Criminal Tax Manual

JURY INSTRUCTIONS - METHODS OF PROOF/MISCELLANEOUS

Title 18 Offenses • Title 26 Offenses

[JI 100]

Methods of Proof

GOVERNMENT PROPOSED JURY INST. NO. MP-1

Specific Items Method of Proof (Unreported Income)

To establish the first element of the offense charged, the receipt by the defendant of unreported income upon which a substantial amount of tax was due and owing, the government has presented evidence under the "specific items" method of proof. The "specific items" method simply consists of offering evidence of particular or specific amounts of taxable income received by the defendant during a tax year, with evidence that the defendant did not include those amounts in his [her] tax return for that year, together with evidence concerning the defendant's knowledge of the omission and his [her] intent and willfulness in attempting to evade payment of tax by the omission.

United States v. Beck, 59-2 U.S.T.C., para. 9486, p. 73,115 (W.D. Wash. Feb. 19, 1959), *aff'd in part and rev'd in part on other grounds*, 298 F.2d 622 (9th Cir. 1962)

GOVERNMENT PROPOSED JURY INST. NO. MP-2

Specific Items Method

To prove that substantial additional tax was due, the government must prove beyond a reasonable doubt that (a) the defendant received substantial income in addition to what he [she] reported on his [her] income tax return, and (b) there was tax due in addition to what was shown to be due on the return.

In order to prove that the defendant received substantial additional income that was omitted from his [her] tax return, the government in this case has introduced evidence of [describe the specific items of income or other evidence which is the basis for the allegation of evasion].

[JI-101]

If you find, based on all the evidence, that the government has established beyond a reasonable doubt that the defendant received substantial income in addition to that reported on his [her] income tax return for the year in question, then you must decide whether, as a result of the defendant's additional, unreported income, there was tax due in addition to what was shown to be due on the return. In reaching your decision on this issue, you should consider, along with all the other evidence, the expert testimony introduced during the trial concerning the computation of the defendant's additional tax liability when the alleged additional income was taken into account.

If you find, based on all the evidence, that the government has established beyond a reasonable doubt that the defendant received substantial additional income and that, as a result of this additional income, there was tax due in addition to what was shown to be due on his income tax return, then this first element has been satisfied.

3 Leonard B. Sand et al., ***Modern Federal Jury Instructions - Criminal***, Instruction 59-5 (2008 rev. ed.)

GOVERNMENT PROPOSED JURY INST. NO. MP-3

Net Worth Method of Proof

Theory

To establish the understatement of tax for the evasion counts for the years ____, ____, and ____, the government relies upon proof by the "net worth" method. I should explain that a person's "net worth" is the difference between his [her] assets and his [her] liabilities at any given date. It is the difference between what he [she] owns and what he [she] owes at that time. If a person has more assets at the end of the year than at the beginning of the year and if that person's liabilities remain the same or decrease, then his [her] net worth has obviously increased. However, only the cost price of the assets is to be considered. Mere increases in market value that have not been realized must not be taken into account.

[In this case, the defendant is married, and is charged with filing false joint income tax returns for the defendant and his [her] spouse. The government accordingly has introduced evidence purporting to reflect their joint net worth and expenditures.][1]

The theory of the net worth method of proof is that if the government proves beyond a reasonable doubt that the defendant's net worth, as I have just defined it, has increased during the taxable year, then it may be inferred that the defendant had receipts of either money or property during the year; and if the government satisfies you beyond a reasonable doubt that the defendant had a source of taxable income and that the receipts did not come from nontaxable sources, then you may find that the receipts constituted taxable income to the defendant.

If you also find that the government proved that the defendant spent money on items that did not add to the defendant's net worth at the end of the year (items such as living expenses and taxes), then it may be inferred that those expenditures also came from funds received during the year. Consequently, such expenditures also may be taken into account in determining the amount of the defendant's taxable income for the year, provided they

were not deductible expenditures which the defendant was entitled to claim as deductions in computing taxable income on his [her] return.

In this case, the government has undertaken to prove what the defendant was worth at the beginning of each year involved and what he [she] was worth at the end of that year, so as to show that his [her] net worth increased during the year. The government also has introduced

---

[JI-102] other evidence, which, if you believe it, would tend to establish money paid out by the defendant for such non-deductible items as federal income taxes, living expenses, and other personal expenditures.

The government claims that the sum of the defendant's net worth increases and non-deductible expenditures for each year, less adjustments, as shown by the government's evidence, represents the defendant's correct taxable income for that year. The resulting figures are alleged by the government to be a reasonable approximation of what the defendant should have reported on his [her] income tax return.

As I have already told you, an attempt to evade income tax for one year is a separate offense from an attempt to evade the tax for a different year. So you must consider the evidence as to each year separately in arriving at your verdict.

Opening Net Worth

Now, I want to point out to you that because the net worth method of proving unreported income involves a comparison of the beginning and ending net worth of the defendant in each prosecution year, the result cannot be correct unless the beginning point, or the opening net worth, is reasonably accurate. You will readily appreciate that if, at the beginning point, the defendant actually owned substantial assets that the government has failed to include in its computations, apparent increases in net worth during the indictment years may be no more than the disclosure of money previously saved or the result of a change in the form of other assets that the defendant owned at the beginning of the year and that the government did not take into account. For example, a taxpayer might have had a substantial amount of cash on hand (not in a bank) which he [she] **1** had

saved up in prior years and which he [she] used to acquire assets or make purchases or other expenditures during a prosecution year. In that case, an apparent increase in the defendant's net worth might be only the result of a conversion of prior accumulated cash into tangible property. Similarly, cash on hand accumulated from prior years may have been used to make non-deductible expenditures. You must, therefore, in order to convict, be satisfied that the government's evidence establishes an opening net worth with reasonable certainty as of the beginning of the year.

On the other hand, the government is not required to refute all possible speculation that, at the beginning of the year, the defendant might have had assets the investigation failed to disclose; nor is the government required to prove the exact cost of the assets owned by the defendant at the starting point or the precise amount of his [her] undeposited cash on hand. It is enough if the government, although unable to determine the exact cost of the assets owned by the defendant at the beginning of the year, can show beyond a reasonable doubt that such assets were insufficient to account for the subsequent increases in the defendant's net worth.

The burden rests originally upon the government, and the burden remains upon the government, to establish an opening net worth with reasonable certainty.

In this case the government has endeavored to prove that the defendant [and his (her) spouse][1] did not have any assets at the beginning of the year other than those disclosed as a result of its investigation by [e.g., tracing the financial and income tax return filing history of the defendant (and his spouse) and by introducing into evidence the defendant's own statements]. The evidence introduced by the government of the defendant's [income tax returns and] financial history in years prior to those named in the indictment may be considered by you only for such light as it may shed on the innocence or guilt of the defendant during the years charged in the indictment.

In determining whether or not the opening net worth is reasonably accurate, you may consider whether the government has tracked down all "reasonable leads" or explanations, if any,

[JI-103] suggested to the government by the defendant (or his [her] representative) during the investigation, which tend to establish the defendant's innocence.

[1] Where the defendant was married and filed joint returns and the net worth computation reflects a joint net worth, then appropriate language should be used in the instruction. This would also apply where both a husband and wife are charged.

If you are satisfied that any such reasonable leads and explanations have been exhausted or refuted, then this would be evidence which you could consider in determining whether the opening net worth included all of the defendant's assets. Obviously, improbable explanations would not be entitled to as much weight as plausible and reasonable explanations. If you should find that the government's investigation has failed to refute what seem to you to be plausible explanations, then such failure may be considered by you in determining the validity of the opening net worth.

If you find that the government has not established the opening net worth of the defendant to a reasonable certainty as of the beginning of any year named in the indictment, then you will return a verdict of not guilty as to any such count of the indictment.

If you find as to any year that the funds reflected in increased net worth and expenditures are not substantially in excess of the income reported by the defendant on his [her] return for that year, or if you have a reasonable doubt as to whether such funds are substantially in excess of the reported income, then you will return a verdict of not guilty as to any such count of the indictment.

If you find, on the other hand, that the government has established the opening net worth of the defendant to a reasonable certainty as of the beginning of any year named in the indictment, and if you also are convinced beyond a reasonable doubt that the funds reflected in increased net worth and expenditures during that year are substantially in excess of the income reported on the defendant's tax return, then you will proceed to inquire whether the government has established that those funds represented taxable income on which the defendant willfully attempted to evade or defeat the tax.

Current Taxable Income

The burden is on the government to establish beyond a reasonable doubt that the funds reflected in the defendant's increased net worth and non-deductible expenditures arose from taxable, rather than nontaxable, sources.

In this connection, I charge you that the federal income tax is levied on gains, profits, and income derived from salaries, wages, or compensation for personal services, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property; also from interest, rents, dividends, securities, or the transaction of any business, legal or illegal, carried on for gain or profit, or gains or profits and income derived from any source whatever.

The law states, however, that certain kinds of funds do not constitute income. Since no income tax is levied on such funds, they need not and should not be reported as income. These funds include gifts, inheritances, proceeds of loans, [and certain other miscellaneous items which are not pertinent here].

As I have previously stated, the burden rests upon the government to prove beyond a reasonable doubt that the funds reflected in increased net worth and expenditures arose from a taxable source or sources, or that the funds did not come from nontaxable sources. In other words, the government must establish either a likely source of income from which you believe the net worth increases and expenditures sprang, or that nontaxable sources of income have been negated as a source of the net worth increases and expenditures.

[JI-104]

If you find that the defendant offered timely explanations of the source[s] of his [her] funds, and that the stated source[s] was [were] reasonably susceptible of being checked, the government may not disregard the defendant's explanation. You may take into consideration any failure by the government to pursue such explanations, if any were made, or the results of any investigation made by the government into the truth of the explanations. On the other hand, where relevant leads are not forthcoming, the government is not required to negate every conceivable source of nontaxable funds, and if the defendant failed to supply information in that regard, you may take such failure into account. The defendant is not required, however, to provide any explanations to prove the source of his net worth, for, as I have said, the burden is on the government to prove that the increases arose from taxable sources.

This instruction is based on the rationale of the courts in the following decisions:

Holland v. United States, 348 U.S. 121 (1954)

Friedberg v. United States, 348 U.S. 142 (1954)

United States v. Calderon, 348 U.S. 160 (1954)

United States v. Massei, 355 U.S. 595 (1957)

United States v. Johnson, 319 U.S. 503 (1942)

United States v. Sorrentino, 726 F.2d 876, 879, 880 (1st Cir. 1984)

United States v. Koskerides, 877 F.2d 1129, 1137 (2d Cir. 1989)

United States v. Breger, 616 F.2d 634, 635 (2d Cir. 1980)

United States v. Terrell, 754 F.2d 1139, 1144 (5th Cir. 1985)

United States v. Schafer, 580 F.2d 774, 775 (5th Cir. 1978)

United States v. Anderson, 642 F.2d 281, 285 (9th Cir. 1981)

GOVERNMENT PROPOSED JURY INST. NO. MP-4

The "Net Worth Method" of Determining Income - Explained

To establish a substantial understatement of the tax on the income tax return of the defendant for the year[s] ____, the government has relied upon proof by the so-called "net worth method" of determining income for that particular period. This "net worth method," if used correctly, is an indirect or circumstantial way to reliably determine income.

A person's "net worth" is the difference between that person's total assets and total liabilities on any given day. Said another way, a person's net worth is the difference between what a person owns and what that person owes at any particular time. If a person had more assets at the end of the year than at the beginning of that year, and if that person's liabilities remained the same during that same year, then that person's net worth has increased.

In determining net worth, however, only the cost price of the defendant's assets is to be considered. Mere increases in market value that have not been actually realized through sale or conversion into cash must not be taken into account in computing net worth in a case such as this.

If the evidence in the case shows beyond a reasonable doubt that the defendant's net worth, computed in this manner, has increased during the year[s] in question, then the jury may find that the defendant had receipts of either money or property during that year. If the evidence in the

---

[JI-105] case also establishes beyond a reasonable doubt that the defendant had one or more sources of taxable income and that the receipts just referred to did not come from non-taxable income, then the jury may find that such receipts constituted taxable income to the defendant during that period.

To show that the defendant's net worth increased in this case, the government has undertaken to prove the defendant's net worth at the beginning of the year 20__ , and also attempted to prove the defendant's net worth at the end of that same year. The government has also introduced evidence in an effort to prove that the defendant paid out various amounts of money during the taxable year for such non-deductible items as personal and living expenses.

Because the "net worth method" of determining income involves a comparison of the net worth of the defendant at the beginning and again at the end of the year in question, the result cannot be accepted as correct unless this starting net worth figure, the beginning point, is reasonably accurate. Although the government is not required to prove the exact value of each and every asset owned by the defendant at the starting point, the evidence must establish beyond a reasonable doubt that all assets owned by the defendant at the starting point were not sufficient to account for any apparent subsequent increase in the defendant's net worth. Said another way, the evidence in the case must establish beyond a reasonable doubt that the defendant's assets at the beginning of the year, plus the defendant's reported income for that same taxable year, do not add up to an amount sufficient to account for the increases in net worth plus non-deductible expenditures during that same year.

The government contends that any increases in the net worth of the defendant during the taxable year 20__ , plus any non-deductible expenditures by the defendant for that year as shown by the evidence in the case, represent the defendant's true and correct net income for that year. These resulting figures are alleged by the government to be a reasonable approximation of what the defendant should have reported on his [her] income tax return for the calendar year 20__ .

The burden is always upon the government to establish beyond a reasonable doubt that any amounts reflected in defendant's increased net worth plus non-deductible expenditures were from taxable, rather than non-taxable, sources. In this regard, you are instructed that federal income tax is levied on income derived from compensation for personal services of every kind, and in whatever form paid, as well as on income from interest, dividends, gains, profits, [and certain other items not pertinent to this case].

The law provides, however, that funds or property received from certain sources do not constitute taxable income. Since no federal income tax is levied on such funds or property, such funds or property do not need to be reported as income. Non-taxable funds

or non-taxable property include such items as gifts, inheritances, the proceeds of life insurance policies, loans, [and certain other items not pertinent to this case].

If it appears from the evidence in the case that during the course of the investigation of his [her] income tax return and before the trial of this case, the defendant offered to Treasury agents certain explanations of the sources of certain funds or property and these sources of funds or property were reasonably capable of being checked and verified by Treasury agents, the government may not unreasonably disregard such explanations. In evaluating the evidence in this case you may take into consideration any failure of the government to reasonably investigate the truth of any such explanations as well as the trustworthiness of the explanations provided.

On the other hand, the government is not required, without suggestion or explanation from the defendant, to investigate every conceivable source of non-taxable funds. If it appears from the evidence in the case that the defendant did not provide an explanation as to the source or sources of any increase in his [her] net worth, then the jury may consider such failure as one of the

---

[JI-106] circumstances in evidence in the case, bearing in mind always that the law never imposes upon a defendant in a criminal case the burden or duty to offer or produce any evidence. The burden is always upon the government to establish beyond a reasonable doubt from the evidence in the case every essential element of the crime charged, including the claim that any increase in the defendant's net worth was from taxable sources.

If the jury should find that the evidence in the case does not establish the net worth of the defendant to a reasonable degree of certainty at the beginning any of the years charged in the indictment, then the jury should find the defendant not guilty as to that year. If the jury should find that any increase in net worth for a particular year is not substantially in excess of the income reported by the defendant on his [her] return for that year, then the jury should find the defendant not guilty as to that year.

On the other hand, if the evidence in the case establishes beyond a reasonable doubt the amount of the net worth of the defendant as of the beginning of the particular calendar year charged in a Count of the indictment, and further establishes beyond a reasonable doubt that funds reflected in any increased net worth, plus the defendant's expenditures,

during the same year substantially exceed the income reported on the defendant's tax return, the jury should then proceed to determine whether the evidence in the case also establishes beyond a reasonable doubt that such additional funds represented taxable income, and then proceed to determine whether the government has proven that the defendant acted willfully in attempting to evade or defeat the additional tax, as charged in Count[s] ___ of the indictment.

