Chapter 5: Mental States

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General Introduction to Mental State Instructions

Federal crimes commonly include the mental states intentionally, knowingly, or willfully, and less commonly recklessly or negligently. Some federal crimes are also strict or absolute liability offenses, without any mental state requirement. These state of mind elements ("mens rea") have been defined in various ways by Congress and the federal courts. Because of the variety of definitions, other Circuits do not provide model instructions on some or all mental states.

This section includes instructions based on the most frequently used definitions of the mental state elements in federal criminal provisions. It also includes instructions on related mental state principles. The purpose is to provide instructions that can be used when the statute defining the crime charged does not state and has not been interpreted as having a different definition of the mental state requirement. When a different meaning has been established by statute or case law, we have included that definition in the instructions for the specific federal crime. *See* Chapter 6 (Elements of Offenses).

As to Which Elements Does the Mental State Requirement Apply. Defining the mental state or culpability requirement does not end the court's inquiry. The court must also determine to which of the elements the mental state requirement applies. The mental state requirement may apply to all or only some of the elements of the offense charged. *See United States v. Bailey*, 444 U.S. 394, 405 (1980) (Supreme Court observed, "Generally, even time-honored common-law crimes consist of several elements, and complex statutorily defined crimes exhibit this characteristic to an even greater degree. Is the same state of mind required of the actor for each element of the crime, or may some elements require one state of mind and some another?"). In deciding this question, of course, the court must ascertain and effectuate the intent of Congress. *Id.* at 632-33.

An example of this further inquiry is *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994). There, where defendant said he did not know the girl in the video he sold was under 18, the Supreme Court held that the language "knowingly … distributes, any visual depiction," at the beginning of 18 U.S.C. § 2252 (of the Protection of Children Against Sexual Exploitation Act of 1977), applied to the element "use of a minor" which was stated in a subsequent subsection that began "if … (A) the … visual depiction involve[s] the use of a minor." Under the Court's interpretation, the government was required to prove not only that the defendant knew he was distributing a sexually explicit visual depiction, but also that he knew that it depicted a minor. The Court recognized that this was not the "most grammatically correct reading" of the statute. However, the Court reasoned that "*Morissette*, reinforced by *Staples*, instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." 513 U.S. at 72, citing *Morissette v. United States*, 342 U.S. 246 (1952), and *Staples v. United States*, 511 U.S. 600 (1994). The Court also relied on two canons of construction – criminal statutes should be strictly interpreted (the so-called "rule of lenity") and statutes should be interpreted to avoid raising a significant constitutional question.

In the criminal statute in *X-Citement Video*, "use of a minor" was the crucial element that allowed criminal prohibition of transporting and distributing pornographic but not obscene depictions without violating the First Amendment. 513 U.S. at 78, citing *New York v. Ferber,* 458 U.S. 747 (1982)*; Smith v. California*, 361 U.S. 147 (1959).

For other examples of Supreme Court cases discussing the application of the mental state requirement to other elements, *see, e.g., Arthur Anderson v. United States*, 544 U.S. 696, 703 (2005) (Supreme Court has "'traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, ..., and out of concern that "a fair warning should be given to the world in language the common world will understand, of what the law intends to do if a certain line is passed" ' " (citations omitted); the Court also stated, when a criminal statute "provides the mens rea – 'knowingly' – and then a list of acts ... the mens rea at least applies to the acts that immediately follow, if not to the *other* elements further down the statutory chain."); *Staples v. United States*, 511 U.S. 600 (1994) (holding that section 5861(d) of the National Firearms Act, making it "unlawful … to receive or possess a firearm that is not registered to him," required proof that the defendant knew the characteristics of the weapon that made it a "firearm" under the statute, even though the act did not expressly provide a mental state requirement); *Morissette v. United States*, 342 U.S. 246 (1952) (holding that "knowingly converts … any thing of value of the United States" requires proof that the defendant was aware not only that he converted property, but also that the property he converted belonged to the United States and had not been abandoned). *But see, e.g., United States v. Freed,* 401 U.S. 601 (1971) (possessing "a firearm that is not registered to him" under § 5861(d) of the National Firearms Act does not require proof that defendant knew the grenades he possessed were unregistered, as long as he knew they were grenades and thus "firearms" under the statute); *United States v. Yermian*, 468 U.S. 63, 68-70 (1984) ("knowingly and willfully" making false statements involving federal agency matters, under 18 U.S.C. § 1001, requires proof that defendant knew his statements were false but not that he knew of federal agency jurisdiction); *United States v. Feola*, 420 U.S. 671, 684 (1975) (assaulting a federal officer under 18 U.S.C. § 111 does not require proof that the defendant knew the person he assaulted was a federal officer).

Congress has not adopted the Model Penal Code, but the Supreme Court has alluded to the benefits of the Code's treatment of mental state requirements, *see, e.g., United States v. Bailey*, 444 U.S. 394 (1980), and has often applied principles similar to the Code in interpreting federal statutes. *See, e.g., United States v. United States Gypsum Co.*, 438 U.S. 422, 440 (1978) ("The ALI Model Penal Code is one source of guidance upon which the Court has relied to illuminate questions of this type."). The Model Penal Code explicitly defines four mental states (called "culpability") to be used in criminal codes (purposely, knowingly, recklessly, and negligently). Model Penal Code § 2.02. The Code's purpose is to "attempt[] the extremely difficult task of articulating the kinds of culpability that may be required .... The purpose of articulating these distinctions in detail is to advance the clarity of draftsmanship, ..., and to dispel the obscurity with which the culpability requirement is often treated when such concepts as 'general criminal intent,' 'mens rea,' 'presumed intent,' 'malice,' 'wilfulness,' 'scienter' and the like have been employed." Comment to Model Penal Code § 2.02. The Model Penal Code also

includes interpretative provisions to help resolve the question whether the expressed mental state requirement applies to all or only some of the elements. *See* Model Penal Code § § 2.02(1), 2.02(3), 2.02(4).

5.01 Proof Of Required State of Mind – Intentionally, Knowingly, Willfully

Often the state of mind *[intent, knowledge, willfulness, or recklessness]* **with which a person acts at any given time cannot be proved directly, because one cannot read another person's mind and tell what he or she is thinking. However,** *(name's)* **state of mind can be proved indirectly from the surrounding circumstances. Thus, to determine** *(name's)* **state of mind** *(what (name) intended or knew)* **at a particular time, you may consider evidence about what** *(name)* **said, what** *(name)* **did and failed to do, how** *(name)* **acted, and all the other facts and circumstances shown by the evidence that may prove what was in** *(name's)* **mind at that time. It is entirely up to you to decide what the evidence presented during this trial proves, or fails to prove, about** *(name's)* **state of mind.**

You may also consider the natural and probable results or consequences of any acts *(name)* **knowingly did, and whether it is reasonable to conclude that** *(name)* **intended those results or consequences. You may find, but you are not required to find, that** *(name)* **knew and intended the natural and probable consequences or results of acts** *(he) (she)* **knowingly did. This means that if you find that an ordinary person in** *(name's)* **situation would have naturally realized that certain consequences would result from** *(his) (her)* **actions, then you may find, but you are not required to find, that** *(name)* **did know and did intend that those consequences would result from** *(his) (her)* **actions. This is entirely up to you to decide as the finders of the facts in**

this case.

Comment

See Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1A *Federal Jury Practice and Instructions* (5th ed. 2006) [hereinafter O'Malley et al] O'Malley § 17.07, 17.08. For variations in other Circuits, *see* Sixth Circuit § 2.08.

The bracketed language *[intent, knowledge, willfulness, recklessness]* suggests that the trial judge should use the actual mental state element provided in the statute proscribing the offense charged.

