

GOVERNMENT PROPOSED JURY INST. NO.

Statutory Language

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

Section 2. ***Principals***

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

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

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

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

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

"Whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

In other words, every person who willfully participates in the commission of a crime may be found to be guilty of that offense. Participation is willful if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

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Devitt and Blackmar, *Federal Jury Practice and Instructions* (3d Ed. 1977), Section 12.01

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

*Cheek v. United States*, 498 U.S. 192, 196 (1991)

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

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

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

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

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

"Whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

In other words, every person who willfully participates in the commission of a crime may be found to be guilty of that offense. Participation is willful if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

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18 U.S.C. § 2

Devitt and Blackmar, *Federal Jury Practice and Instructions* (3d Ed. 1977), Section 12.02

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

*Cheek v. United States*, 498 U.S. 192, 196 (1991)

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

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

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"Aid and Abet" -- Explained

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

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

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

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

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

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

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

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

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

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

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

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Devitt, Blackmar, Wolff and O'Malley, **Federal Jury Practice and Instructions** (4th Ed. 1992), Section 18.01

**United States v. Lindell**, 881 F.2d 1313, 1323 (5th Cir. 1989), cert. denied, 496 U.S. 926 (1990)

**United States v. Morrow**, 923 F.2d 427, 436 (6th Cir. 1991)

**United States v. Roan Eagle**, 867 F.2d 436, 445 n.15 (8th Cir.), cert. denied, 490 U.S. 1028 (1989)

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

**United States v. Esparsen**, 930 F.2d 1461, 1470 (10th Cir. 1991), cert. denied, 112 S. Ct. 882 (1992)

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

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Aiding and Abetting

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

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***Federal Criminal Jury Instructions of the Seventh Circuit*** (1980 Ed.), Section 5.08 (modified)

***United States v. Roan Eagle***, 867 F.2d 436, 445 n.15 (8th Cir.), 490 U.S. 1028 (1989)

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Aiding and Abetting

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

***First***, the [***principal offense***] was committed;

***Second***, the defendant knowingly and intentionally aided, counseled, commanded, induced or procured \_\_\_\_\_ to commit \_\_\_\_\_ and

***Third***, the defendant acted before the crime was completed.

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

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

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

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***Manual of Model Jury Instructions for the Ninth Circuit*** (1992 Ed.),  
Section 5.01

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

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

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



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*United States v. Singh*, 922 F.2d 1169, 1173 (5th Cir.), cert. denied, 112 S. Ct. 260 (1991)

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

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

*United States v. Perez*, 922 F.2d 782, 785 (11th Cir.), cert. denied, 111 S. Ct. 2840 (1991)

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Aiding And Abetting (Agency)

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

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

Notice, however, that before any defendant may be held criminally responsible for the acts of others it is necessary that the accused deliberately associate himself in some way with the crime and participate in it with the intent to bring about the crime.

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

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

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in its commission with the intent to violate the law.

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*Pattern Jury Instructions, Criminal Cases*, Fifth Circuit (1990 Ed.), Section 2.06

*United States v. Walker*, 621 F.2d 163 (5th Cir. 1980)

*United States v. Lindell*, 881 F.2d 1313, 1323 (5th Cir. 1989), cert. denied, 496 U.S. 926 (1990)

*United States v. Morrow*, 923 F.2d 427, 436 (6th Cir. 1991)

*United States v. Roan Eagle*, 867 F.2d 436, 445 n.15 (8th Cir.), cert. denied, 490 U.S. 1028 (1989)

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

*United States v. Esparsen*, 930 F.2d 1461, 1470 (10th Cir. 1991), cert. denied, 112 S. Ct. 882 (1992)

*United States v. Perez*, 922 F.2d 782, 785 (11th Cir.), cert. denied, 111 S. Ct. 2840 (1991)

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

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

Aiding And Abetting (Agency)

The guilt of a defendant in a criminal case may be proved without evidence that he personally did every act involved in the commission of the crime charged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished through direction of another person as an agent, or by acting together with, or under the direction of, another person or persons in a joint effort.

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

Notice, however, that before any defendant can be held criminally responsible for the conduct of others it is necessary that the defendant willfully associate himself in some way with the crime, and willfully participate in it. Mere presence at the scene of a crime and even knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime. You must find beyond a reasonable doubt that the defendant was a willful participant and not merely a knowing spectator.

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***Pattern Jury Instructions, Criminal Cases***, Eleventh Circuit (1985 Ed.), Special Instructions, Instruction No. 6, p. 42

*United States v. Lindell*, 881 F.2d 1313, 1323 (5th Cir. 1989),  
*cert. denied*, 496 U.S. 926 (1990)

*United States v. Morrow*, 923 F.2d 427, 436 (6th Cir. 1991)

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

*United States v. Esparsen*, 930 F.2d 1461, 1470 (10th Cir. 1991),  
*cert. denied*, 112 S. Ct. 882 (1992)

*United States v. Perez*, 922 F.2d 782, 785 (11th Cir.), *cert.*  
*denied*, 111 S. Ct. 2840 (1991)

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

**COMMENT**

*United States v. Walker*, 621 F.2d 163 (5th Cir. 1980), approved  
this instruction.

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Willfully to Cause Criminal Act -- Defined

In order to cause another person to commit a criminal act, it is necessary that the accused willfully do, or willfully fail to do, something which, in the ordinary performance of official duty, or in the ordinary course of the business or employment of such other person, or by reason of the ordinary course of nature or the ordinary habits of life, results in the other person's either doing something the law forbids, or failing to do something the law requires to be done.

An act or a failure to act is "willfully" done, if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

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Devitt and Blackmar, *Federal Jury Practice and Instructions* (3d Ed. 1977), Section 12.04

*Cheek v. United States*, 498 U.S. 192, 196 (1991)

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"Mere Presence" -- Defined

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

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

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Devitt, Blackmar, Wolff and O'Malley, **Federal Jury Practice and Instructions** (4th Ed. 1992), Section 16.09

**United States v. Lindell**, 881 F.2d 1313, 1323 (5th Cir. 1989), cert. denied, 496 U.S. 926 (1990)

**United States v. Morrow**, 923 F.2d 427, 436 (6th Cir. 1991)

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

**United States v. Esparsen**, 930 F.2d 1461, 1470 (10th Cir. 1991), cert. denied, 112 S. Ct. 882 (1992)

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



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

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

**First**, the defendant entered into a conspiracy to [**obtain payment; allowance; aid in obtaining payment; aid in obtaining allowance**] 1 of a claim against [**the United States; a department or agency of the United States**]; 2

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

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

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

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

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**Federal Criminal Jury Instructions of the Seventh Circuit** (1986), Vol. III, p.23.