2B Kevin F. O'Malley et al., ***Federal Jury Practice and Instructions***, § 67.05 (modified) (5th ed. 2000)

GOVERNMENT PROPOSED JURY INST. NO. MP-5

Net Worth Method

In this case the Government relies upon the so-called “net worth method” of proving unreported income.

A person's “net worth” at any given date is the difference between such person's total assets and total liabilities on that date. It is the difference between what one owns and what one owes (measuring the value of what one owns by its cost rather than unrealized increases in market value).

If the evidence establishes beyond a reasonable doubt that the Defendant's net worth increased during a taxable year, then you may infer that the Defendant had receipts of money or property during that year; and if the evidence also establishes that those receipts cannot be accounted for by non-taxable sources, then you may further infer that those receipts were taxable income to the Defendant.

In addition to the matter of the Defendant's net worth, if the evidence establishes beyond a reasonable doubt that the Defendant spent money during the year on living expenses, taxes and other expenditures, which did not add to the Defendant's net worth at the end of the year, then you may infer that those expenditures also came from funds received during the year; and, again, if the evidence establishes that those receipts cannot be accounted for by non-taxable sources, then you may further infer that those funds were also taxable income to the Defendant (provided, of course, the expenditures were not for items which would be deductible on the Defendant's tax return).

[JI-107]

Because the “net worth method” of proving unreported income involves a comparison of the Defendant's net worth at the beginning of the year and the Defendant's net worth at the end of the year, the result cannot be accepted as correct unless the starting net worth

is reasonably accurate. In that regard the proof need not show the exact value of all the assets owned by the Defendant at the starting point so long as it is established that the assets owned by the Defendant at that time were insufficient by themselves to account for the subsequent increases in the Defendant's net worth. So, if you should decide that the evidence does not establish with reasonable certainty what the Defendant's net worth was at the beginning of the year, you should find the Defendant not guilty.

In determining whether or not the claimed net worth of the Defendant at the starting point (or the beginning of the year) is reasonably accurate, you may consider whether Government agents sufficiently investigated all reasonable "leads" suggested to them by the Defendant, or which otherwise surfaced during the investigation, concerning the existence and value of other assets. If you should find that the Government's investigation has either failed to reasonably pursue, or to refute, plausible explanations advanced by the Defendant or which otherwise arose during the investigation concerning other assets the Defendant had at the beginning of the year (or other non-taxable sources of income the Defendant had during the year), then you should find the Defendant not guilty. Notice, however, that this duty to reasonably investigate applies only to suggestions or explanations made by the Defendant, or to reasonable leads that otherwise turn up; the Government is not required to investigate every conceivable asset or source of non-taxable funds.

If you decide the evidence in the case establishes beyond a reasonable doubt the maximum possible amount of the Defendant's net worth at the beginning of the tax year, and further establishes that any increase in the Defendant's net worth at the end of that year, together with non-deductible expenditures made during the year, did substantially exceed the amount of income reported on the Defendant's tax return for that year, you should then proceed to decide whether the evidence also establishes beyond a reasonable doubt that such additional funds represented taxable income (that is, income from taxable sources) on which the Defendant willfully attempted to evade and defeat the tax as charged in the indictment.

Pattern Jury Instructions: Eleventh Circuit, Criminal Cases, OI 93.2 (2003 ed.)

GOVERNMENT PROPOSED JURY INST. NO. MP-6

Expenditures Method of Proof

Theory

The government has introduced evidence of the expenditures method of proof to establish that the taxable income reported by the defendant on his [her] income tax returns is not true and correct. By this method, the government seeks to establish that the defendant[1] spent an amount greater than the amount reported on his [her] income tax returns as being available for spending. In other words, the government claims that the defendant could not have spent the amount that he [she] did in a given year unless he [she] had more income than the defendant reported on his [her] return for that year.

[In this case, the defendant is married, and is charged with filing false joint income tax returns for the defendant and his [her] spouse. The government accordingly has introduced evidence purporting to reflect their joint expenditures.][2]

Under the expenditures method, the first step is to add up and total the amounts that the defendant spent during a given year. The next step is to subtract from the total amount spent: (1)

[JI-108] any funds that the defendant had on hand at the beginning of the year which were spent during the year; (2) any monies received by a conversion into cash of assets that were on hand at the beginning of the year; and (3) any nontaxable funds received during the year.

[2] The instruction should be modified in those instances where a joint return is involved and also where the net worth computation reflects the joint net worth of a husband and wife, or, in rare instances, the joint net worth of a defendant and a third party.

The government claims that a reasonable approximation of the taxable income the defendant should have reported is the amount remaining after personal deductions, exemptions, and adjustments are subtracted from the defendant's income computed on the basis I have just explained to you.

Opening Net Worth

Now, I want to go over some of the points I have just mentioned. As I previously said, under the expenditures method, you subtract from the total amount spent any funds the defendant had on hand at the beginning of the year and any monies received by converting into cash assets that were on hand at the beginning of the year. Another way of saying this is that a starting point or opening net worth must be established so that the defendant is not improperly charged with spending that reflects only what he [she] earned or had from prior years.

You will readily appreciate that if the defendant actually owned substantial assets at the beginning point which the government has failed to consider in its computations, apparent spending of income during the indictment years may be no more than the disclosure of money previously saved or the result of a conversion into cash of assets the defendant owned at the beginning of the year.

For example, a taxpayer might have had a substantial amount of cash on hand that he [she] had saved up in prior years and used to make purchases or other expenditures during a prosecution year. In that case, an apparent spending out of income during the year might be only the result of spending money earned in a prior year. You must, therefore, be satisfied that the government's evidence establishes that the defendant has been given credit for any cash on hand that he [she] had as well as for any cash realized from the conversion into cash of assets that he [she] had on hand.

However, the government is not required to refute all possible speculation that the defendant might have converted into cash assets that he [she] had at the beginning of the year that the investigation failed to disclose; nor is it necessary for the government to prove the precise amount of cash on hand that the defendant had at the beginning of the year. It is enough if the government can show beyond a reasonable doubt that cash on hand and the conversion of assets into cash do not account for the expenditures of the defendant during the taxable year.

The burden rests originally upon the government, and the burden remains upon the government, to establish an opening net worth with reasonable certainty.

In this case, the government has attempted to prove that the defendant did not have any cash on hand or assets at the beginning of the year that he [she] later converted into cash, other than those disclosed as a result of its investigation by, among other things, tracing the financial history of the defendant. The evidence introduced by the government of the defendant's [income tax return(s) and] financial history in years prior to those named in the indictment may be considered by you for such light as it may shed on the innocence or guilt of the defendant during the years named in the indictment.

In determining whether or not the opening net worth is reasonably accurate, you may consider whether the government has tracked down "reasonable leads" or explanations, if any, suggested to the government by the defendant (or his [her] representative) during the investigation, which tend to establish the defendant's innocence.

[JI-109]

If you are satisfied that any such reasonable leads and explanations have been exhausted or refuted, then this would be evidence that you could consider in determining whether the opening net worth relied on by the government is reasonably accurate. Obviously, improbable explanations would not be entitled to as much weight as plausible and reasonable explanations. If you should find that the government's investigation has failed to refute what seem to you to be plausible explanations, such failure may be considered by you in determining the validity of the opening net worth.

If you find that the government has not established the opening net worth of the defendant to a reasonable certainty as of the beginning of any year named in the indictment, then you will find that the defendant is not guilty of reporting a taxable income that is not true and correct for that year.

If you find as to any year that the funds spent by the defendant are not substantially in excess of the taxable income reported by the defendant on his [her] return for that year, or if you have a reasonable doubt as to whether such funds are substantially in excess of

reported taxable income, then you will find that the defendant is not guilty of reporting a taxable income that is not true and correct for that year .

If you find, on the other hand, that the government has established the net worth of the defendant to a reasonable certainty as of the beginning of any year named in the indictment, and if you are also convinced beyond a reasonable doubt that the expenditures established by the government during that year are substantially in excess of the income reported on the defendant's tax return, then you will proceed to inquire whether the government has established that those funds represented income.

Current Taxable Income

The burden is on the government to establish beyond a reasonable doubt that the funds reflected in the defendant's expenditures arose from taxable, rather than nontaxable, sources.

In this connection, I charge you that the federal income tax is levied on gains, profits, and income derived from salaries, wages, or compensation for personal services, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property; also from interest, rent, dividends, securities, or the transaction of any business, [legal or illegal], carried on for gain or profit, or gains or profits and income derived from any source whatever.

The law states, however, that certain kinds of funds do not constitute income. Since no income tax is levied on such funds, they need not and should not be reported as income. These funds include gifts, inheritances, proceeds of loans, [and certain other miscellaneous items which are not pertinent here].

As I have previously stated, the burden rests upon the government to prove beyond a reasonable doubt that the funds reflected in the defendant's expenditures arose from a taxable source or sources or that the funds did not come from nontaxable sources. In other words, expenditures alone do not establish the receipt of taxable income unless the evidence shows either: (1) a likely source of income from which you believe they sprang;

or (2) that the government has established that the defendant did not have a nontaxable source of income which would account for the expenditures.

If you find that the defendant offered timely explanations of the source of his [her] funds, which were reasonably susceptible of being checked, the government may not disregard them; and you may take into consideration any failure by the government to investigate such explanations, if

---

[JI-110] any were made, or the results of any investigation made by the government into the truth of the explanations. On the other hand, where relevant leads are not forthcoming, the government is not required to negate every conceivable source of nontaxable funds, and if the defendant failed to supply information in that regard, you may take that failure into account. The defendant is not required, however, to provide any explanations or to prove the source of his [her] funds, for, as I have said, the burden is on the government to prove that the funds used for expenditures arose from taxable sources.

This instruction is based on the rationale of the courts in the following decisions:

Taglianetti v. United States, 398 F.2d 558, 562 (1st Cir. 1968), *aff'd*., 394 U.S. 315 (1969)

United States v. Citron, 783 F.2d 307, 315 (2d Cir. 1986)

United States v. Breger, 616 F.2d 634, 635 (2d Cir. 1980)

United States v. Marshall, 557 F.2d 527, 529 (5th Cir. 1977)

United States v. Newman, 468 F.2d 791, 793 (5th Cir. 1972)

United States v. Penosi, 452 F.2d 217, 219 (5th Cir. 1971)

United States v. Caswell, 825 F.2d 1228, 1231-32 (8th Cir. 1987)

United States v. Pinto, 838 F.2d 426, 431-32 (10th Cir. 1988)

The instruction is also based on the rationale of the following decisions involving the net worth method, which is essentially the same as the expenditures method, *Taglianetti v. United States*, 398 F.2d at 562:

Holland v. United States, 348 U.S. 121 (1954)

Friedberg v. United States, 348 U.S. 142 (1954)

United States v. Calderon, 348 U.S. 160 (1954)

United States v. Massei, 355 U.S. 595 (1957)

United States v. Johnson, 319 U.S. 503 (1942)

United States v. Sorrentino, 726 F.2d 876, 879, 880 (1st Cir. 1984)

United States v. Breger, 616 F.2d 634, 635 (2d Cir. 1980)

United States v. Terrell, 754 F.2d 1139, 1144 (5th Cir. 1985)

United States v. Schafer, 580 F.2d 774, 775 (5th Cir. 1978)

United States v. Anderson, 642 F.2d 281, 285 (9th Cir. 1981)

GOVERNMENT PROPOSED JURY INST. NO. MP-7

Cash Expenditures Method

In this case the Government relies upon the so-called "cash expenditures method" of proving unreported income. The theory of this method of proof is that if a taxpayer's expenditures and disbursements for a particular taxable year, together with any increase in net worth exceed the total of the taxpayer's reported income together with non-taxable receipts and available cash at the beginning of the year, then the taxpayer has understated [his] [her] income.

The "cash expenditures method" necessarily involves not only the examination of the Defendant's expenditures and disbursements during the taxable year, but also an examination of the Defendant's "net worth" at the beginning and at the end of that year.

[JI-111]

[The remainder of this instruction should consist of the text of Proposed Instruction No. MP-5, *supra*, from the second paragraph to the end of that instruction.]

Pattern Jury Instructions: Eleventh Circuit, Criminal Cases, OI 93.4 (2003 ed.)

GOVERNMENT PROPOSED JURY INST. NO. MP-8

Cash Expenditures Method

To establish a substantial understatement of the tax on the income tax return of Defendant for the year[s] _____ , the government has relied upon proof by the so-called "cash expenditures method" of determining income for that particular period. This "cash expenditures method," if done correctly, is an indirect or circumstantial way to reliably determine income.

In this method of proof, if a taxpayer's expenditures and disbursements for a particular taxable year, together with any increase in net worth, exceed the total of reported income together with non-taxable receipts for that same year and available cash at the beginning of the year, then the taxpayer has unreported income.

A person's net worth is the difference between a person's total assets and that person's total liabilities on any given date. Said another way, net worth is the difference between what a person owns and what that person owes at any particular time.

The "cash expenditures method" necessarily involves not only the examination of the defendant's expenditures and disbursements during the taxable year in question, but also an examination of the defendant's net worth at the beginning and again at the end of that year.[3]

[3] Notes following this jury instruction in O'Malley state, "The pertinent portions of the instruction on the 'Net Worth Method', Section 67.5, should be given to the jury in conjunction with this instruction." Thus, the prosecutor should consult the above net worth instructions for appropriate language to include. While the expenditures method is a "variant of the net worth method," there are certain different elements involved in their presentation, including the showing of net worth required. Under the expenditures method, "net worth need not be established by a formal net worth statement. Rather, accurate inclusion of diminution of resources serves the function of enabling the jurors to determine if expenditures were financed by liquidation of assets, depletion of a cash hoard, or unreported income." *United States v. Citron*, 783 F.2d 307, 315 (2d Cir. 1986); *see Taglianetti v. United States*, 398 F.2d 558, 562 (1st Cir. 1968), *aff'd*, 394 U.S. 316 (1969); *United States v. Caswell*, 825 F.2d 1228, 1232 (8th Cir. 1987); *United States v. Pinto*, 838 F.2d 426, 432 (10th Cir. 1988).

2B Kevin F. O'Malley et al., ***Federal Jury Practice and Instructions***, § 67.06 (5th ed. 2000)

GOVERNMENT PROPOSED JURY INST. NO. MP-9

Bank Deposits (Plus Cash Expenditures) Method[4]

To prove the alleged understatements of taxable income, the government relies upon the bank deposits [plus cash expenditures] method of proof.[5]

To use this method of proof, the government must establish that the defendant was engaged in an income-producing activity during the tax years in issue and that, during the course of such

[JI-112] activity, regular and periodic deposits having the inherent appearance of current income were made into bank accounts in the defendant's name or under his [her] dominion and control.

Deposits into such accounts are totaled. Non-income transactions, such as transfers between bank accounts, redeposits, and deposits of nontaxable amounts, such as loan proceeds, gifts, inheritances, or prior accumulations, are subtracted from the total deposits. [To this total is added any additional undeposited income that the defendant received during the tax year in issue and any cash or currency expenditures made with undeposited funds not derived from a nontaxable source.][6]

The appropriate deductions, exclusions, exemptions, and credits to which the defendant is entitled then are subtracted, leaving an amount the government contends to be the corrected taxable income for the tax year in issue. This amount is then used to compute

---

[4] CAUTION: The above instruction does not include an instruction on cash on hand. In those instances where the bank deposits computation includes cash expenditures or currency deposits, the cases indicate that the government must establish a beginning cash on hand figure. See Section 33.08, *supra*. In such a case, the above instruction should be supplemented with a cash on hand instruction. For an example of a cash on hand instruction, see Proposed Jury Instruction 272 below.

[5] The material in brackets applies to cases that include cash or currency expenditures.

[6] The material in brackets applies to cases that include both cash or currency expenditures and undeposited income. Where only one is included in a case, the bracketed language should be modified accordingly.

the corrected tax due and owing for the year, which is then compared with the actual tax paid in order to establish the alleged understatement of taxes.

