (2012 ed.);

Third Circuit Model Criminal Jury Instructions, § 5.06 (2010 ed.);

Sixth Circuit Pattern Criminal Jury Instructions, § 2.09 (2011 ed.);

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, § 7.04 (2012 ed.);

Ninth Circuit Model Criminal Jury Instructions, § 5.7 (2010 ed.);

Tenth Circuit Criminal Pattern Jury Instructions, § 1.37 (2005 ed.).

COMMENTS

1 In *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. ___, 131 S. Ct. 2060 (2011), the Supreme Court noted that “the doctrine of willful blindness is well established in criminal law.” Observing that all of the Courts of Appeals - with the possible exception of the District of Columbia Circuit - have applied the willful blindness doctrine to a wide range of criminal statutes, the Court saw no reason why it should not also apply to civil lawsuits. The Court noted that the courts all appear to agree on two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact. *See id.* at 2071 (collecting cases); *see also United States v. Griffin*, 524 F.3d 71, 79 n.6 (“The circuits are uniform in approving willful blindness instructions for specific intent criminal offenses.”).

2 The law on "deliberate ignorance" or "willful blindness" varies from circuit to circuit. Several circuits have indicated that "deliberate ignorance" instructions are rarely appropriate. *See, e.g., United States v. Mapelli*, 971 F.2d 284, 286 (9th Cir. 1992); *United States v. Ojebode*, 957 F.2d 1218, 1229 (5th Cir. 1992); *United States v. de Francisco-Lopez*, 939 F.2d 1405, 1409 (10th Cir. 1991). Furthermore, several courts have found "deliberate ignorance" instructions to constitute reversible error when the evidence did not support giving the instruction. *See, e.g., United States v. Whiteford*, 676 F.3d 348, 357 (3d Cir. 2012) (A willful blindness instruction is appropriate when the defendant asserts a lack of guilty knowledge, but the evidence supports an inference of deliberate ignorance); *Mapelli*, 971 F.2d at 287; *United States v. Barnhart*, 979 F.2d 647, 652-53 (8th Cir. 1992). *But see United States v. Stone*, 9 F.3d 934 (11th Cir. 1993). Finally, some courts have held that it is inconsistent for a court to give instructions on both actual knowledge and willful blindness. *See, e.g., United States v. Alston-Graves*, 435 F.3d 331, 342 n. 15 (D.C. Cir. 2006). *But see United States v. Wert-Ruiz*, 228 F.3d 250, 255 (3d Cir. 2000) (approving concurrent use of instructions on actual knowledge and willful blindness).

As a result, great care should be exercised in the use of such an instruction. The law of the circuit should be carefully checked and no such instruction should be requested unless the evidence clearly supports it. *See United States v. Jinwright*, 633 F.3d 471, 478 (4th Cir. 2012) (requests for willful blindness instructions should be handled with caution).

3 If the evidence does clearly support a “deliberate ignorance” instruction and a decision is made to request one, care still must be taken regarding its wording. In particular, no instruction should be requested in a criminal tax case which is inconsistent with the standard of willfulness set forth in *Cheek v. United States*, 498 U.S. 192, 201 (1991), that is, a voluntary, intentional violation of a known legal duty. *See United States v. Stadtmauer*, 620 F.3d 238, 258-58 (3d Cir. 2010) (“The Court’s instruction made clear that willful blindness applied only to the element of knowledge.”).

[JI-15]

18 U.S.C. § 371

GOVERNMENT PROPOSED Jury Inst. No. 18.371-1

Conspiracy -- Offense Charged

Count ___ of the indictment charges that from on or about the ___ day of [month], 20___ , until on or about the ___ day of [month] , 20___ , in the District of _____ [and elsewhere], the defendant[s], [names], came to some type of agreement or understanding to [commit an offense against the United States, namely, (insert name of substantive offense or offenses)] [defraud the United States] [defraud the United States for the purpose of impairing, impeding, obstructing, or defeating the lawful functions of the Internal Revenue Service of the Treasury Department in the ascertainment, computation, assessment, and collection of income (or other relevant, e.g., excise) taxes]¹ and then acted to achieve the goal[s] of the alleged conspiracy or agreement or understanding in that one of its members thereafter [describe overt act or acts].

² Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 31.01 (6th ed. 2008) (modified)

COMMENT

¹ The law is clear that overt acts in furtherance of a conspiracy need not be illegal in themselves. *Braverman v. United States*, 317 U.S. 49, 53-54 (1942); *United States v. Tuohey*, 867 F.2d 534, 537 (9th Cir. 1989).

However, in the case of a *Klein* conspiracy (e.g., "to defraud the United States for the purpose of impairing, impeding, obstructing or defeating the lawful functions of the Internal Revenue Service of the Treasury Department in the ascertainment, computation, assessment, and collection of income), while the indictment need not use any specific words, it must allege the means by which the defendants intended to accomplish the conspiracy, and those means must involve "deceit, craft, trickery, or at least * * * means that are dishonest." *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924).

¹ The Tax Division advises against charging a conspiracy to defraud and a conspiracy to commit substantive tax offenses in the same count or indictment. This is rarely necessary and tends to unduly complicate the trial, especially with respect to the jury instructions.

GOVERNMENT PROPOSED Jury Inst. No. 18.371-2

Statute Defining Offense

Section 371 of Title 18 of the United States Code provides, in part, that "[i]f two or more persons conspire * * * to commit any offense against the United States, or to defraud the United States, or any agency thereof * * * and one or more of such persons do any act to effect the object of the conspiracy, * * *" an offense against the United States has been committed.

[JI-16]

18 U.S.C. § 371

2 Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 31.02 (6th ed. 2008)

GOVERNMENT PROPOSED Jury Inst. No. 18.371-3

Essential Elements of Offense –
When Conspiracy Offense Complete

In order to sustain its burden of proof for the crime of conspiracy to [describe substantive offense(s)] [defraud the United States] as charged in Count ___ of the indictment, the government must prove the following three essential elements beyond a reasonable doubt:

One: The conspiracy, agreement, or understanding to [describe substantive offense(s)] [defraud the United States], as described in the indictment, was formed, reached, or entered into by two or more persons;

Two: At some time during the existence or life of the conspiracy, agreement, or understanding, Defendant knew the purpose(s) of the agreement; and

Three: With knowledge of the purpose(s) of the conspiracy, agreement, or understanding, Defendant then deliberately joined the conspiracy, agreement, or understanding; and

Four: At some time during the existence or life of the conspiracy, agreement, or understanding, [and after _____],¹ one of its alleged members knowingly performed one of the overt acts charged in the indictment and did so in order to further or advance the purpose of the agreement.