Permissive Inferences Not Presumptions. When instructing on proof of state of mind elements, the court must be careful not to suggest to the jury that there is a presumption, either mandatory or rebuttable, that the evidence presented, whatever it might be, proves the required state of mind; *i.e.*, that the jury must find that the defendant had the required state of mind or must find that state of mind unless the defendant presents evidence to the contrary. The jury may be told that it may find or is permitted to find (or to draw an inference) that the defendant had the required state of mind from certain evidence presented at trial, but it must be clear that this is permissive and that the jury is not required to make that finding or draw that inference. See, e.g., *Sandstrom v. Montana*, 42 U.S. 510 (1979); *United States v. United States Gypsum Co.*, 438 U.S. 422, 446 (1978).

5.02 Knowingly

The offense*(s)* **of** *(state offense or offenses that include knowingly or with knowledge)* **charged in the indictment requires that the government prove that** *(name of defendant)* **acted "knowingly"** *["with knowledge"]* **with respect to an** *(certain)* **element***(s)* **of the offense***(s)***. This means that the government must prove beyond a reasonable doubt that** *(name)* **was conscious and aware of the nature of** *(his) (her)* **actions and of the surrounding facts and circumstances, as specified in the definition of the offense***(s)* **charged.**

In deciding whether *(name)* **acted "knowingly"** *["with knowledge"]***, you may consider evidence about what** *(name)* **said, what** *(name)* **did and failed to do, how** *(name)* **acted, and all the other facts and circumstances shown by the evidence that may prove what was in** *(name)***'s mind at that time.**

[The government is not required to prove that (name) knew (his) (her) acts were against the law.]

Comment

See 1A O'Malley et al, supra, § 17.04. For variations in other Circuits, *see* Seventh Circuit § 4.06; Ninth Circuit § 5.6; Eleventh Circuit § 9.1.

In some cases the judge may want to be specific about the conduct, facts, or circumstances knowledge of which is required for the offense charged. In such a case, the judge should include the following after the first paragraph: *"Specifically, this means that in this case the government must prove beyond a reasonable doubt that (name) was conscious and aware of (state the nature of conduct or facts and circumstances knowledge of which is required for the offense charged)."*

The optional language at the end of the instruction explains that this most commonly used definition of knowingly does not require that the defendant know his or her conduct is against the law. In most cases this is not an issue and therefore this optional instruction is not required, but it may be given when this is an issue. In this regard, the most commonly used definition of knowingly differs from the most commonly used definition of "willfully." *See, e.g., United States v. Dixon*, 548 U.S. 1, 126 S.Ct. 2437, 2441 (2006) ("As we have explained, 'unless the text of the statute dictates a different result, the term "knowingly" merely requires proof of knowledge of the facts that constitute the offense.' *Bryan v. United States,* 524 U.S. 184, 193, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998) (footnote omitted). And the term 'willfully' in §924(a)(1)(D) requires a defendant to have 'acted with knowledge that his conduct was unlawful.' *Ibid*.") *See* Instruction 5.05.

Model instructions in some other Circuits include the statement that knowingly means that the defendant "did not act because of ignorance, mistake, or accident." Although this language may be inappropriate in some cases, and is not therefore included in the instruction above, it may be important to include this language in appropriate cases.

Most Frequently Used Definition of Knowingly. This instruction provides the most frequently given definition of "knowingly," when it is used alone in a federal criminal statute. *See, e.g., United States v. Dixon*, 548 U.S. 1, 5 (2006) ("As we have explained, 'unless the text of the statute dictates a different result, the term "knowingly" merely requires proof of knowledge of the facts that constitute the offense.' *Bryan v. United States,* 524 U.S. 184, 193, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998)."); *Arthur Anderson v. United States*, 544 U.S. 696, 705 (2005) (Knowingly is "normally associated with awareness, understanding, or consciousness," citing dictionaries); *United States v. Weiler*, 458 F.2d 474 (3d Cir. 1972). This instruction should be used with offenses that do not have a different definition of "knowingly." The bracketed alternative language *["with knowledge"]* should be used when the statute proscribing the offense charged employs that language.

Different Meaning of Knowingly for Some Offenses. As to some federal offenses, "knowingly" has a meaning different from the meaning given in this instruction, because the statute proscribing the offense explicitly provides a different definition or because federal courts have interpreted knowingly in the statute as having a different meaning. For those offenses, the proper instructions as to the meaning of knowingly are included in the instructions for the specific offenses. See Chapter 6 of these instructions.

The statutes proscribing some federal offenses provides a specific definition of knowingly that is different from the general definition given in this instruction. *See, e.g.*, the False Claims Act, 31 U.S.C. § 3729 (defines "knowingly" as actual knowledge of the information, or deliberate ignorance of the truth or falsity of the information, or reckless disregard of the information).

For other offenses, the Supreme Court and the Third Circuit have interpreted

"knowingly" as having a different meaning than that given in this instruction. For example, in *Liporata v. United States*, 471 U.S. 419 (1985), the Supreme Court interpreted "knowingly uses, transfers, acquires, alters, or possesses [food stamps] in any manner not authorized by [the statute] or the regulation," in the federal statute prohibiting food stamp fraud, to mean not only that the defendant must be aware that he/she did the prohibited actions, but also that the defendant was aware of the existence and meaning of the regulation that those actions violated. (This is similar to the most frequently used definition of "willfully." See Instruction 5.05.) The Court was concerned that unless knowingly required proof of awareness of the regulation, the statute would criminalize "a broad range of apparently innocent conduct." In contrast, in *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558 (1971), the Court held that 18 U.S.C. § 834(f), which makes it a crime to "knowingly violat[e]" a regulation of the ICC regarding transportation of corrosive liquids (promulgated under 18 U.S.C. § 834(a)), only requires proof that the defendant knew it had committed the acts that violated the regulation. The government did not have to prove that defendant knew the existence and meaning of the regulation. The Court reasoned, in part, that a company that is engaged in a business involving significant risks to the public likely would and certainly should know of the federal regulations that apply to that business. Also *see United States v. Barbosa*, 271 F.3d 438, 457-58 (3d Cir. 2001) ("To act 'knowingly' is to act with 'knowledge of the facts that constitute the offense' but not necessarily with knowledge that the facts amount to illegal conduct, unless the statute indicates otherwise. *Bryan v. United States*, 524 U.S. 184, 193, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998).").

This instruction is phrased in terms of "act(s)" or "action(s)." If the government's theory is that the defendant committed the crime by a failure to act or an omission, instead of a positive action, Instruction 5.10 (Failure to Act (Omissions)) should be given. If the defendant asserts "good faith" as a defense, see Instruction 5.07 (Good Faith).

5.03 Intentionally

The offense*(s)* **of** *(state offense or offenses that include intentionally or with intent)* **charged in the indictment requires that the government prove that** *(name of defendant)* **acted "intentionally"** *["with intent"]* **with respect to an** *(certain)* **element***(s)* **of the offense***(s)***. This means that the government must prove beyond a reasonable doubt either that (1) it was** *(name's)* **conscious desire or purpose to act in a certain way or to cause a certain result, or that (2)** *(name)* **knew that** *(he) (she)* **was acting in that way or would be practically certain to cause that result.**

In deciding whether *(name)* **acted "intentionally"** *["with intent"]***, you may consider evidence about what** *(name)* **said, what** *(name)* **did and failed to do, how** *(name)* **acted, and all the other facts and circumstances shown by the evidence that may prove what was in** *(name)***'s mind at that time.**

Comment

O'Malley et al, supra, and the other Circuits do not provide instructions on intent or intentionally. *See* 1A O'Malley et al, supra, § 17.04; Sixth Circuit § 2.07; Seventh Circuit § 4.08; Eighth Circuit § 7.01; Ninth Circuit § 5.4.

Most Frequently Used Definition of Intentionally. This instruction provides the most frequently used definition of "intentionally" in federal criminal statutes. It should be used for all offenses that do not have a different definition of "intentionally." The bracketed alternative language *[with intent]* should be used when that is the language of the statute proscribing the offense charged. Where, as to particular federal offenses, intentionally or with intent have a meaning different from the meaning explained in this instruction, the proper instructions as to the meaning of these terms are included in the instructions for the specific offenses. *See* Chapter 6 (Elements of Offenses).