If you find that the defendant's bank deposits [plus undeposited income and cash expenditures] establish for a tax return in issue a taxable income figure that exceeds the taxable income reported on the tax returns for the years involved, you will proceed to inquire whether the government has established that those excess deposits [and other funds received or spent but not deposited] represent additional taxable income on which the defendant willfully attempted to evade or defeat the tax. In this connection, if the government has established that the defendant was engaged in an income-producing business or activity, that he [she] was making regular and periodic deposits of money to bank accounts in his [her] name or under his control, that the deposits and other funds received and available for deposit have the appearance of income, then you may, but are not required to, draw the inference that these deposits [and other funds available for deposit] represented income during the year in question.

Explanations or "leads" as to the source of the funds used or available for deposits during the prosecution years, such as cash-on-hand, gifts, loans, or inheritances, may be offered to the government by or on behalf of the defendant. If such leads are relevant, reasonably plausible, and reasonably susceptible of being checked, then the government must investigate into the truth of the explanations. Additionally, leads must be furnished well in advance of trial for the government to be obligated to investigate them or to include them in the government's computations. However, if no such leads are provided, the government is not required to negate every conceivable source of nontaxable funds.

The government claims that it has correctly taken into account all of the factors which I have mentioned and that the bank deposits plus undeposited income and cash expenditures result in a figure that fairly approximates the defendant's true individual taxable income for the calendar years 20__ and 20__.

This instruction is based on the rationale, and not the actual language, of the opinions below:

United States v. Morse, 491 F.2d 149, 151 (1st Cir. 1974)

United States v. Slutsky, 487 F.2d 832, 840 (2d Cir. 1973)

United States v. Nunan, 236 F.2d 576, 587 (2d Cir. 1956)

United States v. Venuto, 182 F.2d 519, 521 (3d Cir. 1950)

Morrison v. United States, 270 F.2d 1, 2 (4th Cir. 1959)

Skinnett v. United States, 173 F.2d 129 (4th Cir. 1949)

United States v. Conaway, 11 F.3d 40, 43-44 (5th Cir. 1993)

United States v. Tafoya, 757 F.2d 1522, 1528 (5th Cir. 1985)

United States v. Normile, 587 F.2d 784, 785 (5th Cir. 1979)

United States v. Boulet, 577 F.2d 1165, 1167 (5th Cir. 1978)

[JI-113]

United States v. Horton, 526 F.2d 884, 887 (5th Cir. 1976)

United States v. Parks, 489 F.2d 89, 90 (5th Cir. 1974)

United States v. Moody, 339 F.2d 161, 162 (6th Cir. 1964)

United States v. Ludwig, 897 F.2d 875, 878-882 (7th Cir. 1990)

United States v. Esser, 520 F.2d 213, 216 (7th Cir. 1975)

United States v. Stein, 437 F.2d 775, 779 (7th Cir. 1971)

United States v. Lacob, 416 F.2d 756, 759 (7th Cir. 1969)

United States v. Mansfield, 381 F.2d 961, 965 (7th Cir. 1967)

United States v. Abodeely, 801 F.2d 1020, 1024-1025 (8th Cir. 1986)

United States v. Vannelli, 595 F.2d 402, 404 (8th Cir. 1979)

United States v. Stone, 770 F.2d 842, 844 (9th Cir. 1985)

United States v. Soulard, 730 F.2d 1292, 1296 (9th Cir. 1984)

United States v. Hall, 650 F.2d 994, 999 (9th Cir. 1981)

United States v. Helina, 549 F.2d 713, 720 (9th Cir. 1977)

Percifield v. United States, 241 F.2d 225, 229 & n.7 (9th Cir. 1957)

United States v. Bray, 546 F.2d 851, 853 (10th Cir. 1976).

GOVERNMENT PROPOSED JURY INST. NO. MP-10

Bank Deposits Method

In this case the Government relies upon what is called the "bank deposits method" of proving unreported income.

This method of proof proceeds on the theory that if a taxpayer is engaged in an income producing business or occupation and periodically deposits money in bank accounts in the taxpayer's name or under the taxpayer's control, an inference arises that such bank deposits represent taxable income unless it appears that the deposits represented re-deposits or transfers of funds between accounts, or that the deposits came from non-taxable sources such as gifts, inheritances or loans. This theory also contemplates that any expenditures by the Defendant of cash or currency from funds not deposited in any bank and not derived from a non-taxable source, similarly raises an inference that such cash or currency represents taxable income.

Because the "bank deposits method" of proving unreported income involves a review of the Defendant's deposits and cash expenditures that came from taxable sources, the Government must establish an accurate cash-on-hand figure for the beginning of the tax year. The proof need not show the exact amount of the beginning cash-on-hand so long as it is established that the Government's claimed cash-on-hand figure is reasonably accurate. So, if you should decide that

[JI-114] the evidence does not establish with reasonable certainty what the Defendant's cash-on-hand was at the beginning of the year, you should find the Defendant not guilty.

In determining whether or not the claimed cash-on-hand of the Defendant at the starting point (or the beginning of the year) is reasonably accurate, you may consider whether Government agents sufficiently investigated all reasonable "leads" suggested to them by the Defendant, or which otherwise surfaced during the investigation, concerning the existence of other funds at that time. If you should find that the Government's investigation has either failed to reasonably pursue, or to refute, plausible explanations which were advanced by the Defendant, or which otherwise arose during the

investigation, concerning the Defendant's cash-on-hand at the beginning of the year, then you should find the Defendant not guilty. Notice, however, that this duty to reasonably investigate applies only to suggestions or explanations made by the Defendant, or to reasonable leads that otherwise turn up; the Government is not required to investigate every conceivable source of non-taxable funds.

If you decide that the evidence in the case establishes beyond a reasonable doubt that the Defendant's bank deposits together with non-deductible cash expenditures during the year did substantially exceed the amount of income reported on the Defendant's tax return for that year, you should then proceed to decide whether the evidence also establishes beyond a reasonable doubt that such additional deposits and expenditures represented taxable income (that is, income from taxable sources) on which the Defendant willfully attempted to evade and defeat the tax as charged in the indictment.

Pattern Jury Instructions: Eleventh Circuit, Criminal Cases, OI 93.3 (2003 ed.)

GOVERNMENT PROPOSED JURY INST. NO. MP-11

The "Bank Deposits Method" of Determining Income - Explained

To establish a substantial understatement of the tax on the income tax return of Defendant for the year[s] 20__, the government has relied upon proof by the so-called “bank deposits method” of determining income during a particular period. This “bank deposits method”, done correctly, is an indirect or circumstantial way to reliably determine income.

The theory of this method of proof is that if a taxpayer is engaged in an activity that produces income and if that taxpayer periodically deposits money in bank accounts under the taxpayer's name, or under the taxpayer's control, it may be inferred, unless otherwise explained, that these bank deposits represent taxable income. If there are expenditures of cash by the taxpayer from funds not deposited in any bank and not from any non-taxable source, such as by gift or from inheritance, it may be inferred, unless otherwise explained, that this cash represents unreported income.

In this method of proof, a taxpayer's bank deposits for the tax year are totaled, with adjustments made for funds in transit at the beginning and again at the end of that year. Any “non-income” deposits are excluded from this total and income which has not been deposited is included in the total. This procedure provides a gross income figure.

Income tax is then calculated in the usual way with legitimate credits and legitimate deductions taken into account. If the resulting figure is greater than that which the taxpayer reported on [his] [her] tax return for that year, then that taxpayer has unreported income in that amount.

Because the “bank deposits method” of determining income involves a review of bank deposits and cash expenditures during a taxable year, the government must establish with a reasonable degree of certainty an accurate “cash on hand” figure for the beginning of the tax year in

[JI-115] question. The government is not required to prove an exact “cash on hand” figure, but must prove a figure that is reasonably accurate.

If, therefore, you do not find that the government has established to a reasonable degree of certainty what the defendant's “cash on hand” was at the beginning of the year 20__, then you should find the defendant not guilty.

If on the other hand, you find that the government has proven to a reasonable degree of certainty what the defendant's “cash on hand” was at the beginning of the year 20__, you must then proceed to decide whether the evidence in the case establishes beyond a reasonable doubt that the bank deposits and non-deductible cash expenditures of Defendant substantially exceeded the amount reported on [his][her] tax return for that year. If so, you should then proceed to decide whether or not the government has proven, beyond a reasonable doubt, that the defendant willfully attempted to evade or defeat the additional tax as charged in Count of the indictment.

2B Kevin F. O'Malley et al., ***Federal Jury Practice and Instructions***, § 67.07 (5th ed. 2000)

Miscellaneous

GOVERNMENT PROPOSED JURY INST. NO. Misc-1

Consider Each Count Separately

A separate crime is charged in each count of the indictment. Each charge, and the evidence pertaining to it, should be considered separately by the jury. The fact that you may find [the] [a] defendant guilty or not guilty as to one of the counts should not control your verdict as to any other count.

1A Kevin F. O'Malley et al., ***Federal Jury Practice and Instructions***, § 12.12 (6th ed. 2008)

GOVERNMENT PROPOSED JURY INST. NO. Misc-2

Separate Consideration Of Multiple Counts

A separate crime is charged against the defendant in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

Manual of Model Jury Instructions for the Ninth Circuit, § 3.12 (2003 ed.)

GOVERNMENT PROPOSED JURY INST. NO. Misc-3

Consider Each Count And Each Defendant Separately

A separate crime is alleged against [each][one or more] of the defendants in each count of the indictment. Each alleged offense, and any evidence pertaining to it, should be considered separately by the jury. The fact that you find one defendant guilty or not guilty of one of the offenses charged should not control your verdict as to any other offense charged against that defendant or against any other defendant.

You must give separate and individual consideration to each charge against each defendant.

1A Kevin F. O'Malley et al., ***Federal Jury Practice and Instructions***, § 12.13 (6th ed. 2008)

[JI-116]

GOVERNMENT PROPOSED JURY INST. NO. Misc-4

Separate Consideration Of Each Count And Each Defendant

A separate crime is charged against one or more of the defendants in each count. The charges have been joined for trial. You must decide the case of each defendant on each crime charged against that defendant separately. Your verdict on any count as to any defendant should not control your verdict on any other count or as to any other defendant.

All of the instructions apply to each defendant and to each count (unless a specific instruction states that it applies only to [a specific defendant][or][a specific count]).

Manual of Model Criminal Jury Instructions for the Ninth Circuit, § 3.14 (2003 ed.)

GOVERNMENT PROPOSED JURY INST. NO. Misc-5

Give Each Defendant Separate Consideration

It is your duty to give separate and personal consideration to the case of each defendant. When you do so, you should analyze what the evidence in the case shows with respect to that defendant, leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants.

Each defendant is entitled to have his [her] case determined from evidence as to his [her] own acts, statements, and conduct and any other evidence in the case which may be applicable to him [her].

The fact that you return a verdict of guilty or not guilty as to one defendant should not, in any way, affect your verdict regarding any other defendant.

1A Kevin F. O'Malley et al., ***Federal Jury Practice and Instructions***, § 12.14 (6th ed. 2008)

GOVERNMENT PROPOSED JURY INST. NO. Misc-6

Separate Consideration For Each Defendant

Even though the defendants are being tried together, you must give each of them separate consideration. In doing this, you must analyze what the evidence shows about each defendant [, leaving out of consideration any evidence that was admitted solely against some other defendant or defendants]. Each defendant is entitled to have his/her case decided on the evidence and the law that applies to that defendant.

Federal Criminal Jury Instructions of the Seventh Circuit, § 4.05 (1998 ed.)

GOVERNMENT PROPOSED JURY INST. NO. Misc-7

Separate Consideration For Each Defendant

Although the defendants are being tried together, you must give separate consideration to each defendant. In doing so, you must determine which evidence in the case applies to each defendant, disregarding any evidence admitted solely against some other defendant[s]. The fact that you may find one of the defendants guilty or not guilty should not control your verdict as to any other defendant[s].

[JI-117]

Manual of Model Criminal Jury Instructions for the Ninth Circuit, § 1.14 (2003 ed.)

GOVERNMENT PROPOSED JURY INST. NO. Misc-8

Caution -- Consider Only Crime Charged

You are here to decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant is not on trial for any act, conduct, or offense not alleged in the indictment. Neither are you concerned with the guilt of any other person or persons not on trial as a defendant in this case, except as you are otherwise instructed.

Fifth Circuit Criminal Jury Instructions, No. 1.19 (2001 ed.)

GOVERNMENT PROPOSED JURY INST. NO. Misc-9

Caution – Punishment (Single Defendant -- Single Count)

If a defendant is found guilty, it will be my duty to decide what the punishment will be. You should not be concerned with punishment in any way. It should not be a part of your consideration or discussions.

Fifth Circuit Criminal Jury Instructions, No. 1.20 (2001 ed.)

GOVERNMENT PROPOSED JURY INST. NO. Misc-10

Caution – Punishment (Single Defendant -- Single Count)

I caution you, members of the jury, that you are here to determine from the evidence in this case whether the defendant is guilty or not guilty. The defendant is on trial only for the specific offense alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the defendant is convicted the matter of punishment is for the judge to determine.

Pattern Jury Instructions: Eleventh Circuit, Criminal Cases, BI 10.1 (2003 ed.)

GOVERNMENT PROPOSED JURY INST. NO. Misc-11

Caution – Punishment (Single Defendant -- Multiple Counts)

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

Fifth Circuit Criminal Jury Instructions, No. 1.21 (2001 ed.)

[JI-118]

GOVERNMENT PROPOSED JURY INST. NO. Misc-12

Caution – Punishment (Single Defendant -- Multiple Counts)

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

I caution you, members of the jury, that you are here to determine from the evidence in this case whether the defendant is guilty or not guilty. The defendant is on trial only for those specific offenses alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the defendant is convicted the matter of punishment is for the Judge alone to determine.

Pattern Jury Instructions: Eleventh Circuit, Criminal Cases, BI 10.2 (2003 ed.)

GOVERNMENT PROPOSED JURY INST. NO. Misc-13

Caution – Punishment (Multiple Defendants -- Single Count)

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

Fifth Circuit Criminal Jury Instructions, No. 1.22 (2001 ed.)

GOVERNMENT PROPOSED JURY INST. NO. Misc-14

Caution – Punishment (Multiple Defendants -- Single Count)

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

I caution you, members of the jury, that you are here to determine from the evidence in this case whether each defendant is guilty or not guilty. Each defendant is on trial only for the specific offense alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If a defendant is convicted the matter of punishment is for the Judge alone to determine later.

Pattern Jury Instructions: Eleventh Circuit, Criminal Cases, BI 10.3 (2003 ed.)

[JI-119]

GOVERNMENT PROPOSED JURY INST. NO. Misc-15

(Multiple Defendants -- Multiple Counts)

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

Fifth Circuit Criminal Jury Instructions, No. 1.23 (2001 ed.)

GOVERNMENT PROPOSED JURY INST. NO. Misc-16

Caution – Punishment (Multiple Defendants -- Multiple Counts)

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

I caution you, members of the jury, that you are here to determine from the evidence in this case whether each defendant is guilty or not guilty. Each defendant is on trial only for the specific offense alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the defendant is convicted the matter of punishment is for the Judge alone to determine later.

Pattern Jury Instructions: Eleventh Circuit, Criminal Cases, BI 10.4 (2003 ed.)

GOVERNMENT PROPOSED JURY INST. NO. Misc-17

"On Or About" -- Explained

The indictment charges that the offense alleged [in Count _____] was committed "on or about" a certain date.

Although it is necessary for the government to prove beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged in [Count _____ of] the indictment, it is not necessary for the government to prove that the offense was committed precisely on the date charged.

1A Kevin F. O'Malley, ***Federal Jury Practice and Instructions***, § 13.05 (6th Ed. 2008)

Fifth Circuit Criminal Jury Instructions, No. 1.18 (2001 ed.)

[JI-120]

GOVERNMENT PROPOSED JURY INST. NO. Misc-18

Date Of Crime Charged

The indictment charges that the offense was committed "on or about" _____. The government must prove that the offense happened reasonably close to that date but is not required to prove that the alleged offense happened on that exact date.

Federal Criminal Jury Instructions of the Seventh Circuit, § 4.04 (1998 ed.)

