Chapter 7. Final Instructions: Additional Bases for Criminal Responsibility

7.01 Attempt

(Name) **is charged with attempt to commit the crime of** *(state offense defendant is alleged to have attempted)***. An attempt to** *(state offense)* **is a federal crime even though the defendant did not actually complete the crime of** *(state offense)***.**

In order to find *(name)* **guilty of attempt to** *(state offense)***, you must find that the government proved beyond a reasonable doubt each of the following two (2) elements:**

First: That *(name)* **intended to commit the crime of** *(state offense)***,** *(as I have defined that offense) (as I will define that offense)***; and**

Second: That *(name)* **performed an act***(s)* **constituting a substantial step***(s)* **toward the commission of** *(state offense)* **which strongly corroborates or confirms that** *(name)* **intended to commit that crime.**

With respect to the first element of attempt, you may not find *(name)* **guilty of attempt to commit** *(state offense)* **merely because** *(he) (she)* **thought about it. You must find that the evidence proved beyond a reasonable doubt that** *(name)***'s mental state passed beyond the stage of thinking about the crime to actually intending to commit it.**

With respect to the substantial step element, you may not find *(name)* **guilty of attempt to commit** *(state offense)* **merely because** *(he) (she)* **made some plans to or some preparation for committing that crime. Instead, you must find that** *(name)*

took some firm, clear, undeniable action to accomplish *(his) (her)* **intent to commit** *(state offense)***. However, the substantial step element does not require the government to prove that the defendant did everything except the last act necessary to complete the crime.**

Comment

See Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 2 *Federal Jury Practice and Instructions* (5th ed. 2000) [hereinafter O'Malley et al] §§ 21.01. 21.03, 21.04. For variations in other Circuits, *see* First Circuit § 4.01; Fifth Circuit § 1.32; Sixth Circuit § 5.01; Eighth Circuit § 8.01; Ninth Circuit § 5.3; Tenth Circuit § 1.32.

When to Instruct on Attempt. When the indictment charges a completed offense but does not also charge an attempt to commit that offense, the trial court should consider instructing on attempt if one of the parties requests an attempt instruction and the evidence would permit a rational jury to acquit of the charged offense but find the defendant guilty of attempt to commit it. Fed. R. Crim. P. 31(c) provides:

> Lesser Offense or Attempt. A defendant may be found guilty of any of the following:
> (1) an offense necessarily included in the offense charged;
> (2) an attempt to commit the offense charged; or
> (3) an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right.

Either as part of this instruction or separately, the trial judge should also instruct the jury on the definition or elements of the offense the defendant is charged with attempting, so that the jury will understand what the defendant must have intended to commit and taken a substantial step toward committing.

Federal Attempt Provisions. There is no separate, general federal attempt statute. However, there are specific federal attempt statutes with respect to particular federal offenses or groups of offenses. *See, e.g.*, 21 U.S.C. §§ 846, 963 (which identically provide that "[a]ny person who attempts ... to commit any offense defined by this subchapter [the federal narcotics offenses] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt ...."). Other federal offenses include within their statutory definitions an attempt to commit the offense. *See, e.g.,* 18 U.S.C. 2113(a) ("Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, ... any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, ...").

Attempt Defined. There is also no federal statutory definition of "attempt." The Third Circuit has noted that when Congress uses a common law term, like attempt, it is presumed to adopt the common law meaning. However, with respect to attempt as used in federal statutes, the Third Circuit and most federal appeals courts have adopted the Model Penal Code's formulation. *See, e.g., United States v. Earp*, 84 Fed. Appx. 228, 232-34 (3d Cir 2004) (unpublished opinion containing thorough discussion of Third Circuit attempt law, citing many published decisions); *United States v. Hsu*, 155 F.3d 189, 202-03 (3d Cir. 1998) ("We adopt the Model Penal Code ... test for attempt because it is consistent with our own case law and with the great weight of modern precedent," citing *Kikumura*, *Cruz-Jiminez*, and *Everett*); *United States v. Lee*, 701 Fed. Appx. 175, 184 (3d Cir. 2017) (non-precedential); *United States v. Cicco*, 10 F.3d 980, 984-85 (3d Cir. 1993); *United States v. Cruz-Jiminez*, 977 F.2d 95, 102 (3d Cir. 1992); *United States v. Kikumura*, 918 F.2d 1084, 1108 (3d Cir. 1990); *United States v. Everett*, 700 F. 2d 900, 903-04 (3d Cir. 1983).

Model Penal Code section 5.01(1)(c) provides: "A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the crime, he ... purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." Model Penal Code § 5.01(1)(c). *See, e.g., United States v. Earp*, 84 Fed. Appx. at 233; *United States v. Cruz-Jiminez*, 977 F.2d at 102. In *Cruz-Jiminez*, the Third Circuit stated that this definition requires the government to prove: "(1) the intent, or kind of culpability otherwise required, to engage in criminal conduct; and (2) conduct constituting a 'substantial step' toward the commission of the substantive offense that strongly corroborates the criminal intent." 997 F. 2d at 101-02 & n. 8. Although this language reflects the Model Penal Code's statement that the person must act "with the kind of culpability otherwise required for the commission of the crime," the Third Circuit has also stated that the mental state element for attempt is the intent to commit the offense the defendant is charged with attempting. *United States v. Garner*, 915 F.3d 167, 170 (3d Cir. 2021); (*See, United States v. Earp*, 84 Fed. Appx. at 234 (stating that the District Court's instruction "that the government was required to prove beyond a reasonable doubt that Earp had intended to commit each substantive offense" was "consistent with the law of attempt"); *United States v. Hsu*, 155 F.3d at 202 ("the defendant must (1) have the intent needed to commit a crime defined by the EEA"); *United States v. Dworken*, 855 F.2d 12, 16-17 (1st Cir. 1988), cited by, *e.g., United States v. Cruz-Jiminez*, 977 F.2d at 102 & n.8 ("'Conduct *designed* to cause or culminate in the commission of a crime obviously yields an indication that the actor is disposed towards such activity.". . . "Thus, the Code's standard for attempt is focused on discerning a significant intent or design to commit crime generally . . . . Under the Code's standard, individuals with serious criminal propensities are identifiable, and may be convicted, upon proof of two elements: (1) an intent to engage in criminal conduct and (2) conduct constituting a 'substantial step' toward the commission of the substantive offense that strongly corroborates the criminal intent.").

Proof of the Mental State Requirement. Third Circuit cases state that when the government's only evidence of a defendant's intent to commit the offense attempted is the conduct alleged to constitute the substantial steps towards commission of the offense, those steps must unambiguously or unequivocally show the defendant's intent. However, when the government presents other evidence of the defendant's intent besides the alleged substantial steps, those steps

need not unambiguously or unequivocally show the defendant's criminal intent, they need only strongly corroborate or confirm his or her intent. *See, United States v. Davis,* 985 F.3d 298, 302 – 303 (3d Cir. 2019); *United States v. Cruz-Jiminez*, 977 F.2d 95, 102 (3d Cir. 1992), citing *United States v. Dworken*, 855 F.2d 12, 17 & n.3 (1st Cir. 1988); *United States v. Everett*, 700 F.2d 900, 908-09 (3d Cir. 1983). The trial judge should instruct the jury on one or the other of these points depending on the nature of the evidence in the particular case.

Substantial Step. With respect to the "substantial step" element generally, *see, e.g., United States v. Earp*, 84 Fed. Appx. at 234 (citing cases from other circuits). The substantial step element is satisfied when a defendant takes a "tangible act" that "strongly corroborate[d] the firmness of the defendant's intent to carry out the substantive offense" *United States v. Gordon*, 710 F.3d 1124, 1152 (10th Cir. 2013) as cited in *United States* v. *Lee*, 701 Fed. Appx. at 184. In *Lee*, the Third Circuit found sufficient evidence to support the "substantial step" element of an attempt to obstruct conviction, noting that "the record shows that Lee took several substantial steps directed at obstructing justice. In particular, he told his cousin to retrieve his phone from the FBI and have someone wipe the data from it. When that did not happen, he then told his cousin to have the phone wiped remotely. He continued to ask his cousin if he had successfully had the phone wiped. And when his cousin refused to destroy the evidence as Lee demanded, Lee asked for the contact information for someone who could wipe the phone so that Lee himself could make the arrangements." 701 Fed. Appx at 184. See also *Martinez v. Attorney General*, 906 F.3d 281, 284 (3d Cir. 2018).

The Model Penal Code § 5.01(2) lists various typical acts that should not be held insufficient as substantial steps as a matter of law as long as they strongly corroborate criminal purpose, but the Third Circuit has not explicitly adopted this provision.