Different Meaning for Some Offenses; General and Specific Intent. In *United States*

v. United States Gypsum Co., 438 U.S. 422, 445 (1978), the Supreme Court recognized that the "[t]he element of intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of purpose [meaning, conscious object or desire] or the more general one of knowledge or awareness." The Court also noted that the Model Penal Code breaks this traditional concept of intent into two separate mental states of "purposely," meaning conscious object, and "knowingly," meaning awareness. 438 U.S. at 444, citing Model Penal Code § 2.02(2). The Court observed, however, that "[g]enerally this limited distinction between knowledge and purpose has not been considered important since 'there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results.'" 438 U.S. at 445, quoting W. LaFave & A. Scott, Criminal Law 197 (1972). Whether "intent" in a federal criminal statute is given this traditional meaning or a more precise meaning akin to the Model Penal Code's purposely depends, of course, on the language of the statute and the intent of Congress. In the *United States Gypsum* case, involving the mental state requirement for criminal violations of the Sherman Act, the Court concluded that nothing in the Act, its history, or otherwise suggested that the traditional understanding of intent should not be used. 438 U.S. at 445-46.

The common law distinguished between "specific" and "general" intent, and classified crimes as specific or general intent crimes. *See, e.g., United States v. Bailey*, 444 U.S. 394, 403 (1980). In *Bailey*, the Court discussed these concepts and their prevalence in modern federal crimes. 444 U.S. at 402-09 (holding that the crime of escape under 18 U.S.C. § 751(a) only requires general not specific intent; therefore, the government only had to prove the defendant knew his or her actions would result in leaving physical confinement without permission). The Court recognized that the Model Penal Code's more precise articulation of state of mind (culpability) elements exemplified the modern movement away from this traditional, common law approach. *Id.* at 403-04. Citing *United States v. United States Gypsum Co.*, the *Bailey* Court observed that in federal statutes "intent" generally encompasses both "specific intent" (which corresponds loosely to "purposely" under the Model Penal Code) and "general intent" (loosely comparable to "knowingly" under the Code), but did acknowledge that for a narrow class of crimes (e.g., murder, conspiracy, attempt) the heightened culpability purposely (conscious object) and not knowingly was required. *Id.* at 405.

Continued use of the terms specific intent and general intent in modern federal criminal law is more likely to confuse than enlighten. With respect to those offenses for which intentionally has a meaning different from that expressed in this instruction (*i.e.,* a meaning limited to what the common law called specific intent and the Model Penal Code calls purposely), see the instructions for those specific offenses.

Conditional Intent. The Supreme Court has also recognized that the intent or specific intent required to commit a crime may be conditional. *See, e.g., Holloway v. United States*, 526 U.S. 1, (1999) (Carjacking "with intent to cause death or serious bodily injury" requires "specific intent or purpose to kill or harm, but does not require an unconditional intent to kill or harm, and can be established by proof that the defendant used a deliberate threat of violence that he would

use if the victim did not comply by relinquishing her vehicle), citing inter alia, Model Penal Code § 2.02(6) ("When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.").

This instruction is phrased in terms of "act(s)" or "action(s)." If the government's theory is that the defendant committed the crime by a failure to act or an omission, instead of a positive action, Instruction 5.10 (Failure to Act (Omissions)) should be given. If the defendant asserts "good faith" as a defense, see Instruction 5.07 (Good Faith).

5.04 Motive Explained

Motive is not an element of the offense with which *(name)* **is charged. Proof of bad motive is not required to convict. Further, proof of bad motive alone does not establish that** *(name)* **is guilty and proof of good motive alone does not establish that** *(name)* **is not guilty. Evidence of** *(name's)* **motive may, however, help you find** *(name's)* **intent.**

Intent and motive are different concepts. Motive is what prompts a person to act. Intent refers only to the state of mind with which the particular act is done.

Personal advancement and financial gain, for example, are motives for much of human conduct. However, these motives may prompt one person to intentionally do something perfectly acceptable while prompting another person to intentionally do an act that is a crime.

Comment

See 1A O'Malley et al, supra, § 17.06.

This instruction is phrased in terms of "act(s)" or "action(s)." If the government's theory is that the defendant committed the crime by a failure to act or an omission, instead of a positive action, Instruction 5.10 (Failure to Act (Omissions)) should be given.

5.05 Willfully

The offense*(s)* **of** *(state offense or offenses that include willfully)* **charged in the indictment require***(s)* **the government to prove that** *(name)* **acted "willfully" with respect to an** *(certain)* **element***(s)* **of the offense***(s)***. This means the government must prove beyond a reasonable doubt that** *(name)* **knew** *(his) (her)* **conduct was unlawful and intended to do something that the law forbids. That is, to find that** *(name)* **acted "willfully," you must find that the evidence proved beyond a reasonable doubt that** *(name)* **acted with a purpose to disobey or disregard the law. "Willfully" does not, however, require proof that** *(name)* **had any evil motive or bad purpose other than the purpose to disobey or disregard the law.**

["Willfully" (does) (does not) require proof that the actor knew of the existence and meaning of the statute making his conduct criminal.]

Comment

See 1A O'Malley et al, supra, § 17.05. For variations in other Circuits, *see* Fifth Circuit § 1.38; Eleventh Circuit § 9.1. Some Circuits do not recommend a general instruction defining the term "willfully." *See* Sixth Circuit § 2.05; Seventh Circuit § 4.09; Eighth Circuit § 7.02; Ninth Circuit § 5.5.

An instruction defining "willfully" should be given only when, by statute or court decision, willfully is made a mental state element of the offense charged. An instruction on willfully should not be given just because willfully is alleged in the indictment, unless it is a legal element of the offense charged. *See* Seventh Circuit § 4.09.

Most Frequently Used Definition of Willfully. Although "willfully" has been defined in various ways and is a word of notoriously elusive meaning, the definition given here is the one now used most frequently by the Supreme Court and the Third Circuit. The important difference between willfully as defined in this instruction and the most frequently used definition of

knowingly, as stated in Instruction 5.02, is that willfully requires proof beyond a reasonable doubt that the defendant knew his or her conduct was unlawful and intended to do something that the law forbids; that the defendant acted with a purpose to disobey or disregard the law. *See, e.g., United States v. Dixon*, 548 U.S. 1, 126 S.Ct. 2437, 2441 (2006) ("As we have explained, 'unless the text of the statute dictates a different result, the term "knowingly" merely requires proof of knowledge of the facts that constitute the offense.' *Bryan v. United States,* 524 U.S. 184, 193, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998) (footnote omitted). And the term 'willfully' in § 924(a)(1)(D) requires a defendant to have 'acted with knowledge that his conduct was unlawful.' *Ibid*.") Sometimes "willfully," as defined here, is referred to by courts as "specific intent."

In *Bryan v. United States*, 524 U.S. 184 (1998), the Supreme Court held that in the Firearms Owners' Protection Act, "willfully" dealing in firearms without a federal license required proof that the defendant acted with the knowledge that his conduct was unlawful. The Court reasoned that there was no danger of convicting the innocent where there was enough evidence that the defendant knew dealing in firearms was unlawful to show that defendant acted "with an evil-meaning mind." That was all willfully required in this statute. Similarly, in *Ratzlaf v. United States*, 510 U.S. 135 (1994), the Court held that "willfully," in 31 U.S.C. § 5324 (part of the Money Laundering Control Act of 1986), required proof not only that the defendant knew of the bank's reporting requirements for certain financial transactions, but also that he knew the structuring of transactions he undertook to evade those requirements constituted a criminal offense, because otherwise there was a risk of punishing innocent conduct.