**NOTES**

- 1 Insert language to reflect the charges in the case.
- 2 Insert language to reflect the charges in the case.

**COMMENT**

1 Section 286 does not require the allegation or proof of an overt act. See **United States v. Umentum**, 547 F.2d 987, 989-991 (7th Cir.

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1976)(21 U.S.C. § 846); *United States v. Cortwright*, 528 F.2d 168,  
172 n.1 (7th Cir. 1975) (21 U.S.C. § 846).

False Claim -- Offense Charged

The indictment sets forth \_\_\_\_\_ counts or charges.

Count \_\_\_\_\_ charges that on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_, in the \_\_\_\_\_ District of \_\_\_\_\_, the defendant, \_\_\_\_\_, a resident of \_\_\_\_\_, made and presented to the United States Treasury Department a claim against the United States for payment, which he [she] knew to be false, fictitious, or fraudulent, by [*e.g., preparing and causing to be prepared, and filing and causing to be filed, what purported to be a federal income tax return*], <sup>1</sup> which was presented to the United States Treasury Department, through the Internal Revenue Service, wherein he [she] claimed [*e.g., a refund of taxes*] <sup>2</sup> in the amount of \$\_\_\_\_\_, knowing such claim to be false, fictitious, or fraudulent.

Count II charges that \* \* \*.

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

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**NOTES**

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

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

**COMMENT**

**1** When the false claim charged was filed electronically, the prosecutor should insure that the indictment and instructions do not charge either the signing or the filing of a federal income tax return unless the paper Form 8453 relating to each false claim has been retrieved from the

IRS and can be introduced into evidence along with the electronic portion of the return. The Form 8453 is a necessary part of the "tax return," and without it the government cannot prove that a "tax return" was filed. For further information, see "Prosecuting Electronic Fraud" (distributed to all U.S. Attorneys on February 6, 1993, and available from the Tax Division).

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Statutory Language -- Section 287

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

Section 287. False, fictitious or fraudulent claims.

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

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

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

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Sand, Siffert, Loughlin & Reiss, **Modern Federal Jury Instructions: Criminal** (1993 Ed.), Vol. 1, Instruction 18-2, p. 18-3

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

**United States v. Maher**, 582 F.2d 842 (4th Cir. 1978), cert. denied, 439 U.S. 1115 (1979).

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Elements of the Offense

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

**First**, that on or about [*insert date*], the defendant knowingly made or presented a claim to [*insert (1) name of person or officer in the civil or military service of the United States or (2) name of department or agency of the United States*].

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

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

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

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Sand, Siffert, Loughlin & Reiss, **Modern Federal Jury Instructions: Criminal** (1993 Ed.), Vol. 1, Instruction 18-3, p. 18-4 (modified)

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First Element--Submission of Claim

The first element which the government must establish beyond a reasonable doubt is that the defendant knowingly made or presented a claim to [*insert (1) name of person or officer in the civil or military service of the United States or (2) name of department or agency of the United States*]. In this regard, I instruct you that [*insert name of person*] is a person (or officer) in the [*name of department or agency*].

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Sand, Siffert, Loughlin & Reiss, *Modern Federal Jury Instructions: Criminal* (1993 Ed.), Vol. 1, Instruction 18-4, p. 18-6 (modified)



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Second Element -- Claim Against the United States

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

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

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Sand, Siffert, Loughlin & Reiss, **Modern Federal Jury Instructions: Criminal** (1993 Ed.), Vol. 1, Instruction 18-6, p. 18-11 (modified)

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Third Element -- Claim was False, Fictitious or Fraudulent

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

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

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

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

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

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Sand, Siffert, Loughlin & Reiss, **Modern Federal Jury Instructions: Criminal** (1993 Ed.), Vol. 1, Instruction 18-8, p. 18-8 (modified)

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Fourth Element -- Knowledge that Claim Was False

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

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

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

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Sand, Siffert, Loughlin & Reiss, *Modern Federal Jury Instructions: Criminal* (1993 Ed.), Vol. 1, Instruction 18-9, p. 18-16 (modified)

**NOTE**

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

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False Claims Against the Government

Title 18, United States Code, Section 287, makes it a crime knowingly to make a false claim against any department or agency of the United States. You are instructed that the [*insert name of agency*] is a department or agency of the United States within the meaning of that law.

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

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

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

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

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

If you find that the government has proved these things, you do not need to consider whether the false claim was material, although that term is used in the indictment. This is not a question for the jury to decide.

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*Pattern Jury Instructions, Criminal Cases*, Fifth Circuit (1990 Ed.), Section 2.20, p.89

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False, Fictitious, Or Fraudulent Claims (Elements)

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

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

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

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

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

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

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

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**Federal Criminal Jury Instructions of the Seventh Circuit** (1983 Ed.), Vol. II, p. 40.

**NOTE**

**1** The Fourth and the Ninth Circuits have held that it is not necessary to prove an intent to defraud when the charge is that the defendant filed a *false* claim for a refund. **United States v. Blecker**, 657 F.2d 629 (4th Cir. 1981), *cert. denied*, 454 U.S. 1150 (1982); **United States v. Milton**, 602 F.2d 231, 233 (9th Cir. 1979). See also Section 22.06(1), *supra*.

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

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

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***Federal Criminal Jury Instructions of the Seventh Circuit*** (1983 Ed.), Vol. II, p. 42.

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Making a False Claim Against the United States

The crime of making a (false, fictitious, or fraudulent) claim against the United States, as charged in Count [*insert number of count*] of the indictment, has three essential elements, which are:

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

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

*Three*, the defendant knew the claim was (false, fictitious, or fraudulent).