Defense of Impossibility. These model instructions do not include an instruction on the common law defense of impossibility. Under the common law, so-called "legal impossibility" was a defense to attempt, but "factual impossibility" was not. However, the distinction between the two types of impossibility has become largely semantic and, because the two types are often indistinguishable, most jurisdictions have abolished the legal impossibility defense. *United States v. Hsu*, 155 F.3d 189, 199 (3d Cir. 1998). *See Osborn v. United States,* 385 U.S. 323, 333 (1966) (Supreme Court questioned whether the doctrine of impossibility "with all its subtleties" had any "continuing validity" in the law of criminal attempt). In *Hsu*, the Third Circuit stated, "In fact, we are the only circuit which continues to recognize a common law defense of legal impossibility. We established its validity in *United States v. Berrigan*, 482 F.2d [171] at 190 [(3d Cir. 1973)], where we held that legal impossibility is a defense to certain crimes of attempt." 155 F.3d at 199-200. *Berrigan* held that legal impossibility was a defense to attempt to smuggle letters in and out of a federal prison without the knowledge and consent of the warden in violation of 18 U.S.C. § 1791. The Third Circuit recognized that the modern position is to eliminate the impossibility defense, but it nonetheless concluded that legal impossibility was a valid defense unless the specific federal statute involved provided otherwise.

In more recent cases, however, the Third Circuit "noted that *Berrigan* was a case of statutory interpretation, and we found that we should limit its reasoning to the particular law in that

case." *United States v. Hsu*, 155 F.3d at 200, referring to *United States v. Everett*, 700 F.2d 900, 908 (3d Cir. 1983). In these cases, the Third Circuit analyzed Congressional intent and concluded that Congress intended to eliminate the defense of impossibility for the statutory provisions defining the specific attempt crimes charged. *See, e.g., United States v. Tykarsky*, 446 F.3d 458, 465-69 (3d Cir. 2000) (attempt to persuade, etc., any person under the age of 18 to engage in prostitution or other criminal sexual activity, in violation of 18 U.S.C. § 2422(b)); *United States v. Hsu*, 155 F.3d at 199-203 (attempt to misappropriate trade secrets in violation of 18 U.S.C. § 1832(a)(4)); *United States v. Everett*, 700 F.2d at 904-09 (attempted distribution of a controlled substance in violation of 21 U.S.C. § 846). In support of these decisions, the Third Circuit analyzed the relevant statutory text, its purpose and legislative history, the potential damage to law enforcement if impossibility were a defense, and the fact that the statutes were enacted "at a time when 'the doctrine of impossibility had become mired in fine distinctions and had lost whatever acceptance at common law it may have possessed when the statute considered in *Berrigan* was first enacted in 1930.'" *United States v. Tykarsky*, 446 F.3d at 468. The Third Circuit also noted in *Tykarsky*, 446 F.3d at 466, that the purpose of the Model Penal Code's definition of attempt, which the Third Circuit has adopted, was to eliminate the legal impossibility defense. Thus, although *Berrigan* has not been overruled, the Third Circuit has clearly suggested that legal impossibility will be a defense in few if any other situations, only in what seem to be very rare cases in which, applying the analysis of *Everett*, *Hsu*, and *Tykarsky*, it is possible to find that Congress did not intend to eliminate the impossibility defense.

Abandonment (Renunciation). These instructions also do not include an instruction on abandonment as a defense to attempt. First, abandonment would be a defense to attempt if the defendant abandoned his or her intent to commit the crime before he or she took a substantial step toward its commission, because the government must prove beyond a reasonable doubt both that the defendant had the intent to commit the offense and that he or she performed conduct constituting a substantial step. This type of abandonment "defense" is covered by the instruction's explanation that the government must prove the elements of attempt beyond a reasonable doubt.

Second, the Model Penal Code provides an affirmative defense to attempt where the evidence proves that the defendant voluntarily and completely abandoned his or her attempt at some point in time after performing a substantial step, and defines when abandonment is voluntary and complete. Model Penal Code §5.01(4) ("[I]t is an affirmative defense that he abandoned his effort to commit the crime ... under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."). However, the Third Circuit does not seem to have adopted this defense or even discussed it except in the non-precedential opinion in *United States v. Davis*, 41 Fed Appx 566, 572-73 (3d Cir. 2002).

In *Davis*, responding to the defendant's argument that he had abandoned his attempt to receive a certain child pornography videotape, the Third Circuit stated:

> We have recognized, in *United States v. Kikumura,* 918 F.2d 1084, 1108 (3d Cir.1990), that Model Penal Code § 5.01 is representative of the 'well-settled principles of the law of attempts.' Assuming for the purposes of this opinion that the defense of abandonment is

available to Davis, that defense is only available if the asserted abandonment was voluntary. *See United States v. Shelton,* 30 F.3d 702, 706 (6th Cir.1994) ('[W]ithdrawal, abandonment and renunciation, however characterized, do not provide a defense to an attempt crime. As noted, the attempt crime is complete with proof of intent together with acts constituting a substantial step toward commission of the substantive offense.')....
Here, the only reason Davis did not receive [the tape] was that he was in the hospital. Following his return from the hospital he asked that it be re-sent. He eventually selected and received a different child pornography video. The district court properly found Davis guilty of attempting to possess child pornography." Also *see United States v. Dworken*, 855 F.2d 12, 20-22 (1st Cir. 1988).

(Revised 12/2021)

7.02 Accomplice Liability: Aiding and Abetting (18 U.S.C. § 2(a))

A person may be guilty of an offense*(s)* **because** *(he) (she)* **personally committed the offense***(s) (himself) (herself)* **or because** *(he) (she)* **aided and abetted another person in committing the offense. A person who has aided and abetted another person in committing an offense is often called an accomplice. The person whom the accomplice aids and abets is known as the principal.**

In this case, the government alleges that *(name of defendant)* **aided and abetted** *(name of alleged principal, if known)* **in committing** *(state offense(s))* **as charged in the indictment. In order to find** *(name of defendant)* **guilty of** *(state offense(s))* **because** *(he) (she)* **aided and abetted** *(name of alleged principal)* **in committing** *(this) (these)* **offense***(s)***, you must find that the government proved beyond a reasonable doubt each of following four (4) requirements:**

First: That *(name of alleged principal)* **committed the offense***(s)* **charged by committing each of the elements of the offense***(s)* **charged, as I have explained those elements to you in these instructions.** *((Name of alleged principal) need not have been charged with or found guilty of the offense(s), however, as long as you find that the government proved beyond a reasonable doubt that (he) (she) committed the offense(s)).*

Second: That *(name of defendant)* **knew that the offense***(s)* **charged** *(was) (were)* **going to be committed or** *(was) (were)* **being committed by** *(name of alleged principal)***, and**

Third: That *(name of defendant)* **knowingly did some act for the purpose of** *[aiding] [assisting] [soliciting] [facilitating] [encouraging] (name of alleged principal)* **in committing the specific offense***(s)* **charged and with the intent that** *(name of alleged principal)* **commit that** *[those]* **specific offense***(s)*, **and**

Fourth: That *(name of defendant)* **performed an act***(s)* **in furtherance of the offense***(s)* **charged.**

In deciding whether *(name of defendant)* **had the required knowledge and intent to satisfy the third requirement for aiding and abetting, you may consider both direct and circumstantial evidence including** *(name of defendant)***'s words and actions and the other facts and circumstances. However, evidence that** *(name)* **merely associated with persons involved in a criminal venture or was merely present or was merely a knowing spectator during the commission of the offense***(s)* **is not enough for you to find** *(name)* **guilty as an aider and abetter. If the evidence shows that** *(name)* **knew that the offense was being committed or was about to be committed, but does not also prove beyond a reasonable doubt that it was** *(name)***'s intent and purpose to** *[aid] [assist] [encourage] [facilitate]* **or otherwise associate** *(himself) (herself)* **with the offense, you may not find** *(name)* **guilty of the offense***(s)* **as an aider and abettor. The government must prove beyond a reasonable doubt that** *(name)* **in some way participated in the offense committed by** *(name of alleged principal)* **as something** *(name of defendant)* **wished to bring about and to make succeed.**

To show that *(name of defendant)* **performed an act*(s)* in furtherance of the**

offense*(s)* charged, to satisfy the fourth requirement, the government needs to show some affirmative participation by *(name)* which at least encouraged *(name of alleged principal)* to commit the offense. That is, you must find that *(name of defendant)*'s act*(s)* did, in some way, *[aid,] [assist,] [facilitate,] [encourage,] (name of alleged principal)* to commit the offense*(s)*. *(Name of defendant)*'s act*(s)* need not further *[aid,] [assist,] [facilitate,] [encourage,]* every part or phase *(or element)* of the offense*(s)* charged; it is enough if *(name of defendant)*'s act*(s)* further *[aid,] [assist,] [facilitate,] [encourage,]* only one *(or some)* part*(s)* or phase*(s) (elements)* of the offense*(s)*. Also, *(name of defendant)*'s acts need not themselves be against the law.

Comment

See 1A O'Malley et al., supra, § 18.01. For variations in other Circuits, *see* First Circuit §4.02, Fifth Circuit § 2.06, Sixth Circuit § 4.01, Eighth Circuit § 5.01, Ninth Circuit § 5.1.