2 Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 31.03 (6th ed. 2008) (modified)

United States v. Falcone, 311 U.S. 205, 210 (1940)
United States v. O'Campo, 973 F.2d 1015, 1021 (1st Cir. 1992)
United States v. Wiley, 846 F.2d 150, 153-54 (2d Cir. 1988)
United States v. Rankin, 870 F.2d 109, 113 (3d Cir. 1989)
United States v. Tedder, 801 F.2d 1437, 1446 (4th Cir. 1986)
United States v. Yamin, 868 F.2d 130, 133 (5th Cir. 1989)
United States v. Bostic, 480 F.2d 965, 968 (6th Cir. 1973)
United States v. Mealy, 851 F.2d 890, 896 (7th Cir. 1988)
United States v. Cerone, 830 F.2d 938, 944 (8th Cir. 1987)
United States v. Penagos, 823 F.2d 346, 348 (9th Cir. 1987)
United States v. Gonzalez, 797 F.2d 915, 916 (10th Cir. 1986)
United States v. Cure, 804 F.2d 625, 628 (11th Cir. 1986)
United States v. Treadwell, 760 F.2d 327, 333 (D.C. Cir. 1985)

COMMENT

¹ If there is evidence of overt acts both within and without the statute of limitations period, state the date of the beginning of that period.

1 Prosecutors charging Klein conspiracies in the Ninth Circuit should be aware of *United States v. Caldwell*, 989 F.2d 1056 (9th Cir. 1993). In *Caldwell*, the Ninth Circuit held that the government must prove that the defendant used deceitful or dishonest means to defraud the United States. *Id.* at 1058-59.

GOVERNMENT PROPOSED Jury Inst. No. 18.371-4

Conspiracy -- Existence of an Agreement

A criminal conspiracy is an agreement or a mutual understanding knowingly made or knowingly entered into by at least two people to violate the law by some joint or common plan or course of [JI-17] action. A conspiracy is, in a very true sense, a partnership in crime.

A conspiracy or agreement to violate the law, like any other kind of agreement or understanding, need not be formal, written, or even expressed directly in every detail.

The government must prove that Defendant and at least one other person knowingly and deliberately arrived at an agreement or understanding that they, and perhaps others, would [violate some law(s)] [defraud the United States] by means of some common plan or course of action as alleged in Count ___ of the indictment. It is proof of this conscious understanding and deliberate agreement by the alleged members that should be central to your consideration of the charge of conspiracy.

[To prove the existence of a conspiracy or an illegal agreement, the government is not required to produce a written contract between the parties or even produce evidence of an express oral agreement spelling out all of the details of the understanding. To prove that a conspiracy existed, moreover, the government is not required to show that all of the people named in the indictment as members of the conspiracy were, in fact, parties to the agreement, or that all of the members of the alleged conspiracy were named or charged, or that all of the people whom the evidence shows were actually members of a conspiracy agreed to all of the means or methods set out in the indictment.]

Unless the government proves beyond a reasonable doubt that a conspiracy, as just explained, actually existed, then you must acquit Defendant of the charge contained in Count ___ of the indictment.

2 Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 31.04 (6th ed. 2008)

United States v. Falcone, 311 U.S. 205, 210 (1940)

United States v. Labat, 905 F.2d 18, 21 (2d Cir. 1990)

United States v. DePew, 932 F.2d 324, 328 (4th Cir. 1991)

United States v. Nicoll, 664 F.2d 1308, 1315 (5th Cir. 1982)

United States v. Hopkins, 916 F.2d 207, 212 (5th Cir. 1990)

United States v. Pearce, 912 F.2d 159, 161 (6th Cir. 1990)

United States v. Schultz, 855 F.2d 1217, 1221 (6th Cir. 1988)

United States v. McNeese, 901 F.2d 585, 599 (7th Cir. 1990)

United States v. Kibby, 848 F.2d 920, 922 (8th Cir. 1988)

United States v. Powell, 853 F.2d 601, 604 (8th Cir. 1988)

United States v. Boone, 951 F.2d 1526, 1543 (9th Cir. 1992)

United States v. Gonzalez, 940 F.2d 1413, 1417 (11th Cir. 1991)

GOVERNMENT PROPOSED Jury Inst. No. 18.371-5

Conspiracy -- Membership in an Agreement

Before the jury may find that Defendant _____, or any other person, became a member of the conspiracy charged in Count ___ of the indictment, the evidence in the case must show beyond a reasonable doubt that Defendant knew the purpose or goal of the agreement or understanding and deliberately entered into the agreement intending, in some way, to accomplish the goal or purpose by this common plan or joint action.

[If the evidence establishes beyond a reasonable doubt that Defendant knowingly and deliberately entered into an agreement to [describe substantive offense] [defraud the United States], the fact that the defendant did not join the agreement at its beginning, or did not know all of the details of [JI-18] the agreement, or did not participate in each act of the agreement, or did not play a major role in accomplishing the unlawful goal is not important to your decision regarding membership in the conspiracy.]

Merely associating with others and discussing common goals, mere similarity of conduct between or among such persons, merely being present at the place where a crime takes place or is discussed, or even knowing about criminal conduct does not, of itself, make someone a member of the conspiracy or a conspirator.

2 Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 31.05 (6th ed. 2008)

United States v. Flaherty, 668 F.2d 566, 580 (1st Cir. 1981)

United States v. Southland, 760 F.2d 1366, 1369 (2d Cir. 1985)

United States v. Rankin, 870 F.2d 109, 113 (3d Cir. 1989)

United States v. Norris, 749 F.2d 1116, 1121 (4th Cir. 1984) (1985)

United States v. Yanin, 868 F.2d 130, 133 (5th Cir. 1989)

United States v. Christian, 786 F.2d 203, 211 (6th Cir. 1986)

United States v. Warner, 690 F.2d 545, 550 (6th Cir. 1982)

United States v. Brown, 934 F.2d 886, 889 (7th Cir. 1991)

United States v. Zimmerman, 832 F.2d 454, 457 (8th Cir. 1987)

United States v. Esparza, 876 F.2d 1390, 1392 (9th Cir. 1989)

United States v. Medina, 940 F.2d 1247, 1250 (9th Cir. 1991)

United States v. Horn, 946 F.2d 738, 740 (10th Cir. 1991)

United States v. Lynch, 934 F.2d 1226, 1231 (11th Cir. 1991)

United States v. Andrews, 953 F.2d 1312, 1318 (11th Cir. 1992)

United States v. Dale, 991 F.2d 819, 851 (D.C. Cir. 1993)

GOVERNMENT PROPOSED Jury Inst. No. 18.371-6

"Overt Act" --
Defined Success of Conspiracy Immaterial

In order to sustain its burden of proof under Count ____ of the indictment, the government must prove beyond a reasonable doubt that one of the members of the alleged conspiracy or agreement knowingly performed at least one overt act, that this overt act was performed during the existence or life of the conspiracy [and after _____], ¹ and was done to somehow further the goal(s) of the conspiracy or agreement.

The term "overt act" means some type of outward, objective action performed by one of the parties to or one of the members of the agreement or conspiracy which evidences that agreement.

Although you must unanimously agree that the same overt act was committed, the government is not required to prove more than one of the overt acts charged.

The overt act may, but for the alleged illegal agreement, appear totally innocent and legal.

2 Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 31.07 (6th ed. 2008) (modified)

United States v. Yates, 354 U.S. 298, 334 (1957)

United States v. Arboleda, 929 F.2d 858, 865 (1st Cir. 1991)

United States v. Anderson, 611 F.2d 504, 510 (4th Cir. 1979)

United States v. Lewis, 759 F.2d 1316, 1344 (8th Cir. 1985)

United States v. Hermes, 847 F.2d 493, 495 (8th Cir. 1988)

United States v. Zielie, 734 F.2d 1447, 1456 (11th Cir. 1984)

[JI-19]

¹If there is evidence of overt acts both within and without the statute of limitations period, state the date of the beginning of that period.