[*Insert name of agency*] is an agency of the United States and [*describe the claim charged in the indictment*] is a claim against the United States.

(A claim is "false" or "fictitious" if any part of it is untrue when made, and then known to be untrue by the person making it or causing it to be made.) (A claim is "fraudulent" if any part of it is known to be untrue, and made or caused to be made with the intent to deceive the Government agency to which submitted.)

(The materiality of the matters set forth in Element Two is not a matter with which you are concerned and should not be considered by you in determining the guilt or innocence of the defendant.)

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*Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit*, (1992 Ed.), p. 166 (modified).



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Definition of Knowingly

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

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***Federal Criminal Jury Instructions of the Seventh Circuit*** (1980 Ed.), Vol. I, Sec. 6.03, p. 86 (modified).

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False Claims Against the Government

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

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

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

**First:** That the defendant knowingly presented to an agency of the United States a false and fraudulent claim against the United States, as charged in the indictment; and

**Second:** That the defendant acted willfully and with knowledge of the false and fraudulent nature of his claim

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

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**Pattern Jury Instructions, Criminal Cases**, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 3, p. 68 (modified)

Knowledge of Falsehood  
(Deliberate Ignorance)

The fact of knowledge may be established by direct or circumstantial evidence, just as any other fact in the case.

A defendant's knowledge may be inferred from proof beyond a reasonable doubt that the defendant deliberately closed his [her] eyes to what would otherwise have been obvious to him [her].

Thus, 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 his [her] 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.

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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. deFranciso-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 (11th Cir. 1993).

As a result, great care should be exercised in the use of such an instruction. The law of the circuit should be carefully checked and no such instruction should be requested unless the evidence clearly supports it.

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), provides that the element of knowledge is established if the defendant is "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.

Conspiracy -- Offense Charged

Count \_\_\_\_ of the indictment charges that from on or about the \_\_\_\_ day of \_\_\_\_, 19\_\_, until on or about the \_\_\_\_ day of \_\_\_\_, 19\_\_, in the \_\_\_\_ District of \_\_\_\_ [**and elsewhere**], the defendant[s], \_\_\_\_\_, came to some type of agreement or understanding to [**commit an offense against the United States namely, describe substantive offense or offenses**] [**defraud the United States**] <sup>1</sup> and then acted to achieve the goal[s] of the alleged conspiracy or agreement or understanding in that one of its members thereafter [**describe overt act or acts**].

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Devitt, Blackmar, and O'Malley, **Federal Jury Practice and Instructions** (4th Ed. 1990), Section 28.01

**NOTE**

<sup>1</sup> Substitute appropriate language if a *Klein* conspiracy is charged, e.g., to defraud the United States by impeding, impairing, obstructing, and defeating the lawful government functions of the Internal Revenue Service of the Treasury Department in the ascertainment, computation, assessment, and collection of the revenue: to wit, income taxes.

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

Statute Defining Offense

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

"If two or more persons conspire \* \* \* to commit any offense against the United States, or to defraud the United States, or any agency thereof \* \* \* and one or more of such persons do any act to effect the object of the conspiracy, \* \* \*"

an offense against the United States has been committed.

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18 U.S.C. § 371

Devitt, Blackmar and O'Malley, **Federal Jury Practice and Instructions** (4th Ed. 1990), Section 28.02

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

Essential Elements of Offense --  
When Conspiracy Offense Complete

In order to sustain its burden of proof for the crime of conspiracy to [**describe substantive offense(s)**] [**defraud the United States**] as charged in Count \_\_\_\_\_ of the indictment, the government must prove the following three (3) essential elements beyond a reasonable doubt:

**One:** The conspiracy, agreement, or understanding to [**describe substantive offense(s)**] [**defraud the United States**] 1, as described in the indictment, was formed, reached, or entered into by two or more persons;

**Two:** At some time during the existence or life of the conspiracy, agreement, or understanding, one of its alleged members knowingly performed one of the overt acts charged in the indictment in order to further or advance the purpose of the agreement; and

**Three:** At some time during the existence or life of the conspiracy, agreement, or understanding, defendant \_\_\_\_\_ knew the purpose of the agreement, and then deliberately joined the conspiracy, agreement, or understanding.

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Devitt, Blackmar and O'Malley, **Federal Jury Practice and Instructions** (4th Ed. 1990), Section 28.03

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

**United States v. O'Campo**, 973 F.2d 1015, 1021 (1st Cir. 1992)

**United States v. Wiley**, 846 F.2d 150, 153-54 (2d Cir. 1988)

**United States v. Rankin**, 870 F.2d 109, 113 (3d Cir.), cert. denied, 493 U.S. 840 (1989)

**United States v. Tedder**, 801 F.2d 1437, 1446 (4th Cir. 1986), cert. denied, 480 U.S. 938 (1987)

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

492 U.S. 924 (1989)

*United States v. Bostic*, 480 F.2d 965, 968 (6th Cir. 1973)

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

*United States v. Cerone*, 830 F.2d 938, 944 (8th Cir. 1987), *cert. denied*, 486 F.2d 1006 (1988)

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

*United States v. Gonzalez*, 797 F.2d 915, 916 (10th Cir. 1986)

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

*United States v. Treadwell*, 760 F.2d 327, 333 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1064 (1986)

**NOTE**

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



GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

Conspiracy -- Existence of an Agreement

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

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

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

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

Unless the government proves beyond a reasonable doubt that a

conspiracy, as just explained, actually existed, then you must acquit the defendant \_\_\_\_\_.

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Devitt, Blackmar and O'Malley, **Federal Jury Practice and Instructions** (4th Ed. 1990), Section 28.04

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

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

**United States v. DePew**, 932 F.2d 324, 328 (4th Cir.), cert. denied, 112 S. Ct. 210 (1991)

**United States v. Nicoll**, 664 F.2d 1308, 1315 (5th Cir.), cert. denied, 457 U.S. 1118 (1982)

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

**United States v. Pearce**, 912 F.2d 159, 161 (6th Cir. 1990), cert. denied, 498 U.S. 1093 (1991)

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

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

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

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

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

**United States v. Gonzalez**, 940 F.2d 1413, 1417 (11th Cir. 1991), cert. denied, 112 S. Ct. 910 (1992)

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

Must be More Than One Conspirator

The indictment charges a conspiracy among the defendants A and B and others, some of whom are named in the indictment as co-conspirators and some who are not so named because the indictment says that the grand jurors do not know who they are. A person cannot conspire with himself and therefore you cannot find either of the defendants guilty unless you find beyond reasonable doubt that he participated in a conspiracy as charged with at least one other person, whether a defendant or not, and whether named in the indictment or not. With this qualification you may find both of the defendants guilty or one of the defendants guilty and one not guilty or both not guilty, all in accordance with these instructions and the facts you find.