18 U.S.C. § 2(a) provides:

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

Although some Third Circuit opinions conflate the elements of aiding and abetting liability into two or three, this instruction reflects the Third Circuit's more precise articulation of four elements in *United States v. Nolan*, 718 F.2d 589, 592 (3d Cir. 1983). *United States v. Centeno*, 793 F.3d 378, 387 (3d Cir. 2015) (Third Circuit affirmed the use of this instruction at trial on sufficiency grounds explaining that the government must prove "(1) that another committed a substantive offense; and (2) the one charged with aiding and abetting knew of the commission of the substantive offense and acted to facilitate it. United States v. Mercado, 610 F.3d 841, 846 (3d Cir. 2010). Additionally, we require proof that the defendant had the specific intent to facilitate the crime."); See also *United States v. Louis*, 596 Fed. Appx. 167, 172 (3d Cir. 2015) (non-precedential) (The government must prove that "the underlying crime occurred," that "the defendant knew of the crime," and "had the specific intent of facilitating" it, that is, "the defendant associated himself with the venture and sought by his actions to make it succeed.").

Ordinarily, where the principal is also being prosecuted for the offenses, the principal and the accomplice will be tried jointly. However, if the principal has not yet been prosecuted, or has been acquitted, or is not known, the trial judge should include the bracketed language in the *First* requirement. Also, if the alleged principal is known by name, the trial judge should use his or her name when referring to the principal in this instruction, but if the name of the alleged principal is not known, the judge should substitute "another person" or "the other person" for the name of the principal wherever that appears in this instruction. Finally, the judge should use the appropriate word(s) in describing the nature of the defendant's alleged participation (aid, assist, encourage, facilitate, etc), in accordance with the government's theory of the case.

Aiding and Abetting Compared to Co-conspirator's (*Pinkerton*) Liability. In *Nye & Nissen v. United States*, 336 U.S. 613 (1949), the Supreme Court explained: "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wished to bring about, that he seek by his action to make it succeed.' L. Hand, J., in *United States v. Peoni*, 100 F.2d 401, 402." 336 U.S. at 618. The Third Circuit has called this the "classic definition" of accomplice liability. *United States v. Nolan*, 718 F.2d at 591. The Supreme Court in *Nye & Nissen* also discussed the differences and similarities between accomplice liability and co-conspirator's liability under *Pinkerton v. United States*, 328 U.S. 640 (1946). See also *United States v. James Whitted*, 734 Fed.Appx. 90 (3d Cir. 2018) (non-precedential) ("A defendant is liable for substantive offenses committed by co-conspirators under a *Pinkerton* theory if (1) the defendant is a party to a criminal conspiracy, (2) one or more co-conspirators committed the substantive offense in furtherance of the conspiracy, and (3) commission of the substantive offense was reasonably foreseeable. *See United States v. Ramos*, 147 F.3d 281, 286 (3d Cir. 1998). In contrast, to be liable for aiding and abetting under federal law a defendant must '(1) take an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission.' *Rosemond*, 134 S.Ct. at 1245.")

Although a defendant may be guilty as an accomplice and also guilty of conspiracy, aiding and abetting and conspiracy are separate theories of criminal responsibility. *See, e.g., United States v. Nolan*, 718 F.2d at 594. A defendant may aid and abet the commission of an offense without conspiring with the principal, *United States v. Krogstad*, 576 F.2d 22, 29 (3d Cir. 1978), and a jury may acquit a defendant on a conspiracy charge yet convict on an aiding and abetting theory. *See, e.g., United States v. Van Scoy*, 654 F.2d 257, 263 (3d Cir. 1981); *United States v. McCrane*, 527 F.2d 906, 912 (3d Cir. 1975).

No Need to Indict for Aiding or Abetting. A defendant need not be indicted specifically as an aider and abettor (accomplice) in order to be convicted on that theory. *United States v. Donahue*, 885 F.2d 45, 48 (3d Cir. 1989). Aiding and abetting is implied in every indictment for a substantive offense. *United States v. Frorup*, 963 F.2d 41, 52 n.1 (3d Cir. 1992) (the Third Circuit also stated, as to the requirement that the accomplice must in fact render some aid or assistance to the principal, that aiding and abetting requires "some affirmative participation which at least encourages the principal offender to commit the offense," 963 F. 2d at 43 quoting *United States v. Raper*, 676 F. 2d 841, 850 (D.C. Cir. 1982)).

Conduct Requirement for Accomplice Liability. The "Fourth" requirement in this Instruction states the conduct element of accomplice liability (aiding and abetting). As the Supreme Court recognized in *Rosemond v. United States*, 570 U.S. 65, 134 S. Ct. 1240 (2014), "[t]he common law [and therefore 18 U.S.C. § 2(a)] imposed aiding and abetting liability on a person (possessing the requisite intent) who facilitated any part – even though not every part – of a criminal venture." 134 S.Ct at 1246. The amount of aid or assistance is immaterial; it is enough that the accomplice aided or otherwise helped bring about only one or some part, or phase, or element of the offense committed by the principal. In *Rosemond* specifically, the Court held that the defendant's conduct would be sufficient for aiding and abetting the compound or combination offense of using or carrying a firearm during and in relation to a crime of violence or drug trafficking offense (18 U.S.C. §924(c)) where the defendant's acts furthered the drug or violent crime part of the offense, even if he or she took no action with respect to the firearm part. *134 S.Ct.* at 1247-48. In *United States v. Centeno*, 793 F.3d at 387, the Third Circuit explained "There must, however, be 'more than associat[ion] with individuals involved in the criminal venture.' 'Neither mere presence at the scene of the crime nor mere knowledge of the crime is sufficient to support a conviction.' A defendant is not guilty of aiding and abetting an offense unless the defendant 'did something to forward the crime and was a participant rather than merely a knowing spectator.' " (citations omitted). *See also Ocasio v. United States*, __ U.S. __, __ - __, 136 S. Ct. 1423, 1431 n. 4 (2016) (In prosecution for transporting or causing a woman to be transported across state lines for an immoral purpose, "aiding or assisting requires more than mere 'consent' or 'acquiescence.' ").

This instruction is phrased in terms of "act(s)." A defendant may also be responsible as an accomplice (aider and abetter) based on his or her failure to act despite having a legal duty to act. When the government's theory is that the defendant was an accomplice through failure(s) to act or omission(s), the court should give Instruction 5.10 (Failure to Act, Omission).

Mental State Requirement for Accomplice Liability. As for the mental state element of accomplice liability, Third Circuit case law is clear that the defendant must know that the principal is committing or will commit an offense and must intend to aid the principal in some way. *United States v. Centeno*, 793 F.3d at 387; *United States v. Carbo*, 572 F.3d 112, 118 (3rd Cir. 2009) ("Our conclusion is merely an application of the rule that, 'in order to convict a defendant of aiding and abetting, the government must prove that "the defendant charged with aiding and abetting that crime knew of the commission of the substantive offense and acted with the intent to facilitate it." ' " Citing *United States v. Kemp,* 500 F.3d 257, 293 (3d Cir. 2007), quoting *United States v. Dixon,* 658 F.2d 181,189 n. 17 (3d Cir. 1981)). Indeed, the Third Circuit has specifically stated that, "When the charge of aiding and abetting is submitted to the jury, the court must include in its instructions that mere knowledge of the crime is insufficient to bring about a conviction." *United States v. Bey*, 736 F.2d 891, 895-96 (3d Cir. 1984). *See also United States v. Centeno*, 793 F.3d at 387. The requirement of intentional participation means that it must be the accomplice's purpose (conscious objective) or specific intent that the principal commit the offense and that the accomplice help bring it about. *See, e.g., United States v. Soto*, 539 F. 3d 191, 194-97 (3d Cir. 2008); *United States v. Wexler*, 838 F.2d 88, 92 (3d Cir. 1988); *United States v. Bey*, 736 F.2d at 895; *United States v. Newman*, 490 F.2d 139, 143 (3d Cir. 1974). As stated in Judge Learned Hand's oft quoted explanation in *United States v. Peoni*, 100 F. 2d 401, 402 (2d Cir. 1938), quoted in, e.g., *Nye & Nissen v. United States*, 336 U.S. 613, 618 (1949), the defendant

must wish to bring about the offense and desire that it succeed. *See, e.g., United States v. Bey*, 736 F.2d at 895; *United States v. Newman*, 490 F.2d at 143.

In *United States v. Centeno*, 793 F.3d 378, 387 (3d Cir. 2015), the Third Circuit found evidence sufficient to prove the defendants had the intent to aid and abet an assault because a "rational juror could infer at a minimum that their physical presence was intimidating, prohibited the victim's escape, or encouraged their friends to proceed in the assault and thus they were involved in the attack, The Centenos' conduct following the attack further supports a reasonable inference that they were participants. The Centenos fled the scene in the same car with the other three men immediately after the attack, and there is no evidence that they objected to the other three men leaving with them in Baldwin's car." 793 F 3d. at 387-88. Moreover, there was evidence that four days later, the defendants traveled together in the same car to approximately the same location, where a similar assault occurred. The Court reasoned that this evidence permitted a rational juror to find that the defendants '' 'acted with a method of operation as evidenced by a unique pattern,' and that it was less likely the [defendants] were 'merely knowing spectator[s]'" 793 at 388 [citation omitted].