GOVERNMENT PROPOSED Jury Inst. No. 18.371-7

Conspiracy (Regular Charge)

Title 18, United States Code, Section 371, makes it a crime for anyone to conspire with someone else to commit an offense against the laws of the United States.

The defendant is charged with conspiring to (describe the object of the conspiracy as alleged in the indictment).

A “conspiracy” is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of “partnership in crime” in which each member becomes the agent of every other member.

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

First: That the defendant and at least one other person made an agreement to commit the crime of (describe) as charged in the indictment;

Second: That the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose; and

Third: That one of the conspirators during the existence of the conspiracy [and after _____],¹ knowingly committed at least one of the overt acts described in the indictment, in order to accomplish some object or purpose of the conspiracy.

One may become a member of a conspiracy without knowing all the details of the unlawful scheme or the identities of all the other alleged conspirators. If a defendant understands the unlawful nature of a plan or scheme and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him for conspiracy even though the defendant had not participated before and even though the defendant played only a minor part.

The government need not prove that the alleged conspirators entered into any formal agreement, nor that they directly stated between themselves all the details of the scheme. Similarly, the government need not prove that all of the details of the scheme alleged in the indictment were actually agreed upon or carried out. Nor must it prove that all of the persons alleged to have been members of the conspiracy were such, or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

Mere presence at the scene of an event, even with knowledge that a crime is being committed, or the mere fact that certain persons may have associated with each other, and

¹ If there is evidence of overt acts both within and without the statute of limitations period, state the date of the beginning of that period.

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 purpose of a conspiracy, does not thereby become a conspirator.

18 U.S.C. § 371

Fifth Circuit Criminal Jury Instructions, § 2.20 (2001 ed.) (modified)

United States v. Hopkins, 916 F.2d 207, 212 (5th Cir. 1990)

United States v. Lewis, 902 F.2d 1176, 1181 (5th Cir. 1990)

[JI-20]

United States v. Yamin, 868 F.2d 130, 133 (5th Cir. 1989)

United States v. Holcomb, 797 F.2d 1320, 1327 (5th Cir. 1986)

United States v. Nicoll, 664 F.2d 1308, 1315 (5th Cir. 1982)

United States v. Diecidue, 603 F.2d 535, 548 (5th Cir. 1979)

Sears v. United States, 343 F.2d 139, 141-42 (5th Cir. 1965)

GOVERNMENT PROPOSED Jury Inst. No. 18.371-8

Conspiracy

A conspiracy is an agreement between two or more persons to accomplish an unlawful purpose. To sustain the charge of conspiracy, the government must prove:

First, that the conspiracy as charged in Count ____ existed, [and]

Second, that the defendant knowingly became a member of the conspiracy with an intention to further the conspiracy [, and]

[Third, that an overt act was committed by at least one conspirator in furtherance of the conspiracy.]¹

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

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

[A conspiracy may be established even if its purpose was not accomplished.]

[It is not necessary that all the overt acts charged in the indictment be proved, and the overt act proved may itself be a lawful act.]

[To be a member of the conspiracy, the defendant need not join at the beginning or know all the other members or the means by which its purpose was to be accomplished. The government must prove beyond a reasonable doubt that the defendant was aware of the common purpose and was a willing participant.]

***Federal Criminal Jury Instructions of the Seventh Circuit*, § 5.08 (1998 ed.) (modified)**

United States v. Brown, 934 F.2d 886, 889 (7th Cir. 1991)

United States v. McNeese, 901 F.2d 585, 599 (7th Cir. 1990)

United States v. Mealy, 851 F.2d 890, 896 (7th Cir. 1988)

United States v. Noble, 754 F.2d 1324, 1327 (7th Cir. 1985)

¹ If there is evidence of overt acts both within and without the statute of limitations period, state that the overt act must have been committed within that period.

GOVERNMENT PROPOSED Jury Inst. No. 18.371-9

Conspiracy

The defendant is charged in Count ____ of the indictment with conspiring to [describe] in violation of Section ____ of Title ____ of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

[JI-21]

First, beginning on or about [_____], and ending on or about [_____], there was an agreement between two or more persons to commit at least one crime as charged in the indictment; [and]

Second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it; [and]

[Third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy, with all of you agreeing on a particular overt act that you find was committed.]¹

I shall discuss with you briefly the law relating to each of these elements.

A conspiracy is a kind of criminal partnership—an agreement of two or more persons to commit one or more crimes. The crime of conspiracy is the agreement to do something unlawful; it does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the crimes alleged in the indictment as an object of the conspiracy with all of you agreeing as to the particular crime which the conspirators agreed to commit.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the

¹ If there is evidence of overt acts both within and without the statute of limitations period, state that the overt act must have been committed within that period.

Use the third element in the instruction only if the applicable statute requires proof of an overt act, but omit the third element when the applicable statute does not require proof of an overt act. *See Whitfield, v. United States*, 543 U.S. 209, 212-15 (2005) (proof of overt act not necessary for conspiracy to commit money laundering).

originators. On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing that a conspiracy exists.

An overt act does not itself have to be unlawful. A lawful act may be an element of a conspiracy if it was done for the purpose of carrying out the conspiracy. The government is not required to prove that the defendant personally did one of the overt acts.

***Manual of Model Criminal Jury Instructions for the Ninth Circuit*, § 8.20 (2010 ed.)**

United States v. Caldwell, 989 F.2d 1056, 1060 (9th Cir. 1993)

United States v. Boone, 951 F.2d 1526, 1543 (9th Cir. 1992)

United States v. Esparza, 876 F.2d 1390, 1392 (9th Cir. 1989)

United States v. Penagos, 823 F.2d 346, 348 (9th Cir. 1987)

COMMENT

1 Prosecutors charging *Klein* conspiracies in the Ninth Circuit should be aware of *United States v. Caldwell*, 989 F.2d 1056 (9th Cir. 1993). The first element of the jury instruction should read:

First, [beginning on or about ____ and ending on or about ____] [starting sometime before ____] there was an agreement between two or more persons to defraud the United States by cheating the government out of money, [such as income tax payments, or property] and also an agreement [**Jl-22**] to defraud the United States that involved the impairing, impeding, obstructing, or defeating of the lawful functions of an agency of the government, such as the IRS, by deceit, craft, trickery, or means that are dishonest. *Caldwell*, 989 F.2d at 1060.

GOVERNMENT PROPOSED Jury Inst. No. 18.371-10

General Conspiracy Charge 18 U.S.C. § 371

Title 18, United States Code, Section 371, makes it a separate Federal crime or offense for anyone to conspire or agree with someone else to do something that would be another Federal crime if it was actually carried out.

A “conspiracy” is an agreement by two or more people to commit an unlawful act. In other words, it is a kind of “partnership” for criminal purposes. Every member of a conspiracy becomes the agent or partner of every other member.

The Government to prove that all of the people named in the indictment were members of the plan, or that those who were members made any kind of formal type of agreement.

The Government does not have to prove that the members planned together all of the details of the plan or the “overt acts” that the indictment charges would be carried out in an effort to commit the intended crime.

