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2.01 Recesses

We are about to take a break or recess during the trial, and I want to remind you of the instructions I gave you earlier about your conduct as jurors.

During this recess and all other recesses, do not discuss this case with anyone, including your fellow jurors, other people involved in the trial, members of your family, friends, or anyone else. Do not speak at all with any of the parties, the witnesses, or the attorneys. Do not permit anyone to discuss the case with you. If anyone approaches you and tries to talk to you about the case, please report that to me, through my courtroom deputy, immediately.

While I do not know whether there is any news coverage of this case, do not watch or listen to any news reports concerning this trial on television or on radio and do not read any news accounts of this trial in a newspaper or on the Internet. Do not use the internet to search for information about the parties, witnesses, lawyers, or anyone else associated with the trial. The only information you are to consider in deciding this case is what you learn in this courtroom.

Remember to keep an open mind. Do not make up your mind about the verdict until you have heard all the evidence, I have given you final instructions about the law at the end of trial, and you have discussed the case with your fellow jurors during your deliberations.

Comment

See O'Malley § 11.01 (Admonitions At Court Recess--Long Form), § 11.02 (Admonitions At Court Recesses--Short Form). For variations, *see* Eighth Circuit § 2.01, Ninth Circuit § 2.1.

2.02 Stipulated Testimony

The parties have agreed what (*name of witness*)'s **testimony would be if called as a witness. You should consider that testimony in the same way as if it had been given here in court by the witness.**

Comment

The instruction is derived from Ninth Circuit § 2.3. For variations, *see* Sand § 5-7 and Eighth Circuit § 2.02.

When the parties stipulate to what a witness would testify to if called, it is error to instruct the jury that it must consider the stipulated testimony as true. *See United States v. Bennally*, 756 F.2d 773 (10th Cir. 1985). *See* Instruction 2.03 (Stipulation of Facts) if the stipulation is as to an issue of fact.

2.03 Stipulation of Fact

The Government and the defendant*(s)* **have agreed that** *(set forth stipulated fact(s)) (is)(are)* **true. You should therefore treat** *(this fact)(these facts)* **as having been proved. You are not required to do so, however, since you are the sole judge of the facts.**

Comment

See 1AO'Malley, § 12.03, Sand § 5-6, and Ninth Circuit § 2.4. For variations, *see* Ninth Circuit § 2.4 and Federal Judicial Center § 12.

In a criminal case, the jury is not necessarily bound by a stipulation between the parties. In *United States v. Cornish*, 103 F.3d 302 (3d Cir. 1997), the defendant unsuccessfully argued that the trial court's instruction gave too binding an effect to the stipulation concerning the defendant's prior conviction. The trial court simply instructed the jury that "it's been agreed that on April 16th, 1994, defendant had been previously convicted of such a crime." The Third Circuit concluded that the instruction was not plain error. Nevertheless, the court appeared to express a preference for instructions that tell the jurors they "should" treat stipulated facts as having been proved, commenting that such instructions "avoid the hazard, apparent or not, of directing a verdict on a factual issue and would be shielded from constitutional challenge." *Id.* at 306-07.

In cases where a stipulation may amount to an admission to an element of the offense, the judge may wish to exercise caution. The Third Circuit has yet to address the question, but judges may wish to ascertain that the defendant understands the contents of the stipulation and agrees to it.

2.04 Judicial Notice (F.R.E. 201)

I have taken judicial notice of certain facts. *(State the fact(s) that are being judicially noticed.)* **I believe** *(this fact is)(these facts are) [(of such common knowledge)(can be so accurately and readily determined from) (name accurate source)]* **that** *(it)(they)* **cannot reasonably be disputed. As with any fact, however, the final decision whether or not to accept it is for you to make and you are not required to agree with me.**

Comment

This instruction is derived from Eighth Circuit § 2.04. For variations, *see* 1A O'Malley § 12.03, Sand § 5-5, Sixth Circuit § 7.19, Seventh Circuit § 1.02, and Ninth Circuit § 2.5.

Rule 201 of the Federal Rules of Evidence governs judicial notice of adjudicative facts. Rule 201(b) defines the kinds of facts that may be judicially noticed:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Judicial notice may be taken at any stage of the proceedings, but generally only after the parties have been afforded an opportunity to be heard on the matter. An instruction on judicial notice should be given at the time that notice is taken. It may also be given at the time the jury is charged at the close of the evidence.

Rule 201(g) directs that "[i]n a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." In this regard, the rule for criminal cases differs from the rule for civil cases, in which the jury has no discretion to reject judicially noticed facts. The Third Circuit has noted with approval instructions that adhere to the language of the rule for criminal cases. *See United States v. Mitchell*, 365 F.3d 215, 251 n. 28 (3d Cir. 2004); *United States v. Saada*, 212 F.3d 210, 223 (3d Cir. 2000). While approving the trial court's instructions in both *Mitchell* and *Saada*, the court did not include the text of either instruction. As a result, it is not clear whether the court tracked the language of the rule exactly.

2.05 Audio/Video Recordings - Consensual

You are about to hear *(audio)(video)* **recordings of conversations with the defendant***(s)* **made without** *(his)(her)(their)* **knowledge. These recordings were made with the consent and agreement of** *(name)*, **one of the other parties to the conversations.**

The use of this procedure to gather evidence is lawful and the recordings may be used by either party.

Comment

See Sand § 5-10.

This instruction addresses the jurors' possible concern about the legality of recordings offered in evidence. It should not be given routinely, but should be given if there is reason to believe the jury would be concerned and if it is requested by either party.

2.06 Audio/Video Recordings – Non-consensual (Wiretaps)

You are about to hear recordings of telephone calls with the defendant*(s)* which were obtained without the knowledge of the parties to the conversations, but with the consent and authorization of the court. These recordings, sometimes referred to as wiretaps, were lawfully obtained.