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Devitt and Blackmar, *Federal Jury Practice and Instructions* (3d Ed. 1977), Section 27.12

*Morrison v. California*, 291 U.S. 82, 92 (1934)

*Rodgers v. United States*, 340 U.S. 367, 375 (1951)

*United States v. Giry*, 818 F.2d 120, 125 (1st Cir.), cert. denied, 484 U.S. 855 (1987)

*United States v. Barnes*, 604 F.2d 121, 161 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980)

*United States v. Allen*, 613 F.2d 1248, 1253 (3d Cir. 1980)

*United States v. Anderson*, 611 F.2d 504, 511 (4th Cir. 1979)

*United States v. Chase*, 372 F.2d 453, 459 (4th Cir.), cert. denied, 387 U.S. 907 (1967)

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

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

*United States v. Rey*, 923 F.2d 1217, 1222 (6th Cir. 1991)

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*United States v. Galvan*, 961 F.2d 738, 742 (8th Cir. 1992)

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

Conspiracy -- Membership in an Agreement

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

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

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

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Devitt, Blackmar and O'Malley, **Federal Jury Practice and Instructions** (4th Ed. 1990), Section 28.05

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

**United States v. Southland**, 760 F.2d 1366, 1369 (2d Cir.), cert. denied, 474 U.S. 825 (1985)

**United States v. Rankin**, 870 F.2d 109, 113 (3d Cir.), cert. denied, 493 U.S. 840 (1989)

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

*denied*, 471 U.S. 1065 (1985)

***United States v. Yanin***, 868 F.2d 130, 133 (5th Cir.), *cert. denied*, 492 U.S. 924 (1989)

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

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

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

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

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

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

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

***United States v. Lynch***, 934 F.2d 1226, 1231 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 885 (1992)

***United States v. Andrews***, 953 F.2d 1312, 1318 (11th Cir.), *cert. denied*, 112 S. Ct. 3007 (1992)

***United States v. Dale***, 991 F.2d 819, 851 (D.C. Cir.), *cert. denied*, 114 S. Ct. 286 (1993)

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

"Overt Act" -- Defined  
Success of Conspiracy Immaterial

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

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

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

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

The government is not required to prove that the parties to or members of the agreement or conspiracy were successful in achieving any or all of the objects of the agreement or conspiracy.

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Devitt, Blackmar and O'Malley, **Federal Jury Practice and Instructions** (4th Ed. 1990), Sections 28.07, 28.08

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

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

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

*United States v. Lewis*, 759 F.2d 1316, 1344 (8th Cir.), cert. denied, 474 U.S. 994 (1985)

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

*United States v. Zielie*, 734 F.2d 1447, 1456 (11th Cir. 1984), cert. denied, 469 U.S. 1216 (1985)



GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

Conspiracy  
(Regular Charge)

Title 18, United States Code, Section 371, makes it a crime for anyone to conspire with someone else to commit an offense against the laws of the United States. In this case, the defendant is charged with conspiring to \_\_\_\_\_ [***describe the object of conspiracy as alleged in the indictment***].

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

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

**First:** That two or more persons made an agreement to commit the crime of \_\_\_\_\_ [***describe***] as charged in the indictment;

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

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

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

participated before and even though the defendant played only a minor part.

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

Mere presence at the scene of an event, even with knowledge that a crime is being committed, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of a conspiracy, does not thereby become a conspirator.

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18 U.S.C. § 371

*Pattern Jury Instructions, Criminal Cases*, Fifth Circuit (1990 Ed.)  
Title 18 Offenses, Instruction No. 2.21, p. 89

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

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

*United States v. Yamin*, 868 F.2d 130, 133 (5th Cir.), cert. denied,  
492 U.S. 924 (1989)

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

*United States v. Nicoll*, 664 F.2d 1308, 1315 (5th Cir.), cert.  
denied, 457 U.S. 1118 (1982)

*United States v. Diecidue*, 603 F.2d 535, 548 (5th Cir. 1979), cert.  
denied, 445 F.2d 946 (1980)

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

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

Conspiracy

In order to establish the offense of conspiracy, the government must prove these elements beyond a reasonable doubt:

1. that the alleged conspiracy existed, and
2. that an overt act was committed in furtherance of the conspiracy, and
3. that the defendant knowingly and intentionally became a member of the conspiracy.

A conspiracy is a combination of two or more persons to accomplish an unlawful purpose. A conspiracy may be established even if its purpose was not accomplished.

In determining whether the alleged conspiracy existed, you may consider the actions and statements of all the alleged participants. The agreement may be inferred from all the circumstances and the conduct of all the alleged participants.

A conspiracy is not proved unless the evidence establishes that at least one overt act was committed by at least one conspirator to further the purpose of the conspiracy. It is not necessary that all the overt acts charged in the indictment be proved, and the overt act proved may itself be a lawful act.

In determining whether the defendant became a member of the conspiracy you may consider only the acts and statements of that particular defendant.

To be a member of the conspiracy, the defendant need not join at the beginning or know all the other members or the means by which the purpose was to be accomplished.

The government must prove beyond a reasonable doubt, from the defendant's own acts and statements, that he was aware of the common purpose and was a willing participant.

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*Federal Criminal Jury Instructions of the Seventh Circuit* (1980 Ed.), Section 5.11

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

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

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

*United States v. Noble*, 754 F.2d 1324, 1327 (7th Cir.), cert. denied, 474 U.S. 818 (1985)

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

Conspiracy

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

**First**, [**beginning on or about** \_\_\_\_\_ **and ending on or about** \_\_\_\_\_] [**starting sometime before** \_\_\_\_\_] there was an agreement between two or more persons to commit at least one crime as charged in the indictment 1;

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

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

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

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

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

indictment as an object of the conspiracy.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is charged with the same responsibility as if that person had been one of the originators of it. On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a member merely by associating with one or more persons who are conspirators, nor merely by knowing of the existence of a conspiracy.