The heart of a conspiracy is the making of the unlawful plan itself followed by the commission of any overt act. The Government does not have to prove that the conspirators succeeded in carrying out the plan.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

First: Two or more persons agreed to try to accomplish a common and unlawful plan;

Second: The Defendant knew the unlawful purpose of the plan and willfully joined in it;

Third: During the conspiracy [and after _____],¹ one of the conspirators knowingly engaged in at least one overt act described in the indictment; and

Fourth: The “overt act” was committed at or about the time alleged and with the purpose of carrying out or accomplishing some object of the conspiracy.

An “overt act” is any transaction or event, even one that may be entirely innocent when viewed alone, that a conspirator commits to accomplish some object of the conspiracy.

A person may become a member of a conspiracy without knowing all of the details of the unlawful plan or the names and identities of all the other alleged conspirators.

¹ If there is evidence of overt acts both within and without the statute of limitations period, state the date of the beginning of that period.

If the Defendant played only a minor part in the plan but had a general understanding of the unlawful purpose of the plan and willfully joined in the plan on at least one occasion, that's sufficient for you to find the Defendant guilty.

But simply being present at the scene of an event or merely associating with certain people and discussing common goals and interests doesn't establish proof of a conspiracy. A person who doesn't know about a conspiracy but happens to act in a way that advances some purpose of one doesn't automatically become a conspirator.

Pattern Jury Instructions: Eleventh Circuit, Criminal Cases, OI 13.1 (2010 ed.)
(modified)

[JI-23]

United States v. Andrews, 953 F.2d 1312, 1318 (11th Cir. 1992)

United States v. Gonzalez, 940 F.2d 1413, 1417 (11th Cir. 1991)

United States v. Lynch, 934 F.2d 1226, 1231 (11th Cir. 1991)

United States v. Cure, 804 F.2d 625, 628 (11th Cir. 1986)

United States v. Zielie, 734 F.2d 1447, 1456 (11th Cir. 1984)

GOVERNMENT PROPOSED Jury Inst. No. 18.371-11

Multiple Objects
(For Use With General Conspiracy Charge)

18 U.S.C. § 371

In this case, regarding the alleged conspiracy, the indictment charges that the defendants conspired [insert objects of conspiracy -- e.g., to file false income tax returns *and* to evade income taxes].¹ In other words, the Defendants are charged with conspiring to commit *two* separate, substantive crimes or offenses.

The Government does not have to prove that the Defendant willfully conspired to commit both crimes. It is sufficient if the Government proves beyond a reasonable doubt that the Defendant willfully conspired to commit one of those crimes. But to return a verdict of guilty, you must all agree on which of the two crimes the Defendant conspired to commit.

Pattern Jury Instructions: Eleventh Circuit, Criminal Cases, OI 13.2 (2010 ed.)
(modified)

¹ If one of the objects of the conspiracy is to defraud the United States by impeding, impairing, and obstructing the Internal Revenue Service in its ascertainment, assessment, and collection of taxes, the better practice would be that the remainder of the instruction not talk of "offenses." Instead, the word "object" should be used. For example, "[i]t is charged, in other words, that they conspired to achieve two separate objects."

Further, the Tax Division advises against charging a conspiracy to defraud and a conspiracy to commit substantive tax offenses in the same count or indictment. This is rarely necessary and tends to unduly complicate the trial, especially with respect to the jury instructions.

GOVERNMENT PROPOSED Jury Inst. No. 18.371-12

Overt Act During Period of Conspiracy and Within Statute of Limitations Period

The government must also establish beyond reasonable doubt that at least one of the overt acts alleged in the indictment¹ occurred while the conspiracy was still in existence [and after _____].²

2 Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 31.07 (6th ed. 2008) (modified)

United States v. Yates, 354 U.S. 298, 334 (1957), *overruled on other grounds by Burks v. United States*, 437 U.S. 1, 8, 18 (1978);

United States v. Arboleda, 929 F.2d 858, 865 (1st Cir. 1991)

United States v. Lewis, 759 F.2d 1316, 1344 (8th Cir. 1985)

United States v. Diecidue, 603 F.2d 535, 563 (5th Cir. 1979)

United States v. Johnson, 575 F.2d 1347, 1357 (5th Cir. 1978)

[JI-24]

COMMENT

1 This instruction may not be necessary in a case in which the evidence shows that the conspiracy, if it existed at all, continued during the entire period indicated by the alleged overt acts. It should be given, however, if there is an issue of termination.

¹ Convictions have been sustained in cases where the government failed to prove the overt act alleged in the indictment, but proved an overt act that was not alleged. *United States v. Fassoulis*, 445 F.2d 13, 19 (2d Cir.), *cert. denied*, 404 U.S. 858 (1971); *United States v. Arnone*, 363 F.2d 385 (2d Cir. 1966), *cert. denied*, 385 U.S. 957 (1966); *United States v. Negro*, 164 F.2d 168, 173 (2d Cir. 1947).

² If there is evidence of overt acts both within and without the statute of limitations period, state the date of the beginning of that period.

GOVERNMENT PROPOSED Jury Inst. No. 18.371-13

Single or Multiple Conspiracies

Count ____ of the indictment charges that defendant _____ knowingly and deliberately entered into a conspiracy to [describe substantive offense(s)] [defraud the United States].

In order to sustain its burden of proof for this charge, the government must show that the single [overall] [umbrella] [master] conspiracy alleged in Count ____ of the indictment existed. Proof of separate or independent conspiracies is not sufficient.

In determining whether or not any single conspiracy has been shown by the evidence in the case, you must decide whether common, master, or overall goals or objectives existed which served as the focal point for the efforts and actions of any members to the agreement. In arriving at this decision you may consider the length of time the alleged conspiracy existed, the mutual dependence or assistance between various persons alleged to have been its members, and the complexity of the goal(s) or objective(s) shown.

A single conspiracy may involve various people at differing levels and may involve numerous transactions which are conducted over some period of time and at various places. In order to establish a single conspiracy, however, the government need not prove that an alleged coconspirator knew each of the other alleged members of the conspiracy, nor need it establish that an alleged coconspirator was aware of each of the transactions alleged in the indictment.

Even if the evidence in the case shows that defendant _____ was a member of some conspiracy, but that this conspiracy is not the single conspiracy charged in the indictment, you must acquit defendant _____ of this charge.

Unless the government proves the existence of the single [overall] [umbrella] [master] conspiracy described in the indictment beyond a reasonable doubt, you must acquit defendant _____ of this charge.

2 Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 31.09 (6th ed. 2008)

Blumenthal v. United States, 332 U.S. 539, 557 (1947)

United States v. Diecidue, 603 F.2d 535, 548 (5th Cir. 1979)

United States v. Noble, 754 F.2d 1324, 1327 (7th Cir. 1985)

United States v. Massa, 740 F.2d 629, 636 (8th Cir. 1984)

United States v. Horn, 946 F.2d 738, 740 (10th Cir. 1991)

[JI-25]

GOVERNMENT PROPOSED Jury Inst. No. 18.371-14

Multiple Conspiracies

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

Fifth Circuit Criminal Jury Instructions, § 2.21 (2001 ed.)

GOVERNMENT PROPOSED Jury Inst. No. 18.371-15

Multiple Conspiracies

You must decide whether the conspiracy charged in the indictment existed, and, if it did, who at least some of its members were. If you find that the conspiracy charged did not exist, then you must return a not guilty verdict, even though you may find that some other conspiracy existed. Similarly, if you find that any defendant was not a member of the charged conspiracy, then you must find that defendant not guilty, even though that defendant may have been a member of some other conspiracy.