1A Kevin F. O'Malley et al, ***Federal Jury Practice and Instructions***, § 13.05, notes (6th ed. 2008)

GOVERNMENT PROPOSED JURY INST. NO. Misc-19

Each Tax Year is Separate

Any willful failure to comply with the requirements of the Internal Revenue Code for one year is a separate matter from any such failure to comply for a different year. The tax obligations of the defendant in any one year must be determined separately from the tax obligations in any other year.

2B Kevin F. O'Malley et al., ***Federal Jury Practice and Instructions***, § 67.24 (5th ed. 2000)

GOVERNMENT PROPOSED JURY INST. NO. Misc-20

Proof of Precise Amount of Tax Owed Not Necessary

The government must prove beyond a reasonable doubt that the defendant willfully attempted to evade or defeat a substantial portion of the tax owed.

Although the government must prove a willful attempt to evade a substantial portion of tax, the government is not required to prove the precise amount of additional tax alleged in the indictment or the precise amount of [additional] tax owed.

Kevin F. O'Malley, et al., ***Federal Jury Practice and Instructions***, § 67.08 (5th Ed. 2000)

GOVERNMENT PROPOSED JURY INST. NO. Misc-21

Not Necessary to Show Any Additional Tax Due

Although the government is required to prove beyond a reasonable doubt that the defendant willfully filed a false document as charged in Count ____ of the indictment [information], the government is not required to prove that any additional tax was due to the government or that the government was deprived of any tax revenues by reason of any filing of any false return.

2B Kevin F. O'Malley et al., ***Federal Jury Practice and Instructions***, § 67.19 (5th Ed. 2000)

[JI-121]

GOVERNMENT PROPOSED JURY INST. NO. Misc-22

Funds or Property From Unlawful Sources

There has been evidence in this case that the defendant received funds or property from unlawful sources.

In determining the issue of the taxable income of the defendant, no distinction is made between income derived from lawful or unlawful sources. Funds or property received from unlawful or illegal sources, therefore, are treated in the same manner as funds or property from lawful or legal sources.

2B Kevin F. O'Malley et al., ***Federal Jury Practice and Instructions***, § 67.21 (5th Ed. 2000)

26 U.S.C. § 61

James v. United States, 366 U.S. 213 (1961)

Rutkin v. United States, 343 U.S. 130 (1952)

GOVERNMENT PROPOSED JURY INST. NO. Misc-23

Computation of Tax Deficiency

The first step in arriving at an individual's taxable income is to determine the gross income of that individual. Gross income generally means all income from whatever source derived. Gross income includes, but is not limited to, compensation for services, such as wages, salaries, fees, or commissions, income derived from a trade or business, gains from dealings in property, interest, royalties, and dividends. Gross income includes both lawful and unlawful earnings.

After having determined an individual's gross income, the next step in arriving at the income upon which the tax is imposed is to subtract from the gross income such deductions and losses as the law provides. In this connection, an individual is permitted to deduct from gross income all of the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business or other profit-seeking endeavors, to the extent those expenses are not reimbursed by the business.

The amount remaining after subtracting the allowable deductions and losses from gross income is termed "adjusted gross income." In arriving at income upon which the tax is imposed, the individual is permitted to deduct from adjusted gross income either the zero bracket amount allowed by law or, in the alternative, amounts paid during the year for itemized deductions, which are limited by law, such as medical expenses, state income and property taxes, interest, charitable contributions, and other miscellaneous items. An individual is then allowed a deduction for each qualified exemption. The resulting figure is termed "taxable income," that is to say, the sum on which the income tax is normally imposed.

26 U.S.C. §§ 61 through 223 (Corporations, 26 U.S.C. §§ 61 through 281)

GOVERNMENT PROPOSED JURY INST. NO. Misc-24

Accrual Method of Accounting

Taxable income is computed by using the same method of accounting that the taxpayer used to compute his [her] income, as long as that accounting method clearly reflects income. In this case, the defendant reported taxable income and deductible expenses on the accrual method of accounting.

Under the accrual method of accounting, income is to be included in the taxable year when all events have occurred which fix the right to receive such income and the amount of the income can be determined with reasonable accuracy. Similarly, deductions are allowable for the taxable year in which all the events have occurred which establish the fact of liability giving rise to such deduction and the amount of the deduction can be determined with reasonable accuracy. When income is actually received or an expense is actually paid is irrelevant in the accrual method of

[JI-122] accounting.

26 U.S.C. §§ 446, 461(a)

Treasury Regulations on Income Tax (1986 Code), Sec. 1.461-1(a)(2) (26 C.F.R.)

GOVERNMENT PROPOSED JURY INST. NO. Misc-25

Corporate Diversions

Gains or profits and income derived from any source whatever are included in gross income for the purpose of taxation of income. This includes both lawful and unlawful gains.

You have heard evidence that the defendant was a shareholder in and diverted cash or other property from the [insert name of corporation], a corporation.

If you find that the defendant was a shareholder in the [insert name of corporation] and obtained cash or other property from the corporation, then you should proceed to determine whether this was income to the defendant.

In regard to this, you must first determine whether the defendant had complete control over the cash or other property he [she] obtained from the corporation, took it as his [her] own, and treated it as his [her] own, so that as a practical matter he [she] derived economic value from the money or property received. If you find this to be the case, then the money or property received by the defendant may [constitute] [be] income.

The defendant has introduced evidence to establish that [describe defense, e.g., money (or property) was held by the defendant for legitimate corporate purposes, constituted a loan or repayment of a loan, or constituted a nontaxable return of the defendant's investment in the corporation] and therefore was not income to the defendant for tax purposes.

In determining whether the defendant received any income from his [her] corporation, you are instructed as follows:

1. Loan. If you find that funds taken by the defendant (or any part thereof) were a loan from the corporation that was to be repaid or were repayment by the corporation of a loan from the defendant, then to the extent that the distribution was a loan or loan repayment, it would not be income to the defendant.

2. Return of Investment (or return of capital). If the funds constituted a distribution from the corporation and the distribution was with respect to the corporation's stock, and if the accumulated earnings and profits of the corporation and the earnings and profits of the corporation for the taxable year in issue were not great enough in amount to account for the distribution, all or a portion of the distribution may constitute a nontaxable return of the defendant's investment in the corporation. The amount of a distribution that is not accounted for by a corporation's earnings and profits is a return of capital, and not taxable to a shareholder,

---

[JI-123] to the extent of the shareholder's investment. The amount of such a distribution in excess of the shareholder's investment is capital gain income to the shareholder, which is taxable.

A payment to a shareholder is not automatically a distribution with respect to the corporation's stock. To constitute such a distribution, a distribution must be made to a shareholder because of his ownership of the corporation's stock and be paid to the shareholder in his capacity as such. Therefore, a payment does not qualify as a distribution with respect to stock if, for example, the corporation pays an individual shareholder in his capacity as a debtor, creditor, employee, or vendee, or under other circumstances where the individual's status as a shareholder is incidental, such as embezzlement or misappropriation. Facts with a bearing on whether a distribution is with respect to a corporation's stock include the distribution of stock ownership and conditions of corporate employment (whether, for example, a shareholder's efforts on behalf of a corporation amount to a good reason to treat a payment as salary). [Point to additional facts of the case that support the conclusion that a diversion is not a distribution with respect to stock.]

It is for you the jury to decide whether the circumstances surrounding a receipt of funds, including the intent of the defendant and the corporation, establish that the funds received by the defendant constituted income or a loan or return of the defendant's investment.

Boulware v. United States, 128 S. Ct. 1168 (2008)

United States v. D'Agostino, 145 F.3d 69, 72-73 (2d Cir. 1998)

United States v. Ruffin, 575 F.2d 346, 351 n.6 (2d Cir. 1978)

United States v. Leonard, 524 F.2d 1076, 1082-1084 (2d Cir. 1975)

DiZenzo v. Commissioner Of Internal Revenue, 348 F.2d 122, 125-127 (2d Cir. 1965)

GOVERNMENT PROPOSED JURY INST. NO. Misc-25b

Corporate Diversions (2)[7]

Gains or profits and income derived from any source whatever are included in gross income for the purpose of taxation of income. This includes both lawful and unlawful gains.

You have heard evidence that the defendant was a stockholder in and received cash or other property from the [insert name of corporation], a corporation.

If you find that the defendant was a stockholder in the [insert name of corporation] and obtained cash or other property from the corporation, then you should proceed to determine whether this was income to the defendant.

In this connection, you must first determine whether the defendant had complete control over the cash or other property he [she] obtained from the corporation, took it as his [her] own, and treated it as his [her] own, so that as a practical matter he [she] derived economic value from the money or property received. If you find this to be the case, then the money or property received by the defendant would be income; if you do not find this to be the case, then the money or property obtained by the defendant would not be income to the defendant.

Boulware v. United States, 128 S. Ct. 1168 (2008)

United States v. D'Agostino, 145 F.3d 69, 72-73 (2d Cir. 1998)

United States v. Ruffin, 575 F.2d 346, 351 n.6 (2d Cir. 1978)

United States v. Leonard, 524 F.2d 1076, 1082-1084 (2d Cir. 1975)

[7] This instruction should not be used if there is evidence of a basis for finding diverted funds to be nontaxable other than that the defendant held the funds on behalf of the corporation and expended them only for legitimate corporate purposes. For an instruction explaining the bases for finding funds nontaxable, such as a claim that diverted funds were loans or repayment of loans, see the instructions above and below.

DiZenzo v. Commissioner Of Internal Revenue, 348 F.2d 122, 125-127 (2d Cir. 1965)

[JI-124]

GOVERNMENT PROPOSED JURY INST. NO. Misc-26

Constructive Dividends[8]

The government has introduced evidence to establish that the defendant was a shareholder in [insert name of corporation], a corporation, and [e.g., obtained money or property from the corporation] and/or [caused the corporation to spend money for personal purposes of the defendant][9] which represented a [dividend] [and/or capital gain income][10] that should have been reported on the defendant's return.

The defendant has introduced evidence to establish that [describe defense, e.g., money (or property) obtained by the defendant from the corporation and expenditures made by the corporation for personal purposes of the defendant] was not income to the defendant but [e.g., a loan from the corporation or a nontaxable return of the defendant's investment in the corporation].[11]

In determining whether the defendant received any income from his [her] corporation, you are instructed as follows:

1. Dividend. A distribution by a corporation to or for the benefit of a stockholder that is not a loan is reportable as a dividend to the extent that the distribution (or any part thereof) could have been paid out of the accumulated earnings and profits of the corporation; or out of the earnings and profits of the corporation for the taxable year in issue.

[8] This instruction may be given in those situations where the government's theory of the case is that diverted funds constituted a constructive dividend but the defendant has introduced evidence to the effect that there were no corporate earnings or profits from which a dividend could have been paid.
[9] Select language and alternatives that reflect the evidence introduced by the government.
[10] Select language and alternatives that reflect the evidence introduced by the government.
[11] If the defense evidence is to the effect that the defendant received no money or property from the corporation and no expenditures were made for personal purposes of the defendant, this portion of the instruction should be modified accordingly.

2. Return of Capital. If the accumulated and current earnings and profits of the corporation are not great enough in amount to account for all, or a part of, the distribution to the defendant, then that portion of the distribution which could not be paid out of earnings and profits would be a nontaxable return of capital up to the amount of money invested in the corporation by the defendant.

3. Capital Gain Income. Finally, any portion of the distribution which exceeds both the accumulated earnings and profits of the corporation and the amount the defendant had invested in the corporation, would be capital gain income to the defendant.

[4. Loan. If you find that a distribution received by the defendant (or any part thereof) was a loan from the corporation that was to be repaid, then to the extent that the distribution was a loan, it would not be income to the defendant.][12]

Boulware v. United States, 128 S. Ct. 1168 (2008)

United States v. D'Agostino, 145 F.3d 69, 72-73 (2d Cir. 1998)

United States v. Thetford, 676 F.2d 170, 175 n.5 (5th Cir. 1982), *cert. denied*, 459 U.S. 1148 (1983)

Bernstein v. United States, 234 F.2d 475, 480-482 (5th Cir.), *cert. denied*, 352 U.S. 915 (1956)

[JI-125]

[12] This portion of the instruction is to cover those situations where evidence has been introduced of a loan defense. Another instruction concerning loans is set forth below.

GOVERNMENT PROPOSED JURY INST. NO. Misc-27

Loan -- Explained

A loan that the parties to the loan agree is to be repaid does not constitute gross income as that term is defined by the Internal Revenue Code. However, merely calling a transaction a loan is not sufficient to make it such. When money is acquired and there is no good faith intent on the part of the borrower to repay the funds advanced, such funds are income under the income tax laws and are taxable as such.

United States v. Mann, 161 F.3d 840, 854 (5th Cir. 1998)

United States v. Swallow, 511 F.2d 514, 522 n.7 (10th Cir.), *cert. denied*, 423 U.S. 845 (1975)

See also United States v. Rosenthal, 454 F.2d 1252 (2d Cir. 1972), *cert. denied*, 406 U.S. 931 (1972)

United States v. Rosenthal, 470 F.2d 837, 841-842 (2d Cir. 1972), *cert. denied*, 412 U.S. 909 (1973)

United States v. Rochelle, 384 F.2d 748, 751 (5th Cir. 1967), *cert. denied*, 390 U.S. 946 (1968)

GOVERNMENT PROPOSED JURY INST. NO. Misc-28

Gift -- Defined

It is for you, the jury, to decide whether certain funds are taxable or nontaxable as gifts to the defendant. In determining whether a payment of money or property to the defendant is a nontaxable gift, you should look to the intent of the parties at the time the payment was made, particularly the intent of the person making the payment.

A gift proceeds from a detached and disinterested generosity arising from affection, respect, admiration, charity, or like impulses. In this regard, the most critical consideration is the transferor's or donor's intention. What controls is the intention with which the payment, however voluntary, was made.

If a payment in funds or in property from one person to another proceeds primarily from a duty, either moral or legal, that payment is not a gift. Likewise, if the payment acts as an incentive for an anticipated benefit of an economic nature, then such payment is not a gift. Similarly, where

[JI-126] the payment is in return for services rendered, it is not a gift. It does not matter whether the donor derives economic benefit from the payment.

Moreover, the donor's characterization of his [her] action is not conclusive. It is for you, the jury, to determine objectively whether what is called a gift is in reality a gift. Additionally, the parties' expectations or hopes as to the tax treatment of their conduct have nothing to do with the matter.

The decision as to whether individual payments are gifts or income [or political contributions] is a question of fact for you to determine in the light of practical human experience. If you find that a payment was a gift, as I have defined it, then that payment does not constitute income and need not be reported on an income tax return.

Commissioner v. Duberstein, 363 U.S. 278, 285-286 (1960)

GOVERNMENT PROPOSED JURY INST. NO. Misc-29

Gift -- Defined

It is for you, the jury, to decide whether certain funds are taxable or nontaxable as gifts to the defendant. In determining whether a payment of money or property to the defendant is a nontaxable gift, you should look to the intent of the parties at the time the payment was made, particularly the intent of the person making the payment.

A gift proceeds from a detached and disinterested generosity arising from affection, respect, admiration, charity, or like impulses. In this regard, the most critical consideration is the transferor's or donor's intention. What controls is the intention with which the payment, however voluntary, was made.

The characterization given to a certain payment by either the defendant or the person making the payment is not conclusive. Rather, you the members of the jury must make an objective inquiry as to whether a certain payment is a gift. You should look at the terms and substance of any request made by the defendant for the funds. In addition, you may take into account the following factors:

1. A payment is not a gift if it is made to compensate the defendant for his services. In this connection, you should consider how the defendant made his living.

2. A payment is not a gift if the person making the payment expects to receive anything in return for it. A payment would not be a gift if it was made with the expectation that it would allow the defendant to remain in business.

3. A payment is not a gift if the person making the payment felt he had a duty or obligation to make the payment.

4. A payment is not a gift if the person making the payment did so out of fear or intimidation.

This is not a complete listing of all the factors you should consider. You should take into account all the facts and circumstances of this case in determining whether any payment was a gift.