An overt act does not itself have to be unlawful. A lawful act may be an element of a conspiracy if it was done for the purpose of carrying out the conspiracy. The government is not required to prove that the defendant personally did one of the overt acts. Once you have decided that the defendant was a member of a conspiracy, the defendant is responsible for what other conspirators said or did to carry out the conspiracy, whether or not the defendant knew what they said or did.

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*Manual of Model Jury Instructions for the Ninth Circuit* (1992 Ed.),  
Section 8.05A

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

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

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

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

**NOTE**

1 Prosecutors charging **Klein** conspiracies in the Ninth Circuit

should be aware of *United States v. Caldwell*, 989 F.2d 1056 (9th Cir. 1993). The first element of the jury instruction should read:

*First, [beginning on or about \_\_\_\_\_ and ending on or about \_\_\_\_\_] [starting sometime before \_\_\_\_\_] there was an agreement between two or more persons to defraud the United States by cheating the government out of money, [such as income tax payments, or property] and also an agreement to defraud the*



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United States that involved the impairing, impeding, obstructing, or defeating of the lawful functions of an agency of the government, such as the IRS, by deceit, craft, trickery, or means that are dishonest. *Caldwell*, 989 F.2d at 1060.

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

General Conspiracy Charge

Title 18, United States Code, Section 371, makes it a separate Federal crime or offense for anyone to conspire or agree with someone else to do something which, if actually carried out, would amount to another Federal crime or offense. So, under this law, a "conspiracy" is an agreement or a kind of "partnership" in criminal purposes in which each member becomes the agent or partner of every other member.

In order to establish a conspiracy offense it is **not** necessary for the government to prove that all of the people named in the indictment were members of the scheme; **or** that those who **were** members had entered into any formal type of agreement; **or** that the members had planned together **all** of the details of the scheme or the "overt acts" that the indictment charges would be carried out in an effort to commit the intended crime.

Also, because the essence of a conspiracy offense is the making of the agreement itself (followed by the commission of any overt act), it is not necessary for the government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

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

**First:** That two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment;

**Second:** That the defendant willfully became a member of such conspiracy;

**Third:** That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the methods (or

"overt acts") described in the indictment; and

**Fourth:** That such "overt act" was knowingly committed at or about the time alleged in an effort to carry out or accomplish some object of the conspiracy.

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

A person may become a member of a conspiracy without knowing all of the details of the unlawful scheme, and without knowing who all of the other members are. So, if a defendant has an understanding of the unlawful nature of a plan and knowingly and willfully joins in that plan on one occasion, that is sufficient to convict him for conspiracy even though he did not participate before, and even though he played only a minor part.

Of course, mere presence at the scene of a transaction or event, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of one, does not thereby become a conspirator.

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**Pattern Jury Instructions, Criminal Cases**, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 4.1, p. 70

**United States v. Andrews**, 953 F.2d 1312, 1318 (11th Cir.), cert. denied, 112 S. Ct. 3007 (1992)

**United States v. Gonzalez**, 940 F.2d 1413, 1417 (11th Cir. 1991), cert. denied, 112 S. Ct. 910 (1992)

**United States v. Lynch**, 934 F.2d 1226, 1231 (11th Cir. 1991), cert. denied, 112 S. Ct. 885 (1992)

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

**United States v. Zielie**, 734 F.2d 1447, 1456 (11th Cir. 1984), cert. denied, 469 U.S. 1216 (1985)

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Conspiracy -- Offense Charged

Count \_\_\_\_\_ of the indictment charges that from on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_, until on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_ [**the date of this indictment**], in the \_\_\_\_\_ District of \_\_\_\_\_ [**and elsewhere**], the defendants, [**insert name of first defendant**], [**insert name of second defendant**], [**insert names of other defendants**], came to some type of agreement or understanding to [**commit an offense against the United States, namely, (insert name of substantive offense or offenses)**] [**defraud the United States for the purpose of impairing, impeding, obstructing, or defeating the lawful functions of the Internal Revenue Service of the Treasury Department in the ascertainment, computation, assessment, and collection of income (or other relevant, e.g., excise) taxes**] and then acted to achieve the goal[s] of the alleged conspiracy or agreement or understanding in that one of its members thereafter [**describe overt act or acts**].

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In violation of Title 18, United States Code, Section 371. Count II charges that . . .

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Devitt & Blackmar, **Federal Jury Practice and Instructions** (4th Ed. 1990), Section 28.01 (modified)

**NOTE**

1 The law is clear that overt acts in furtherance of a conspiracy need not be illegal in themselves. **Yates v. United States**, 354 U.S. 298, 334 (1957); **Braverman v. United States**, 317 U.S. 49, 53-54 (1942); **United States v. Tuohey**, 867 F.2d 534, 537 (9th Cir. 1989).

However, in the case of a **Klein** conspiracy (e.g., "to defraud the United States for the purpose of impairing, impeding,

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

Multiple Objects  
(For Use With General Conspiracy Charge)  
18 U.S.C. § 371

In this instance, with regard to the alleged conspiracy, the indictment charges that the defendants conspired [*insert objects of conspiracy -- e.g., to file false income tax returns and to evade income taxes*].<sup>1</sup> It is charged, in other words, that they conspired to commit two separate, substantive crimes or offenses.

In such a case it is not necessary for the government to prove that the defendant under consideration willfully conspired to commit *both* of those substantive offenses. It would be sufficient if the government proves, beyond a reasonable doubt, that the defendant willfully conspired with someone to commit *one* of those offenses; but, in that event, in order to return a verdict of guilty, you must unanimously agree upon *which* of the two offenses the defendant conspired to commit. If you cannot agree in that manner, you must find the defendant not guilty.

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*Pattern Jury Instructions, Criminal Cases*, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 4.2, p. 73 (modified)

**NOTE**

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

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

Overt Act During Period of Conspiracy

The government must also establish beyond reasonable doubt that at least one of the overt acts as alleged in the indictment **1** occurred while the conspiracy was still in existence.