Manual of Model Criminal Jury Instructions for the Ninth Circuit, § 8.22 (2010 ed.)

GOVERNMENT PROPOSED Jury Inst. No. 18.371-16

Multiple Conspiracies
(For Use With General Conspiracy Charge)

Proof of several separate conspiracies isn't proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies proved is the single overall conspiracy.

You must decide whether the single overall conspiracy charged existed between two or more conspirators. If not, then you find the Defendants not guilty of that charge.

But if you decide that a single overall conspiracy did exist, then you must decide who the conspirators were. And if you decide that a particular Defendant was a member of some other conspiracy - not the one charged - then you must find that Defendant not guilty.

So to find a Defendant guilty, you must all agree that the Defendant was a member of the conspiracy charged - not a member of some other separate conspiracy.

Pattern Jury Instructions: Eleventh Circuit, Criminal Cases, OI 13.3 (2010 ed.)

COMMENT

1 *United States v. Diecidue*, 603 F.2d 535, 548-549 (5th Cir. 1979), approved this instruction.

[JI-26]

GOVERNMENT PROPOSED Jury Inst. No. 18.371-17

Conspiracy -- Withdrawal

A person is not responsible for the conduct of another if, before the commission of a crime, he [she] terminates his [her] effort to promote or facilitate the commission of the crime, by [wholly depriving his prior efforts of effectiveness in the commission of the crime]; or [giving timely warning to the proper law enforcement authorities]; or [doing an affirmative act inconsistent with the object of the conspiracy where such act is communicated in a manner reasonably calculated to reach co-conspirators]; or [making proper effort to prevent the commission of the crime].

Federal Criminal Jury Instructions of the Seventh Circuit, § 5.12 (1998 ed.)

United States v. Read, 658 F.2d 1225, 1236 (7th Cir. 1981)

GOVERNMENT PROPOSED Jury Inst. No. 18.371-18

Conspiracy (Withdrawal -- Statute of Limitations)

One of the issues in this case is whether [defendant's name] withdrew from the conspiracy.

In order to withdraw, [defendant's name] must have taken some affirmative act to terminate his effort to promote or facilitate the conspiracy, by [wholly depriving his prior efforts of effectiveness in the commission of the crime, giving timely warning to the proper law enforcement authorities, doing an affirmative act inconsistent with the object of the conspiracy where the act is communicated in a manner reasonably calculated to reach co-conspirators, making proper effort to prevent the commission of the crime].

[Defendant's name] cannot be found guilty of the conspiracy charge if he [she] withdrew from the conspiracy more than five years¹ before the indictment was returned. The indictment in this case was returned on [date]. Thus, the government must prove beyond a reasonable doubt that [defendant's name] did not withdraw from the conspiracy prior to [date].

Federal Criminal Jury Instructions of the Seventh Circuit, § 5.13 (1999 ed.)

United States v. Read, 658 F.2d 1225, 1233 (7th Cir. 1981)

¹ The statute of limitations is six years in a conspiracy to evade income taxes and in a *Klein* conspiracy. See 2008 Criminal Tax Manual [§ 7.01\[2\]](#), STATUTE OF LIMITATIONS.

GOVERNMENT PROPOSED Jury Inst. No. 18.371-19

Withdrawal From Conspiracy

Once a person becomes a member of a conspiracy, that person remains a member until that person withdraws from it. One may withdraw by doing acts which are inconsistent with the purpose of the conspiracy and by making reasonable efforts to tell the coconspirators about those acts. You may consider any definite, positive step that shows that the conspirator is no longer a member of the conspiracy to be evidence of withdrawal.

The government must prove beyond a reasonable doubt that the defendant did not withdraw from the conspiracy before the overt act -- on which you all agreed -- was committed by some member of [JI-27] the conspiracy.

Manual of Model Criminal Jury Instructions for the Ninth Circuit, § 8.24 (2010 ed.)

United States v. Krasn, 614 F.2d 1229, 1236 (9th Cir. 1980)

GOVERNMENT PROPOSED Jury Inst. No. 18.371-20

Withdrawal From Conspiracy
(Use With General Conspiracy Charge)

A conspiracy isn't a crime unless (1) there is an agreement, and (2) a conspirator performs an overt act.

So, if a Defendant joins a conspiracy but later has a change of mind and withdraws from the conspiracy before any conspirator has committed an "over act," the Defendant isn't guilty of conspiracy.

But to find that a Defendant withdrew from a conspiracy, you must find that the Defendant took action to disavow or defeat the purpose of the conspiracy before any member of the conspiracy committed any overt act.

Pattern Jury Instructions: Eleventh Circuit, Criminal Cases, OI 13.4 (2010 ed.)

United States v. Finestone, 816 F.2d 583, 589 (11th Cir.), *cert. denied*, 484 U.S. 948 (1987)

18 U.S.C. § 1001

GOVERNMENT PROPOSED Jury Inst. No. 18.1001-1

Concealing a Material Fact -- Offense Charged
(First Clause)

The indictment sets forth _____ counts or charges.

Count ___ of the indictment charges that on or about _____, 20___, in the District of _____, the defendant, _____, knowingly and willfully concealed or covered up a material fact from a department or agency of the United States, the Internal Revenue Service, by _____.

18 U.S.C. § 1001(a)(1)

2A Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 40.01 (6th ed. 2008) (modified)

[JI-28]

GOVERNMENT PROPOSED Jury Inst. No. 18.1001-2

Making a False, Fictitious or Fraudulent Statement -- Offense Charged
(Second Clause)

The indictment sets forth _____ counts or charges.

Count ____ of the indictment charges that on or about _____, 20____, in the District of _____, the defendant, _____, knowingly made a false, fictitious, or fraudulent statement or representation concerning a material fact within the jurisdiction of a department or agency of the United States, the Internal Revenue Service, by _____.

18 U.S.C. § 1001(a)(2)

2A Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 40.05 (6th ed. 2008) (modified)

GOVERNMENT PROPOSED Jury Inst. No. 18.1001-3

Making or Using Any False Writing or Document --
Offense Charged (Third Clause)

The indictment sets forth _____ counts or charges.

Count ___ of the indictment charges that on or about _____, 20___, in the District of _____, the defendant, _____, knowingly and willfully made or used a false writing or document containing a false, fictitious, or fraudulent statement or entry concerning a material matter within the jurisdiction of a department or agency of the United States, the Internal Revenue Service, by _____.

18 U.S.C. § 1001(a)(3)

2A Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 40.09 (6th ed. 2008) (modified)

GOVERNMENT PROPOSED Jury Inst. No. 18.1001-4

Statute Defining Offense

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

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully [falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any materially false, fictitious, or fraudulent statements or representations or makes or uses any false writing or document knowing the same to contain any materially false, fictitious or fraudulent statement or entry,]¹ shall be guilty of an offense against the laws of the United States.

18 U.S.C. § 1001

2A Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, §§ 40.02; 40.06; 40.10 (6th ed. 2008)

[JI-29]

¹ Select the appropriate language for the offense charged in the indictment.