United States v. Terrell, 754 F.2d 1139, 1149 n.3 (5th Cir.), *cert. denied*, 472 U.S. 1029 (1985)[13]

[JI-127] the expectation that it will be used to further the religious or ministerial activities of the defendant.] This sentence would appear to be incomplete. In its opinion, the court correctly states the law on this point as follows, *Terrell*, 754 F.2d at 1149:

> If money is given to a minister for religious purposes, any money used instead for the personal benefit of the minister becomes taxable income to him.

[13] The instruction in *Terrell* also stated, "A payment is not a gift to the defendant if it is made with

GOVERNMENT PROPOSED JURY INST. NO. Misc-30

Partnership Income

A partnership as such is not subject to income tax. Instead, each partner is individually taxed on and must report his [her] share of the partnership income, even if the income is not actually distributed to the partners.

If the partnership incurs a loss, each partner can deduct his [her] share of the loss on that partner's individual return.

26 U.S.C. §§ 701, 702

GOVERNMENT PROPOSED JURY INST. NO. Misc-31

Partnership Losses

A partnership does not pay taxes. Its income or loss flows through to the individual partners. The loss which a partner is entitled to claim on his [her] tax return with respect to a partnership loss is limited to the amount of his [her] contribution to the partnership. A partner's contribution to the partnership includes the amount of money he [she] contributed to the partnership as well as his [her] proportionate share of the partnership's liabilities or debts.

In the present case, if you find that certain asserted partnership liabilities do not exist or are of lesser value than that asserted on the partnership tax return, then such claimed liability, or portion thereof, may not be included in determining a partner's contribution to the partnership.

On the other hand, if you find that liabilities in the amounts asserted by [Name of partnership] were in fact incurred, then each partner's contribution to the partnership would include his [her] proportionate share of those partnership liabilities in determining the amount of loss which each partner is entitled to claim on his [her] individual income tax return.

26 U.S.C. §§ 704(d), 722, & 752(a)

GOVERNMENT PROPOSED JURY INST. NO. Misc-32

Deductions

Generally, there is an inference that a taxpayer will claim all deductions allowed on his [her] return, and the deductions stated on the return are prima facie proof of the maximum deductible amounts to which the defendant is entitled. Accordingly, if the defendant asserts additional deductions other than those shown on the return, it is incumbent upon the defendant to introduce evidence with respect to such additional deductions. The government has no burden of proving deductions beyond those claimed on the return.

This instruction is based on Fed. R. Evid. 801(d) and the rationale of the opinions below:

[JI-128]

United States v. Link, 202 F.2d 592, 593-594 (3d Cir. 1953)

United States v. Lacob, 416 F.2d 756, 760 (7th Cir. 1969), *cert. denied*, 396 U.S. 1059 (1970)

United States v. Bender, 218 F.2d 869, 871-872 (7th Cir.), *cert. denied*, 349 U.S. 920 (1955)

Clark v. United States, 211 F.2d 100, 103 (8th Cir. 1954), *cert. denied*, 348 U.S. 911 (1955)

United States v. Marabelles, 724 F.2d 1374, 1383 (9th Cir. 1984)

Elwert v. United States, 231 F.2d 928, 933 (9th Cir. 1956)

GOVERNMENT PROPOSED JURY INST. NO. Misc-33

Overstatement of Lawful Deductions

An income tax return may be false, not only by reason of an understatement of income, but also because of an overstatement of lawful deductions.

The term "deduction" means any item allowed by the internal revenue laws to be subtracted from gross income, in computing the amount of net or taxable income for income tax purposes.

In this case, it is charged that the income tax return was false because of an alleged willful overstatement of the amount of the deductions allowed by the internal revenue laws.

A deduction from gross income is allowed by the internal revenue laws, within limits not pertinent here, for such charitable contributions as are actually paid by the taxpayer during the taxable year to religious, charitable, educational and similar non-profit organizations.

A deduction from gross income is also allowed by the internal revenue laws for certain taxes, including State, County, and City taxes.

The internal revenue laws also permit, within limits not pertinent here, a deduction from gross income for expenses actually paid during the taxable year, not compensated for by insurance or otherwise, for medical and dental care regardless of when the incident or event which occasioned the expense occurred.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), § 36.07

See United States v. Helmsley, 941 F2d 71, 92 (2nd Cir. 1991), *cert. denied*, 112 S. Ct. 1162 (1992)

GOVERNMENT PROPOSED JURY INST. NO. Misc-34

Proof of Lawful Deductions

The evidence in the case need not establish beyond a reasonable doubt that the deductions, as allowed by the revenue laws, totalled the exact amount alleged in the indictment, or that the allowable deductions were overstated in the exact amounts alleged. The evidence must establish beyond a reasonable doubt only that the accused willfully overstated, or caused to be overstated, in some substantial amount, the deductions to which the taxpayer was entitled under the internal revenue laws, as charged in the indictment.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), § 36.08

[JI-129]

GOVERNMENT PROPOSED JURY INST. NO. Misc-35

Economic Substance[14]

A transaction without economic substance that is entered into solely for the purpose of tax avoidance cannot properly be used to compute taxes. That is to say, the law does not allow a deduction that arises out of a transaction which has no purpose, substance, or utility apart from the anticipated tax consequences. On the other hand, a deduction is proper in this context if there is some economic substance to the transaction giving rise to the deduction beyond the taxpayer's desire to secure a deduction.

A taxpayer may of course try to pay as little tax as possible, so long as he [she] uses legal means. Transactions may be arranged in an attempt to minimize taxes if the transactions have economic substance.

The government contends that [describe the transaction] has no economic substance. The defendant contends that this transaction did have economic substance.

In determining whether a particular transaction had economic substance or not, you are instructed to consider the overall circumstances surrounding the asserted transaction.

If, after reviewing the evidence regarding a transaction, you find that the reduction of taxes was the sole purpose for entering into the transaction and that the transaction had no other substance or utility, then you may disregard the intended tax effects of the transaction.

If, on the other hand, you find that the defendant's desire to reduce taxes was not the only motive for entering into the transaction but that the transaction had substance or utility

[14] This is an extremely complex area. Consequently, great care should be exercised in framing an instruction on economic substance. The law of your circuit should be carefully checked to insure that the instruction is consistent with the latest law on the question.

apart from the taxpayer's desire to reduce taxes, then you are to consider the tax aspects and impact of the transaction, as I have instructed you previously.

United States v. Ingredient Technology Corporation, 698 F.2d 88, 97 n.9 (2d Cir.), *cert. denied*, 462 U.S. 1131 (1983)

Goldstein v. Commissioner, 364 F.2d 734, 740-41 (2d Cir. 1966), *cert. denied*, 385 U.S. 1005 (1967)

GOVERNMENT PROPOSED JURY INST. NO. Misc-36

Income Tax on Ministers

The federal income tax is levied on income received by ministers. When an individual provides ministerial services as his trade or business, controls the money he receives in that business, and receives no separate salary, the income of that business is taxable to the minister. Payments made to a minister as compensation for his services also constitute income to him. If money is given to a minister for religious purposes, any money used instead for the personal benefit of the minister becomes taxable income to him.

The law provides that funds or property received from certain sources do not constitute taxable income. Since no income tax is levied on such funds or property, they are not properly reported

---

[JI-130] as income. Such nontaxable funds or property includes such items as gifts, inheritances, the proceeds of life insurance policies, loans and other miscellaneous items.

United States v. Terrell, 754 F.2d 1139, 1148-1149 (5th Cir.), *cert. denied*, 472 U.S. 1029 (1985)[15]

[15] The opinion in ***Terrell*** states that the district court instructed that "[v]oluntary contributions, when received by the minister, are income to him." It appears that the court was referring to a situation where a minister receives a contribution and uses it for personal purposes rather than turning the contribution over to the church.

GOVERNMENT PROPOSED JURY INST. NO. Misc-37

Deductions -- Tax Exempt Organizations

The government contends in Counts ____, and ____, that the defendant, _____, falsely claimed, on his [her] income tax return, a deduction for charitable contributions [made to _____]. The defendant contends that the deduction was properly claimed as a charitable contribution made to a tax-exempt organization.

For a contribution to be deductible, it must have been made as a gift to a tax-exempt organization. For an organization to be tax exempt it must have been organized and operated exclusively for religious, charitable, or educational purposes, and no part of the net earnings of the organization may inure to the benefit of any private individual.

An organization is regarded as operated exclusively for religious, charitable, or educational purposes, only if all of the following criteria are met:

1. The organization must have been organized and operated exclusively for exempt purposes, i.e., religious, charitable, or educational purposes, and not, except to an insubstantial degree, for a non-exempt purpose. That is to say, an organization is not tax exempt if its activities involve a single non-exempt purpose that is substantial in nature, regardless of the number or importance of truly exempt purposes.

2. No part of the net earnings of the organization may inure in whole, or in part, to the benefit of any private stockholder or individual. A private individual for these purposes is a person having a personal and private interest in the activities of the organization. The phrase, net earnings inure to the benefit of a private individual, means that funds of the organization are used by a private individual for personal purposes.

3. The organization cannot have been organized or operated for the benefit of the personal or private interests of an individual but only for a public purpose. In other

words, the organization cannot have been organized or operated for the benefit of private interests, such as designated individuals, the creator of the organization, or his family, or for persons controlled by such private interests.

26 U.S.C. § 170(c)(2)(B)&(C)

26 U.S.C. § 501(a)&(c)(3)

26 C.F.R. § 1.170A-1 (1993)

[JI-131]

26 C.F.R. § 1.501(c)(3)-1(c)(2) (1993)

26 C.F.R. § 1.501(a)-1(c) (1993)

26 C.F.R. § 1.501(c)(3)-1(d)(1)(ii) (1993)

United States v. Daly, 756 F.2d 1076, 1082-1083 (5th Cir.), *cert. denied*, 474 U.S. 1022 (1985)

McGahen v. Commissioner, 76 T.C. 468, 481-483 (1981), *aff'd*, 720 F.2d 664 (3d Cir. 1983)

Ecclesiastical Order of Ism of Am v. Commissioner, 80 T.C. 833, 839-841 (1983)

Better Business Bureau v. United States, 326 U.S. 279, 283 (1945)

Stephenson v. Commissioner, 79 T.C. 995, 1002 (1982), aff'd, 748 F.2d 331 (6th Cir. 1984)

Hall v. Commissioner, 729 F.2d 632, 634 (9th Cir. 1984)

Davis v. Commissioner, 81 T.C. 806, 818 (1983), *aff'd*, 767 F.2d 931 (1985)

GOVERNMENT PROPOSED JURY INST. NO. Misc-38

Charitable Contribution -- Defined

For income tax purposes, a charitable contribution is defined as a contribution or gift to an organization, corporation, trust, fund, or foundation organized and operated exclusively for religious, charitable, or educational purposes, no part of the net earnings of which inures to or is used for the benefit of any private shareholder or individual.

26 U.S.C. § 170(c)

GOVERNMENT PROPOSED JURY INST. NO. Misc-39

Charitable Contributions And Gifts -- Year Deductible

If you find that a charitable contribution or gift, as previously defined, was made by the defendant to a tax-exempt organization, then you are instructed that any such charitable contribution or gift can only be claimed as a deduction (by the individual who made the contribution or gift) for the tax year in which the contribution was made, i.e., the year in which it was paid to a tax-exempt organization. For example, if a contribution to a tax-exempt organization was made in the year 2004, then it would only be deductible on the taxpayer's 2004 return.

26 U.S.C. § 170(a)(1)

GOVERNMENT PROPOSED JURY INST. NO. Misc-40

Civil Tax Irrelevant

There is a distinction between the civil liability of a defendant and a defendant's criminal liability. This is a criminal case.

The defendant is charged under the law with the commission of a crime, and the fact that the defendant has or has not settled his [her] civil liability for the payment of taxes claimed to be due to the United States is not to be considered by you in determining the issues in this case.

Spies v. United States, 317 U.S. 492, 495 (1943)

United States v. Dack, 747 F.2d 1172, 1174-1175 (7th Cir. 1984)

United States v. Richards, 723 F.2d 646, 648 (8th Cir. 1984)

United States v. Voorhies, 658 F.2d 710, 714 (9th Cir. 1981)

[JI-132]

United States v. Buras, 633 F.2d 1356, 1360 (9th Cir. 1980)

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), § 35.17 (modified)

GOVERNMENT PROPOSED JURY INST. NO. Misc-41

"Deliberate Ignorance or Willful Blindness"

The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed her [his] eyes to what would otherwise have been obvious to him [her]. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from proof beyond a reasonable doubt of her [his] deliberate blindness to the existence of the fact.

It is entirely up to you as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. Although knowledge may be inferred from the defendant's behavior, the issue is what the defendant actually knew. A showing of mistake, carelessness, negligence, even gross negligence or recklessness, is not sufficient to support a finding of knowledge.

See United States v. MacKenzie, 777 F.2d 811, 818 n.2 (2d Cir. 1985), *cert. denied*, 476 U.S. 1169 (1976)

COMMENTS

1 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), *cert. denied*, 113 S. Ct. 1291 (1993); *United States v. de Francisco-Lopez*, 939 F.2d 1405, 1409 (10th Cir. 1991). Furthermore, several recent cases have found "deliberate ignorance" instructions to constitute reversible error when the evidence did not support the giving of the instruction. *See, e.g., United States v. 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, 937-41 (11th Cir. 1993) (holding that giving of deliberate ignorance instruction was harmless error). Consequently, 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.

2 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.

3 Unlike the instruction set forth above, which requires actual knowledge, the "deliberate ignorance" instruction in *United States v. Fingado*, 934 F.2d 1163, 1166 (10th Cir.), *cert. denied*, 112 S. Ct. 320 (1991), provided that the element of knowledge was established if the defendant was "aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." Although we believe that, in the context of a defendant's deliberate ignorance, this standard does satisfy the knowledge component of willfulness in criminal tax cases, we do not recommend its use (although, obviously, such an instruction may be used in the Tenth Circuit), because there is at least some risk that a court of appeals will hold that only a defendant's actual knowledge is sufficient.

[JI-133]

GOVERNMENT PROPOSED JURY INST. NO. Misc-42

Knowledge of Contents of Return

Section 6064 of Title 26 of the United States Code provides, in part:

The fact that an individual's name is signed to a return * * * shall be prima facie evidence for all purposes that the return * * * was actually signed by him.

In other words, you may infer and find that a tax return was, in fact, signed by the person whose name appears to be signed to it. You are not required, however, to accept any such inference or to make any such finding.

If you find beyond a reasonable doubt from the evidence in the case that the defendant signed the return in question, then you may also draw the inference and may also find, but are not required to find, that the defendant knew of the contents of the return that the defendant signed.

2B Kevin F. O'Malley et al., ***Federal Jury Practice and Instructions***, § 67.22 (5th Ed. 2000)

GOVERNMENT PROPOSED JURY INST. NO. Misc-43

Proof of Knowledge of Contents of Returns

The fact that an individual's name is signed to a return means that, unless and until outweighed by evidence in the case which leads you to a different or contrary conclusion, you may find that the filed tax return was in fact signed by the person whose name appears to be signed to it. If you find proof beyond a reasonable doubt that the defendant signed his [her] tax return, that is evidence from which you may, but are not required to, find or infer that the defendant had knowledge of the contents of the return.

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction No. 6.26.7206 (2007 ed.)

United States v. Wainwright, 448 F.2d, 984, 986 (10th Cir. 1971), *cert. denied*, 407 U.S. 911 (1972)

United States v. Gaines, 690 F.2d 849, 853-55 (11th Cir. 1982)

GOVERNMENT PROPOSED JURY INST. NO. Misc-44

Exculpatory Statements - Later Proved False

Statements knowingly and voluntarily made by Defendant upon being informed that a crime had been committed or upon being accused of a criminal charge, may be considered by the jury.

When a defendant voluntarily offers an explanation or voluntarily makes some statement tending to show his [her] innocence and it is later shown that the defendant knew that the statement or explanation was false, the jury may consider this as showing a consciousness of guilt on the part of Defendant since it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish his [her] innocence.

Whether or not evidence as to a Defendant's explanation or statement points to a consciousness of guilt on his [her] part and the significance, if any, to be attached to any such evidence, are

[JI-134] matters exclusively within the province of the jury as the sole judges of the facts of this case.