In *United States v. Mercado*, 610 F.3d 841 (3d Cir. 2010), which the Third Circuit admitted was a close case, the court held "that a defendant's presence on multiple occasions during critical moments of drug transactions may, when considered in light of the totality of the circumstances, support an inference of the defendant's [intentional] participation in the criminal activity," "particularly . . . because [the principal] and [the defendant] switched cars on three occasions during the day; thus, [defendant] got out of one of [principal's] cars and chose to get into another car on three separate instances to continue accompanying [the principal] at important junctures during a prolonged drug transaction. . . . in conjunction with the phone call patterns, which establish[ed] [defendant's] association with [the principal]." 610 F.3d at 848-49. The court explained that:

> [W]e require proof that the defendant had the specific intent to facilitate the crime. *United States v. Garth,* 188 F.3d 99, 113 (3d Cir.1999). . . . We have emphasized that "facilitation" for aiding and abetting purposes is "'more than associat[ion] with individuals involved in the criminal venture.'" *Soto,* 539 F.3d at 194 (quoting *United States v. Dixon,* 658 F.2d 181, 189 (3d Cir.1981)). Rather, the defendant must "participate in" the criminal enterprise. *Id.* Neither mere presence at the scene of the crime nor mere knowledge of the crime is sufficient to support a conviction. *Id.* Thus, to convict for aiding and abetting, the Government must prove the defendant associated himself with the venture and sought by his actions to make it succeed. *United States v. Powell,* 113 F.3d 464, 467 (3d Cir.1997). The Government need only show some affirmative participation which, at least, encourages the principal offender to commit the offense. *United States v. Frorup,* 963 F.2d 41, 43 (3d Cir.1992). An aiding and abetting conviction can be supported solely with circumstantial evidence as long as there is a " 'logical and convincing connection between the facts established and the conclusion inferred.' " *Soto,* 539 F.3d at 194 (quoting *Cartwright,* 359 F.3d at 287).

United States v. Mercado, 610 F.3d at 846.

In *United States v. Peterson*, 622 F.3d 196 (3d Cir. 2010), the Third Circuit rejected the defendant's argument that, because its precedent stated that the government must prove the accomplice had the "specific intent" of facilitating the crime, the aiding and abetting instruction must contain the words "specific intent." The court reasoned that:

> [The] argument fails for two reasons. First, the district court used the Third Circuit's Model Criminal Jury Instructions § 7.02 for aiding and abetting. The district court's instruction on intent is taken verbatim from those model instructions. We have a hard time concluding that the use of our own model jury instruction can constitute error, and nothing that [defendant] says removes our doubt that use of such an instruction can constitute error. Moreover, [defendant] does not even contend that the model instruction is wrong. Second, we believe that the phrases "the defendant's intent and purpose to aid or otherwise associate himself with the offense" and "that the defendant in some way participated in the offense as something the defendant wished to bring about and make succeed" sufficiently informed the jury that it had to find that [defendant] had the specific intent to aid and abet the crime charged in the indictment.

622 F.3d at 208-09. *See also United States v. Berscht*, 370 Fed. Appx. 325, 329 (3d Cir. 2010) (non-precedential) (where the Third Circuit upheld an aiding and abetting instruction stated in the words of this instruction, without citing to the Model Instructions.).

The instructions also need to be clear that the accomplice must intend to aid and abet the specific offense or criminal scheme charged in the indictment. *See, e.g., United States v. Kemp*, 500 F.3d 257, 299-300 (3d Cir. 2007); *United States v. Dobson*, 419 F.3d 231, 236 (3d Cir.2005). In *Kemp* the Third Circuit concluded that the trial court's instructions "left no danger that [defendant] would be convicted for aiding and abetting some other scheme. Accordingly, we conclude that the instructions are consistent with *Dobson*'s teaching. . . ." The trial judge had instructed in *Kemp* that the government must prove "the defendant knowingly and deliberately associated himself or herself in some way with the crime charged and participated in it with the intent to commit the crime. . . [T]hat the defendant: First, knew that the crime charged was to be committed or was being committed. Second, knowingly did some act for the purpose of aiding the commission of that crime. And third, acted with the intention of causing the crime charged to be committed." 419 F.3d at 236. *See also United States v. Rawlins*, 606 F.3d 73, 80-82 (3d Cir. 2010) (evidence of the involvement of defendant (an airport baggage handler) in the cocaine conspiracy, including his tag-switching activities and serving as a lookout, supported a reasonable inference that defendant knowingly and intentionally aided and abetted possession of cocaine with intent to distribute).

Some Third Circuit opinions have also used "willfully" in describing the mental element. For example, in *United States v. Waller*, 607 F.2d 49, 51-52 (3d Cir. 1979), the Third Circuit rejected a challenge to an instruction which stated that it was "necessary that the accused willfully associate himself in some way with the criminal venture, and willfully participate in it, as he would in something he wishes to bring about; that is to say, that he willfully would seek, by some act or omission of his, to make the criminal venture successful." The defendant in *Waller* asserted that the instruction did not explicitly state that unknowing participation was insufficient, but the Third

Circuit responded that, "the trial judge's charge viewed in its entirety was a correct statement of the law. Having earlier stressed the requisite willfulness and intent for an aiding and abetting conviction, the trial judge's latter explanation was neither misleading nor erroneous." 607 F.2d at 52. Also *see, e.g., United States v. Bey*, 736 F.2d at 895 (rejecting defendant's contention that there was plain error in the jury charge because it did not include "willfully;" without stating specifically that "willfully" was required and defining "willfully" merely as "doing a voluntary, deliberate or intentional act;" the Third Circuit reasoned that the instructions were sufficient because "the trial court's charge makes clear that Bey's mere presence and knowledge of the crime would not constitute aiding and abetting, but on the contrary, that his intentional involvement was required."); *United States v. Newman*, 490 F.2d at 143 (concluding that it was error not to charge the jury that aiding and abetting required willful participation, where, "Consistent with the court's instructions, the jury might have convicted Garca on the basis of a conclusion that the defendant participated in the activities charged without knowing of their criminal objective. Unknowing participation is not sufficient to constitute an offense under the aiding and abetting statute. Rather, the government must prove beyond a reasonable doubt that the defendant participated in a substantive crime with the desire that the crime be accomplished.").

It is not clear, however, whether the Third Circuit used the word "willfully" in these cases simply to require a purpose or an intent to bring about the principal's commission of an offense, or also to require that the alleged accomplice must be aware that the principal's conduct was against the law and have a "bad purpose" to violate or disobey the law. *See* Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 Ford. L. Rev. 1341, 1425 (2002) (concluding that the federal circuits have defined the mental state required for accomplice liability in several different ways, including specific intent or purpose to bring about commission of the offense and bad purpose to disobey the law (what is often called willfully); noting a distinction between the language of the aiding and abetting section,18 U.S.C.§ 2(a), which does not include an explicit mens rea, and 18 U.S.C. § 2(b), prohibiting causing another to commit a crime, which explicitly requires that the defendant "willfully cause").

This distinction may seem a fine one, and it is an issue in few cases. One consequence of the distinction is that mistake or ignorance of the law would disprove the mental state requirement if bad purpose to violate the law is required (*see* Instruction 5.05 (Willfully) and Comment), but would not disprove the mental state requirement where purpose only to bring about commission of the offense is used. The Third Circuit has recognized that, "with respect to most specific-intent crimes . . . ignorance of the law is no excuse. There is an exception to this rule, however, when intent to violate a legal duty is an element of a crime." *United States v. Carbo*, 572 F.3d 112, 116, 117-18 (3d Cir, 2009) (footnote omitted) (Holding that, "when a private citizen is charged with aiding and abetting or conspiracy to commit honest services fraud by a public official, the prosecution must prove that the defendant knew that the public official was required by law to disclose the conflict of interest. Without the knowledge that the failure to disclose the conflict of interest is illegal, we cannot be certain that the defendant formed the specific intent to defraud the public.")

In the model instruction we avoid this confusion by not using the word "willfully" and by explaining the mental state requirement in the traditional sense of specific intent or purpose.

Scope of Accomplice Responsibility for Additional Offenses. Once the government proves the defendant was an accomplice to an offense, the scope of the defendant's responsibility for additional offenses is often said to depend on application of the "natural and probable consequences doctrine." Under this doctrine, an accomplice is responsible for all crimes committed by the principal that were the "natural and probable consequence" of the crime aided and abetted. This doctrine for accomplice liability has a "close counterpart in the well-established *Pinkerton* doctrine" for co-conspirator's liability. Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 Ford. L. Rev. 1341, 1425 (2002). Indeed, the "natural and probable consequences doctrine" and the *Pinkerton* doctrine would seem to be essentially the same. *See* Instruction 7.03 regarding the *Pinkerton* doctrine.