The use of this procedure to gather evidence is lawful and the recordings may be used by either party.

Comment

See Sand § 5-11.

This instruction addresses the jurors' possible concern about the legality of recordings offered by the government. It should not be given routinely, but should be given if there is reason to believe the jury would be concerned and if it is requested by either party.

2.07 Audio/Video Recordings - Transcripts

You are about to hear *(audio)(video)* **recordings that were received in evidence, and you will be given written transcripts of the recordings.**

Keep in mind that the transcripts are not evidence. They are being given to you only as a guide to help you follow what was being said. The recordings themselves are the evidence. If you notice any differences between what you hear in the recordings and what you read in the transcripts, you must rely on what you hear, not what you read. And if you cannot hear or understand certain parts of the recordings, you must ignore the transcripts as far as those parts are concerned.

[The transcripts name the speakers. But remember, you must decide who is actually speaking in the recording. The names on the transcript are used simply for your convenience.]

Comment

See Sixth Circuit § 7.17 and Eighth Circuit § 2.06. For variations, *see* 1A O'Malley, § 14.09, Sand § 5.04, First Circuit § 2.08, Fifth Circuit § 1.42, Seventh Circuit § 3.17, and Ninth Circuit § 2.17.

Audio and video recordings are generally admissible "'[u]nless the unintelligible portions of the tapes are so substantial as to render the recordings as a whole untrustworthy.'" *United States v. Salvo*, 34 F.3d 1204, 1220 (3d Cir. 1994), citing *United States v. Arango-Correa*, 851 F.2d 54, 58 (2d Cir. 1988) (quoting *Monroe v. United States*, 234 F.2d 49, 55 (D.C. Cir.), *cert. denied*, 352 U.S. 873 (1956)).

The trial judge has discretion to admit transcripts for use with the recordings. In *United States v. Adams*, 759 F.2d 1099, 1115 (3d Cir.), *cert. denied*, 474 U.S. 906 (1985), the court upheld the admission of a tape recording and transcript, noting that "the judge instructed the jury that the tape recording controlled over the transcript in case of error or ambiguity." *See also Salvo*, 34 F.3d at 1220 (concluding that trial court's instruction that tape controlled and transcript was not evidence protected against unfairness).

This instruction should be given when the recording is played. Instruction 4.__ (Audio/Video Recordings - Transcripts) should be included in the final charge.

The bracketed paragraph should be included only if there is a dispute about the identity of the speakers in the recording . *Government of the Virgin Islands v. Martinez*, 847 F.2d 125, 128 (3d Cir. 1988). When such a dispute arises, the preferred solution is to use neutral designations, such as “Speaker 1" and “Speaker 2" rather than names. *Id.* at 129.

If defense counsel contests the accuracy of a government transcript, the court should consult with the attorneys to determine how to handle the question of the accuracy of the transcript. In some cases, the defense may prefer to address the question entirely on cross-examination and will not offer a defense transcript. If the defense offers its own transcript, the attorneys may request that the jurors have both the defense transcript and the prosecution transcript as they listen to the recording. Alternatively, the defense may prefer to have the entire recording or portions of the recording replayed for the jury during the defense case. If the court admits two alternative transcripts, the court should give the jury an appropriately adapted version of the following instruction, based on the instruction suggested by Sand in the notes to Instruction 5-9:

> You have been handed two separate transcripts. One contains the government's interpretation of what appears on the tape recording; the other contains the defense interpretation. Both of these versions of the transcript have been given to you as a guide to assist you in listening to the tapes. Neither transcript has been received in evidence. Rather, it is the tape recording which is the evidence and the transcripts are only guides. Therefore, you must listen to the tapes themselves very carefully. You alone should make your own interpretation of what appears on the tapes from what you hear. You may use both the government version and the defense version of the transcripts to assist you in this task. If you think you hear something differently than the government or the defense has interpreted on their versions of the transcripts, then you are to follow your own interpretation. You may agree partially with each, and you may accept those portions you agree with and reject those portions you disagree with. You need not select between the two versions, and you may come up with your own findings of what appears on the tapes.
>
> You, the jury, are the sole judges of the facts.

2.08 Transcript of Recording in Foreign Language

You are about to listen to *(an audio)(a video)* **recording in** *(language used)*. **Each of you has been given a transcript of the recording which has been admitted into evidence. The transcript is a translation of the foreign language recording.**

Although some of you may know the *(language used)*, **it is important that all jurors consider the same evidence. Therefore, you must accept the English translation contained in the transcript and disregard any different meaning.**

Comment

This instruction is derived from Ninth Circuit § 2.8.

This instruction should be given when recordings in a foreign language are admitted.

When foreign language recordings are introduced, the court should first encourage the parties to agree on a transcript. *United States v. Zambrana*, 841 F.2d 1320, 1335-36 (7th Cir. 1988). If the parties cannot agree on a transcript, then each party may produce its own version either of the entire transcript or of disputed portions of the transcript and also present evidence to establish the accuracy of its transcript. In addition, each party may introduce evidence to challenge the accuracy of the other party's transcript. *Zambrana*, 841 F.2d at 1336. In the event of a dispute, the court should add the following language to the instruction:

> Whether a transcript is an accurate translation, in whole or in part, is for you to decide. In considering whether a transcript is an accurate translation of a conversation, you should consider the testimony presented to you regarding how, and by whom, the transcript was made. You may consider the knowledge, training, and experience of the translator, as well as the nature of the conversation and the reasonableness of the translation in light of all the evidence in the case.

See United States v. Gutierrez, 367 F.3d 733, 736 (8th Cir. 2004); Seventh Circuit, § 3.18.

The Committee on Federal Criminal Jury Instructions of the Seventh Circuit also suggests that, if the jury views a visual recording of the conversation, the court should

instruct the jury that "You may consider the actions of a person, the facial expressions and lip movements that you can observe on videotapes to help you to determine the identity of speakers." *See* Seventh Circuit, § 3.18 (comment).