GOVERNMENT PROPOSED Jury Inst. No. 18.1001-5

The Essential Elements of the Crime Charged

In order to sustain its burden of proof for the crime of knowingly and willfully [falsifying] [concealing] [covering up]¹ a material fact in a matter within the jurisdiction of an agency of the federal government as charged in Count __ of the indictment, the government must prove the following essential elements² beyond a reasonable doubt:

One: The defendant _____ knowingly [concealed a fact by any trick, scheme or device] [made a false, fictitious, or fraudulent statement or representation to the government] [made or used a false writing or document containing a false, fictitious, or fraudulent statement] as detailed in the indictment;

Two: In so doing, the defendant _____ acted knowingly and willfully;

Three: The fact [concealed] [falsified] [covered up] was material; and

Four: The subject matter involved was within the jurisdiction of any department or agency of the United States.

[In the case of concealment, add the following element]

Five: Defendant had a legal duty to disclose the fact concealed.

Now I will give you more detailed instructions on some of these terms:

A “material” fact or matter is one that has a natural tendency to influence or is capable of influencing a decision or action of [insert name of government entity]. To be “material” it is not necessary that the statement or representation, in fact, influence or deceive.

The term “using a trick, scheme or device” means acting in a way intended to deceive others.

An act is done “knowingly and willfully” if it is done voluntarily and intentionally, and not because of some mistake or other innocent reason.

A matter is “within the jurisdiction of the [executive] [legislative] [judicial] branch of the United States government” if [insert name of government entity] has the power to exercise authority in that matter.

¹ Choose the appropriate language depending on the crime charged: concealing a material fact from; making a false statement to; or making or using a false writing or document.

² If the offense charged relates to the first clause, concealing a material matter, there are five elements; otherwise there are four. See the law of your particular circuit as to whether the judge must instruct the jury as to the fifth element. See [Section 24.03](#), *supra*.

It is not necessary that the government prove [that the defendant knew the matter was within the jurisdiction of the United States government] [that the statements were made directly to, or even received by, the United States government].

If you are convinced that the government has proved all of the elements, you should say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of the elements, then you must find the defendant not guilty of this charge.

2A Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, §§ 40.03; 40.07; 40.11 (6th ed. 2008) (modified)

1A Kevin F. O'Malley et al., *Fed. Jury Practice and Instructions*, § 16.11 (6th ed. 2008)

[JI-30]

Pattern Criminal Jury Instructions for the District Courts of the First Circuit, 4.18.1001 (2008 ed.) (elements)

Fifth Circuit Criminal Jury Instructions, § 2.49 (2001 ed.)

Pattern Jury Instructions of the Sixth Circuit, Criminal Cases, § 13.01 (2011 ed.)

Federal Criminal Jury Instructions of the Seventh Circuit, 18 U.S.C. § 1001, at p.197-203 (1998 ed.)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, § 6.18.1001A, B, C (2012 ed.) (elements)

Manual of Model Criminal Jury Instructions for the Ninth Circuit, § 8.73 (2010 ed.) (elements)

Pattern Jury Instructions: Eleventh Circuit, Criminal Cases, OI 36 (2010 ed.) (elements)

See *United States v. Gaudin*, 515 U.S. 506, 510 (1995) (holding that “materiality” is a question for the jury, not the judge, to decide)

GOVERNMENT PROPOSED Jury Inst. No. 18.1001-6

The Essential Elements of the Crime Charged

In order to sustain its burden of proof for the crime of knowingly and willfully making a false [statement] [representation] in a matter within the jurisdiction of¹ an agency of the federal government as charged in Count __ of the indictment, the government must prove the following five² essential elements beyond a reasonable doubt:

One: The defendant _____ made a [statement] [representation];

Two: That the [statement] [representation] was [false] [fictitious] [fraudulent];

Three: That the [statement] [representation] was material;

Four: That the defendant _____ acted knowingly and willfully; and

Five: That the statement pertained to a matter within the jurisdiction of any department or agency of the United States.

Now I will give you more detailed instructions on some of these terms:

A “material” fact or matter is one that has the natural tendency to influence or is capable of **[JI-31]** influencing a decision of [insert name of government entity].

A statement is “false” or “fictitious” if it was untrue when it was made, and the defendant knew it was untrue at that time. A statement is “fraudulent” if it was untrue when it was made, the defendant knew it was untrue at that time, and the defendant intended to deceive.

A “material” statement or representation is one that has the natural tendency to influence or is capable of influencing a [decision] [function] of [insert name of government entity].

An act is done “knowingly and willfully” if it is done voluntarily and intentionally, and not because of some mistake or other innocent reason.

A matter is “within the jurisdiction of the [executive] [legislative] [judicial] branch of the United States government” if [insert name of government entity] has the power to exercise authority in that matter.

¹ Choose the appropriate language depending on the crime charged.

² The Sixth Circuit pattern instruction features five, not four elements, as is standard in many other circuits. See the law of your particular circuit to determine whether this instruction is appropriate.

It is not necessary that the government prove [that the defendant knew the matter was within the jurisdiction of the United States government] [that the statements were made directly to, or even received by, the United States government].

If you are convinced that the government has proved all of the elements, you should say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of the elements, then you must find the defendant not guilty of this charge.

Pattern Jury Instructions of the Sixth Circuit, Criminal Cases, § 13.02 (2011 ed.) (modified).

See United States v. Gaudin, 515 U.S. 506, 510 (1995) (holding that "materiality" is a question for the jury, not the judge, to decide)

GOVERNMENT PROPOSED Jury Inst. No. 18.1001-7

The Essential Elements of the Crime Charged

Title 18, United States Code, Section 1001, makes it a crime for anyone to knowingly and willfully make a false or fraudulent statement to a department or agency of the United States.

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

First: That the defendant made a materially false statement [gave a materially false document] to [name department or agency of United States government];

Second: That the defendant made the statement intentionally, knowing that it was false; and

Third: That the defendant made the false statement for the purpose of misleading the [name department or agency of United States government].

A statement is material if it has a natural tendency to influence, or is capable of influencing, a decision of [name department or agency].

It is not necessary to show that the [name department or agency of United States government] was in fact misled.

[JI-32]

Fifth Circuit Criminal Jury Instructions, § 2.49 (2001 ed.)

GOVERNMENT PROPOSED Jury Inst. No. 18.1001-8

The Essential Elements of the Crime Charged
Concealing a Material Fact

To sustain the charge of concealing a material fact, the government must prove the following propositions:

First, the defendant [concealed; covered up] a fact by trick, scheme or device;

Second, the fact was material;

Third, the defendant did so knowingly and willfully; and

Fourth, the material fact related to a matter within the jurisdiction of a federal department or agency.

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

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

Federal Criminal Jury Instructions of the Seventh Circuit, 18 U.S.C. § 1001, p.197 (1998 ed.)

GOVERNMENT PROPOSED Jury Inst. No. 18.1001-9

The Essential Elements of the Crime Charged
Making a False Statement or Representation

To sustain the charge of making a [false; fictitious; fraudulent] [statement; representation], the government must prove the following propositions:

First, the defendant made a [false; fictitious; fraudulent] [statement; representation];

Second, the [statement; representation] was material;

Third, the [statement; representation] was made knowingly and willfully; and

Fourth, the [statement; representation] was made in a matter within the jurisdiction of a department or agency of the United States.