Although the federal courts, like their state counterparts, are split on the acceptability of the "natural and probable consequences doctrine," one commentator noted that, "[m]ost of the circuits have adopted, or at least recognized the existence of" the doctrine. Weiss, 70 Ford. L. Rev. at 1425.. In *United States v. Green*, 25 F.3d 206, 209 (3d Cir.1994), the Third Circuit only recognized the existence of the doctrine, but did not decide whether to adopt it. That was unnecessary in *Green*, because the additional offense there was not in any event the natural and probable consequence of the offense aided and abetted. *See* Weiss, 70 Ford. L. Rev at 1425, n. 388. The Third Circuit stated, "Whatever the scope of the doctrine of foreseeability in connection with aiding and abetting generally, *compare* view set out in Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 6.8(b), at 157 (1986) ("accomplice liability extends to acts of the principal in the first degree which were a 'natural and probable consequence' of the criminal scheme the accomplice encouraged or aided") *with* that at *id.* at 158 (" 'natural and probable consequences' rule of accomplice liability ... is inconsistent with more fundamental principles of our system of criminal law," the view adopted by the Model Penal Code), we believe it inapplicable here." 25 F.3d at 209.

In addition to being split on the acceptability of this rule, the circuits also disagree on its meaning – what is the standard for determining natural and probable or foreseeable consequences? *See* Weiss, 70 Ford. L. Rev at 1424-36. Because the Third Circuit has not adopted the natural and probable consequences doctrine, this point is not covered in the model instruction.

Accomplice Liability (Aiding and Abetting) Instructions in Cases Charging 18 U.S.C. §924(c) Offenses. With respect to accomplice liability (aiding and abetting) in the context of an 18 U.S.C. §924(c) Offense, see Instruction 6.18.924C (Aiding and Abetting 924(c) Violation) which addresses the requirements set forth by the Supreme Court held in *Rosemond v. United States*, 570 U.S. 65, 134 S. Ct. 1240, 1243 (2014).

(Revised 1/2024)

7.03 Responsibility For Substantive Offenses Committed By Co-Conspirators (*Pinkerton* Liability)

Count*(s) (no.)* **of the indictment charge***(s)* **that on or about the___ day of _____, 2__, in the _____ District of _____,** *(name of defendant)* **committed** *(state offense(s))***.**

The government may prove *(name)* **guilty of** *(this) (these)* **offense***(s)* **by proving that** *(name)* **personally committed it** *(them)***. The government may also prove** *(name)* **guilty of** *(this) (these)* **offense***(s)* **based on the legal rule that each member of a conspiracy is responsible for crimes and other acts committed by the other members, as long as those crimes and acts were committed to help further or achieve the objective of the conspiracy and were reasonably foreseeable to** *(name)* **as a necessary or natural consequence of the agreement. In other words, under certain circumstances the act of one conspirator may be treated as the act of all. This means that all the conspirators may be convicted of a crime committed by any one or more of them, even though they did not all personally participate in that crime themselves.**

In order for you to find *(name)* **guilty of** *(state offense(s))* **charged in Count***(s) (no.)* **based on this legal rule, you must find that the government proved beyond a reasonable doubt each of the following four (4) requirements:**

First: That *(name)* **was a member of the conspiracy charged in the indictment;**

Second: That while *(name)* **was still a member of the conspiracy, one or more of the other members of the conspiracy committed the offense***(s)* **charged in**

Count*(s) (no)***, by committing each of the elements of** *(that) (those)* **offense***(s)***, as** *(I explained) (will explain)* **those elements to you in these instructions.**

[However, the other member(s) of the conspiracy need not have been found guilty of (or even charged with) the offense(s), as long as you find that the government proved beyond a reasonable doubt that the other member(s) committed the offense(s).]

Third: That the other member*(s)* **of the conspiracy committed** *(this) (these)* **offense***(s)* **within the scope of the unlawful agreement and to help further or achieve the objective***(s)* **of the conspiracy; and**

Fourth: That *(this) (these)* **offense***(s) (was) (were)* **reasonably foreseeable to or reasonably anticipated by** *(name)* **as a necessary or natural consequence***(s)* **of the unlawful agreement.**

The government does not have to prove that *(name)* **specifically agreed or knew that** *(this) (these)* **offense***(s)* **would be committed. However, the government must prove that the offense***(s) (was) (were)* **reasonably foreseeable to** *(name)***, as a member of the conspiracy, and within the scope of the agreement as** *(name)* **understood it.**

[As I have instructed you, in order to prove that (name) was a member of the conspiracy charged in the indictment, the government must prove that (name) knew of the objective(s) of the conspiracy to commit an offense(s) against the United States, namely the offense(s) of (state the offense(s) alleged as the object(s) of the conspiracy), and intended

to join together with at least one other alleged conspirator to achieve (that) (these) objective(s). However, for you to find name guilty of (state offense(s)) charged in Count(s) (no.) based on the rule that each member of a conspiracy is responsible for crimes committed by the other members, the government does not have to prove that (name) specifically agreed or knew that (this) (these) offense(s) would be committed, as long as the government proves that the offense(s) (was) (were) reasonably foreseeable to (name), as a member of the conspiracy, and within the scope of the agreement as (name) understood it.]

Comment

See 1A O'Malley et al., supra, § 31.10. For variations in other Circuits, *see* Fifth Circuit § 2.22, Sixth Circuit § 3.10, Seventh Circuit § 5.09 & 5.10, Ninth Circuit § 8.20.

The *Pinkerton* doctrine applies to conspiracies charged under the general conspiracy statute, 18 U.S.C. § 371, and also under specific conspiracy statutes. *See, e.g., United States v. Applewhaite*, 195 F.3d 679 (3d Cir. 1999) (general conspiracy § 371); *United States v. Turcks*, 41 F.3d 893 (3d Cir. 1994) (conspiracy to commit access device fraud under 18 U.S.C. § 1029(b)(2)); *United States v. Gonzalez*, 918 F.2d 1129 (3d Cir. 1990) (conspiracy to commit federal drug offenses under 21 U.S.C. § 846); *United States v. American Investors of Pittsburgh, Inc.*, 879 F.2d 1087 (3d Cir. 1989) (general conspiracy to defraud the United States under § 371). *Pinkerton v. United States*, 328 U.S. 640 (1946), was tried under 18 U.S.C. § 88, the predecessor to 18 U.S.C. § 371.

A member of a conspiracy is liable for the substantive crimes committed by co-conspirators in furtherance of the conspiracy, even if the member neither participates in the co-conspirators' crimes nor has any knowledge of them . *United States v. Bailey,* 840 F.3d 99 (3d Cir. 2016); *United States v. Fattah*, 914 F.3d 112, 169 (3d Cir. 2019). The Third Circuit has sometimes said that there are three exceptions to the *Pinkerton* rule: that the substantive offense was not within the scope of the unlawful project; or that the offense was not committed in furtherance of the conspiracy; or that the offense was not reasonably foreseeable to the defendant. *United States v. Bailey,* 840 F.3d 99 (3d Cir. 2016); *United States v. Fattah*, 914 F.3d 112, 169 (3d Cir. 2019, *United States v. Gonzalez*, 918 F.2d 1129, 1135 (3d Cir. 1990), citing *Pinkerton*, 328 U.S. at 647-48. However, these "exceptions" are merely statements of situations in which the evidence does not prove the requirements of the rule. The trial judge should be careful to consider

these requirements or exceptions in deciding when to give a *Pinkerton* instruction. See also *U.S. v. Dozier*, 572 Fed. Appx. 156 (3d Cir. 2014) (non-precedential) (Although the trial court instructions did not recite each element in the fashion set forth in the Third Circuit Model Instructions, the instructions did specify the necessary elements and, as such, there was no plain error.) The trial judge must be careful to explain that the defendant can be convicted of substantive offenses under the *Pinkerton* doctrine only if a co-conspirator committed the offenses "both 'in furtherance of' *and* 'as a foreseeable consequence of' the conspiracy." Thus, in *United States v. Turcks*, 41 F.3d 893, 897-98 (3d Cir. 1994), the Third Circuit held that the trial judge erred in using the disjunctive "or" rather than the conjunctive "and," thereby failing to make clear that both prongs of the *Pinkerton* doctrine had to be met, though the Court ultimately held the error was harmless.

To be guilty of conspiracy to commit an offense against the United States, the evidence must prove that the defendant "joined the agreement or conspiracy knowing of its objective*(s)* to commit an offense*(s)* against the United States and intending to join together with at least one other alleged conspirator to achieve *(that) (those)* objective*(s).*" Instruction 6.18.371A (Conspiracy to Commit an Offense Against the United States Basic Elements (18 U.S.C. § 371)). However, to be guilty of a substantive offense committed by a co-conspirator that was not the objective of the conspiracy, the defendant need not know of that offense before it is committed; that offense need only be in furtherance of and within the scope of the conspiracy, and reasonably foreseeable as a necessary or probable consequence of the conspiracy. If the trial judge is concerned that this difference might confuse the jury, the judge may give the bracketed alternative final paragraph of this instruction.