This definition of willfully has often been given for criminal violations of federal tax laws, because of their complexity, but the Supreme Court no longer seems to limit this definition to that context. In *Cheek v. United States*, 498 U.S. 192 (1991), the Court reaffirmed its traditional interpretation that "willfully" in federal tax statutes means "voluntary, intentional violation of a known legal duty," and therefore required proof that defendant had actual knowledge that the law imposed a legal duty on him and that he voluntarily and intentionally violated that duty. Accordingly, the Court said that the defendant could not be found guilty if the jury found that he honestly believed the tax laws did not make his conduct criminal, even if that belief was unreasonable. The Court reasoned that, because of the complexity of federal tax laws, citizens may honestly not realize their conduct is criminal and thus may innocently believe they are not violating the law. This specific definition of willfully is included in the specific instructions for tax evasion, in Chapter 6 of these Model Instructions. *See* Instruction No. 6.26.7201-4 (Tax Evasion – Willfully Defined).

The Third Circuit case law tracks that of the Supreme Court. *See, e.g., United States v. DePaoli*, 41 Fed. Appx. (3d Cir. 2002) (federal income tax evasion); *United States v. Curran*, 20 F.3d 560, 567-69 (3d. Cir. 1994) (concluding that Supreme Court's definition of willfully in *Ratzlaf* should be applied generally, and specifically to "willfully causing" under 18 U.S.C. § 2(b)); *United States v. Gross*, 961 F.2d 1097 (3d Cir. 1992) (securities law violations); *United States v. Greenlee*, 517 F.2d 899 (3d Cir. 1975) (failure to file federal income tax return). With respect to the last sentence of the first paragraph of the instruction, *see, e.g., United States v.*

Pompanio, 429 U.S. 10 (1976) (federal tax evasion).

Ignorance or Mistake of Law. As the Supreme Court noted in *Cheek*, this definition of "willfully," by requiring awareness of and a purpose to violate the law, allows for a "defense" of ignorance or mistake of law. Although traditionally ignorance of the law was not a defense, where the state of mind element requires awareness that the conduct is against the law, ignorance or mistake about whether the conduct violates the law would negate the state of mind element. If the jury finds that the defendant made a mistake about or was ignorant whether his or her conduct violated the law, then the jury must find that the government failed to meet its burden of proving willfully beyond a reasonable doubt. The mistake or ignorance need not be reasonable, as long as it is honest or genuine. Of course, the jury can disbelieve the defendant's claim of mistake, find that it was not honestly or genuinely held, and therefore find that the defendant did act willfully. See *Cheek v. United States*, 498 U.S. 192 (1991); Model Penal Code § 2.02(9).

If there a significant issue in the case about whether the defendant made an honest mistake or had an honest misunderstanding about whether he or she was doing something illegal, the trial judge may want to instruct as follows (*see* Sand § 3A-3):

> In this case there is a question whether the defendant *(name)* honestly believed that *(his) (her)* conduct was lawful *[not unlawful]*. It is for you to decide whether *(name)* honestly thought or believed that *(his) (her)* conduct was lawful, meaning something that the law allows. *[did not know or misunderstood whether (his) (her) conduct was unlawful, something that the law forbids]*. To find the defendant guilty, you must find that *(he) (she)* acted willfully, and therefore you must find that the government proved beyond a reasonable doubt that *(name)* knew *(his) (her)* conduct was unlawful and had a purpose to disobey or disregard the law.

In this instruction, the positive statements ("honestly believed that *(his) (her)* conduct was lawful," etc.) should be given whenever possible, but the alternative double negative language may have to be used depending on the nature of the mistake or misunderstanding raised in the case.

Good Faith Defense. The defense of ignorance or mistake of law, discussed in the preceding paragraph, is encompassed with the "good faith" defense explained in Instruction 5.07 (Good Faith). Good faith, in the sense of the defendant's honest belief that his or her conduct was lawful, is a defense to any offense in which the mental state element requires proof that the defendant was aware that his or her conduct was unlawful (*e.g.,* willfully as defined in this instruction). However, the "good faith defense" seems to be used in the federal courts most often in the context of tax offenses and fraud type offenses, such as mail fraud, securities fraud, bankruptcy fraud, bank fraud and the like, as well as false statement offenses. *See* Daniel S. Jonas, *The Circuit Split Over Instructing the Jury Specifically on the Good Faith Defense: A Consequence of Superlegislation by Courts or the Standards of the Appellate Review*, 46 SYR. L.R. 61 (1995). For tax offenses, *see* Instruction 6.26.7201-4 (Tax Evasion – Willfully

Defined).

Knowledge of Specific Statute Making Conduct Criminal. The bracketed, second paragraph of the instruction recognizes that in some situations the Supreme Court has interpreted federal criminal statutes either as requiring or as not requiring proof that the actor knew not only that what he or she did was generally against the law, but also that he or she knew of the existence and meaning of the statute making the unlawful conduct criminal. *Compare Bryan v. United States*, 524 U.S. 184 (1998) ("willfully" in firearms act does not require proof that defendant knew the existence of the federal statute that made it criminal) *with Ratzlaf v. United States*, 510 U.S. 135 (1994) ("willfully" in Money Laundering Control Act of 1986 requires proof that defendant knew of the existence and meaning of the criminal statute he was charged with violating; Congress later amended the statute to disavow the Court's interpretation; see Money Laundering Suppression Act of 1994). The jury may well have difficulty with this distinction, therefore it is included in the model instruction as alternative language. If the jury does not need to consider this issue, the bracketed second paragraph need not be given. However, the trial court should instruct on this point if the issue is fairly raised at trial and is supported by the evidence.

This instruction is phrased in terms of "act(s)" or "action(s)." If the government's theory is that the defendant committed the crime by a failure to act or an omission, instead of a positive action, Instruction 5.10 (Failure to Act (Omissions)) should be given.

5.06 Willful Blindness *[Deliberate Ignorance]*

To find *(name)* **guilty of** *(state the offense)***, you must find that the government proved beyond a reasonable doubt that** *(name)* **knew** *(state the fact or circumstance, knowledge of which is required for the offense charged)***. In this case, there is a question whether** *(name)* **knew** *(state the fact or circumstance, knowledge of which is required for the offense)***. When, as in this case, knowledge of a particular fact or circumstance is an essential part of the offense charged, the government may prove that** *(name)* **knew of that fact or circumstance if the evidence proves beyond a reasonable doubt that** *(name)* **deliberately closed** *(his) (her)* **eyes to what would otherwise have been obvious to** *(him) (her)***.**

No one can avoid responsibility for a crime by deliberately ignoring what is obvious. Thus, you may find that *(name)* **knew** *(state the fact or circumstance, knowledge of which is required for the offense charged)* **based on evidence which proves that: (1)** *(name)* **was aware of a high probability of this** *(fact) (circumstance)***, and (2)** *(name)* **consciously and deliberately tried to avoid learning about this** *(fact) (circumstance)***.**

You may not find that *(name)* **knew** *(state the fact or circumstance, knowledge of which is required for the offense charged)* **if you find that the defendant actually believed that this** *(fact) (circumstance)* **did not exist. Also, you may not find that** *(name)* **knew** *(state the fact or circumstance, knowledge of which is required for the*

offense charged) **if you find only that** *(name)* **should have known of the** *(fact) (circumstance)* **or that a reasonable person would have known of a high probability of the** *(fact) (circumstance)***. It is not enough that** *(name)* **may have been stupid or foolish, or may have acted out of inadvertence or accident. You must find that** *(name)* **was actually aware of a high probability of** *(state the fact or circumstance, knowledge of which is required for the offense charged)***, deliberately avoided learning about it, and did not actually believe that it did not exist.**

Comment

See 1A O'Malley et al, supra, § 17.09. For variations in other Circuits, *see* First Circuit § 2.14; Sixth Circuit § 2.09; Eighth Circuit § 7.04; Ninth Circuit § 5.7. The willful blindness instruction is sometimes referred to as the "ostrich instruction."