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Devitt and Blackmar, *Federal Jury Practice and Instructions* (3d Ed. 1977), Section 27.09

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

*United States v. Lewis*, 759 F.2d 1316, 1344 (8th Cir.), cert. denied, 474 U.S. 994 (1985)

*United States v. Diecidue*, 603 F.2d 535, 563 (5th Cir. 1979), cert. denied, 445 U.S. 946 (1980)

*United States v. Johnson*, 575 F.2d 1347, 1357 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979)

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

**NOTE**

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

**COMMENT**

**1** This instruction may not be necessary in a case in which the evidence shows that the conspiracy, if it existed at all, continued during the entire period indicated by the alleged overt acts. It should be given, however, if there is an issue of termination. See Devitt and Blackmar, *Federal Jury Practice and Instructions*, (3d Ed. 1977), Sec. 27.09, NOTES, p. 30:



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18 U.S.C. § 371

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

Withdrawal of Alleged Overt Act Not Shown by Evidence

As you were advised following the close of the prosecution's case-in-chief, since no evidence was offered in support of the alleged overt act designated in the indictment as \_\_\_\_\_, that overt act has been withdrawn from your consideration, and must be entirely disregarded, in arriving at your verdict as to the guilt or innocence of the defendant of the offense of conspiracy charged in the indictment.

However, the evidence in the case as to the remaining overt acts alleged in the indictment, and designated as \_\_\_\_\_, is to be considered in your determination of the guilt or innocence of the defendant of the offense of conspiracy charged in the indictment. The government does not have to establish performance of all of the remaining overt acts as set out in the indictment. Proof beyond a reasonable doubt of one such act is sufficient.

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Devitt and Blackmar, *Federal Jury Practice and Instructions* (3d Ed. 1977), Section 27.02

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

*United States v. Lewis*, 759 F.2d 1316, 1344 (8th Cir.), cert. denied, 474 U.S. 994 (1985)

*United States v. Zielie*, 734 F.2d 1447, 1456 (11th Cir. 1984), cert. denied, 469 U.S. 1216 (1985)

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

Single or Multiple Conspiracies

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

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

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

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

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

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

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Devitt, Blackmar and O'Malley, **Federal Jury Practice and Instructions** (4th Ed. 1990), Section 28.09

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

**United States v. Diecidue**, 603 F.2d 535, 548 (5th Cir. 1979), *cert. denied*, 445 F.2d 946 (1980)

**United States v. Noble**, 754 F.2d 1324, 1327 (7th Cir.), *cert. denied*, 474 U.S. 818 (1985)

**United States v. Massa**, 740 F.2d 629, 636 (8th Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985)

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

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

Multiple Conspiracies

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

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***Pattern Jury Instructions, Criminal Cases***, Fifth Circuit (1990 Ed.), Title 18 Offenses, Instruction No. 2.22, p. 92

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

Multiple Conspiracies

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

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*Manual of Model Jury Instructions for the Ninth Circuit* (1992 Ed.),  
Section 8.05B

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

Multiple Conspiracies  
(For Use With General Conspiracy Charge)

You are further instructed, with regard to the alleged conspiracy offense, that proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges.

What you must do is determine whether the single conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit the defendants of that charge. However, if you decide that such a conspiracy did exist, you must then determine who the members were; and, if you should find that a particular defendant was a member of some other conspiracy, not the one charged in the indictment, then you must acquit that defendant.

In other words, to find a defendant guilty you must unanimously find that he was a member of the conspiracy charged in the indictment and not a member of some other separate conspiracy.

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***Pattern Jury Instructions, Criminal Cases***, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 4.3, p. 74

**COMMENT**

1 ***United States v. Diecidue***, 603 F.2d 535, 548-549 (5th Cir. 1979), cert. denied, 445 U.S. 946 (1980), approved this instruction.



GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

Conspiracy -- Withdrawal

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

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*Federal Criminal Jury Instructions of the Seventh Circuit* (1980 Ed.), Section 5.12

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

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

Conspiracy (Withdrawal -- Statute of Limitations)

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

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

[**Defendant's name**] cannot be found guilty of the conspiracy charge if he [she] withdrew from the conspiracy more than five years <sup>1</sup> before the indictment was returned. The indictment in this case was returned on [**date**]. Thus, the government must prove beyond a reasonable doubt that [**defendant's name**] did not withdraw from the conspiracy prior to [**date**].

[**NOTES: Choose appropriate term contained in brackets**].

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**Federal Criminal Jury Instructions of the Seventh Circuit**, Vol II (1983 Ed.), Instruction No. 5.13, p. 3

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

**NOTE**

<sup>1</sup> The statute of limitations is six years in a conspiracy to evade income taxes and in a *Klein* conspiracy. See Section 23.12, STATUTE OF LIMITATIONS, *supra*.

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

Withdrawal From Conspiracy

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

The government has the burden of proving that the defendant did not withdraw from the conspiracy before the overt act -- on which you all agreed -- was committed by some member of the conspiracy.

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**Manual of Model Jury Instructions for the Ninth Circuit** (1992 Ed.),  
Section 8.05D

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

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

Withdrawal From Conspiracy  
(Use With General Conspiracy Charge)

As you have been instructed, a conspiracy, like the one charged in this case, does not become a crime until two things have occurred: first, the making of the agreement; and, second, the performance of some "overt act" by one of the conspirators.

So, if a defendant enters into a conspiracy agreement but later changes his mind and withdraws from that agreement before anyone has committed an "overt act," as previously defined, then the crime was not complete at that time and the defendant who withdrew cannot be convicted -- he would be not guilty of the alleged conspiracy offense.

However, in order for you to decide that a defendant withdrew from a conspiracy you must find that the defendant took affirmative action to disavow or defeat the purpose of the conspiracy; and, as just explained, he must have taken such action before he or any other member of the scheme had committed any "overt act."

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***Pattern Jury Instructions, Criminal Cases***, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 4.4, p. 75

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

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

The indictment sets forth \_\_\_\_\_ counts or charges.