In your evaluation of evidence of an exculpatory statement shown to be false, you may consider that there may be reasons--fully consistent with innocence--that could cause a person to give a false statement showing his innocence. Fear of law enforcement, reluctance to become involved, and simple mistake may cause a person who has committed no crime to give such a statement or explanation.

[Any testimony concerning a false exculpatory statement by Defendant is in no way attributable to any other defendant on trial in this case and may not be considered by you in determining whether the government has proven the charge[s] against any other defendant beyond a reasonable doubt.]

1A Kevin F. O'Malley et al., ***Federal Jury Practice and Instructions***, § 14.06 (6th Ed. 2008)

COMMENT

1 The Fifth, Seventh, Ninth and Eleventh Circuits either do not include any consciousness of guilt instructions, or specifically recommend that these matters be left to argument and that no such instruction be given. See the Committee Comments to the Seventh Circuit Instruction 3.05 and Ninth Circuit Instruction 4.03. The Federal Judicial Center includes a general instruction on "Defendant's Incriminating Actions after the Crime." See Federal Jury Center Instruction 43. But the Committee Commentary recommends that it should not be given in most cases, and that generally these matters should be left to argument by counsel.

GOVERNMENT PROPOSED JURY INST. NO. Misc-45

Exculpatory Statements - Later Proved False

Now, during the course of the trial of this matter you heard witnesses testify about statements made by the defendant _____ after he been confronted with some suggestion that he might have been guilty of the commission of a crime, and I am expressing no opinion now about the evidence in the case, about what the facts are, but once in awhile I have to refer to some of the evidence which has been heard so that you understand the principle of law that I am referring to. I charge you that the conduct of a defendant, including statements made and acts done upon being informed that a crime has been committed, or upon being confronted with a criminal charge, may be considered by the Jury in the light of other evidence in the case in determining the guilt or innocence of the accused. When a defendant voluntarily offers an explanation or makes some statement tending to establish his innocence or her innocence, and such explanation or statement is later shown to be false in whole or in part, the Jury may consider whether this circumstantial evidence points to a consciousness of guilt. It is reasonable to infer that an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish his innocence. Whether or not evidence as to a defendant's voluntary explanation or statement points to a consciousness of guilt and the significance, if any, to be attached to any such evidence are matters for determination by the Jury. I am not suggesting to you that either of the defendants made any contradictory statements. I am not suggesting that at all. I express no opinion about it, but I give you that principle of law in the charge because, if you conclude that such contradictory statements were made either in whole or in part, then that is the principle of law for your consideration, but, as I say, I express no opinion about the matter whatsoever

This instruction was approved in ***United States v. Pringle***, 576 F.2d 1114, 1120 (5th Cir. 1979); *but see* Comment to prior instruction.

[JI-135]

GOVERNMENT PROPOSED JURY INST. NO. Misc-46

False Exculpatory Statements

When a defendant voluntarily and intentionally offers an explanation, or makes some statement tending to show his innocence, and this explanation or statement is later shown to be false, you may consider whether this evidence points to a consciousness of guilt. The significance to be attached to any such evidence is a matter for you to determine.

United States v. Davis, 437 F.3d 989, 995-996 (10th Cir. 2006)

United States v. Strother, 49 F.3d 869, 876-77 (2d Cir. 1995)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, No. 4.15 (2008 ed.).

See also United States v. Pino-Lara, 104 F.3d 357 (2d Cir. 1996); *United States v. Hudson*, 717 F.2d 1211, 1215 (8th Cir. 1983).

COMMENTS

If the defendant denies making the statement or denies that it is exculpatory or false, this language may need to be changed to more clearly state that the jury must decide whether or not the statement was made or whether or not it was false or exculpatory. *United States v. Holbert*, 578 F.2d 128, 130 (8th Cir. 1978); *United States v. Pringle*, 576 F.2d 1114, 1120 n.6 (5th Cir. 1978); *see also Hudson*, 717 F.2d at 1215 (defendant asserted statement was not false or exculpatory; approved instruction stating, "[w]hether or not evidence as to a defendant's voluntary explanation or statement points to a consciousness of guilt, and the significance to be attached to any such evidence, are matters exclusively within the province of the jury.").

GOVERNMENT PROPOSED JURY INST. NO. Misc-47

Similar Acts

During this trial, you have heard evidence of acts of the defendant which may be similar to those charged in the indictment, but which were committed on other occasions. You must not consider any of this evidence in deciding if the defendant committed the acts charged in the indictment. However, you may consider this evidence for other, very limited, purposes.

If you find beyond a reasonable doubt from other evidence in this case that the defendant did commit the acts charged in the indictment, then you may consider evidence of the similar acts allegedly committed on other occasions to determine:

whether the defendant had the state of mind or intent necessary to commit the crime charged in the indictment;

or

whether the defendant had a motive or the opportunity to commit the acts charged in the indictment;

or

whether the defendant acted according to a plan or in preparation for commission of a crime;

or

[JI-136]

whether the defendant committed the acts for which he is on trial by accident or mistake.

These are the limited purposes for which any evidence of other similar acts may be considered.

Fifth Circuit Criminal Jury Instructions No. 1.30 (2001)

COMMENT

United States v. Pompa, 434 F.3d 800, 805-06 (5th Cir. 2005), cites instructions with approval. *See also United States v. Practi*, 861 F.2d 82 (5th Cir. 1988) (states court "should" give jury cautionary and limiting instruction when similar act evidence is introduced; review for plain error if no timely objection). Under some circumstances, the failure to give a limiting instruction, even in the absence of a request, may constitute plain error, although instructions that clearly inform jury of need to convict on charges filed may avoid plain error. *Id.*

GOVERNMENT PROPOSED JURY INST. NO. Misc-48

Prior Similar Acts

(1) You have heard testimony that the defendant committed some [crimes, acts, wrongs] other than the ones charged in the indictment. If you find the defendant did those [crimes, acts, wrongs], you can consider the evidence only as it relates to the government's claim on the defendant's [intent, motive, opportunity, preparation, plan, knowledge, identity, absence of mistake, absence of accident]. You must not consider it for any other purpose.

(2) Remember that the defendant is on trial here for _____, not for the other acts. Do not return a guilty verdict unless the government proves the crime charged beyond a reasonable doubt.

Pattern Jury Instructions of the Sixth Circuit, Criminal Cases, § 7.13 (2007 ed.)

COMMENT

This instruction should be used when evidence of other crimes has been admitted to prove motive, opportunity, intent or the like under Fed. R. Evid. 404(b). Moreover, the instruction should specify the purpose(s) for which the jury may consider the evidence (e.g., intent, motive).

GOVERNMENT PROPOSED JURY INST. NO. Misc-49

Prior Similar Acts

You [are about to hear] [have heard] evidence that the defendant (describe evidence the jury is about to hear or has heard). You may consider this evidence only if you (unanimously) find it is more likely true than not true. This is a lower standard than proof beyond a reasonable doubt. If you find that this evidence is more likely true than not true, you may consider it to help you decide (describe purpose under 404(b) for which evidence has been admitted.) You should give it the weight and value you believe it is entitled to receive. If you find that it is not more likely true than not true, then you shall disregard it.

Remember, even if you find that the defendant may have committed [a] similar [act] [acts] in the past, this is not evidence that [he] [she] committed such an act in this case. You may not convict a person simply because you believe [he] [she] may have committed similar acts in the past. The defendant is on trial only for the crime[s] charged, and you may consider the evidence or prior acts only on the issue of (state proper purpose under 404(b), e.g., intent, knowledge, motive.)]

[JI-137]

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, § 2.08 (2008).

GOVERNMENT PROPOSED JURY INST. NO. Misc-50

Prior Similar Acts

You have heard evidence of other [crimes] [acts] [wrongs] engaged in by the defendant. You may consider that evidence only as it bears on the defendant's [*e.g.* motive, opportunity, intent, preparation, plan, etc.] and for no other purpose.

Ninth Circuit Manual of Model Criminal Jury Instructions, § 4.3 (2008)

COMMENTS

See United States v. Montgomery, 150 F.3d 983, 1000 (9th Cir. 1998) (four-part test for admissibility under Fed. R. Evid. 404(b))

GOVERNMENT PROPOSED JURY INST. NO. Misc-51

Cautionary Instruction During Trial - Prior Similar Acts

You are about to hear testimony that the defendant previously committed other [crimes] [wrongs] [acts] not charged here. I instruct you that the testimony is being admitted only for the limited purpose of being considered by you on the question of defendant's [intent] [motive] [opportunity] [preparation] [plan] [knowledge] [identity] [absence of mistake] [absence of accident] and for no other purpose.

Ninth Circuit Manual of Model Criminal Jury Instructions, No. 2.10 (2008)

This instruction comports with Fed. R. Evid. 404(b). Such a limiting instruction must be given if requested (Fed. R. Evid. 105) and must be given *sua sponte* when appropriate.

GOVERNMENT PROPOSED JURY INST. NO. Misc-51b

Cautionary Instruction During Trial - Similar Acts

Evidence that an act was done or that an offense was committed by Defendant _____ at some other time is not, of course, any evidence or proof whatever that, at another time, the defendant performed a similar act or committed a similar offense, including the offense charged in [Count ____ of] this indictment.

Evidence of a similar act or offense may not be considered by the jury in determining whether Defendant _____ actually performed the physical acts charged in this indictment. Nor may such evidence be considered for any other purpose whatever, unless the jury first finds beyond a reasonable doubt from other evidence in the case, standing alone, that Defendant _____ physically did the act charged in [Count _____ of] this indictment.

If the jury should find beyond a reasonable doubt from other evidence in the case that the Defendant _____ did the act or acts alleged in the particular count under consideration, the jury may then consider evidence as to an alleged earlier act of a like nature in determining the state of mind or intent with which Defendant _____ actually did the act or acts charged in the particular count.

[JI-138]

The defendant is not on trial for any acts or crimes not alleged in the indictment. Nor may a defendant be convicted of the crime[s] charged even if you were to find that he [she] committed other crimes--even crimes similar to the one charged in this indictment.

O'Malley, Grenig and Lee, ***1A Federal Jury Practice and Instructions***, § 17.08 (6th Ed. 2008)

COMMENTS

1 While Federal Rule of Evidence 404(b) prohibits evidence of prior acts or offenses "to show action in conformity therewith," the United States Supreme Court has held that such evidence is admissible for other purposes, including proof of knowledge or intent. ***Andresen v. Maryland***, 427 U.S. 463, 483 (1976).

2 A limiting instruction must be given, if requested. Fed. R. Evid. 105.

GOVERNMENT PROPOSED JURY INST. NO. Misc-52

Opinion Evidence -- The Expert Witness

The rules of evidence ordinarily do not permit witnesses to testify as to their own opinions or their own conclusions about important questions in a trial. An exception to this rule exists as to those persons who are described as "expert witnesses." An "expert witness" is someone who, by education or by experience, may have become knowledgeable in some technical, scientific, or very specialized area. If such knowledge or experience may be of assistance to you in understanding some of the evidence or in determining a fact, an "expert witness" in that area may state an opinion as to a matter in which he or she claims to be an expert.

You should consider each expert opinion received in evidence in this case and give it such weight, if any, as you may think it deserves. You should consider the testimony of expert witnesses just as you consider other evidence in this case. If you should decide that the opinion of an expert witness is not based upon sufficient education or experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you should conclude that the opinion is outweighed by other evidence [including that of other "expert witnesses"], you may disregard the opinion in part or in its entirety.

As I have told you several times, you -- the jury -- are the sole judges of the facts of this case.

O'Malley, Grenig and Lee, ***1A Federal Jury Practice and Instructions*** (6th Ed. 2008), § 14.01

GOVERNMENT PROPOSED JURY INST. NO. Misc-53

Opinion Evidence -- The Expert Witness

During the trial you heard the testimony of _____, who expressed opinions concerning _____.

If scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified by knowledge, skill, experience, training, or education, may testify and state an opinion concerning such matters.

Merely because such a witness has expressed an opinion does not mean, however, that you must accept this opinion. You should judge such testimony like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's

[JI-139] education and experience, the soundness of the reasons given for the opinion, and all other evidence in the case.

Fifth Circuit Criminal Jury Instructions, No. 1.17 (2001 ed.)

COMMENT

The revised instructions specifically deleted references to the witness as an expert.

GOVERNMENT PROPOSED JURY INST. NO. Misc-54

Opinion Evidence -- The Expert Witness

(1) You have heard the testimony of _____, who testified as an opinion witness.

(2) You do not have to accept _____'s opinion. In deciding how much weight to give it, you should consider the witness's qualifications and how he reached his conclusions. Also consider the other factors discussed in these instructions for weighing the credibility of witnesses.

(3) Remember that you alone decide how much of a witness's testimony to believe, and how much weight it deserves.

Sixth Circuit Pattern Criminal Jury Instructions, § 7.03 (2007)

COMMENTS

1 The instructions were revised to delete use of the term "expert."

2 Additional instructions are appropriate if a witness, such as a law enforcement officer, testifies about facts as well as opinions.

GOVERNMENT PROPOSED JURY INST. NO. Misc-55

Opinion Evidence -- The Expert Witness

You have heard a witness [witnesses] give opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way that you judge the testimony of any other witness. The fact that such a person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness' qualifications, and all of the other evidence in the case.

Pattern Criminal Federal Jury Instructions for the Seventh Circuit, No. 3.07 (1998)

COMMENT

The term “expert” was removed from the instruction to avoid undue credit.

[JI-140]

GOVERNMENT PROPOSED JURY INST. NO. Misc-56

Opinion Evidence -- The Expert Witness

You have heard testimony from persons described as experts. Persons who, by knowledge, skill, training, education or experience, have become expert in some field may state their opinions on matters in that field and may also state the reasons for their opinion.

Expert testimony should be considered just like any other testimony. You may accept or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all other evidence in the case.

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, 4.10 (2008 ed.)

GOVERNMENT PROPOSED JURY INST. NO. Misc-57

Opinion Evidence -- The Expert Witness

You have heard testimony from persons who, because of education or experience, are permitted to state opinions and the reasons for their opinion.

Expert opinion testimony should be judged just like any other testimony. You may accept or reject it, and give it as much weight as you think it deserves, considering the witness' education and experience, the reasons for the opinion, and all the other evidence in the case.

Ninth Circuit Manual of Model Criminal Jury Instructions, No. 4.17 (2008 ed.)

GOVERNMENT PROPOSED JURY INST. NO. Misc-58

Opinion Evidence -- The Expert Witness

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field is permitted to state an opinion concerning those technical matters.

Merely because such a witness has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it.

Pattern Jury Instructions: Eleventh Circuit, Criminal Cases, Eleventh Circuit, (2003) Basic Instruction No. 7

GOVERNMENT PROPOSED JURY INST. NO. Misc-59

Charts and Summaries -- Not Admitted

Charts or summaries have been prepared by _____ and shown to you during the trial for the purpose of explaining facts that are allegedly contained in books, records, and other documents which are in evidence in the case. Such charts or summaries are not evidence in this trial or proof of any fact. If you find that these charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, the jury should disregard the charts or summaries.

[JI-141]

In other words, such charts or summaries are used only as a matter of convenience for you and to the extent that you find they are not, in truth, summaries of facts or figures shown by the evidence in the case, you can disregard them entirely.

O'Malley, Grenig and Lee, ***1A Federal Jury Practice and Instructions,*** § 14.02 (6th Ed. 2008)

GOVERNMENT PROPOSED JURY INST. NO. Misc-60

Charts and Summaries -- Not Admitted

During the trial you have seen counsel use [summaries, charts, drawings, calculations, or similar material] which were offered to assist in the presentation and understanding of the evidence. This material is not itself evidence and must not be considered as proof of any facts.

Sixth Circuit Criminal Panel Jury Instructions, No. 7.12 (2007 ed.)

GOVERNMENT PROPOSED JURY INST. NO. Misc-61

Charts and Summaries -- Not Admitted

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records, or other underlying evidence in the case. Those charts or summaries are used for convenience. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the books, records or other underlying evidence.

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit,No. 4.11 (2008 ed.)