In *Gonzalez*, the Third Circuit rejected a rule or presumption that carrying a firearm during a drug deal was foreseeable, noting that "the very term 'foreseeability' implies a prediction about uncertain events in terms of probability.... We should, however, be wary of importing into criminal law the expansive notions the term foreseeability has acquired from its talismanic use in defining duty for purposes of liability in tort." 918 F.2d at 1136 n.5. Further, "reasonable foreseeability" under the *Pinkerton* doctrine means that the substantive offense must have been reasonably foreseeable to the defendant as a necessary or natural consequence of the conspiracy. *See* 918 F.3d. at 1136. It is not enough that the offense may be reasonably foreseeable to the jury; the jury must find beyond a reasonable doubt that the offense was reasonably foreseeable to the defendant. See also *U.S. v. Whitted*, 304 Fed. Appx. 52 (3d Cir. 2008) (non-precedential) (evidence that defendant knew that coconspirator generally was armed when they purchased cocaine, and defendant usually asked if coconspirator had his firearm with him was sufficient to permit a jury find it was reasonably foreseeable to that coconspirator would use the firearm in furtherance of a drug trafficking crime.)

If the other member(s) of the conspiracy alleged to have committed the substantive offense(s) have not yet been prosecuted or charged, or has (have) been acquitted, or is (are) not known, the trial judge should include the bracketed language within the second requirement.

Conspiracy Need Not Be Charged for *Pinkerton* Liability. In *United States v. Lopez*, 271 F.3d 472 (3d Cir. 2001), the Third Circuit held that, "[[i]t is not required that a conspiracy be

charged in the indictment for *Pinkerton* liability to apply, as long as the evidence at trial establishes beyond a reasonable doubt that a conspiracy existed and that the substantive offense was committed in furtherance of the conspiracy." 271 F.3d at 480-81. ("Though this is our first opportunity to address this issue, we have little difficulty following our sister circuit courts of appeals in determining that a conspiracy need not be charged in order for *Pinkerton's* doctrine to apply.") (citations omitted). The instruction provided here assumes that the indictment does charge conspiracy. In cases where the government asserts *Pinkerton* co-conspirator's responsibility without a separate conspiracy charge, the trial judge should modify the *First* requirement to state: "*First*, a conspiracy existed and *(name)* was a member of that conspiracy," and should also give the jury Instructions with respect to the elements of conspiracy. *See* Instructions 6.18.371A-6.18.371K.

(Revised 12/2021)

7.04 Withdrawal as a Defense to Substantive Offense Committed by Co-conspirators

(Name) **has argued that** ***(he) (she)*** **is not guilty of** ***(state offense)*****, which was allegedly committed by** ***(his) (her)*** **co-conspirator, because** ***(name)*** **withdrew from the conspiracy before the co-conspirator committed that offense. If you find, based on the evidence, that** ***(name)*** **withdrew from the conspiracy before** ***(his) (her)*** **co-conspirator committed** ***(state offense)*****, then you must find** ***(name)*** **not guilty of that offense.**

In order to withdraw from the conspiracy, ***(name)*** **must have taken some clear, definite and affirmative action to terminate** ***(his) (her)*** **participation, to abandon the illegal objective, and to disassociate** ***(himself) (herself)*** **from the agreement. Withdrawal requires proof that** ***(name)*** **changed** ***(his) (her)*** **intent about participating in the agreement. If the evidence only shows that** ***(name)*** **stopped activities in furtherance of the conspiracy, or stopped cooperating with the conspiracy, or merely was inactive for a period of time, that is not enough to find that** ***(name)*** **withdrew from the conspiracy.**

(Name) **has the burden of proving by a preponderance of the evidence that** ***[he] [she]*** **withdrew from the conspiracy before a co-conspirator committed the offense***(s)* **charged in the indictment. Preponderance of the evidence is a lower standard than proof beyond a reasonable doubt. To prove something by a preponderance of the evidence means to prove that it is more likely true than not true. If you put the**

credible evidence that is favorable to *(name)* and the credible evidence that is favorable to the government on opposite sides of a scale, the scale would have to tip somewhat on *(name's)* side in order for you to find that *(name)* is not guilty because of withdrawal before a co-conspirator committed the offense*(s)* charged in the indictment. However, if the scale tips in favor of the government, or if the credible evidence appears to be equally balanced, or if you cannot say on which side the credible evidence is heavier, then you must decide that *(name)* has not proved the defense of withdrawal before commission of the offense*(s)* charged by a preponderance of the evidence. In making this determination, you should consider all of the evidence presented during the trial, regardless of who offered it. You should evaluate the evidence and its credibility according to the instructions I gave you earlier.

You should also remember that the fact that *(name)* raised this defense does not relieve the government of the burden of proving all the elements of the offense*(s)* charged beyond a reasonable doubt.

Comment

See 2 O'Malley et al., supra, § 31.11. For variations in other Circuits, *see* Sixth Circuit § 3.11B.

For instructions on withdrawal as a defense to the crime of conspiracy, *see* Instructions 6.18.371J-1 (Withdrawal Before the Commission of an Overt Act as a Defense to Conspiracy) and 6.18.371J-2 (Withdrawal as a Defense to Conspiracy Based on the Statute of Limitations). The Comment to Instruction 6.18.371J-1 discusses the "withdrawal defense" generally, and is relevant to the present instruction.

Burden of Proof. As discussed in the Comments to Instructions 6.18.371J-1 and J-2, before the Supreme Court's decision in *Smith v. United States*, 568 U.S. 106, 133 S. Ct. 714 (2013), this instruction stated that the government had the burden of proof on withdrawal in accordance with Third Circuit case law. *See, e.g., United States v. Antar*, 53 F.3d 568, 582 (3d Cir. 1995); *United States v. Jannotti*, 729 F.2d 213, 221 (3d Cir. 1984); *United States v. Steele*, 685 F.2d 793, 803-04 (3d Cir.1982); *United States v. Detelich*, 351 Fed. Appx. 616, 620 (3d Cir. 2009) (non-precedential).

However, in *Smith* (a case in which the offenses charged were conspiracy to distribute and possess with intent to distribute controlled substances under 21 U.S.C. § 846 and conspiracy to violate RICO under 18 U.S.C. § 1962(d)), the Supreme Court held that when the defendant asserts that he withdrew from the conspiracy and then the statute of limitations ran before his indictment, this is an affirmative defense to conspiracy that the defendant has the burden of proving. Accordingly, the Court affirmed the district court's instruction that " '[o]nce the government has proven that a defendant was a member of a conspiracy, the burden is on the defendant to prove withdrawal from a conspiracy by a preponderance of the evidence.' " 133 S. Ct. at 718.

Smith did not involve withdrawal as a defense to a substantive offense committed by a co-conspirator, and one might argue that the Court's reasoning would not also apply in this situation. *See* Comment to Instruction 6.18.371J-1 with respect to the burden of proof on withdrawal before the commission of an overt act. However, dicta in the Court's opinion might suggest that if faced with this situation the Court would hold that the burden of proof regarding withdrawal is also on the defendant. Thus, the Court stated, albeit in the context of the intersection of a withdrawal defense and a statute-of-limitations defense, that, "[e]stablishing withdrawal was a burden that firmly rested on the defendant *regardless of when the purported withdrawal took place*." 133 S.Ct. at 719 (emphasis added). More specifically with respect to responsibility for offenses committed by co-conspirators, the Court noted that, "conspiracy is a continuing offense" and once the government proves the elements of the conspiracy "he becomes responsible for the acts of his co-conspirators in pursuit of their common plot." 133 S.Ct. at 719., citing *Pinkerton v. United States*, 328 U.S. 640, 646 (1946). *See* Instruction 7.03 (Responsibility for Substantive Offenses Committed by Co-Conspirators (*Pinkerton* Liability)).

As a result, to be safe, this instruction places the burden on the defendant to prove, by a preponderance of the evidence, withdrawal before a co-conspirator committed the substantive offense(s) charged.