When to Give Willful Blindness Instruction. The mental state requirements knowingly, intentionally, and willfully each includes some aspect of awareness or knowledge of pertinent facts or circumstances. See Instructions 5.02, 5.03, and 5.05. "Willful blindness" may be used to prove the knowledge or awareness aspect of any of these mental states. "Willful blindness" could also be used to prove the awareness of substantial and unjustifiable risk aspect of recklessly. See Instruction 5.08. Thus, when supported by the evidence, this willful blindness instruction should be given together with the instruction on the appropriate mental state element, either the general mental state instruction included in this chapter or the more specific mental state instruction for the particular crime charged, included in Chapter 6. The Third Circuit has also held that, if supported by the evidence, it is not inconsistent for a court to give instructions on both actual knowledge and willful blindness, because if the jury does not find actual knowledge, it might still find willful blindness. *See, e.g., United States v. Wert-Ruiz*, 228 F.3d 250, 255 (3d Cir. 2000). Other circuits seem to disagree on this point. *See, e.g., United States v. Alston-Graves*, 435 F.3d 331, 342 n. 15 (D.C. Cir 2006).

Among the Third Circuit cases that show the situations in which a willful blindness instruction was properly given is *United States v. Brodie*, 403 F.3d 123 (3d Cir. 2005). Charged with conspiracy to violate the Trading with Enemy Act and Cuban Assets Control Regulations, which required proof that the defendant (company president) knew the facts constituting the offense, knew the illicit purpose of the conspiracy, knew the law forbidding his actions, and acted with the specific intent to circumvent that law, the defendant denied having that knowledge and intent. Instead, he asserted that he thought the transactions in question were being handled

lawfully through Canadian and United Kingdom companies, not unlawfully through a United States company. However, various pieces of evidence showed that the defendant recognized the likelihood that the United States entity was involved in illegal transactions with Cuba "yet deliberately avoided learning the true facts." This included evidence suggesting that the defendant tried to ensure that he never saw a direct reference to Cuba, that the corporate culture was to refer to Cuba by "code words," that the defendant failed to ask the "natural follow-up question[s]" to references to the "Caribbean," and never instigated any follow-up to his own instruction to ensure that his company was not transacting business with Cuba. The Third Circuit held that the trial judge properly instructed the jury on willful blindness.

For other cases in which the Third Circuit has upheld the giving of willful blindness instructions, *see, e.g., United States v. Wasserson,* 418 F.3d 225, 237-39 (3d Cir. 2005) (with respect to defendant charged with causing, and aiding and abetting, the disposal of hazardous waste without a permit in violation of the Resource Conservation and Recovery Act, it was reasonable for the jury to conclude that defendant knew or was willfully blind about whether hazardous wastes would be disposed of at an unpermitted facility where, knowing of the presence of hazardous waste in his company's warehouse and of the requirements for proper disposal of that waste, defendant told an unknowing employee to find someone to clean out the warehouse); *United States v. Titchell*, 261 F.3d 348 (3d Cir. 2001) (in a prosecution for mail fraud and conspiracy to commit mail fraud based on fraudulent advertising invoices, defendant denied knowledge of the falsity of statements he had made); *United States v. Wert-Ruiz*, 228 F.3d 250 (3d Cir. 2000) (conspiracy to commit money laundering by generating false receipts in connection with remitting drug trafficking proceeds funds from US to overseas; jury could have concluded that defendant deliberately avoided learning that she was dealing with the proceeds of illegal activity and that the transactions were designed to conceal the illicit source of those funds; jury could rationally conclude that using code words for transactions, minimizing dollar amounts, and receiving large amounts of cash in gym bags must have alerted defendant to the possibility that her money transfer activities were actually in service of a money laundering operation, and that her failure to inquire further evinced willful blindness.); *United States v. Stewart*, 185 F.3d 112 (3d Cir. 1999) (in prosecution for mail fraud, wire fraud, money laundering, and racketeering based on a complicated series of fraudulent transactions involving insolvent insurance companies, defendant argued that he lacked the intent to defraud because he relied on the findings of solvency reported in state examinations and audit reports, but evidence permitted the jury to conclude that he recognized the likelihood of insolvency yet deliberately avoided learning the true facts); *United States v. Caminos*, 770 F.2d 361 (3d Cir. 1985) (at trial for knowingly importing cocaine and possessing cocaine with intent to distribute, evidence was sufficient to allow the jury to find that defendant deliberately ignored the probability that something other than a $60 wood carving was involved, where evidence showed defendant was approached by two men who were willing to pay over $1,000 to ensure that the wood carving, in which cocaine was concealed, was delivered to Pittsburgh).

Categories of Evidence of Willful Blindness. In these cases, the Third Circuit has upheld the use of a willful blindness instructions based on two categories of evidence, without

explicitly identifying the categories as such. *See, e.g., United States v. Wasserson*, 418 F.3d 225, 237-39 (3d Cir. 2005); *United States v. Brodie*, 403 F. 3d 123 (3d Cir. 2005). The Seventh Circuit has articulated these categories, stating that, "[e]vidence of deliberate ignorance can be placed into two categories: evidence of 'overt physical acts,' and evidence of 'purely psychological avoidance, a cutting off of one's normal curiosity by effort of the will." *United States v. Carrillo*, 435 F. 3d 767, 780 (7th Cir. 2006). The Seventh Circuit explained that the first category was generally easy, but "[t]he second category, psychological avoidance, is more troublesome. ... The difficulty in a psychological avoidance case – one without any outward physical manifestation of an attempt to avoid the facts – lies in distinguishing between a defendant's mental effort of cutting off curiosity, which would support an ostrich instruction, and a defendant's simple lack of mental effort, or lack of curiosity, which would not support an ostrich instruction." *Id.*

The Content of the Willful Blindness Instruction. Although the Third Circuit cases are clear about when a willful blindness instruction should be given, they have approved varying forms of the content of the instruction. In *United States v. Titchell*, 261 F.3d 348, 351 (3d Cir. 2001), the court upheld a willful blindness instruction where it concluded that the instructions as a whole made it sufficiently clear that willful blindness is not merely negligence or lack of an objectively reasonable belief, even though the trial judge did not explicitly instruct the jury that it must find that the defendant was (subjectively) "aware of a high probability that the fact or circumstance existed." The court stated, "[O]ur cases make clear that no such requirement exists. As we explained in *United States v. Stewart*, 185 F.3d 112 (3d Cir.1999), 'we do not require a court's [willful blindness] charge to contain specific language that a defendant must have "a subjective awareness of a high probability that something is amiss."' *Id*. at 126 (quoting *United States v. Stuart*, 22 F.3d 76, 81 (3d Cir.1994))." Nevertheless, the Third Circuit has also stated that subjective awareness of a high probability is required for willful blindness and, therefore, the better practice is to instruct the jury on this point explicitly. For example, in *United States v. Wert-Ruiz*, 228 F.3d 250 (3d Cir. 2000), the Third Circuit upheld instructions that allowed the jury to find that the defendant acted knowingly, based on alternative theories of actual knowledge or willful blindness. The court stated (228 F.3d at 255):

> A willful blindness instruction is often described as sounding in "deliberate ignorance." *See United States v. One 1973 Rolls Royce,* 43 F.3d 794, 807-08 (3d Cir.1994). Such instructions must be tailored, as the District Court's was here, to avoid the implication that a defendant may be convicted simply because he or she should have known of facts of which he or she was unaware. Willful blindness is not to be equated with negligence or a lack of due care, *see id.* at 809 n. 13, for "willful blindness is a subjective state of mind that is deemed to satisfy a scienter requirement of knowledge," *id.* at 808. The instruction "must make clear that the defendant himself was subjectively aware of the high probability of the fact in question, and not merely that a reasonable man would have been aware of the probability." *United States v. Caminos,* 770 F.2d 361, 365 (3d Cir.1985). If such a charge is supported by sufficient evidence, it is not inconsistent for a court to give a charge on both willful blindness and actual knowledge, for if the jury

> does not find the existence of actual knowledge, it might still find willful blindness. *See United States v. Stewart*, 185 F.3d 112, 126 (3d Cir.1999).