2.09 Opinion Testimony (Expert Witnesses)

The rules of evidence ordinarily do not permit witnesses to state their own opinions about important questions in a trial, but there are exceptions to these rules.

You will hear testimony from *(state the name of the person(s) who will offer an opinion).* **Because of** *(his)(her)(their)* **knowledge, skill, experience, training, or education in the field of** *(state the witness(es)'s field)*, *(Mr.)(Ms.)(Dr.) (name)* **will be permitted to offer** *(an)* **opinion***(s)* **in that field and the reasons for** *(that)(those)* **opinion***(s)*.

The opinion*(s) (this)(these)* **witness***(es)* **state***(s)* **should receive whatever weight you think appropriate, given all the other evidence in the case. In weighing this opinion testimony you may consider the witness' qualifications, the reasons for the witness' opinions, and the reliability of the information supporting the witness' opinions, as well as the other factors I will discuss in my final instructions for weighing the testimony of witnesses. You may disregard the opinion***(s)* **entirely if you decide that** *(Mr.)(Ms.)(Dr.) (name)*'s **opinion***(s) (is)(are)* **not based on sufficient knowledge, skill, experience, training, or education. You may also disregard the opinion***(s)* **if you conclude that the reasons given in support of the opinion***(s)* **are not sound, or if you conclude that the opinion***(s) (is)(are)* **not supported by the facts shown by the evidence, or if you think that the opinion***(s) (is)(are)* **outweighed by other evidence.**

Comment

See Fed. R. Evid. 702; 1A O'Malley § 14.01. For model or pattern instruction from other Circuits regarding expert or opinion testimony in criminal cases, *see* First Circuit § 2.06; Fifth Circuit § 1.17; Sixth Circuit § 7.03; Eighth Circuit § 4.10; Ninth Circuit § 4.16; Eleventh Circuit § 7.

This instruction should be given at the time a witness is qualified to give an opinion. For a comparable instruction that should be given in the final instructions to the jury, *see* 4.__ (Opinion Evidence (Expert Witnesses)). This instruction should only be used when an "expert" witness is about to offer opinion testimony. When lay witnesses are permitted to offer an opinion, use Instruction 4.__. If both expert and lay witnesses are permitted to give opinion testimony, both sets of instructions should be given.

These instructions avoid labeling the witness as an "expert." If the court refrains from designating the witness as an "expert" this will "ensure[] that trial courts do not inadvertently put their stamp of authority" on a witness' opinion, and will protect against the jury's being "overwhelmed by the so-called 'experts'." Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials,* 154 F.R.D. 537, 559 (1994). *See also* Advisory Committee Note to Federal Rule of Evidence 702 (2000) (cautioning against instructing the jury that the witness is an "expert").

Before the beginning of trial, the judge should discuss with counsel that they should also avoid using the word "expert" to refer to the witnesses. However, if counsel refers to witnesses as "experts," the trial judge should modify the instruction by telling the jury what an "expert" is. Therefore, the court should include, after the first paragraph of the model instruction set forth above, the following additional paragraph:

> The defendant's lawyer/the prosecutor called *(Mr.)(Ms.)(Dr.)(name)* an expert witness. Someone who is called an expert witness is simply a witness who, because of his or her knowledge, skill, experience, training, or education, may have become knowledgeable in some technical, scientific, or specialized field and therefore is permitted to state an opinion about that field. You should not give any greater weight or credit to *(Mr.)(Ms.)(Dr.)(name)*'s testimony merely because he or she was called an expert witness by the lawyers.

See 1A O'Malley, § 14.01, 248-49.

2.10 Opinion Testimony (Lay Witnesses) (F.R.E. 701)

Witnesses are not generally permitted to state their personal opinions about important questions in a trial. However, a witness may be allowed to testify to his or her opinion if it is rationally based on the witness' perception and is helpful to a clear understanding of the witness' testimony or to the determination of a fact in issue.

In this case, I am permitting *(name)* **to offer** *(his)(her)* **opinion based on** *(his)(her)* **perceptions. The opinion of this witness should receive whatever weight you think appropriate, given all the other evidence in the case and the other factors I will discuss in my final instructions for weighing and considering whether to believe the testimony of witnesses.**

Comment

Federal Rule of Evidence 701 provides that "if the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed.R.Evid. 701.

Whether to give this instruction on lay witness opinion testimony is within the trial judge's discretion. Ordinarily, the instruction will not be necessary, but is provided in the event one of the lawyers requests it or the trial judge otherwise considers it necessary in the case on trial. The instruction should not be given routinely for "run of the mill" lay opinion testimony, such as "he looked angry" or "she was driving fast." The instruction should be given when the lay opinion is more like an "expert" opinion or when there is also expert opinion testimony given in the same trial, to avoid the confusion that might result because Instruction 2.09 (Opinion Evidence (Expert Witnesses)) states that opinion testimony is generally not permitted.

If the trial judge decides that an instruction on lay opinion testimony is necessary, the above instruction can be given at the time the witness is giving his or her opinion testimony. For a comparable instruction that should be given in the final instructions to the jury, *see* Instruction 4.__ (Opinion Evidence (Lay Witnesses) (F.R.E. 701)).

2.11 Limited Admissibility: Evidence Admitted for a Limited Purpose

In certain instances evidence may be admitted only for a particular purpose and not generally for all purposes.

[You heard evidence that (name of declarant) told the Defendant that (name of victim) was looking for her and had a gun. That evidence was admitted only to explain Defendant's state of mind when she later encountered (name of victim), and you may consider that evidence only in determining Defendant's state of mind and the reasonableness of Defendant's actions. You may not, however, use (name of declarant)'s statement as evidence that (name of victim) actually was looking for Defendant or that (name of victim) actually had a gun.]

For the limited purpose for which this evidence has been received you may give it such weight as you feel it deserves. You may not, however, use this evidence for any other purpose not specifically mentioned.