(Revised 11/2018)

7.05 Causing the Criminal Acts of Another (18 U.S.C. § 2(b))

A person may be guilty of an offense because *(he) (she)* **personally committed the offense** *(himself) (herself)* **or because** *(he) (she)* **willfully caused** *(another person)* **to commit acts which would constitute the offense if the acts had been performed by** *(him) (her)* **directly.**

In this case, *(name of defendant)* **is charged with** *(state offense(s))* **because** *(he) (she)* **is alleged to have caused** *(name of other person defendant allegedly caused to commit the acts)* **to commit acts which would constitute** *(state offense(s))* **if the acts had been performed by** *(name of defendant)* **directly. To find** *(name of defendant)* **guilty of** *(this) (these)* **offense***(s)* **because** *(he) (she)* **caused** *(name of other person)* **to commit the act***(s)* **constituting the offense***(s)***, you need not find that** *(name of defendant)* **committed any of the acts** *(himself) (herself)***. You must, however, find that the government proved beyond a reasonable doubt each of the following three (3) requirements:**

First: That acts constituting the offense*(s)* **charged were committed by** *(name of other person)***;**

Second: That *(name of defendant)* **had the mental state required for the offense that** *(he) (she)* **caused** *(name of other person)* **to commit. In this case that means the government must prove beyond a reasonable doubt that** *(name)* **acted** *(state the mental state required for the offense charged)***; and**

Third: That *(name)* **willfully caused** *(name of other person)* **to commit the acts**

constituting *(state offense charged)*. **In this case that means the government must prove beyond a reasonable doubt that** *(name)* **willfully caused** *(name of other person)* **to** *(state the acts required for the offense charged)*. **To find that** *(name)* **"caused" this other person to commit those acts, you must find that the government proved beyond a reasonable doubt that** *(name)* **brought about those acts.**

As I stated, the government must prove beyond a reasonable doubt that (*name of other person*) **committed the acts constituting the offense. However, it is not necessary for you to find that** (*name of other person*) **is** *(himself) (herself)* **guilty of the offense as a matter of criminal law. For example, there may be a situation in which a person commits all of the acts which comprise a federal crime, but is not responsible for the crime because of, for example, mental impairment or youth, or is not guilty of the crime because he or she acted innocently, and did not have the mental state required to commit that crime. Nevertheless,** *(name)* **may be guilty of causing that crime, under the instructions I have given to you, where** *(name)* **did intend that the crime be committed and willfully caused the criminal acts to be committed by another person. Thus, to find** *(name)* **guilty of causing another person to commit a crime, it is not necessary that this other person be found guilty of a crime, be charged in the indictment, or even be known, so long as you find beyond a reasonable doubt that** *(name)* **willfully caused the other person to commit the offense.**

Comment

For variations in other Circuits, *see* Seventh Circuit § 5.06, Eighth Circuit § 5.02.

18 U.S.C. § 2(b) provides:

> 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.

Causing Another to Commit Crime; Not Accomplice Liability. This section states a theory of criminal responsibility for the acts of another that is different from aiding and abetting (accomplice liability) under 18 U.S.C. § 2(a). In giving this instruction the court should name the person whom the defendant allegedly caused to commit the acts, if that person is known; otherwise, the court should simply refer to him or her as "the other person."

Unlike accomplice liability, criminal responsibility for causing the acts of another does not require that the government prove that the other person committed an offense. Indeed, 18 U.S.C. § 2(b) often applies where the defendant caused an innocent person or intermediary (*e.g.,* one without the mental state required for the offense) to commit the acts that would constitute the offense. Thus, causing responsibility is imposed when the "actor" is a child, a mentally impaired person, someone acting under duress, someone who was duped and who believed his or her acts were innocent, etc.

Where the government alleges that the defendant is responsible on alternative theories, aiding and abetting and causing acts of another, the trial judge should give both this instruction and Instruction 7.02 (Accomplice Liability; Aiding and Abetting), and the judge should explain carefully the differences between the two theories.

Mental State Requirements. This theory of responsibility has two mental state requirements: the defendant must willfully cause another person to commit the acts constituting the offense charged, and the defendant must also have the mental state required for that offense. *See, e.g., United States v. Smukler*, 991 F3d 472 (3d Cir. 2021); *United States v. Wright*, 363 F.3d 237 (3d Cir. 2004); *United States v. Gumbs*, 283 F.3d 128 (3d Cir. 2002); *United States v. Krogstad*, 576 F.2d 22 (3d Cir. 1978); *United States v. Catena*, 500 F.2d 1319 (3d Cir. 1974). Thus, the Third Circuit stated in *United States v. Gumbs*, 283 F.3d at 134:

> Section 2(b) imposes liability on a defendant who does not himself commit the prohibited *actus reus*, but intentionally manipulates an innocent intermediary to commit the prohibited *actus reus*:
>
> > It is but to quote hornbook law to say that in every crime there must exist a union or joint operation of act, or failure to act, and intent. However, this is far from suggesting that the essential element of criminal intent must always reside in the person who does the forbidden act. Indeed, the latter may act without any criminal intent whatever, while the *mens rea* – "willfulness"-- may reside in a person wholly

> incapable of committing the forbidden act. When such is [the] case, as at bar, the joint operation of act and intent prerequisite to commission of the crime is provided by the person who willfully causes the innocent actor to commit the illegal act. And in such a case, of course, only the person who willfully causes the forbidden act to be done is guilty of the crime.
>
> *United States v. Lester,* 363 F.2d 68, 73 (6th Cir.1966), *quoted in United States v. American Investors of Pittsburgh, Inc.,* 879 F.2d 1087, 1095 (3d Cir.1989). Consistent with these principles, we read § 2(b) as establishing two general *mens rea* elements. First, to be guilty under § 2(b), a defendant must possess the *mens rea* required by the underlying criminal statute that the defendant caused the intermediary to violate, in this case § 287. *See United States v. Curran,* 20 F.3d 560, 567 (3d Cir.1994). ... In addition to requiring the defendant to possess the mental state necessary to violate the underlying statute, § 2(b) also requires the defendant to possess the intent to cause the act prohibited by the underlying statute. This element arises from the explicit requirement in § 2(b) that the defendant "willfully" cause the prohibited *actus reus*....

The Third Circuit has recognized a heightened "willfully" standard in cases involving causing a person to violate his or her disclosure obligations that arise from a complex and technical statutory or regulatory code. See *United States v Smukler*, 991 F.3d at 484 – 488. Thus, in *United States v. Curran*, 20 F.3d 560, 567-69 (3d. Cir. 1994), where defendant was charged with causing campaign officials to file campaign contributor lists which falsely concealed the true source of contributions, the Third Circuit held that the prosecution was required to "prove that defendant knew of the treasurers' reporting obligations, that he attempted to frustrate those obligations, and that he knew his conduct was unlawful" to satisfy the "willful" requirement under 18 U.S.C. § 2(b) and 18 U.S.C §1001). *Also see, United States v. Barel*, 939 F.2d 26, 43 (3d Cir. 1991) (conviction for causing employees to file false entries in bank records, in violation of 18 U.S.C. § 1105, reversed because government failed to prove that defendant had specific intent to cause bank to violate federal law). However, in *United States v. Smukler*, 991 F.3d 472, 486 - 488(3d Cir. 2021), the Third Circuit made clear that these cases do not require a heightened requirement in other contexts.

When the trial court instructs on causing the criminal acts of another under 18 U.S.C. § 2(b), the court should also define "willfully" by giving Instruction 5.05, which states the general definition of willfully.

(Revised 12/2021)

7.06 Corporate Criminal Responsibility

A corporation is a legal entity that may act only through individuals who are called its agents. The agents of a corporation are its officers, directors, employees, and other persons who are authorized by the corporation to act for it.

You must give to a corporate defendant the same impartial consideration of the evidence that you would give to an individual defendant. You may find a corporate defendant guilty or not guilty of the offense charged under the same instructions that apply to an individual.

The legal responsibility of a corporation, if any, is based on the conduct of its agents. *[In this case, the government alleges that those agents were (name(s) of agent) (type(s) of agents).]*

To find *(name of corporate defendant)* **guilty of** *(state offense(s) charged)***, as charged in Count** *(no.)* **of the indictment, you must find that the government proved beyond a reasonable doubt each of the following three (3) requirements:**

First: That each of the elements of *(state offense(s) charged)* **was committed by an officer, director, employee, or other agent of** *(name of corporate defendant)***. I** *(will explain) (have explained)* **in these instructions the elements of** *(state offense(s) charged)***.**

Second: That each of the acts committed by *(state the name of the agent or the type of agent alleged to have committed the acts)* **were within the course and scope of the employment or agency given to** *(name of agent) (type of agent)* **by**

(name of corporate defendant); **and**

Third: That *(name of agent) (type of agent*) **committed each of these acts with the intent to benefit** *(name of corporate defendant)*.

In order to find that an act was committed within the course and scope of the employment or agency given to *(name of agent) (type of agent)*, **the evidence must prove that the act related directly to the general duties that** *(name of agent) (this type of agent)* **was expected to perform by** *(name of corporate defendant)*. **However, the government does not need to prove that the act was authorized by** *(name of corporate defendant)* **formally or in writing.**

[If the acts were not within the course and scope of employment or agency of (name of agent) (type of agent) at the time the acts were committed, the acts of (name) (type) may have been later approved or adopted by (name of corporate defendant). An act of an agent has been approved or adopted by the corporation if another agent of the corporation, who was acting within the course and scope of (his) (her) employment or agency and with the intent to benefit (name of corporate defendant), later approved the earlier act with knowledge of the earlier act.]