GOVERNMENT PROPOSED JURY INST. NO. Misc-62

Charts and Summaries -- Not Admitted

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records, and other documents which are in evidence in the case. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the underlying evidence.

Ninth Circuit Manual of Model Criminal Jury Instructions, No. 4.18 (2008)

GOVERNMENT PROPOSED JURY INST. NO. Misc-63

Charts and Summaries -- Admitted

Charts or summaries have been prepared by _____, have been admitted into evidence, and have been shown to you during the trial for the purpose of explaining facts that are allegedly contained in books, records, or other documents which are in evidence in the case. You may consider the charts and summaries as you would any other evidence admitted during the trial and give them such weight or importance, if any, as you feel they deserve.

O'Malley, Grenig and Lee, ***1A Federal Jury Practice and Instructions,*** § 14.02 (6th Ed. 2008)

[JI-142]

GOVERNMENT PROPOSED JURY INST. NO. Misc-64

Charts and Summaries -- Admitted

Certain summaries are in evidence. They truly and accurately summarize the contents of voluminous books, records or documents, and should be considered together with and in the same manner as all other evidence in the case.[16]

and/or

Certain summaries are in evidence. Their accuracy has been challenged by [the government] [the defendant]. Thus the original materials upon which the exhibits are based have also been admitted into evidence so that you may determine whether the schedules or summaries are accurate.[17]

Pattern Criminal Federal Jury Instructions for the Seventh Circuit, Nos. 3.15 and 3.16 (1998)

[16] This instruction should only be given when the accuracy and authenticity of the exhibits are not in question.

[17] This instruction is not intended to cover the situation where some or all of the underlying materials are unavailable.

GOVERNMENT PROPOSED JURY INST. NO. Misc-65

Charts and Summaries -- Admitted

You will remember that certain [schedules] [summaries] [charts] were admitted in evidence. You may use those [schedules] [summaries] [charts] as evidence, even though the underlying documents and records are not here. [However, the [accuracy] [authenticity] of those [schedules][summaries] [charts] has been challenged. It is for you to decide how much weight, if any, you will give to them. In making that decision, you should consider all of the testimony you heard about the way in which they were prepared.]

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit,No. 4.12 (2008 ed.)

COMMENT

1 Bracketed text applies if the accuracy or authenticity of a chart is challenged.

GOVERNMENT PROPOSED JURY INST. NO. Misc-66

Charts and Summaries -- Admitted

Certain charts and summaries have been received into evidence. Charts and summaries are only as good as the underlying supporting material. You should, therefore, give them only such weight as you think the underlying evidence deserves.

Ninth Circuit Manual of Model Criminal Jury Instructions, No. 4.19 (2008 ed.)

[JI-143]

GOVERNMENT PROPOSED JURY INST. NO. Misc-67

Lesser Included Offense[18]

The law permits the jury to determine whether the government has proven the guilt of the Defendant _____ for any [less serious] [other] offense which is, by its very nature, necessarily included in the crime of [insert name of charged offense] that is charged in [Count _____ of] the indictment.

If the jury should unanimously find that the government has proven each of the essential elements of the offense of [insert name of charged offense] that is charged in Count _____ of the indictment beyond a reasonable doubt, the foreperson should write "guilty" in the space provided and the jury's consideration of that count [for that defendant] is concluded.

If the jury should determine unanimously[19] that the government has not proven each element of the offense of [insert name of charged offense] that is charged in Count _____ of the indictment beyond a reasonable doubt, then the foreperson should write "not guilty" in the space provided and the jury should then consider the guilt or innocence of Defendant ___ for the [less serious][other] offense necessarily included in the offense of [insert name of charged offense] charged in Count _____ of the indictment.

---

[18] CAUTION: There are only a limited number of circumstances where a lesser included offense instruction is appropriate in a criminal tax case. See Section 8.11 of this Manual.

[19] Some courts have noted that a jury need not unanimously decide upon a verdict of not guilty before proceeding to a consideration of the lesser included offense. *See, e.g.*, ***United States v. Jackson***, 726 F.2d 1466 (9th Cir. 1984); ***United States v. Tsanas***, 572 F.2d 340, 346 (2d Cir.1978). The law of your circuit should be consulted on this point. If a unanimous decision of not guilty is not required, the following language may be substituted for this paragraph:

If, after reasonable efforts have been unsuccessful, the jury is unable to reach a verdict as to whether the government has proven each element of the offense charged in Count _____ of the indictment beyond a reasonable doubt, the jury should then consider whether the defendant is guilty or not guilty of the [less serious] [other] crime of [insert name of lesser included offense]

The crime of [insert name of charged offense], which is charged in Count _____ of the indictment in this case, necessarily includes the [less serious] [other] offense of [insert name of lesser included offense]. In order to find Defendant ___ guilty of the [less serious] [other] included offense, the government must prove the following ____ essential elements beyond a reasonable doubt: [list elements of lesser included offense].

The difference between the crime charged in Count _____ of the indictment and the [less serious][other] included offense is [list additional elements necessary to prove charged offense].

The jury will bear in mind that the burden is always upon the government to prove, beyond a reasonable doubt, each and every essential element of any [less serious] [other] offense which is necessarily included in any crime charged in Count _____ of the indictment. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

O'Malley, Grenig and Lee, ***1A Federal Jury Practice and Instructions***, § 20.05 (6th Ed. 2008)

[JI-144] which is necessarily included in the offense of [insert name of charged offense] charged in Count _____ of the indictment.

GOVERNMENT PROPOSED JURY INST. NO. Misc-68

Lesser Included Offense (Attempted Evasion of Payment/Failure to Pay)[20]

The law permits the jury to determine whether the government has proven the guilt of the defendant for any offense that is necessarily included in any crime charged in the indictment,whenever such a course is consistent with the facts found by the jury from the evidence in the case, and with the law as given in the instructions of the court.

So, if the jury should unanimously[21] find the accused "Not Guilty" of the crime of willfully attempting to evade or defeat payment of tax as charged in Count _____ of the indictment, then the jury must proceed to determine whether the government has proven the guilt of the defendant as to any lesser offense, which is necessarily included in the crime charged.

The crime of willfully attempting to evade or defeat payment of taxes, which is the crime charged in Count _____ of the indictment, necessarily includes the lesser offense of willful failure to pay the tax. This lesser offense is defined in Section 7203 of the Internal Revenue Code [26 U.S.C.§ 7203], which provides in part that:

"Any person required . . . to pay any . . . tax, . . ., who willfully fails to pay such . . . tax . . . at the time or times required by law shall be guilty of an offense against the laws of the United States.

[20] CAUTION: There are only a limited number of circumstances where a lesser included offense instruction is appropriate in a criminal tax case. See Section 8.11 of this Manual; *United States v. Becker*, 965 F.2d 383, 390-91 (7th Cir. 1992) (§ 7203, willful failure to file, is not a lesser included offense of §7201, tax evasion).

[21] Some courts have noted that a jury need not unanimously decide upon a verdict of not guilty before proceeding to a consideration of the lesser included offense. *See, e.g., United States v. Jackson*, 726 F.2d 1466 (9th Cir. 1984); *United States v. Tsanas*, 572 F.2d 340 (2d Cir. 1978).The law of your circuit should be consulted on this point. If a unanimous decision of not guilty is

In order for the defendant to be found guilty of the lesser included offense of willful failure to pay the tax, the government must prove each of the following elements beyond a reasonable doubt:

1. That there was a tax due and owing by the defendant;

2. That the defendant failed to pay the tax when due; and

3. That the failure was willful.

As stated before, the burden is always on the prosecution to prove beyond a reasonable doubt each essential element of the crime charged; the law never imposes on a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.

Schmuck v. United States, 489 U.S. 705, 715-21 (1989)

Sansone v. United States, 380 U.S. 343, 351-352 (1965)

[JI-145] not required, the following language may be substituted for this paragraph:

So, if, after reasonable efforts have been unsuccessful, the jury is unable to reach a verdict as to whether the government has proven each element of the offense of willfully attempting to evade or defeat payment of a tax as charged in Count _____ of the indictment beyond a reasonable doubt, then the jury must proceed to determine whether the government has proven beyond a reasonable doubt the guilt of the defendant as to any lesser offense, which is necessarily included in the crime charged.

GOVERNMENT PROPOSED JURY INST. NO. Misc-69

Lesser Included Offense[22]

We have just talked about what the government has to prove for you to convict the defendant of the crime charged in the indictment [insert name of greater crime]. Your first task is to decide whether the government has proved, beyond a reasonable doubt, that the defendant committed that crime. If your verdict on that is guilty, you are finished. But if your verdict is not guilty, or if after all reasonable efforts, you are unable to reach a verdict, you should go on to consider whether the defendant is guilty of [insert name of lesser included crime]. You should find the defendant guilty of [insert name of lesser included crime] if the government has proved, beyond a reasonable doubt, that the defendant did everything we discussed before except that it did not prove that the defendant [describe missing element].

To put it another way, the defendant is guilty of [insert name of lesser included crime] if the following things are proved beyond a reasonable doubt: [list elements of lesser included crime].The defendant is guilty of [insert name of greater crime] if it is proved beyond a reasonable doubt that the defendant did all those things and, in addition, [describe missing element]. If your verdict is that the defendant is guilty of [insert name of greater crime], you need go no further. But if your verdict on that crime is not guilty, or if after all reasonable efforts, you are unable to reach a verdict on it, you should consider whether the defendant has been proved guilty of [insert name of lesser included crime].

Of course, if the government has not proved beyond a reasonable doubt that the defendant committed [insert name of lesser included crime], your verdict must be not guilty of all of the charges.

Fifth Circuit Pattern Criminal Jury Instructions, No. 1.33 (2001 ed.)

[22] CAUTION: There are only a limited number of circumstances where a lesser included offense is appropriate in a criminal tax case. See Section 8.11 of this Manual.

GOVERNMENT PROPOSED JURY INST. NO. Misc-70

Lesser Included Offense[23]

If you find the defendant not guilty of the offense of [insert name of greater offense] as charged in Count ___ [or if you cannot unanimously agree that the defendant is guilty of that offense], then you must go on to consider whether the government has proved the offense of [insert name of lesser included offense].

Pattern Federal Criminal Jury Instructions for the Seventh Circuit, No. 2.02 (1998 ed.)

[JI-146]

[23] CAUTION: There are only a limited number of circumstances where a lesser included offense instruction is appropriate in a criminal tax case. See Section 8.11 of this Manual.

GOVERNMENT PROPOSED JURY INST. NO. Misc-71

Lesser Included Offense[24]

The crime of [insert name of greater offense] includes the lesser crime of [insert name of lesser included offense]. If (1) [any] [all][25] of you are not convinced beyond a reasonable doubt that the defendant is guilty of [insert name of greater offense] and (2) all of you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime of [insert name of lesser included offense], you may find the defendant guilty of [insert name of lesser included offense].

In order for the defendant to be found guilty of the lesser crime of [insert name of lesser included offense], the government must prove each of the following elements beyond a reasonable doubt:[list elements of lesser included offense].

Ninth Circuit Manual of Model Criminal Jury Instructions, No. 3.15 (2008 ed.).

[24] CAUTION: There are only a limited number of circumstances where a lesser included offense instruction is appropriate in a criminal tax case. See Section 8.09 of this Manual.

[25] If the defendant expresses no choice, the trial court may employ either a jury instruction requiring the jury to unanimously acquit on the greater charge before considering the lesser included offense or an instruction advising the jury that it can consider the lesser included offense if it is unable after a reasonable effort to reach a verdict on the greater offense. It is error to reject the form of instruction that is timely requested by the defendant. ***United States v. Jackson***, 726F.2d 1466, 1469-1470 (9th Cir. 1984).

GOVERNMENT PROPOSED JURY INST. NO. Misc-72

Lesser Included Offense[26]

In some cases, the law that a defendant is charged with breaking actually covers two separate crimes -- one is more serious than the second, and the second is generally called a "lesser included offense."

So, in this case, with regard to the offense charged in Count _____, if you should find the defendant "not guilty" of that crime as defined in these instructions, you should then proceed to decide whether the defendant is guilty or not guilty of the lesser included offense of [insert name of lesser included offense]. The [first] lesser included offense would consist of proof beyond a reasonable doubt of all of the facts stated before as necessary to a conviction under Count ,except .

[If you find the Defendant “not guilty” of the crime as charged in Count , and also find the Defendant “not guilty” of the first lesser included offense just discussed, you should then proceed to decide whether the Defendant is guilty or not guilty of a second lesser included offense of [give generic description of the second lesser included offense]. The second lesser included offense would consist of proof beyond a reasonable doubt of all of the facts stated before as necessary to a conviction under Count , except ____.]

[JI-147]

Pattern Jury Instructions: Eleventh Circuit, Criminal Cases, SI 10 (2003 ed.)

[26] CAUTION: There are only a limited number of circumstances where a lesser included offense instruction is appropriate in a criminal tax case. See Section 8.11 of this Manual.

GOVERNMENT PROPOSED JURY INST. NO. Misc-73

Action on Advice of Counsel

Defendant claims that [he] [she] is not guilty of the willful or deliberate wrongdoing as charged in[Count _____ of] the indictment because [he] [she] acted on the basis of advice from his [her]attorney.

If [before taking any action] [failing to take any action], the defendant, while acting in good faith and for the purpose of securing advice on the lawfulness of [his] [her] future conduct, sought and obtained the advice of an attorney [he] [she] considered to be competent, and made a full and accurate report or disclosure to his [her] attorney of all important and material facts of which [he][she] had knowledge or the means of knowing, and then acted strictly in accordance with the advice his [her] attorney gave following this full report or disclosure, then the defendant would not be willfully or deliberately doing wrong in [performing] [omitting] some act the law [forbids][requires], as these terms are used in these instructions.

Whether the defendant acted in good faith for the purpose of truly seeking guidance as to questions about which he [she] was in doubt, and whether he [she] made a full and complete report or disclosure to [his] [her] attorney and whether [he] [she] acted strictly in accordance with the advice received, are all questions for the jury to determine.

O'Malley, Grenig and Lee, ***1A Federal Jury Practice and Instructions***, § 19.08 (6th Ed. 2008)

GOVERNMENT PROPOSED JURY INST. NO. Misc-74

Defenses -- Reliance on Accountant

You have heard evidence that the defendant received advice from an accountant, [insert name of person] and you may consider that evidence in deciding whether the defendant acted willfully and with knowledge.

The mere fact that the defendant may have received accounting advice does not, in itself,necessarily constitute a complete a defense. Instead, you must ask yourselves whether the defendant honestly and in good faith sought the advice of an accountant as to what he may lawfully do; whether he fully and honestly laid all the facts before his accountant; and whether in good faith he honestly followed such advice, relying upon it and believing it to be correct. In short you should consider whether, in seeking and obtaining advice from a lawyer, the defendant intended that his acts shall be lawful. If he did so, it is the law that a defendant cannot be convicted of a crime which involves willful and unlawful intent, even if such advice were an inaccurate.

On the other hand, no man can willfully and knowingly violate the law and excuse himself from the consequences of his conduct by pleading that he followed the advice of his accountant.

Whether the defendant acted in good faith for the purpose of seeking guidance as to the specific acts in this case, and whether he made a full and complete report to his accountant, and whether he acted substantially in accordance with the advice received, are questions for you to determine.

[JI-148]

1 Sand, Siffert, Loughlin, Reiss, Allen and Rakoff, ***Modern Federal Jury Instructions: Criminal***,Instruction 8-4 (Comment), pp. 8-20 - 8-21 (2008 ed.).

GOVERNMENT PROPOSED JURY INST. NO. Misc-75

Defenses - Reliance on Accountant for Tax Return Preparation

If the defendant, provided [insert name of person who prepared return] with full information with regard to his [her] taxable income and expenses, and the defendant then adopted, signed, and filed the tax return as prepared by [insert name of person who prepared return] without having reason to believe that it was not correct, then you will find the defendant not guilty.

If, on the other hand, you find beyond a reasonable doubt that the defendant did not provide full and complete information to [insert name of person who prepared return], or that the defendant knew that the return as prepared by [insert name of person who prepared return] was not correct and substantially understated the tax liability of defendant [and his wife] [and her husband], then you may find the defendant guilty even though he did not prepare the return himself but rather had it prepared for him [her] by another person.