Comment

This instruction is derived from 1A O'Malley § 11.09.

If evidence is admitted for a limited purpose and one of the parties requests a limiting instruction, the court should inform the jury of the limited purpose of the evidence at the time it is introduced. This instruction provides a general template that can be adapted to the specific situation; the bracketed language is an example of a description of evidence and its limited role in the case. If the evidence is admitted only against one defendant in a multiple defendant trial, the court should give Instruction 2.12 (Limited Admissibility: Evidence Admitted Against Only One Defendant) instead. In addition, some specific types of evidence are dealt with in specific instructions. *See, e.g.,* Instruction 2.23 (Defendant's Prior Acts (F.R.E. 404(b)). *See generally United States v. Butch*, 256 F.3d 171, 176 n.4 (3d Cir. 2001)(citing with approval trial court's instruction, based on 1A O'Malley § 11.09, limiting consideration of other act evidence admitted under F.R.E. 404(b) for limited purpose).

2.12 Limited Admissibility: Evidence Admitted Against Only One Defendant

You *(are about to hear)(just heard) (describe testimony or exhibit).* **You can consider** *(this testimony)(this exhibit)* **only in the case against** *(name).* **You must not consider that evidence in the case against the other defendant***(s).* **Each defendant is entitled to have** *(his)(her)* **case decided just on the evidence which applies to** *(him)(her).*

Comment

This instruction is derived from Eighth Circuit § 2.14.

If requested, this instruction should be given during the trial of multiple defendants to limit the jury's consideration of evidence admitted against only one defendant. *See generally United States v. Butch*, 256 F.3d 171, 176 n.4 (3d Cir. 2001)(citing with approval trial court's instruction, based on 1A O'Malley § 11.09, limiting consideration of other act evidence admitted under F.R.E. 404(b) for limited purpose).

2.13 Prior Conviction of Defendant Charged with Possession of a Firearm by a Convicted Felon (18 U.S.C.A. § 922(g))

You have heard evidence *(through a stipulation)* **that the defendant was convicted before this incident in** *(name of court; e.g., a court of the Commonwealth of Pennsylvania)* **of a crime punishable by imprisonment for a term exceeding one year.**

This prior conviction has been brought to your attention only because it tends to establish one of the elements of the crime of possession of a firearm by a convicted felon as set forth in the indictment, specifically, that the defendant had a prior felony conviction. You are not to speculate as to the nature of the conviction. You may not consider the prior conviction in deciding whether *(name of defendant)* **was in knowing possession of the gun that** *(he)(she)* **is charged in this case with possessing, which is a disputed issue in this case.**

The fact that the defendant was found guilty of another crime on another occasion does not mean that *(he)(she)* **committed this crime on** *(date of offense charged in indictment)*, **and you must not use** *(his)(her)* **guilt of the other crime as proof of the crime charged in this case except for the one element of this crime which I have mentioned. You may find the defendant guilty of this crime only if the government has proved beyond a reasonable doubt all of the elements of this crime and that the defendant committed it.**

Comment

This instruction is based on the instruction approved in *United States v. Belk*, 346 F.3d 305, 309 n.4 (2d Cir. 2003).

This instruction should be given when the government introduces evidence that the defendant is a convicted felon as required to prove a violation of 18 U.S.C.A. § 922 (g). Section 922(g) provides:

> It shall be unlawful for any person -
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
> * * *
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

In order to establish the defendant's guilt under this section, the government must prove beyond a reasonable doubt that the defendant was convicted of a felony. Evidence of the prior conviction tends to prejudice the defendant, generating a risk that the jury will conclude that the defendant is more likely to have committed the offense(s) for which the defendant is on trial simply because the defendant has previously been convicted. Despite this risk of prejudice, the government must be allowed to prove the felony conviction.

When the defendant is charged only with a violation of Section 922(g), the court should give this curative instruction when the evidence of the prior conviction is introduced; Instruction 6.18.922G-4 (Evidence of Prior Conviction of Defendant Charged with Possession of a Firearm by a Convicted Felon (18 U.S.C. § 922(g))) should be included in the final charge to the jury. The defendant is not entitled to bifurcation of the issues. *See United States v. Jacobs*, 44 F.3d 1219 (3d Cir. 1995).

If the felon in possession charge under § 922(g) is joined with other charges, the court should bifurcate the trial of the 922(g) count. In the bifurcated trial, the jury should first hear evidence and deliberate concerning the other counts of the indictment and make a factual determination of whether the defendant was in knowing possession of the firearm. In the second phase of the trial, the jury hears evidence of the defendant's criminal record and deliberates concerning the count charging a violation of Section 922(g). *See, e.g., United States v. Joshua*, 976 F.2d 844 (3d Cir. 1992).

If the court should decide for some reason not to bifurcate the trial, the Third Circuit has expressed a preference for severance of the felon in possession charge, unless the evidence of the prior conviction would be admissible even if the counts were tried separately. *See United States v. Busic*, 587 F.2d 577, 585 (3d Cir. 1978). The defendant is not entitled to severance if the trial court bifurcates the trial. *See United States v. Joshua*, 976 F.2d 844 (3d Cir. 1992).

There are additional steps that the court should take to reduce the prejudice. In *Old Chief v. United States*, 519 U.S. 172 (1997), the Supreme Court recognized the risk of prejudice and held that, where the defendant offered to stipulate that he was a convicted felon, it was reversible error to admit evidence of the name and nature of the offense of which the defendant was convicted. In a bifurcated trial, the prior felony conviction should not be a subject of voir dire. However, in a non-bifurcated trial, the court should address the prior conviction in voir dire. In *United States v. Smith,* 104 Fed.Appx. 266, 275, 2004 WL 1778268 (3rd Cir. 8/10/2004), a non-precedential

decision, the Third Circuit noted that "careful *voir dire* can help insure that jurors who would be influenced by knowledge of the element of a prior felony conviction are not chosen for the jury."