Count \_\_\_ of the indictment charges that on or about \_\_\_\_\_, 19\_\_, in the District of \_\_\_\_\_, the defendant, \_\_\_\_\_, knowingly and willfully concealed or covered up a material fact from a department or agency of the United States, the Internal Revenue Service, by \_\_\_\_\_.

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18 U.S.C. § 1001

Devitt, Blackmar and O'Malley, **Federal Jury Practice and Instructions** (4th Ed. 1990), Section 37.01 (modified)

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

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

The indictment sets forth \_\_\_\_\_ counts or charges.

Count \_\_\_ of the indictment charges that on or about \_\_\_\_\_, 19\_\_, in the District of \_\_\_\_\_, the defendant, \_\_\_\_\_, knowingly made a false, fictitious, or fraudulent statement or representation concerning a material fact within the jurisdiction of a department or agency of the United States, the Internal Revenue Service, by \_\_\_\_\_.

\_\_\_\_\_  
18 U.S.C. § 1001

Devitt, Blackmar and O'Malley, **Federal Jury Practice and Instructions** (4th Ed. 1990), Section 37.05 (modified)

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

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

The indictment sets forth \_\_\_\_\_ counts or charges.

Count \_\_\_ of the indictment charges that on or about \_\_\_\_\_, 19\_\_, in the District of \_\_\_\_\_, the defendant, \_\_\_\_\_, knowingly and willfully made or used a false writing or document containing a false, fictitious, or fraudulent statement or entry concerning a material matter within the jurisdiction of a department or agency of the United States, the Internal Revenue Service, by

\_\_\_\_\_.

\_\_\_\_\_

18 U.S.C. § 1001

Devitt, Blackmar and O'Malley, **Federal Jury Practice and Instructions** (4th Ed. 1990), Section 37.09 (modified)

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

Statute Defining Offense

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

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

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18 U.S.C. § 1001

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Sections 37.02; 37.06; 37.10

**NOTE**

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



GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

The Essential Elements of the Crime Charged

In order to sustain its burden of proof for the crime of knowingly and willfully \_\_\_\_\_ 1 an agency of the federal government as charged in Count \_\_ of the indictment, the government must prove the following four 2 essential elements beyond a reasonable doubt:

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

**Two:** In so doing, the defendant \_\_\_\_\_ acted willfully;

**Three:** The [*fact concealed; statement; or writing or document*] was material; 3 and

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

The court must decide Element Three concerning materiality 4 and Element Four concerning the jurisdiction of the United States.

You are to decide Element One, concerning whether the defendant \_\_\_\_\_ knowingly [*concealed a material fact by any trick, scheme or device; made a false, fictitious, or fraudulent statement or representation to the government; made or used a false writing or document containing a false, fictitious, or fraudulent statement*], and Element Two, whether in this regard the

18 U.S.C. § 1001

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defendant \_\_\_\_\_ acted willfully.

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Devitt, Blackmar and O'Malley, **Federal Jury Practice and Instructions** (4th Ed. 1990), Sections 37.03; 37.07; 37.11

**NOTES**

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

**2** If the offense charged relates to the first clause, concealing a material matter, there is an additional fifth element -- "the defendant, \_\_\_\_\_, had a legal duty to disclose the fact concealed." Yet, see the law of your particular circuit as to whether the judge must instruct the jury as to this particular element. See Section 24.04, *supra*

**3** The Second Circuit has held that materiality is not an element of the offense relating to either the second or third clauses of the statute; and therefore, if the offense charged does not relate to the first clause of Section 1001, concealing a fact, the materiality element should be deleted from this proposed charge. See Sections 24.03 and 24.06, *supra*

**4** The Ninth and Tenth Circuits have held that materiality is a question for the jury to decide. See Section 24.06, *supra*. Accordingly, an instruction on the definition of materiality is required. See **Manual of Model Jury Instructions**, Ninth Circuit, Instruction No. 8.20 (1989)

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

The Essential Elements of the Crime Charged

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

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

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

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

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

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

If you find that the government has proved these things, you do not need to consider whether the false statement was material, even though that language is used in the indictment. This is not a question for the jury to decide.

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***Pattern Jury Instructions, Criminal Cases***, Fifth Circuit, Instruction No. 2.46 (1990)

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

The Essential Elements of the Crime Charged  
Concealing a Material Fact

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

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

**Second**, the fact was material;

**Third**, the defendant did so knowingly and willfully; and

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

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

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

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**Federal Criminal Jury Instructions**, Seventh Circuit, Volume III, Chapter 47, p. 49 (1986)

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

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

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

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

**Second**, the [**statement; representation**] was material;

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

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

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

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

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**Federal Criminal Jury Instructions**, Seventh Circuit, Volume III, Chapter 47, p. 50 (1986)

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

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

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

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

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

*Third*, the [*statement; entry*] was material;

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

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

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

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

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*Federal Criminal Jury Instructions*, Seventh Circuit, Volume III, Chapter 47, p. 51 (1986)

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

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

The crime of [**falsifying**][**concealing**] a fact from a government agency, as charged in [**Count \_\_\_\_\_of**] the indictment, has three essential elements, which are:

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

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

**Three**, the defendant did these acts knowingly, voluntarily and intentionally.

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

[**The materiality of the fact[s] alleged to be [falsified] [concealed] is not a matter with which you are to be concerned and should not be considered by you in determining the guilt or innocence of the defendant.**]



GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

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

The crime of making a [**false**] [**fictitious**] [**fraudulent**] [**statement**] [**representation**] in a matter within the jurisdiction of a government agency, as charged in [**Count** \_\_\_\_\_ **of**] the indictment, has three essential elements which are:

**One**, the defendant knowingly made a [**false**] [**fictitious**] [**fraudulent**] [**statement**] [**representation**];

**Two**, the [**statement**] [**representation**] was made voluntarily and intentionally; and

**Three**, the [**statement**] [**representation**] was made in [**describe matter within agency jurisdiction, e.g. a federal income tax return**].