Also *see, e.g., United States v. Brodie*, 403 F.3d 123, 148 (3d Cir. 2005) ("To find knowledge premised on the latter 'willful blindness' theory, the jury must be able to conclude that 'the defendant himself was [subjectively] aware of the high probability of the fact in question, and not merely that a reasonable man would have been aware of the probability,'" quoting *United States v. Caminos,* 770 F.2d 361, 365 (3d Cir.1985)). Even though other circuits have approved different wording for willful blindness instructions, they all seem to agree that, "[t]he most important principle for the district court to keep in mind is that the ostrich 'instruction is not meant to allow a jury to convict a person for negligence.' ... [E]ven under that old formulation of the ostrich instruction we repeatedly held, in the face of objections to the contrary, that the instruction 'calls for a subjective inquiry, rather than an objective one.' " *United States v. Carrillo*, 435 F.3d 767, 781-82 (7th Cir. 2006) (citations omitted).

The Third Circuit has also not explicitly held that the jury must be instructed that it cannot find knowledge based on willful blindness unless it finds that the defendant did not actually believe that the fact or circumstance did not exist. However, in more than one case the court has referred to this requirement favorably. For example, in *United States v. Titchell*, 261 F.3d 348, 351 (3d Cir. 2001), the court stated:

> The court gave the jury a fairly standard willful blindness instruction, which stated that the government could meet its burden of proving Titchell's knowledge of the falsity of his statements if the government establishes "beyond a reasonable doubt that [Titchell] acted with deliberate disregard" of the truth or with the "conscious purpose of avoiding learning the truth." The court also properly limited this instruction by telling the jury that the element of knowledge would not be satisfied if Titchell "actually believed the statement[s] to be true," and that guilty knowledge "cannot be established by demonstrating that [Titchell] was merely negligent or foolish or acting out of inadvertence or accident."

In *United States v. Wert-Ruiz*, 228 F.3d 250 (3d Cir. 2000), the defendant did not challenge the legal adequacy of the instruction as it was worded, only the sufficiency of the evidence to justify it. The court noted that, "[a]t trial, the District Court instructed the jury on the issue of willful blindness as follows: When knowledge of the existence of a particular fact is an essential part of an offense, such knowledge may be established if a defendant is aware of a high probability of its existence, *unless she actually believes that it does not exist*. ...I must emphasize, however, that the requisite proof of knowledge on the part of a defendant cannot be established by demonstrating she was negligent, careless or foolish." 228 F.3d at 255 (emphasis added). Although it has not been specifically adopted by Congress, the Supreme Court, or the Third Circuit, *see also* Model Penal Code § 2.02(7) ("*Requirement of Knowledge Satisfied by Knowledge of High Probability*. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of

its existence, unless he actually believes that it does not exist."). Other circuits have recognized that the willful blindness instruction is problematic, because it seems inconsistent to say that awareness can be proved by evidence that the defendant avoided awareness: "It makes obvious sense to say that a person cannot act 'knowingly' if he does not know what is going on. To add that such a person acts 'knowingly' if she intentionally does not know what is going on is something else again." *United States v. Alston-Graves*, 435 F.3d 331, 337 (D.C. Cir 2006). "[I]t is hard to see how ignorance, from whatever cause, can be knowledge." *Id.* at 337 n. 1 (internal quotation marks and citations omitted).

Willful Blindness Instructions in Other Federal Circuits. Finally, "[a]ll of the other circuits ... have approved [willful blindness] instructions for a wide range of offenses, although the courts' rationales vary, as do the wording of the instructions, and the limits on the doctrine's proper use." *United States v. Alston-Graves*, 435 F.3d at 338 (footnotes omitted). For example, the Ninth Circuit, which decided *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976), one of the earliest federal appeals court willful blindness cases, recently held it was error to give the instruction in *United States v. Heredia*, 429 F.3d 820 (9th Cir. 2005). In *Heredia*, the Ninth Circuit stated:

> In the years since we decided *Jewell,* we have restricted the circumstances under which we will permit the instruction to be issued. We have warned that the instruction is "rarely appropriate," and should be given only when the government presents "specific evidence" that the defendant "(1) actually suspected that he or she might be involved in criminal activity, (2) deliberately avoided taking steps to confirm or deny those suspicions, and (3) did so in order to provide himself or herself with a defense in the event of prosecution." . . . It is not enough that the defendant "was mistaken, recklessly disregarded the truth or negligently failed to inquire." . . . The instruction should therefore "be rarely given because of the risk that the jury will convict on a standard of negligence: that the defendant *should* have known the conduct was illegal." The purpose of the *Jewell* instruction is ... for those cases of "willful blindness," where the defendant "suspects a fact, realizes its probability, but refrains from obtaining final confirmation in order to be able to deny knowledge if apprehended."

429 F.3d at 824-25 (citations omitted). "Many of the [other] courts of appeals [also] admonish that 'caution is necessary in giving a willful blindness instruction.' " *Unites States v. Alston-Graves*, 435 F.3d at 340-41 (citations omitted).

This instruction is phrased in terms of "act(s)" or "action(s)." If the government's theory is that the defendant committed the crime by a failure to act or an omission, instead of a positive action, Instruction 5.10 (Failure to Act (Omissions)) should be given.

5.07 Good Faith Defense

The offense*(s)* **of** *(state offenses)* **charged in the indictment require***(s)* **proof that** *(name)* **acted** *(describe the required mental state, e.g., "willfully," "intent to defraud," "knowingly defraud," "intentionally or knowingly making false statements")***. If you find that** *(name)* **acted in "good faith," that would be a complete defense to this charge, because good faith on the part of** *(name)* **would be inconsistent with** *(his) (her)* **acting** *(describe the required mental state)***.**

A person acts in "good faith" when he or she has an honestly held belief, opinion, or understanding that *(describe the belief or opinion that is inconsistent with the required mental state, e.g., honest belief about the existence of a fact, honest belief in the truth of statements, honest opinion that acts were not unlawful)***, even though the belief, opinion, or understanding turns out to be inaccurate or incorrect. Thus, in this case if** *(name)* **made an honest mistake or had an honest misunderstanding about** *(state the belief, opinion or understanding that would be inconsistent with the required mental state)* **then** *(he) (she)* **did not act** *(describe the required mental state)***.**

[(Name) did not act in "good faith," however, if, even though (he) (she) honestly held a certain opinion or belief or understanding, (he) (she) also knowingly made false statements, representations, or promises to others.]

(Name) **does not have the burden of proving "good faith." Good faith is a defense because it is inconsistent with the requirement of the offense***(s)* **charged, that**

(name) **acted** *(describe the required mental state)*. **As I have told you, it is the government's burden to prove beyond a reasonable doubt each element of the offense, including the mental state element. In deciding whether the government proved that** *(name)* **acted** *(describe the required mental state)* **or, instead, whether** *(name)* **acted in good faith, you should consider all of the evidence presented in the case that may bear on** *(name's)* **state of mind. If you find from the evidence that** *(name)* **acted in good faith, as I have defined it, or if you find for any other reason that the government has not proved beyond a reasonable doubt that** *(name)* **acted** *(describe the required mental state)*, **you must find** *(name)* **not guilty of the offense of** *(state the offense)*.

Comment

See 1A O'Malley et al, supra, § 19.06. For variations in other Circuits, *see* First Circuit § 5.02; Seventh Circuit §§ 6.10 & 6.11; Eighth Circuit § 9.08; Eleventh Circuit §§ 17 & 18.