2.14 Stricken Testimony, Disregard

I have ordered *(describe testimony or exhibits)* **stricken from the record. This is not proper evidence in the case. You must disregard it entirely. Do not consider** *(this testimony)(this exhibit)* **in reaching your decision.**

Comment

This instruction should be given when testimony or exhibits are stricken from the record after they have been presented to the jury.

2.15 Prior Consistent Statements (F.R.E. 801(d)(1)(B))

You *(just heard)(are about to hear)* **evidence that, before** *(he)(she)* **testified in this trial,** *(name)* **made statements that were the same as, or similar to, what** *(he)(she)* **said in the courtroom. You may consider evidence of this statement in determining the facts of this case. In addition, this evidence may help you decide whether you believe** *(name)*'s **testimony. If** *(name)* **said essentially the same thing before trial, it may be reason for you to believe** *(name)*'s **testimony in court.**

Comment

This instruction is based on Federal Judicial Center § 34. A prior consistent statement can be offered as substantive evidence under Rule 801(d)(1)(B) of the Federal Rules of Evidence if it "is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." This instruction informs the jurors that they may use the prior consistent statement both to decide the case and to bolster the in-court testimony.

Caution: This instruction should not be given routinely. The prior consistent statements are admitted without limitation, so the jury can consider them in any way it deems relevant. The significance of the prior consistent statements should generally be left to argument of counsel. However, this instruction should be included if prior inconsistent statements are admitted solely to impeach in the same trial as the prior consistent statements. This instruction is then necessary to distinguish the unlimited role of prior consistent statements from the limited role of prior inconsistent statements admitted only to impeach. *See* Instruction 2.16 (impeachment of Witness - Prior Inconsistent Statement for Credibility Only).

2.16 Impeachment of Witness – Prior Inconsistent Statement for Credibility Only

You have heard the testimony of *(name)*. **You have also heard that before this trial** *(he)(she)* **made a statement that may be different from** *(his)(her)* **testimony in this trial. It is up to you to determine whether this statement was made and whether it was different from** *(his)(her)* **testimony in this trial. This earlier statement was brought to your attention only to help you decide whether to believe** *(his)(her)* **testimony here at trial. You cannot use it as proof of the truth of what the witness said in the earlier statement. You can only use it as one way of evaluating** *(name)*'s **testimony in this trial.**

[You have also heard evidence that (this witness)(certain witnesses) made statements before this trial that were (describe requirement; e.g., made under oath, given before the grand jury). When a statement is (describe condition; made under oath, made before the grand jury), you may use it not only to help you decide whether you believe the witness' testimony in this trial but also as evidence of the truth of what the witness said in the earlier statement. But when a statement is (describe condition; e.g., not made under oath, not given before the grand jury), you may use it only to help you decide whether you believe the witness' testimony in this trial and not as proof of the truth of what the witness said in the earlier statement.]

Comment

This instruction is based on Sixth Circuit § 7.04 and Seventh Circuit § 3.09. For variations, *see* Sand § 7-19, First Circuit § 2.02, Fifth Circuit § 1.10, Eighth Circuit § 3.04, and Eleventh Circuit § 6.1.

Prior inconsistent statements of witnesses may be admitted for two different purposes. First, a witness' statements may be admitted substantively – to prove the truth of the matters asserted. Second, a witness' statements may be admitted for the limited purpose of impeaching the witness.

Rule 801(d)(1)(A) of the Federal Rules of Evidence allows a prior inconsistent statement to be used substantively as well as to impeach if it was "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." If the prior statement falls within Rule 801(d)(1)(A), this instruction should not be given. A key characteristic of statements falling within Rule 801(d)(1)(A) is that they were made under oath. However, even a sworn statement does not fall within the rule and may be used only to impeach if it was not given at a proceeding.

Prior inconsistent statements that do not fall within the rule may still be admissible to impeach the witness. Such a statement is not hearsay because it is not admitted for the truth of the matter asserted, but only for the purpose of impeaching the witness. This instruction should be given to inform the jury of this limited purpose. The defendant is entitled to a limiting instruction at the time of the testimony as well as at the conclusion of the trial. *United States v. Palumbo*, 639 F.2d 123, 128 (3d Cir. 1981); 4.__ (Impeachment of Witness - Prior Inconsistent Statement for Credibility Only). The court should give the instruction if the defendant requests it. Failure to give the instruction is not necessarily plain error. *United States v. Corson*, 389 F.2d 563 (3d Cir. 1968). To minimize uncertainty concerning the role of inconsistent statements and the need for an instruction, the court may want to advise counsel at the beginning of the trial that they must request a limiting instruction at the time a statement is admitted if they want the jury informed of the limited purpose of the statement.

The bracketed language should be used if both types of prior inconsistent statements have been admitted in the trial – some only to impeach and others for substantive use as well. The court may want to include the bracketed language to emphasize the distinction for the jury.

Some judges may prefer the following variation, based on 1A O'Malley § 15.06:

> The testimony of a witness may be attacked by showing that the witness previously made statements which are different than the witness' testimony here in court. The earlier statements are admissible only to discredit or impeach the credibility of the witness and not to establish the truth of these earlier statements made somewhere other than here during this trial. You must determine whether to believe a witness who has made prior inconsistent statements.
>
> [*If a witness is shown to have knowingly testified falsely concerning any important or material matter, you obviously have a right to distrust the testimony of the witness concerning other matters. You may reject all of the testimony of that witness or give it such weight as you determine it deserves*].