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

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

Federal Criminal Jury Instructions of the Seventh Circuit, 18 U.S.C. § 1001, p.198 (1998 ed.)

[JI-33]

GOVERNMENT PROPOSED Jury Inst. No. 18.1001-10

The Essential Elements of the Crime Charged
Making or Using a False Writing or Document

To sustain the charge of [making; using] a false [writing; document] knowing it to contain any [false; fictitious; fraudulent] [statement; entry], the government must prove the following propositions:

First, the defendant [made; used] a false [writing; document];

Second, the defendant knew the [writing; document] contained a [false; fictitious; fraudulent] [statement; entry];

Third, the [statement; entry] was material;

Fourth, the defendant [made; used] the [document; writing] knowingly and willfully; and

Fifth, the defendant [made; used] the [document; writing] within the jurisdiction of a federal department or agency.

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

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

Federal Criminal Jury Instructions of the Seventh Circuit, 18 U.S.C. § 1001, p.199 (1998)

GOVERNMENT PROPOSED Jury Inst. No. 18.1001-11

The Essential Elements of the Crime Charged
Concealing a Material Fact From a Government Agency

The crime of [falsifying] [concealing] a fact from a government agency, as charged in [Count _____ of] the indictment, has four essential elements:

One, the defendant knowingly, voluntarily and intentionally [falsified][concealed] a material fact, [describe material fact falsified or concealed, (e.g. the true purchase price of the ABC Building)], in [describe the matter within agency jurisdiction, (e.g. a loan closing statement submitted to XYZ Association)];

Two, the defendant did so by use of a [trick] [scheme] [device], that is, a course of action intended to deceive others; and

Three, the fact was material to the (name agency, e.g., Federal Home Loan Bank Board); and

Four, the (describe matter, e.g., loan closing statement) was a matter within the jurisdiction of (name agency, e.g., Federal Home Loan Bank Board). You may find that this element has been satisfied if you find that the (name of agency)'s function includes (describe evidence adduced to show agency jurisdiction, e.g., "reviewing lending practices of XYZ Association").

[Describe matter, e.g. loan closing statements submitted to the XYZ Association] are matters within the jurisdiction of the [name agency, e.g. Internal Revenue Service] which is an agency of the United States.

A fact is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of the agency. [However, whether a fact is "material" does not depend on whether a course of action intended to deceive others actually succeeded.]

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, § 6.18.1001A (2012 ed.) (modified)

[JI-34]

GOVERNMENT PROPOSED Jury Inst. No. 18.1001-12

The Essential Elements of the Crime Charged
False Statement to Government Agency

The crime of making a materially [false] [fictitious] [fraudulent] [statement] [representation] in a matter within the jurisdiction of a government agency, as charged in [Count _____ of] the indictment, has five essential elements:

One, the defendant knowingly and intentionally made the [statement] [representation] [as charged];

Two, that [statement] [representation] was [false] [fraudulent];

Three, the [statement] [representation] concerned a material fact;

Four, the [statement] [representation] was made about a matter within the jurisdiction of the [name of the federal agency]; and

Five, the defendant knew it was untrue when [he] [she] made the [statement] [representation].

[Statements] [representations] in [describe matter, (e.g. income tax returns)] are matters within the jurisdiction of the [name agency, (e.g. Internal Revenue Service)] which is an agency of the United States.

A statement is "false" or "fictitious", if it was untrue when made. [A statement or representation is "fraudulent", if the defendant made it with the intent to deceive.]

A "material fact" is a fact that would naturally influence or is capable of influencing a decision of the agency. Whether a [statement] [representation] is "material" does not depend on whether the agency was actually deceived or misled.

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, § 6.18.1001B (2012 ed.) (modified)

GOVERNMENT PROPOSED Jury Inst. No. 18.1001-13

The Essential Elements of the Crime Charged
Using a False Document

The crime of [making] [using] a false [writing] [document] in a matter within the jurisdiction of a government agency, as charged in [Count _____ of] the indictment, has four essential elements, which are:

One, the defendant voluntarily and intentionally [made] [used] a [writing] [document] containing a [false] [fictitious] [fraudulent] [statement] [entry] in [describe matter within agency jurisdiction, (e.g. support of claimed deductions during an audit conducted by the Internal Revenue Service)];

Two, at the time the defendant did so, he knew that the [writing] [document] contained a [false] [fictitious] [fraudulent] [statement] [entry]; and

Three, the [false] [fictitious] [fraudulent] [statement] [entry] was material to the (name of agency, e.g. Internal Revenue Service); and

Four, the [Describe matter, e.g. using a document in support of claimed deductions during an audit] was a matter within the jurisdiction of the [name agency, (e.g. Internal Revenue Service)] which is an agency of the United States.

A [writing] [document] is “material” if it has a natural tendency to influence, or is capable of influencing, the decision of the agency. [However, whether a [writing] [document] is “material” does not depend on whether the [agency] was actually deceived.]

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, § 6.18.1001C (2012 ed.) (modified)

[JI-35]

GOVERNMENT PROPOSED Jury Inst. No. 18.1001-14

The Essential Elements of the Crime Charged

The defendant is charged in [Count _____ of] the indictment with knowingly and willfully [making a false statement] [using a document containing a false statement] in a matter within the jurisdiction of a government agency or department in violation of Section 1001 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [made a false statement] [used a writing which contained a false statement] in a matter within the jurisdiction of the [e.g., United States Treasury Department];

Second, the defendant acted willfully; that is, deliberately and with knowledge that the statement was untrue; and

Third, the statement was material to the [United States Treasury Department]'s activities or decisions; that is, it had a natural tendency to influence, or was capable of influencing the agency's decisions or activities.

A statement is material if it could have influenced the agency's decisions or activities.

Manual of Model Criminal Jury Instructions for the Ninth Circuit, § 8.73 (2010 ed.) (modified)

GOVERNMENT PROPOSED Jury Inst. No. 18.1001-15

The Essential Elements of the Crime Charged

Title 18, United States Code, Section 1001, makes it a Federal crime or offense for anyone to willfully make a materially false or fraudulent statement to a department or agency of the United States.

The defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: the Defendant [made the statement] [made or used the document], as charged'

Second: the [statement] [document] was false;

Third: the falsity concerned a material matter;

Fourth: the Defendant acted willfully, knowing that the [statement] [document] was false; and

Fifth: the [false statement] [false document] was made or used for a matter within the jurisdiction of a department or agency of the United States

A [statement] or [document] is "false" when [made] or [used] if it is untrue when made and the person [making] [using] it knows it is untrue. The Government doesn't have to show that the government agency was, in fact, deceived or misled.

[The Internal Revenue Service, Department of the Treasury, is an "agency of the United States," and the filing of documents with that agency to affect a matter or investigation concerning federal income taxes is a matter within the jurisdiction of that agency.]¹

The [making of a false statement] [use of a false document] is not an offense unless the falsity relates to a "material" fact. A "material" fact is an important fact - not some unimportant or trivial detail - that has a natural tendency to influence or is capable of influencing the Internal Revenue Service in investigating or auditing a tax return or in [JI-36] verifying or monitoring the reporting of income by a taxpayer.