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

[**A statement is "false" or "fictitious", if untrue when made, and then known to be untrue by the person making it or causing it to be made.**] [**A statement or representation is "fraudulent", if known to be untrue, and made or caused to be made with the intent to deceive the Government agency to whom it was submitted.**]

[**The materiality of the [statement] [representation] alleged to be [false] [fictitious] [fraudulent] is not a matter with which you are concerned and should not be considered by you in determining the guilt or innocence of the defendant.**]

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

The Essential Elements of the Crime Charged  
Using a False Document

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

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

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

**Three**, the defendant did these acts knowingly, voluntarily and intentionally.

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

[**The materiality of the [writing] [document] alleged to be [false] [fictitious] [fraudulent] is not a matter with which you are concerned and should not be considered by you in determining the guilt or innocence of the defendant.**]

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

The Essential Elements of the Crime Charged

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

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

*Second*, the defendant knew that the statement was untrue; and

*Third*, the statement was material to the [*United States Treasury Department*]'s activities or decisions.

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

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*Manual of Model Jury Instructions*, Ninth Circuit (1992 Ed.), Section 8.20

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

The Essential Elements of the Crime Charged

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

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

**First:** That the defendant knowingly [**made a false statement**] or [**made or used a false document**] in relation to a matter within the jurisdiction of a department or agency of the United States, as charged;

**Second:** That the [**false statement**] or [**false document**] related to a material matter; and

**Third:** That the defendant acted willfully with knowledge of the falsity.

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

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

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

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18 U.S.C. § 1001

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*Pattern Jury Instructions, Criminal Cases*, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 29, p. 128

**NOTE**

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

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

"Conceals or Covers Up by Any Trick, Scheme, or Device -- Defined"  
(First Clause)

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

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Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 37.04

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

False, Fictitious or Fraudulent Statements or Representations

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

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

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Devitt, Blackmar and O'Malley, **Federal Jury Practice and Instructions** (4th Ed. 1990), Section 37.08; See also **Manual of Model Criminal Jury Instructions**, Eighth Circuit, Instruction No. 6.18.1001B (1992); **Pattern Jury Instructions, Criminal Cases**, Eleventh Circuit, Instruction No. 29 (1985)

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

False, Fictitious or Fraudulent Statements or Representations

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

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

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***Federal Criminal Jury Instructions***, Seventh Circuit, Volume III, Chapter 47, pp. 54-5 (1986)



GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

Makes or Uses Any False Writing or Document

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

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

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

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Devitt, Blackmar, and O'Malley, **Federal Jury Practice and Instructions** (4th Ed. 1990), Section 37.12; see also **Manual of Criminal Jury Instructions**, Eighth Circuit, Instruction No. 6.18.1001C (1992); **Pattern Jury Instructions, Criminal Cases**, Eleventh Circuit, Instruction No. 29 (1985)

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

Department or Agency of the United States

The [***Internal Revenue Service***] is an "agency of the United States"; and statements contained in [ ***e.g., an affidavit submitted to an employee of the Internal Revenue Service to affect a matter or investigation concerning federal income taxes***] are matters within the jurisdiction of an agency of the United States.<sup>1</sup>

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Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), Section 28.03 (modified for a tax case)

**NOTE**

**1** Whether a matter is within the jurisdiction of a federal agency or department is a question of law. It is uniformly conceded that the Internal Revenue Service, Department of the Treasury, is a department or agency of the United States within the meaning of 18 U.S.C. § 1001. See Section 24.05, *supra*.

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

"Knowingly" - Defined

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

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

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Devitt, Blackmar, and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 37.13; see also ***Federal Criminal Jury Instructions of the Seventh Circuit***, Instruction No. 6.04 (1980).

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

"Willfully" - Defined

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

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Devitt, Blackmar, and O'Malley, **Federal Jury Practice and Instructions** (4th Ed. 1990), Section 37.14.

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

The Exculpatory No Defense 1

There are certain exceptions to the federal law that prohibit the making of false or fraudulent statements to the government.

If you find, therefore, that the defendant \_\_\_\_\_ knowingly and willfully made a false statement to a government agent, but that the following four elements have been met, you may not convict the defendant for the charges contained in Count \_\_ of the indictment:

**One:** The statement was made in response to a question or questions initiated by the government during a criminal investigation; and

**Two:** A truthful answer to the question or questions would have incriminated the defendant; and

**Three:** In making the false or fraudulent statement, the defendant merely denied knowledge of or participation in criminal conduct rather than created a misleading story calculated to subvert the government's legitimate functions; and

**Four:** The false or fraudulent statement was not made regarding a claim that the defendant was pursuing against the government or regarding a claim which the government was pursuing against the defendant.

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Devitt, Blackmar and O'Malley, **Federal Jury Practice and Instructions** (4th Ed. 1990), Section 37.17

**NOTE**

1 This is a judicially created rule precluding liability under 18 U.S.C. § 1001. Refer to Section 24.08[1], *supra* to determine whether such an instruction should be given and the appropriate language in your particular circuit.

18 U.S.C. § 1001

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Elements of the Offense

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

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

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

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

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

GOVERNMENT PROPOSED JURY INST. NO. \_\_\_\_\_

Provisions of Statute

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

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

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

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18 U.S.C. § 1956(a)(1)(A)(ii)



Tax Evasion -- Offense Charged

The indictment sets forth \_\_\_\_\_ counts or charges.

Count I charges that the defendant, \_\_\_\_\_, who during the calendar year 19\_\_ was married and resided at \_\_\_\_\_ in the District of \_\_\_\_\_, willfully attempted to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year \_\_\_\_\_, by causing to be filed with the Director, Internal Revenue Service Center, at \_\_\_\_\_, \_\_\_\_\_, on or about \_\_\_\_\_, 19\_\_, a false and fraudulent income tax return on behalf of himself and his wife, wherein it was stated that their joint taxable income for said calendar year was the sum of \$\_\_\_\_\_, and that the amount of tax due and owing thereon was the sum of \$\_\_\_\_\_; whereas, as the defendant then and there well knew, their joint taxable income for the said calendar year was the sum of \$\_\_\_\_\_ upon which said taxable income there was owing to the United States of America an income tax of \$\_\_\_\_\_.

Count II charges that \* \* \*

All in violation of Title 26, United States Code, Section 7201.

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Devitt, Blackmar and O'Malley, **Federal Jury Practice and Instructions** (4th Ed. 1990), Section 56.01 (modified)