See United States v. Vannelli, 595 F.2d 402, 404-05 (8th Cir. 1979)

GOVERNMENT PROPOSED JURY INST. NO. Misc-76

Good Faith Reliance Upon Advice of Counsel

Good faith is a complete defense to the charge in the indictment if good faith on the part of the defendant is inconsistent with the existence of willfulness, which is an essential part of the charge.The burden of proof is not on the defendant to prove his good faith, of course, since he [she] has no burden to prove anything. The government must establish beyond a reasonable doubt that the defendant acted willfully as charged in the indictment.

So, a defendant would not be "willfully" doing wrong if, before taking any action with regard to the alleged offense, he [she] consulted in good faith an attorney whom he [she] considered competent, made a full and accurate report to her [his] attorney of all material facts of which he[she] had the means of knowledge, and then acted strictly in accordance with the advice given to him [her] by his [her] attorney.

Whether the defendant acted in good faith for the purpose of seeking advice concerning questions about which he [she] was in doubt, and whether he [she] made a full and complete report to her[his] attorney, and whether he [she] acted strictly in accordance with the advice he [she] received,are all questions for you to determine.

Pattern Jury Instructions: Eleventh Circuit, Criminal Cases, SI 18 (2003 ed.)

GOVERNMENT PROPOSED JURY INST. NO. Misc-77

Good Faith Belief of Accused[27]

To establish a violation of (26 U.S.C. 7201, 7202, 7203, 7206), as charged in Count(s) ____ of the indictment, the government must prove beyond a reasonable doubt that the defendant acted willfully. "Willfully" means a voluntary and intentional violation of a known legal duty. The defendant's conduct was not willful if he [she] acted through negligence -- even gross negligence -- mistake, or accident, or due to a good-faith belief or misunderstanding as to the law. Defendant claims that he [she] acted in good faith.

[JI-149] A good faith belief is one that is honestly and genuinely held.[28] In determining whether the defendant held a good faith belief, you are to determine what the defendant in fact believed, not what a reasonable person should have believed. When determining whether an asserted belief of the defendant was actually or genuinely held, you may also consider the reasonableness of the claimed belief. Note, however, that in considering the defendant's asserted good-faith misunderstanding or belief, you must make your decision based upon what the evidence established that the defendant actually believed and not upon what you (or someone else) believe or think the defendant ought to believe. The test you must apply is whether the defendant himself [herself] actually believed in good faith that he [she] had [reported and paid the entire tax due under the Internal Revenue Code] [complied with all of the obligations under the Internal Revenue Code]. If the defendant actually had that belief [those beliefs], a finding that his belief[s] is [are] unreasonable is not a basis for finding that the defendant lacked good faith.

I instruct you that a defendant who knows what the law requires and who merely disagrees with the law and chooses not to follow it does not present a good faith defense. It is the duty of all persons to obey the law whether or not they agree with it. Also, a person's claim that the tax laws violate his [her] constitutional rights does not constitute a good faith misunderstanding of the law and does not negate willfulness. [Furthermore, a

---

[27] CAUTION: Do not propose this instruction in cases involving only charges in which willfulness is not an element of the crime, such as 18 U.S.C. §§ 286, 287, 371 (conspiracy, defraud clause), 1001, and 26 U.S.C. § 7212. However, where knowledge of falsity or fraudulence is an element of an offense and falsity or fraudulence turns on the law, a mistake of law may negate knowledge, and therefore an instruction regarding a good faith misunderstanding of the law or belief as to the law may be appropriate. *See*, *e.g.*, *United States v. Nash*, 175 F.3d 429, 436-37 (6th Cir. 1999).

[28] This instruction is for use in cases where a defendant asserts a good faith misunderstanding of the law. The instruction should be modified for use in cases where a defendant claims that he [she] does not know the requirements of the law.

person's disagreement with [the government's monetary system and policies] does not negate willfulness.] (Modify with claims relevant to case.)

While the term “good faith” has no precise definition, it refers to, among other things, a belief that is actually held and the intent to perform all lawful obligations. A person who acts on a belief actually held in good faith is not punishable under this statute merely because that belief turns out to be incorrect or wrong. The tax laws subject to criminal punishment only those people who willfully violate the law. It is for you, the jury, to determine whether the defendant acted in good faith -- that is, whether he [she] sincerely misunderstood the law -- or whether the defendant knew that he [she] was required to [pay taxes] [file a true and correct return]. You should consider all of the evidence in the case bearing on the defendant's state of mind when determining whether the defendant acted willfully as alleged in Counts [identify counts where willfulness is an element, do not include offenses, such as 18 U.S.C. 286, 287, 371 (conspiracy, defraud clause), and 26 U.S.C. 7212, that do not have willfulness as an element]. Evidence you may consider includes evidence that the defendant was aware of his [her] [duty to file a return], [duty to pay a tax on April 15, YEAR], [duty to file a true and correct return] [court opinions rejecting [his] [her] claims] [IRS forms that specify that {wages are income}], or other evidence that informed the defendant that his [her] claim was wrong.]

Ultimately, if the evidence in the case leaves you, the jury, with a reasonable doubt as to whether the defendant made a good-faith effort to comply with the law or acted with willful intent to violate the law, you must acquit the defendant.

Remember that the burden of proving good faith does not rest with the defendant, because the defendant has no obligation to prove anything to you. The government has the burden of proving to you beyond a reasonable doubt that the defendant acted willfully.

Cheek v. United States, 498 U.S. 192 (1991)

United States v. Marston, 517 F.3d 996, 1003 (8th Cir. 2008)

United States v. Dean, 487 F.3d 840, 850-51 (11th Cir. 2007)

United States v. Pensyl, 387 F.3d 456, 459-60 (6th Cir. 2004)

United States v. Middleton, 246 F.3d 825, 837 (6th Cir. 2001)

United States v. Hilgeford, 7 F.3d 1340, 1342-44 (7th Cir. 1993)

United States v. Grunewald, 987 F.2d 531,536 (8th Cir. 1993)

United States v. Barnett, 945 F.2d 1296, 1298-99 (5th Cir. 1991)

Alternatives

Good Faith

A defendant does not act willfully if he [she] believes in good faith that he [she] is acting within the law or that his [her] actions comply with the law. Therefore, if the defendant actually believed that what he [she] was doing was in compliance with the tax law, he [she] cannot be said to have willfully [attempted to evade or defeat taxes] [failed to file tax returns] [filed false or fraudulent tax returns]. This is so even if the defendant's belief was not objectively reasonable, as long as he [she] actually

held the belief in good faith. Nevertheless, you may consider, as a factor in deciding whether he [she] actually held that belief, whether the defendant's asserted beliefs about the tax statutes were reasonable.

On the other hand, if the defendant claimed, even in good faith, that the tax laws were not valid or were unconstitutional, he [she] would not be excused from violating them. If the defendant understood the duties imposed on him [her], but claimed that the Internal Revenue laws were invalid or unconstitutional as applied to him [her], that claim, no matter how earnestly asserted, would not be a defense to the charges in this case. Likewise, a disagreement with the Internal Revenue Code or a claim that the law should be different from what it is, no matter how earnestly asserted, is not a defense and does not negate willfulness. It is the duty of all citizens to obey the law whether they agree with it or not. I instruct you that a defendant who knows what the law requires and who merely disagrees with the law and disobeys it, does not present a good faith defense.

Cheek v. United States, 498 U.S. 192 (1991)

United States v. Marston, 517 F.3d 996, 1003 (8th Cir. 2008)

United States v. Dean, 487 F.3d 840, 850-51 (11th Cir. 2007)

United States v. Pensyl, 387 F.3d 456, 459-60 (6th Cir. 2004)

United States v. Middleton, 246 F.3d 825, 837 (6th Cir. 2001)

United States v. Hilgeford, 7 F.3d 1340, 1342-44 (7th Cir. 1993)

United States v. Grunewald, 987 F.2d 531,536 (8th Cir. 1993)

United States v. Barnett, 945 F.2d 1296, 1298-99 (5th Cir. 1991)

Good Faith - objective reasonableness a factor

While a good faith belief need not be objectively reasonable to negate willfulness, the objective reasonableness of a belief is a factor for the jury to consider in determining whether a defendant actually held the belief and acted upon it. The more farfetched a belief is, the less likely it is that a person actually held or would act upon that belief. A defendant who knows what the law is and who disagrees with it does not have a defense of bona fide misunderstanding. A persistent refusal to acknowledge the law does not constitute misunderstanding of the law. One is not immune from criminal prosecution if he [she] knows what the law is but believes that it should be otherwise and therefore violates it.

Seventh Circuit Pattern Jury Instruction (edited)

United States v. Marston, 517 F.3d 996, 1003 (8th Cir. 2008)

United States v. Dean, 487 F.3d 840, 850-51 (11th Cir. 2007)

United States v. Pensyl, 387 F.3d 456, 459-60 (6th Cir. 2004)

United States v. Middleton, 246 F.3d 825, 837 (6th Cir. 2001)

United States v. Hilgeford, 7 F.3d 1340, 1342-44 (7th Cir. 1993)

United States v. Grunewald, 987 F.2d 531,536 (8th Cir. 1993)

United States v. Barnett, 945 F.2d 1296, 1298-99 (5th Cir. 1991)

COMMENTS

1 These instructions amplify and clarify a number of points in former Instruction No. Misc-77, which was based on O'Malley, Grenig and Lee, ***2B Federal Jury Practice and Instructions***, § 67.25 (5th Ed. 2000).

2 See also the instructions concerning a good faith belief defense set forth as a part of the instructions on 26 U.S.C. § 7203, *supra*.

3 In light of the decision in *Cheek v. United States*, 498 U.S. 192 (1991), care should be taken to ensure that an instruction on the good faith defense does not suggest that a claimed good faith belief as to the requirements of the law or a claimed good faith mistake of law must be objectively reasonable to negate willfulness. However, instructions informing the jury that it may consider the reasonableness of a claimed belief in determining whether a defendant actually held the belief have been held to be consistent with *Cheek*. *See, e.g.*, *United States v. Grunewald*, 987 F.2d 531,536 (8th Cir. 1993).

GOVERNMENT PROPOSED JURY INST. NO. Misc-78

First Amendment

The First Amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose. Speech which "incites imminent lawless activity" is not protected speech under the First Amendment. Speech which "merely advocates law violation"is protected by the First Amendment.

If you find that the defendant's speech was limited to the advocacy of violations of the income tax laws or remote action, then his speech is protected by the First Amendment and cannot be a basis for a guilty verdict. If, however, you find that the defendant's speech both was intended by

---

[JI-150] him and, in fact, tended to produce or incite a likely imminent filing of a false income tax return, then such speech is not protected by the First Amendment.

Brandenburg v. Ohio, 395 U.S. 444 (1969)

Rice v. Paladin Enterprises, Inc., 128 F.3d 233 (4th Cir. 1997)

United States v. Rowlee, 899 F.2d 1275, 1276-78 (2d Cir. 1990)

United States v. Kelley, 769 F.2d 215, 216-17 (4th Cir. 1985)

United States v. Freeman, 761 F.2d 549, 551-52 (9th Cir. 1985)

United States v. Holecek, 739 F.2d 331, 334-35 (8th Cir. 1984)

United States v. Damon, 676 F.2d 1060, 1062-63 (5th Cir. 1982)

United States v. Buttorff, 572 F.2d 619, 622-24 (8th Cir. 1978)

COMMENT

1 An instruction such as this is appropriate, if at all (*see United States v. Daly*, 756 F.2d 1076,1082 (5th Cir.), *cert. denied*, 474 U.S. 1022 (1985) ("the speech Daly claims is protected was not itself the wrong for which he was convicted, but it was merely the means by which he committed the crimes of which he was convicted")), only when the government's case is predicated solely on what the defendant said. If the defendant engaged in an illegal course of conduct, his activities are not protected by the First Amendment merely because the conduct was in part carried out by language in contrast to direct action. *See United States v. Kelley*, 864 F.2d 569, 577 (7th Cir.),*cert. denied*, 110 S. Ct. 55 (1989); *United States v. Solomon*, 825 F.2d 1292, 1297 (9th Cir.1987), *cert. denied*, 484 U.S. 1046 (1988); *see Paladin Enterprises, Inc.*, 128 F.3d at 245-46.

GOVERNMENT PROPOSED JURY INST. NO. Misc-79

Immunized Witnesses

The witnesses [insert name of first witness] and [insert name of second witness] testified under a grant of immunity, pursuant to court order, after a petition by the government was filed requesting such an order. Under the law, none of the testimony during this trial can ever be used against them in any subsequent criminal proceeding. However, if any one of them testified untruthfully under the grant of immunity, he [she] could be prosecuted for perjury or the making of a false statement even though he [she] was testifying under a grant of immunity.

The testimony of a witness who provides evidence against a defendant for immunity from prosecution, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the witness's testimony has been affected by interest or by prejudice against the defendant.

United States v. Lea, 618 F.2d 426, 432 n.7 (7th Cir. 1980)

GOVERNMENT PROPOSED JURY INST. NO. Misc-80

Credibility of Witnesses -- Immunized Witness

The testimony of an immunized witness, someone who has been told by the government either that his [her] crimes will go unpunished in return for testimony or that his [her] testimony will not be used against him [her] in return for that cooperation,[29] must be examined and weighed by the jury with greater care than the testimony of someone who is appearing in court without the need for such an agreement with the government.

[Insert name of witness] may be considered to be an immunized witness in this case.

[JI-151]

The jury must determine whether the testimony of the immunized witness has been affected by self-interest, or by the agreement he [she] has with the government, or by his [her] own interest in the outcome of this case, or by prejudice against the defendant.

O'Malley, Grenig and Lee, ***1A Federal Jury Practice and Instructions***, § 15.03 (6th Ed. 2008)

[29] Only the clause that fits the facts of the case should be chosen for use in the instruction.

GOVERNMENT PROPOSED JURY INST. NO. Misc-81

Testimony Under Grant of Immunity

You have heard testimony from [insert name of witness], who received immunity -- that is, a promise from the government that any testimony or other information he [she] provided would not be used against him [her] in a criminal case. You may give her [his] testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care.

Federal Pattern Criminal Jury Instructions for the Seventh Circuit, § 3.13 (1998 ed.)

GOVERNMENT PROPOSED JURY INST. NO. Misc-82

Testimony Under Grant of Immunity

You have heard testimony from [insert name of witness], a witness who received immunity. That testimony was given in exchange for a promise by the government that [the witness will not be prosecuted] or [the testimony will not be used in any case against the witness].

In evaluating [insert name of witness]'s testimony, you should consider the extent to which or whether [witness name's] testimony may have been influenced by [this] [any of these] factor(s). In addition, you should examine [witness name's] testimony with greater caution than that of other witnesses.

Ninth Circuit Manual of Model Criminal Jury Instructions, No. 4.9 (2008 ed.)

GOVERNMENT PROPOSED JURY INST. NO. Misc-83

Statute of Limitations -- Conspiracy

In order for any defendant to be found guilty of the crime of conspiracy, as charged in Count [insert count number] in violation of Section 371 of Title 18 of the United States Code, the government must prove each of the following elements beyond a reasonable doubt:

* * * *

One of the members of the conspiracy performed at least one overt act after [beginning of statute of limitations period] for the purpose of carrying out the conspiracy.

GOVERNMENT PROPOSED JURY INST. NO. Misc-84

Statute of Limitations -- Tax Evasion

In order to establish that the [a] defendant willfully attempted to evade or defeat a tax, as alleged in Count(s) [insert count number], in violation of Section 7201 of Title 26 of the United States Code, the government must prove each of the following elements beyond a reasonable doubt:

* * * *

That the defendant made an affirmative attempt after [beginning of statute of limitations period] to evade or defeat a tax.

[JI-152]

APPENDIX

Links to Circuit Pattern Criminal Jury Instructions

First Circuit

Third Circuit

Fifth Circuit

Sixth Circuit

Seventh Circuit

Eighth Circuit

Ninth Circuit

Tenth Circuit

Eleventh Circuit