(Name of agent) (Type of agent) **was not acting within the course and scope of** *(his) (her)* **employment if that person performed an act which** *(name of corporate defendant)*, **in good faith, had forbidden** *(name of agent) (type of agent*) **to perform. A corporate defendant is not responsible for acts which it tries to prevent. However, a corporate defendant, like an individual defendant, may not avoid criminal**

responsibility by meaningless or purely self-serving pronouncements.

Comment

See 1A O'Malley et al., supra, § 18.05. For other Circuit instructions on the point, *see* Eighth Circuit §5.03.

A corporation acts through its agents and employees. It is criminally responsible for those acts when the agent's or employee's acts were within his or her authority and within the course of his employment, that is, performed with the intention of benefitting the employer. *United States* v. *American Radiator & Standard Sanitary Corp*., 433 F.2d 174, 204 – 205 (3d Cir. 1970), cert. denied, 401 U.S. 948, 91 S.Ct. 929, 28 L.Ed.2d 231 (1971).

The bracketed alternative language in paragraph 3 allows the trial judge to identify the name or type of agent alleged to have committed the criminal act(s). This choice is also presented in succeeding paragraphs. *(Type of agent)* would require the trial judge to state the particular type of agent or agents – director, officer, employee, etc. – who is or are alleged to have acted on the corporate defendant's behalf in the case.

Paragraph 4 refers to the elements of the offense(s) charged; these will be explained in separate instructions related specifically to those offenses.

The bracketed language in paragraph 6 should only be given when the evidence shows that the agent's acts or omissions were not within the course or scope of employment or agency when committed, but were later approved or adopted by another agent of the corporate defendant.

This instruction is phrased in terms of "act(s)." If the government's theory is that the defendant committed the offense charged through failure(s) to act or omission(s), Instruction 5.10 should be given.

(Revised 1/2024)

7.07 Personal Criminal Responsibility of A Corporate Agent

A person is personally responsible under the criminal law for acts *(he) (she)* **performs or causes to be performed on behalf of a corporation, just the same as if** *(he) (she)* **performed those acts on** *(his) (her)* **own behalf.**

However, a person who is a *(state the type of agent alleged to have committed the acts)* **of a corporation is not criminally responsible for illegal acts committed by another agent on behalf of that corporation merely because of** *(his) (her)* **status as an** *(type of agent)* **of the corporation** *[, unless the defendant had, by reason of (his)(her) position in the corporation, responsibility and authority either to prevent in the first instance, or promptly correct, the violation complained of, and failed to do so]***.**

Comment

See 1A O'Malley et al., supra, § 18.04. For other Circuit instructions on the point, *see* Eighth Circuit §5.04.

(Type of agent) requires the trial judge to state the particular type of agent or agents – director, officer, employee, etc. – who is or are alleged to have acted on the corporate defendant's behalf.

Responsible Corporate Agent Doctrine; Liability for Failure to Prevent Violations of the Law. The bracketed language at the end of the Instruction should be used in those cases in which the "responsible corporate agent" doctrine applies. The Supreme Court recognized in *United States v. Park*, 421 U.S. 658 (1975), and *United States v. Dotterweich*, 320 U.S. 277 (1943), that with respect to certain federal statutes that impose criminal liability without any mental state requirement, responsible corporate officers or agents may be held criminally liable without performing any acts, but instead for failing to prevent violations of the law. Thus, in *Park* the Court observed:

> [T]he principle had been recognized that a corporate agent, through whose act, default, or omission the corporation committed a crime, was himself guilty individually of that crime. The principle had been applied whether or not the crime required "consciousness of wrongdoing," and it had been applied not only to those corporate agents who themselves

committed the criminal act, but also to those who by virtue of their managerial positions or other similar relation to the actor could be deemed responsible for its commission.

In the latter class of cases, the liability of managerial officers did not depend on their knowledge of, or personal participation in, the act made criminal by the statute. Rather, where the statute under which they were prosecuted dispensed with "consciousness of wrongdoing," an omission or failure to act was deemed a sufficient basis for a responsible corporate agent's liability. It was enough in such cases that, by virtue of the relationship he bore to the corporation, the agent had the power to prevent the act complained of. . . .

421 U.S. at 670-71. The *Park* Court also noted:

The theory upon which responsible corporate agents are held criminally accountable for "causing" violations of the Act permits a claim that a defendant was "powerless" to prevent or correct the violation to "be raised defensively at a trial on the merits." . . . If such a claim is made, the defendant has the burden of coming forward with evidence, but this does not alter the Government's ultimate burden of proving beyond a reasonable doubt the defendant's guilt, including his power, in light of the duty imposed by the Act, to prevent or correct the prohibited condition. . . .

Turning to the jury charge in this case, it is of course arguable that isolated parts can be read as intimating that a finding of guilt could be predicated solely on respondent's corporate position. But . .. . Reading the entire charge satisfies us that the jury's attention was adequately focused on the issue of respondent's authority with respect to the conditions that formed the basis of the alleged violations. Viewed as a whole, the charge did not permit the jury to find guilt solely on the basis of respondent's position in the corporation; rather, it fairly advised the jury that to find guilt it must find respondent "had a responsible relation to the situation," and "by virtue of his position . . . had . . . authority and responsibility" to deal with the situation.

Id. at 673-74.

7.08 Accessory After the Fact (18 U.S.C. § 3)

Count *(no.)* **of the indictment charges that on or about the___ day of _____, 2__, in the _____ District of _____,** *(name of defendant, the alleged accessory)* **acted as an accessory after the fact to the crime of** *(state offense allegedly committed by the "principal offender")* **committed by** *(name of principal offender)***.**

It is a federal crime for a person to act as an accessory after the fact. An accessory after the fact is a person who, knowing that an offense against the United States has been committed by another person, receives, relieves, comforts, or assists that person in order to hinder or prevent that person's arrest, trial, or punishment.

In order for you to find *(name of defendant)* **guilty of being an accessory after the fact, you must find that the government proved beyond a reasonable doubt each of the following three** (3) **requirements:**

First: *(Name of principal offender)* **committed each of the elements of** *(state offense(s))***, which elements I** *(have just explained to you) (will explain to you shortly)*;

Second: *(Name of defendant)* **knew that** *(name of principal offender)* **committed** *(that) (those)* **crime***(s)***; and**

Third: With that knowledge, *(name of defendant)* **in some way assisted** *(name of principal offender)* **in order to hinder or to prevent** *(name of principal offender)***'s arrest, trial, or punishment for the crime***(s)* **of** *(state offense(s))***.**

[As I just explained, to find (name of defendant) guilty of being an accessory after

the fact, you must first find that (name of principal offender) committed (state offense(s)). To find that (name of principal offender) committed (state offense(s)), you must find that the government proved beyond a reasonable doubt that (name of principal offender) committed each of the following elements: (state each element of the offense(s) allegedly committed by the principal offender).]

Comment

See 2 O'Malley et al., supra, §§ 22.01-22.04. For variations in other Circuits, *see* Fifth Circuit § 2.07, Sixth Circuit § 4.02, Seventh Circuit §5.07, Eighth Circuit § 5.05, Ninth Circuit § 5.2.

18 U.S.C. § 3 provides, in part, that:

> Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

This section comes into play only after a principal offender has committed an offense. Commission of an offense by the principal is an essential element of the crime of being an accessory after the fact. *See, e.g., United States v. Cabrales*, 524 U.S. 1, 7-8 (1998); *Gov't. of Virgin Islands v. Aquino*, 378 F. 2d 540, 552 (3d Cir. 1967); *United States v. Anthony*, 145 F. Supp. 323 (E.D. Pa. 1956).

The principal offender need not be tried with the accessory after the fact nor convicted before the accessory. *United States v. Panarella*, 277 F.3d 678, 689 (3d Cir. 2002). If the principal offender and the accessory are tried together, the trial judge should instruct the jury on the elements of the principal offender's crime first and then give this instruction regarding the accessory after the fact. If the principal and accessory are tried separately, at the accessory's trial the judge should include the bracketed final paragraph of this instruction.

A Separate Crime; Not Accomplice Liability. Unlike aiding and abetting (accomplice liability) and co-conspirator's liability, where the accomplice or co-conspirator is guilty of the same crime as the principal, accessory after the fact is a separate crime from the principal offender's crime. *United States v. Cabrales*, 524 U.S. at 7-8. Therefore, a defendant must be charged in the indictment specifically with being an accessory after the fact. Charging a defendant with an offense as a principal or an accomplice does not include an accessory after the fact charge, and in such a case it is improper to instruct the jury on accessory after the fact liability. *Gov't. of Virgin Islands v. Aquino*, 378 F.2d at 554. However, it is possible for a defendant to be

both an accomplice and an accessory after the fact to the same crime and, if properly indicted, to be convicted of the substantive crime as an accomplice and also of the separate offense of being an accessory after the fact to the substantive crime. However, a person cannot be a principal offender and an accessory after the fact for the same crime. *See, e.g., Gov't. of Virgin Islands v. Aquino*, 378 F. 2d 540 (3d Cir. 1967); *United States v. Anthony*, 145 F. Supp. 323 (E.D. Pa. 1956).