When is Good Faith a Defense. "Good faith" is a defense whenever the defendant's good faith is inconsistent with a finding that the defendant acted with the mental state required by the definition of the offense charged. Good faith exculpates when, if the jury finds the defendant acted in good faith, it would necessarily have to find that defendant did not act with the required mental state. Of course, whether good faith would disprove the mental state element depends on how that element is defined with respect to the offense charged and the trial evidence about the nature of the defendant's honest beliefs. Because good faith relates to an element of the offense, the defendant does not have the burden of persuasion, although the defendant may have the burden of production. When a good faith defense is raised and supported by some evidence, the government has the burden of disproving good faith as part of its burden of proving the mental state element.

"Good faith" is a defense to any crime for which the defendant's genuine lack of awareness or misunderstanding negates the mental state requirement. Perhaps because of *Cheek v. United States*, 498 U.S. 192 (1991), where the Supreme Court held that the defendant could

not be convicted if the jury found that he honestly believed the tax laws did not make his conduct criminal, even if that belief was unreasonable, this defense is often thought of in connection with tax offenses. *See* Comment to Instruction 5.05. In tax cases the trial judge should give Instruction 6.26.7201-4 (Tax Evasion – Willfully Defined), supplemented if need be under the circumstances of the case, by this instruction.

The defense has also been used commonly in the context of fraud type offenses, such as mail fraud, securities fraud, bankruptcy fraud, bank fraud and the like, as well as false statement crimes. *See* Daniel S. Jonas, *The Circuit Split Over Instructing the Jury Specifically on the Good Faith Defense: A Consequence of Superlegislation by Courts or the Standards of the Appellate Review*, 46 SYR. L.R. 61 (1995). Thus, in *United States v. Gross*, 961 F.2d 1097 (3d Cir.), cert. denied, 506 U.S. 965 (1992), the defendant was charged with making false statements to the Securities and Exchange Commission and conspiring to violate the securities laws, through a scheme to deceive and defraud shareholders of a company in which he was an officer. The offenses charged required proof that the defendant had conspired to knowingly make false statements and willfully defraud, but the defendant asserted that he acted without knowledge of the falsity of the statements or the wrongfulness of his actions (his treating as binding for purpose of his company's revenue statements contracts that were not completely binding at that time). The Third Circuit held that the trial court did not abuse its discretion in declining to give an explicit "good faith" instruction, but recommended that trial judges use the "good faith" instruction in appropriate cases as a supplement to the instructions on "knowingly and willfully."

If the defendant asserts that he or she acted in good faith based on the advice of counsel, the court may want to mention that in its instruction on the good faith defense.

Good Faith Instruction Recommended, But Not Required Where Trial Judge Fully Instructs on the Mental State Requirement. Considering the jury instructions as a whole, the Third Circuit in *United States v. Gross* concluded that the trial judge's "detailed instruction on the elements of the crime with which Gross was charged ... ensured that a jury finding of good faith would lead to an acquittal." 961 F.2d at 1103. The Third Circuit cautioned, however, that, "While it was not reversible error for the district court to refuse to give the good faith instruction in this case, we commend to the district judges in the exercise of their discretion its use as a supplement to the 'knowing and willful' charge in future cases." *Id.* The Court also explained the treatment of good faith instructions in other circuits, stating that it was persuaded by the majority view:

> The majority of circuits have held that an instruction setting forth all of the elements of a "knowledge" crime is sufficient and, hence, that a district court does not abuse its discretion in refusing to instruct on the good faith defense. See *United States v. McElroy,* 910 F.2d 1016, 1025-26 (2d Cir.1990); *United States v. Rochester,* 898 F.2d 971, 978-79 (5th Cir.1990); *United States v. Nivica,* 887 F.2d 1110, 1125 (1st Cir.1989); *United States v. Green,* 745 F.2d 1205, 1209 (9th Cir.1984); *United States v. McGuire,* 744 F.2d 1197, 1201-02 (6th Cir.1984); *United States v. Gambler,* 662 F.2d 834, 837

(D.C.Cir.1981). Two circuits, however, have held that a district court abuses its discretion by refusing to give a good faith defense charge even if the court has already given an instruction on the elements of the crime. See *United States v. Casperson,* 773 F.2d 216, 223-24 (8th Cir.1985); *United States v. Hopkins,* 744 F.2d 716, 718 (10th Cir.1984) (en banc).

> The majority position derives from the theory that the good faith defense instruction is merely surplusage. Rather than treating good faith as an affirmative defense, these circuits have viewed the good faith instruction as simply a reiteration that the government must carry its burden in demonstrating that the accused acted knowingly and willfully, because a jury finding that the defendant has acted knowingly and willfully is inconsistent with a finding that the defendant acted in good faith. Thus, according to the majority position, if an instruction already contains a specific statement of the government's burden to prove these elements of the crime, the good faith instruction is simply a redundant version of the instruction on those elements. In contrast, those circuits that have held to the contrary have emphasized that a specific instruction on good faith "directs the jury's attention to the defense of good faith with sufficient specificity to avoid error." *Casperson,* 773 F.2d at 223. Under this view, conveying to the jury the essence and context of the good faith defense is of crucial importance.

961 F.2d at 1102-03. *See* Daniel S. Jonas, *The Circuit Split Over Instructing the Jury Specifically on the Good Faith Defense: A Consequence of Superlegislation by Courts or the Standards of the Appellate Review*, 46 SYR. L.R. 61 (1995).

In *United States v. Leahy*, 445 F. 3d 634, 651-52 (3d Cir. 2006), the Third Circuit repeated that, while a minority of circuits has held that a good faith instruction should be given upon request, the rule in this Circuit is that the instruction is not required where the trial court fully instructs regarding the mental state requirement for the offense charged. Thus, as in *United States v. Gross, supra*, the Third Circuit held in *Leahy* that where the district court instructed completely and properly regarding the knowledge element of fraud crimes, it did not abuse its discretion in refusing to give a specific good faith instruction, as any “good faith instruction would have been unnecessary and duplicative.”

5.08 Recklessly

The offense*(s)* **of** *(state offense or offenses that include recklessly)* **charged in the indictment require***(s)* **that the government prove that** *(name of defendant)* **acted "recklessly." This means that the government must prove beyond a reasonable doubt (1) that** *(name)* **was aware of a substantial and unjustifiable risk of a fact or circumstance required for the offense or that the result required for the offense would be caused by** *(his) (her)* **actions; and (2) that** *(name)* **consciously disregarded that risk**

Specifically, in this case the government must prove beyond a reasonable doubt:

First: That *(name)* **was aware of a substantial and unjustifiable risk of** *(state the fact or circumstance the risk of which defendant must be aware)* **or that** *(his) (her)* **actions would cause** *(state the result the risk of which the defendant must be aware)***; and**

Second: That *(name)* **consciously disregarded that risk.**

Comment

Instructions defining "recklessly" are not included in O'Malley et al, supra, or in the pattern jury instructions of other circuits. This instruction is based on the definition of "recklessly" in Model Penal Code § 2.02(2)(c). Although Congress has not adopted the Model Penal Code, the Supreme Court, the Third Circuit, and other federal court decisions have been guided by the Model Penal Code definition of recklessly. In addition to defining recklessly as consciously disregarding a substantial and unjustifiable risk that the material element exists or will result from defendant's conduct, the Code also states that "the risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances

known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." Although the Third Circuit does not seem to have included this further definition in its few cases discussing recklessly, the trial court could include it in an instruction on recklessly if thinks a further explanation is necessary.

"Recklessly" is not frequently used to define the state of mind requirement in federal criminal statutes. As a result, few Third Circuit or other federal appellate court cases discuss the meaning of "recklessly." Nevertheless, the federal courts that have discussed recklessly in federal criminal cases have looked to the Model Penal Code for guidance. Thus, for example, in *United States v. Johnstone*, 107 F.3d 200 (3d Cir. 1997) (upholding jury instructions on mental state element of 18 U.S.C. § 242, where state police officers were convicted of using excessive force in violation of that section), the Third Circuit recognized, based on Supreme Court precedent, that "willfully" in § 242 required the government to prove that "the defendant had the particular purpose of violating a protected right made definite by rule of law *or recklessly disregarded the risk that he would violate such a right*." *Id.* at 210 (emphasis added). The Third Circuit noted that although the Supreme Court had not defined "reckless disregard" under § 242, the Court had stated in dicta in *Farmer v. Brennan*, 511 U.S. 825, (1994), that in criminal cases reckless disregard required subjective awareness and disregard of risk, *id.* at 836-37, and that this definition was appropriate in criminal prosecutions under 18 U.S.C. § 242. *Id.* at 839 n.7. Also *see, e.g., United States v. Dise*, 763 F.2d 586, 592 (3d Cir. 1985) (defendant can be criminally liable under § 242 "if he acted in reckless disregard of the law as he understood it").