2.17 Impeachment of Defendant's Character Witness (F.R.E. 404, 405)

<u>If character witness testified to reputation:</u> You heard *(name of witness)* **testify about the defendant's reputation for** *(insert character trait covered by testimony)***. On cross-examination of** *(name of witness)*, **the prosecutor asked** *(him)(her)* **some questions about whether** *(he)(she)* **had heard that** *(briefly describe the subject of the cross-examination on the character trait, e.g., defendant was convicted of fraud on an earlier occasion)*. **The prosecutor was allowed to ask these questions only to test whether** *(name of witness)* **was familiar with the reputation of the defendant in the community. This is not evidence that the acts described in these questions actually occurred.**

You may not use the information developed by the prosecutor on this subject for any other purpose. Specifically, you may not use this information to conclude that the defendant committed the act*(s)* **charged in the indictment or as proof that the defendant has a bad character or any propensity to commit crimes.**

<u>If character witness testified to opinion:</u> You heard *(name of witness)* **testify about the defendant's character for** *(insert character trait covered by testimony)*. **On cross-examination of** *(name of witness)*, **the prosecutor asked** *(him)(her)* **some questions about whether** *(he)(she)* **knew that** *(briefly describe the subject of the cross-examination on the character trait, e.g., defendant was convicted of fraud on an earlier occasion)***. The prosecutor was allowed to ask these questions only to test whether** *(name of witness)* **had a good basis for**

(his)(her) **opinion of the defendant's character. This is not evidence that the acts described in these questions actually occurred.**

You may not use the information developed by the prosecutor on this subject for any other purpose. Specifically, you may not use this information to conclude that the defendant committed the act*(s)* **charged in the indictment or as proof that the defendant has a bad character or any propensity to commit crimes.**

Comment

This instruction is derived from 1A O'Malley § 11.15, Sand § 5-16, and Eighth Circuit § 2.10.

This instruction should be given to the jury at the time of the cross-examination when the prosecutor is permitted to cross-examine the defendant's character witness concerning prior instances of the defendant's conduct; Instruction 4.__ (Defendant's Character Evidence) should be included in the final charge to the jury.

Under Rule 404(a) of the Federal Rules of Evidence, a defendant is permitted to introduce evidence of good character to support the inference that the defendant did not commit the offense charged. Instruction 2.15 (Prior Consistent Statements (F.R.E. 801(d)(1)(B))) describes the role of that evidence. Rule 405(a) permits the prosecutor to cross-examine the defendant's character witness concerning specific instances of the defendant's conduct relating to the character trait at issue. The rules thus continue the common law practice discussed in *Michelson v. United States*, 335 U.S. 469 (1948), but with one difference: opinion evidence, which was prohibited at common law, is allowed under the rules. Under the Federal Rules of Evidence, the character witness may testify to either reputation or opinion.

A reputation witness testifies to the defendant's reputation for a specific trait in a specific community, based on conversations with others concerning the defendant. *See Michelson v. United States*, 335 U.S. 469 (1948). Cross-examination of a reputation witness should focus on what the witness has heard and may inquire "about conduct, and even about charges, which may have come to the attention of the relevant community." *See United States v. Curtis*, 644 F.2d 263, 268 (3d Cir. 1981).

An opinion witness testifies to the witness' own opinion of the defendant's character for a specific trait based on that witness' experience with the defendant. Cross-examination of an opinion witness should focus on what the witness knows and will test the accuracy of and basis for the favorable opinion. In *United States v. Curtis*, 644 F.2d 263, 268 (3d Cir. 1981), the Third Circuit noted that, when the character witness testifies to an opinion, "relevant cross examination is only that which bears on the fact or factual basis for formation of the opinion."

The cross-examination permitted by Rule 405(a) often focuses on prior bad conduct by the defendant and therefore injects a risk of unfair prejudice. The Supreme Court noted in *Michelson*:

> The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him.

Id. at 479. The trial court has broad discretion concerning the cross-examination of character witnesses. *United States v. Boone*, 279 F.3d 163, 175 (3d Cir. 2002). Correspondingly, the trial judge plays an important role in assuring the fairness of the cross-examination. In *Michelson*, the Court remarked that the discretion to allow relevant cross-examination "is accompanied by heavy responsibility on trial courts to protect the practice from any misuse." *Id.* at 480. The Court outlined the safeguards to be taken by the trial court. *Id.* at 221-22. The trial court must ensure that the question is fair, that it rests on a factual foundation, and that it is relevant to the character trait addressed by the defendant's witness. *Id.* at 221-22. Of course, no evidence may be admitted for the jury establishing that the act occurred.

The Court in *Michelson* also emphasized the importance of limiting instructions directing the jury to consider any prior acts brought out in cross-examination only for purposes of assessing the witness' opinion of the defendant's character trait. *Id.* at 472 n.3. In *Government of Virgin Islands v. Roldan,* 612 F.2d 775, 781 (3d Cir. 1979), the Third Circuit stated, "the defendant is entitled to a limiting instruction to the effect that the prior bad act testimony does not bear on the defendant's propensity to commit such crimes again." *See also United States v. Apfelbaum*, 621 F.2d 62, 64 (3d Cir. 1980)(emphasizing importance of limiting instructions). In *Government of Virgin Islands v. Roldan*, however, the defendant had not requested a limiting instruction, and the Third Circuit held that the trial court did not commit plain error by failing to give an instruction.

2.18 Impeachment of Witness – Prior Bad Acts (F.R.E. 608(b))

Alternative 1*(to be given if the witness admits the bad act):* **You have heard evidence that** *(name)*, **a witness, committed** *(describe bad act inquired about during cross-examination)*. **You may consider this evidence, along with other pertinent evidence, only in deciding whether to believe** *(name)* **and how much weight to give** *(his)(her)* **testimony.**

Alternative 2 *(to be given if the witness denies the bad act):* **You heard** *(name of lawyer)* **ask** *(name of witness)* **whether** *(he)(she)* **committed** *(describe bad act inquired about during cross-examination)*, **and** *(he)(she)* **denied it. I remind you that questions by the lawyers are not evidence. It is the answer of the witness that provides evidence. There is therefore no evidence that** *(name of witness*) **committed** *(describe act)*.