Pattern Jury Instructions: Eleventh Circuit, Criminal Cases, OI 36 (2003 ed.)

See Neder v. United States, 527 U.S. 1, 15, (1999) (holding that materiality is an essential element of this crime and that the defendant has a constitutional right to have that issue submitted to the jury)

Pattern Criminal Jury Instructions for the District Courts of the First Circuit, 4.18.1001 (2008 ed.).

¹ Language suggested for use when the Internal Revenue Service is involved.

Fifth Circuit Criminal Jury Instructions, § 2.49 (2001 ed.)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, § 6.18.1001B (2012 ed.)

Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit, 8.73 (2010 ed.)

GOVERNMENT PROPOSED Jury Inst. No. 18.1001-16

“Conceals or Covers Up by Any Trick, Scheme, or Device -- Defined”
(18 U.S.C. 1001 - First Clause)

The phrase “conceals or covers up by any trick, scheme, or device” means any deliberate plan or course of action, or any affirmative act, or any knowing omission designed to deceive others by preventing or delaying the discovery of information.

2A Kevin F. O’Malley et al., *Federal Jury Practice and Instructions*, § 40.04 (6th ed. 2008)

GOVERNMENT PROPOSED Jury Inst. No. 18.1001-17

False, Fictitious or Fraudulent Statements or Representations

A false or fictitious statement or representation is an assertion that is untrue when made or when used and which is known by the person making it or using it to be untrue.

A fraudulent statement or representation is an assertion which is known to be untrue and which is made or used with the intent to deceive.

2A Kevin F. O'Malley et al., *Federal Jury Practice and Instructions* (6th Ed. 2008), Section 40.08; see also *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit*, § 6.18.1001B (2012 ed.); *Pattern Jury Instructions: Eleventh Circuit, Criminal Cases*, OI 36 (2010 ed.)

[JI-37]

GOVERNMENT PROPOSED Jury Inst. No. 18.1001-18

False, Fictitious or Fraudulent Statements or Representations

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

A statement or representation is fraudulent if known to be untrue, and made or caused to be made with intent to deceive.

Federal Criminal Jury Instructions of the Seventh Circuit, 18 U.S.C. § 1001, p.200 (1998 ed.)

GOVERNMENT PROPOSED Jury Inst. No. 18.1001-19

Makes or Uses Any False Writing or Document

The phrase “makes or uses any false writing or document” means to create, to bring into existence, or to submit, or to file some type of form, report, or letter, of any kind, which is not true.

A false statement or representation is an assertion which is untrue when made or when used and which is known by the person making it or using it to be untrue.

A fraudulent statement or representation is an assertion which is known to be untrue and which is made or used with the intent to deceive.

2A Kevin F. O’Malley et al., *Federal Jury Practice and Instructions* (6th ed. 2008), Section 40.12; see also *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit*, § 6.18.1001C (2012 ed.)

GOVERNMENT PROPOSED JURY INST. NO. 18.1001-20

Department or Agency of the United States

The [Internal Revenue Service] is an “agency of the United States”; and statements contained in [e.g., an affidavit submitted to an employee of the Internal Revenue Service to affect a matter or investigation concerning federal income taxes] are matters within the jurisdiction of an agency of the United States.

See, e.g., United States v. Morris, 741 F.2d 188, 190-91 (8th Cir. 1984); *United States v. Fern*, 696 F.2d 1269, 1273 (11th Cir. 1983); *United States v. Schmoker*, 564 F.2d 289, 291 (9th Cir. 1977); *United States v. Johnson*, 530 F.2d 52, 54-55 (5th Cir. 1976); *United States v. Isaacs*, 493 F.2d 1124, 1156-57 (7th Cir. 1974); *United States v. Ratner*, 464 F.2d 101, 104 (9th Cir. 1972); *United States v. McCue*, 301 F.2d 452, 455-56 (2d Cir. 1962); *see also United States v. Knox*, 396 U.S. 77, 80-81 & n.3 (1969) (Court simply accepted, without directly holding, the applicability of the statute to false documents submitted to the IRS).

GOVERNMENT PROPOSED JURY INST. NO. 18.1001-21

“Knowingly” - Defined

A person acts "knowingly", as that term is used in these instructions, if that person acts consciously and with awareness and comprehension and not because of ignorance, mistake or misunderstanding or other similar reason.

[JI-38]

A person who makes, submits, or uses a statement or writing which that person believes to be truthful does not "knowingly" make, submit, or use a false, fictitious, or fraudulent statement.

2A Kevin F. O'Malley et al., *Federal Jury Practice and Instructions* (6th ed. 2008), Section 40.13

GOVERNMENT PROPOSED Jury Inst. No. 18.1001-22

“Willfully” - Defined

A person acts “willfully”, as that term is used in these instructions, when that person acts deliberately, voluntarily, and intentionally.

2A Kevin F. O’Malley et al., *Federal Jury Practice and Instructions* (6th ed. 2008), Section 40.14.

GOVERNMENT PROPOSED Jury Inst. No. 18.1001-23

Material

A statement is “material” if it has a natural tendency to influence or is capable of influencing the decision of _____.

To be “material” it is not necessary that the statement or representation, in fact, influence or deceive.

See United States v. Gaudin, 515 U.S. 506, 510 (1995) (holding that “materiality” is a question for the jury, not the judge, to decide)

1A Kevin F. O’Malley et al., *Federal Jury Practice & Instructions* § 16.11 (6th ed. 2008)

Pattern Jury Instructions of the First Circuit, Criminal Cases, § 4.18.1001 (2008) (elements)

Fifth Circuit Criminal Jury Instructions, § 2.49 (2001 ed.) (elements)

Federal Criminal Jury Instructions of the Seventh Circuit, 18 U.S.C. 1001, p. 201 (definition) (1998 ed.)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Sections 6.18.1001A, B, C (2012 ed.) (elements)

Manual of Model Criminal Jury Instructions for the Ninth Circuit, Section 8.73 (2010 ed.) (elements)

Pattern Jury Instructions: Eleventh Circuit, Criminal Cases, OI 36 (2010 ed.) (elements)

[JI-39]

18 U.S.C. § 1956

GOVERNMENT PROPOSED Jury Inst. No. 18.1956-1

Elements of the Offense

There are four elements to Count _____ of this indictment which the government must prove:

First, the defendant must knowingly conduct or attempt to conduct a financial transaction;

Second, the defendant must know that the property involved in the financial transaction represents the proceeds of some form of unlawful activity;

Third, the property involved in the financial transaction must, in fact, involve the proceeds of specified unlawful activity; and

Fourth, the defendant must engage in the financial transaction with the intent to engage in conduct constituting a violation of § 7201 or 7206 of the Internal Revenue Code of 1986. In this case, [add specific conduct alleged in indictment.]

18 U.S.C. § 1956(a)(1)(A)(ii)

GOVERNMENT PROPOSED Jury Inst. No. 18.1956-2

Provisions of Statute

Count ____ of the indictment charges the defendant with a violation of Title 18, U.S.C. § 1956(a)(1)(A)(ii). This statute provides in pertinent part:

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity --

(A)(ii) with the intent to engage in conduct constituting a violation of § 7201 or 7206 of the Internal Revenue Code of 1986 is guilty of an offense against the United States.

18 U.S.C. § 1956(a)(1)(A)(ii)