Farmer v. Brennan, 511 U.S. 825 (1994), was a civil action asserting the liability of prison officials under the Eighth Amendment Cruel and Unusual Punishment clause for denying humane conditions of confinement, in which the state of mind requirement was "deliberate indifference" to inmate health and safety. After reviewing circuit opinions regarding "deliberate indifference," the Court stated, "[i]t is, indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk." 511 U.S. at 836. The Court rejected an objective test for deliberate indifference (reckless disregard) and held "that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837. Distinguishing the meaning of recklessly in civil cases, the Court stated that in criminal cases reckless disregard generally requires a subjective analysis; a criminal defendant exhibits reckless disregard if he is indifferent to a risk "of which he is aware." *Id.* at 836-37. Citing the Model Penal Code, among other sources, the Court reasoned, "subjective recklessness as used in the criminal law is a familiar and workable standard that is consistent with the Cruel and Unusual Punishment Clause as interpreted in our cases, and we adopt it as the test for 'deliberate indifference' under the Eighth Amendment." *Id.* at 839-40.

Other circuits have reasoned like the Third Circuit in *Johnstone*. For example, in *United*

States v. Albers, 226 F.3d 989 (9th Cir. 2000), the Ninth Circuit interpreted "recklessly" in a Department of Interior regulation prohibiting disorderly conduct in national parks and concluded "that the relevant inquiry in finding recklessness here is whether the defendants deliberately disregarded a substantial and unjustifiable risk of creating a hazardous or physically offensive condition of which they were aware." 226 F.3d at 995. The Ninth Circuit reasoned that in other cases where the regulation or statute did not define terms, it had looked to the Model Penal Code for guidance and quoted section 2.02(2)(c) which defines recklessly. The Ninth Circuit also noted that "the Supreme Court has ... explained that the criminal law generally permits a finding of recklessness only when persons disregard a risk of harm of which they are aware. *See Farmer v. Brennan,* 511 U.S. 825, 836-37 (1994)." Also *see, e.g., United States v. McCord*, 143 F.3d 1095, 1098 (8th Cir. 1998) (regarding sentencing enhancement for fraud offenses that involve "conscious or reckless risk of serious bodily injury," Eighth Circuit explained "[t]he normal meaning of reckless in the criminal law (unlike the civil law) is that the defendant disregarded 'a risk of harm of which he is aware,'" citing *Farmer v. Brennan*); *United States v. Ladish Malting Co.*, 135 F.3d 484, 487 (7th Cir. 1998) (on appeal from conviction for criminal violation of Occupational Health and Safety Act, which imposed a mental state requirement of "willfully" further defined by the Act to include knowingly and recklessly, the Seventh Circuit looked to Model Penal Code definitions, reasoning in part that "[t]he Supreme Court found the Model Penal Code's classification of mental states useful when it had to determine what mental state is required in antitrust prosecutions, see *United States v. United States Gypsum Co.,* 438 U.S. 422, 444-46(1978).").

This instruction is phrased in terms of "act(s)" or "action(s)." If the government's theory is that the defendant committed the crime by a failure to act or an omission, instead of a positive action, Instruction 5.10 (Failure to Act (Omissions)) should be given.

5.09 Negligently

The offense*(s)* **of** *(state offense or offenses that include negligently)* **charged in the indictment require***(s)* **that the government prove that** *(name of defendant)* **acted "negligently." This means that the government must prove beyond a reasonable doubt that the defendant** *(name)* **should have been aware, or that a reasonable person would have been aware, of a substantial and unjustifiable risk that a fact or circumstance required for the offense existed or that a result required for the offense would be caused by** *(his) (her)* **actions.**

[Specifically, this means that the government must prove beyond a reasonable doubt that (name) should have been aware, or that a reasonable person would have been aware, of a substantial and unjustifiable risk that (state the fact or circumstance defendant should have been aware of) or that (state the result defendant should have been aware of).]

[The risk must be such that its disregard involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.]

Comment

This instruction should be used when the federal crime charged includes negligently as an element of the offense. This happens most often in regulatory type offenses, such as violations of environmental laws. *See, e.g.,* Federal Water Pollution Control Act, 33 U.S.C. § 1319(c).

Instructions defining "negligently" are not included in O'Malley et al, supra, or in the model instructions of other circuits. This instruction is based on the definition of "negligently" in Model Penal Code § 2.02(2)(d), because the federal courts often look to the Model Penal Code for guidance with respect to mental state concepts. In addition to defining negligently as "should

be aware of a substantial and unjustifiable risk," the Code further states that "the risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." If the trial court believes that this further definition would assist the jury, the court can give the bracketed second paragraph of the instruction. Negligence as thus defined is sometimes referred to as "criminal negligence," as opposed to "civil negligence" or the mere failure to exercise ordinary, reasonable care.

This instruction is phrased in terms of "act(s)" or "action(s)." If the government's theory is that the defendant committed the crime by a failure to act or an omission, instead of a positive action, Instruction 5.10 (Failure to Act (Omissions)) should be given.

5.10 Failure to Act *(Omissions)*

Ordinarily, to commit an offense a defendant must commit a conscious and voluntary act, with the required state of mind. Thus, ordinarily a criminal offense is not committed by a person's failure to act or omission. In most instances, the law does not require people to act even to help or to save another person who is in danger. However, a failure to act or an omission can be the basis for criminal responsibility if the government proves beyond a reasonable doubt that the defendant had a legal duty to act, but failed or omitted to perform that legal duty with the required mental state.

[In this case the government asserts that (name) had a duty to (describe) that was imposed on (him) (her), because (describe the asserted legal basis for the duty), and consciously, voluntarily failed or omitted to perform that duty. In order to find (name) guilty because of (his) (her) omission or failure to act, you must find that the government proved beyond a reasonable doubt that (name) had this legal duty and consciously, voluntarily failed or omitted to perform it.]

Comment

Neither O'Malley t al, supra, nor any other Circuits provide a general instruction on failures to act or omissions. As suggested by the bracketed second paragraph above, this instruction should be tailored to the particular case before the court.

There do not appear to be any Third Circuit cases discussing omissions as a basis for criminal responsibility, except in limited situations related to specific offenses. *See, e.g., United States v. Curran*, 20 F.3d 560, 566 (3d Cir. 1994) (to convict for concealing a material fact in a matter within the jurisdiction of a federal agency or department, in violation of 18 U.S.C. § 1001,

"the government must show that a defendant had a legal duty to disclose the facts at the time he was alleged to have concealed them.").

Ordinarily, criminal liability is based on an omission when the statute defining the crime explicitly makes an omission or failure to act criminal. However, a legal duty to act may also be imposed by contract or tort law, and also because of a relationship between the defendant and another person that makes the defendant responsible for the safety and well-being of another person, or where a defendant voluntarily undertakes to provide assistance to another person, or when a defendant's actions put another person in danger. *See, e.g., United States v. Jones*, 308 F.2d 307 (D.C. Cir. 1962); Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 Cal. L. Rev. 547 (1988) (and authorities cited therein); Model Penal Code § 2.01(3) ("Liability for commission of an offense may not be based on an omission unaccompanied by action unless: (a) the omission is expressly made sufficient by the law defining the offense; or (b) a duty to perform the omitted act is otherwise imposed by law.").