Comment

This instruction is derived from Ninth Circuit § 4.8.

Rule 608(b) of the Federal Rules of Evidence provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness . . . .

Rule 608(b) governs only when the conduct that is the subject of the cross-examination or extrinsic evidence is relevant only to establish the witness' untruthful character. If the evidence is offered to establish something else, such as bias, incompetency, or compromised ability to perceive or recall the events, Rule 608 does not govern. Instead, the court should evaluate the propriety of questions and the admissibility of extrinsic evidence under Rules 402 and 403. *United States v. Abel*, 469 U.S. 45 (1984).

If the court permits cross-examination concerning prior conduct that suggests untruthful character under Rule 608(b), the court should instruct the jury concerning the cross-examination. The appropriate instruction depends on whether the witness admits or denies the prior conduct in response to the questions asked on cross-examination. Alternative 1 should be given if the witness admits the conduct. This instruction merely directs the jury to consider the prior acts in assessing the witness' credibility. However, if the witness denies the conduct, the court should give Alternative 2, directing the jury to draw no inference from the asking of the question. Rule 608(b) precludes the introduction of extrinsic evidence to establish the prior act, so the witness' denial concludes the inquiry. *See United States v. McNeill*, 887 F.2d 448, 453 (3d Cir. 1989); *United States v. Anderson,* 859 F.3d.1171, 1178 (3d Cir. 1988).

Rule 608(b) permits inquiry only concerning prior acts that are probative of untruthful conduct. To fall within the rule, the acts "will normally involve dishonesty or false statement as employed in Rule 609(a)(2)." Graham § 608.4 at 146-47. The Third Circuit has held that Rule 609(a)(2) applies only to crimes that "bear on the witness' propensity to testify truthfully." *See United States v. Johnson*, 388 F.3d 96 (3d Cir. 2004). In *United States v. Irizarry*, 341 F.3d 343 (3d Cir. 2003), the court noted that the trial court properly allowed the prosecutor to cross-examine the defendant about his possession of identification in someone else's name and about his possession of blank Social Security cards. *Id.* at 312. The Third Circuit stated that the evidence tended to show deceit and therefore fell within Rule 608(b).

The Third Circuit has also held that the decision whether to allow cross-examination under Rule 608(b) falls within the trial court's discretion. *See United States v. McNeill*, 887 F.2d 448, 453 (3d Cir. 1989). In *Johnson v. Elk Lake School District*, 283 F.3d 138 (3d Cir. 2002), the court held that the trial court acted within its discretion when it precluded plaintiff's counsel from cross-examining a key witness concerning a lie on his resume. *Id.* at 145 n. 2. The court noted that the trial court's ruling was reviewed under an abuse of discretion standard with "substantial deference" to the trial court. The court stated that "the trial court was within its discretion to conclude that Stevens' lying on his resume, although duplicitous and wrong, was not so indicative of moral turpitude as to be particularly probative of his character for untruthfulness." *Id.* This result is criticized in Graham who states that "the exercise of discretion should very rarely if ever be exercised to exclude an undisputed act of 'lying'" such as that in *Johnson*. Graham § 608.4 n. 5.

The inquiry under Rule 608(b) should focus on the actual acts that suggested untruthfulness and not any third party action, such as suspension from a job, that resulted from those acts. *See United States v. Davis*, 183 F.3d 231, 257 n. 12 (3d Cir. 1999). The court may preclude inquiry concerning prior acts if they are remote in time. *See Johnson v. Elk Lake School District*, 283 F.3d 138, 145 n.2 (3d Cir. 2002).

In addition, cross-examination under Rule 608(b) may be limited by the Fifth Amendment. Rule 608(b) provides that no witness, including the accused, waives the Fifth Amendment privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness. The Third Circuit appears not to have addressed this aspect of the rule.

2.19 Impeachment of Witness – Prior Conviction (F.R.E. 609)

You are about to hear evidence that *(name)* **has previously been convicted of a crime** *(punishable by more than one year in jail)(involving dishonesty or false statement)*. **You may consider this evidence, along with other pertinent evidence, in deciding whether or not to believe** *(name)* **and how much weight to give to** *(name)'s* **testimony.**

Comment

This instruction is derived from Ninth Circuit § 4.8 and First Circuit § 2.03. For variations, *see* 1A O'Malley § 15.07, Sand § 7-12, Fifth Circuit § 1.12, Sixth Circuit § 7.05B, Seventh Circuit § 3.11, Eighth Circuit § 2.18, and FJC § 30.

This instruction should be given when a witness is to be impeached under Rule 609 of the Federal Rules of Evidence with evidence of a prior conviction. This instruction merely directs the jurors to consider the prior conviction in assessing credibility.

Rule 609 governs the admissibility of prior convictions to impeach. Rule 609 (a)(1) permits impeachment of witnesses other than the accused by convictions of crimes punishable by death or imprisonment greater than one year subject only to balancing under Rule 403. Rule 609(a)(2) permits impeachment by conviction of crimes involving false statement or dishonesty; if the crime falls within (a)(2), the trial court must admit the prior conviction. *See United States v. Wong*, 703 F.2d 65, 68 (3d Cir.), *cert. denied,* 464 U.S. 842 (1983). Rule 609(a)(2) is interpreted narrowly and does not include crimes such as theft that do not "bear on the witness' propensity to testify truthfully." *See United States v. Johnson*, 388 F.3d 96 (3d Cir. 2004)(quoting from the Conference Committee notes). If more than ten years has passed since the date of conviction or release, the prior conviction is not admissible unless the proponent gives written notice and "the court determines, in the interests of justice, that the probative value of the conviction . . . substantially outweighs its prejudicial effect." F.R.E. 609(b). There is no clear authority requiring this instruction. However, the court should give the instruction if requested. It is not clear whether failure to give the instruction will be plain error if the defendant does not request it. *Graham, Handbook of Federal Evidence § 609.6 at pp. 227-28* (5th ed. 2001).

2.20 Impeachment of Witness – Violation of Sequestration Order

At the beginning of trial, I ordered that no witness *(other than (names of witnesses permitted in courtroom during testimony))* **may** *(hear)(discuss)(review)* **the testimony of another witness before** *(he)(she)* **testifies** *(himself)(herself)***. The purpose of this order was to prevent the testimony of one witness from influencing the testimony of another witness.** *(Name of witness)* **violated this order. In evaluating** *(name of witness)*'s **testimony, you may consider the fact that** *(name of witness) (describe violation, e.g., remained in the courtroom during the testimony of (name of other witness))*.

Comment

This instruction may be given if a witness has violated the court's sequestration order. Rule 615 of the Federal Rules of Evidence provides:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

Rules permitting sequestration of witnesses are intended to prevent witnesses from coordinating their testimony and to allow the parties to detect falsehood by "exposing inconsistencies in testimony." *Government of the Virgin Islands v. Edinborough*, 625 F.2d 472, 473 (3d Cir. 1980).

As the Third Circuit pointed out in *Pickel v. United States*, 746 F.2d 176, 182 (3d Cir. 1984), the rule "does not explicitly address the question of sanctions for non-compliance." The court went on to note that "case law . . . suggests three appropriate forms of sanctions: (1) holding the witness in contempt, (2) comment by the court on the violation and its effect on weight or credibility of the witness' testimony, and (3) barring or striking the witness' testimony." 746 F.2d at 182 (citations omitted). The court also noted that dismissal might be appropriate, but only in rare cases and only after consideration of lesser sanctions. 746 F.2d at 182. Determination of the appropriate

sanction lies in the court's discretion. *Wright & Miller*, *Federal Practice and Procedure* § 6246. In *Pickel*, however, the Third Circuit concluded that the trial court abused its discretion when it quashed the offending party's summons. 746 F.2d at 182-83.

The Third Circuit has not approved an instruction commenting on a violation of a sequestration order. In *United States v. Ramos-Lopez*, 1988 U.S. App. LEXIS 7378 (3d Cir. 1988), a non-precedential decision, Judge Becker, dissenting from the holding that defendant's counsel's handling of a sequestration violation was not ineffective, commented "I would have expected competent counsel to have sought comment by the court to the jury in the charge, explaining that the jury, in assessing the agent's credibility, could consider the fact that the agent remained in the room during (and probably heard) defendant's testimony." *Id.* at *11. In *United States v. Jimenez*, 780 F.2d 975, 981 (11th Cir.1986), the Eleventh Circuit commented, "The district court adequately responded to the possibility of prejudice [from the violation of the sequestration order] by specifically instructing the jury that a violation of the rule should be considered in evaluating Agent Robertson's credibility as a witness." *See also Hill v. Porter Memorial Hospital*, 90 F.3d 220, 224 (7th Cir. 1996).

2.21 Fifth Amendment Privilege of Witness Other Than the Defendant

No instruction recommended.

Comment

Witnesses other than the defendant sometimes claim Fifth Amendment protection from compelled self-incrimination and decline to answer questions posed to them in the course of a trial. Generally, an attorney or the witness raises the issue, but in some instances the court may identify the problem and raise it sua sponte. When such an issue arises, the court should take protective steps. First, the court should determine whether the Fifth Amendment claim is valid. Second, the court should insulate the jury from the witness' assertion of the Fifth Amendment privilege by having the witness assert the privilege outside the presence of the jury. Third, if the witness exercises the privilege in the jury's presence, the court should give the jury a cautionary instruction.

First, the court should evaluate the validity of the witness' claim. Section 5.03 of the Benchbook for U.S. District Court Judges (March 2000 rev.) suggests the proper procedure. The Benchbook suggests that the judge should excuse the jury and then engage in a colloquy with the witness. The court must determine whether "the witness has reasonable cause to believe that answering the particular question might tend to incriminate him or her." Benchbook, Section 5.03. *See* also *United States v. Hubbell*, 530 U.S. 27 (2000); *Hoffman v. United States*, 341 U.S. 479 (1951).

The Benchbook does not detail a suggested colloquy but cautions the court "not to interrogate the witness about the claim in such a way as to force the witness to surrender the privilege in order to claim it." *Id.* at 147. In addition, the court should not unduly pressure the witness; a colloquy that exerts undue pressure on a defense witness and persuades the witness not to testify violates the defendant's right to due process. *See Webb v. Texas*, 409 U.S. 95 (1972).

In *United States v. Serrano*, 406 F.3d 1208, 1213-14 (10th Cir. 2005), the court approved the following colloquy, which followed the prosecutor's suggestion that the defendant's witness should be advised of his Fifth Amendment privilege against compelled self-incrimination:

> THE COURT: All right. You may be asked a number of questions here by one of the attorneys that may require you to give testimony about things that you know concerning the shotgun. The government has indicated to me that you have given a statement concerning the sawed-off shotgun. You may be asked questions about matters concerning yourself and that shotgun. And before I permit any questioning about the shotgun and any involvement you may have had with that weapon, if any--I don't know, I don't know what the statements are at this point because the questions have not yet been asked--I need to ask you if you have talked to a lawyer

> about any of your constitutional rights, specifically the right against self-incrimination?
>
> THE WITNESS: No, ma'am.
>
> THE COURT: All right. I must advise you that a person such as yourself who is now a witness having been sworn to give testimony in this case, you as a witness ha[ve] the privilege under the 5th Amendment to the United States Constitution to decline to respond to a question if that answer would tend to incriminate you. That is, if that answer would tend to indicate that you were guilty of a crime or would furnish a link in the chain of evidence that would be needed to prosecute you for a crime.
>
> I don't know specifically what information you have and what answers you would give or statements that you would make in response to questions that may be asked of you during the course of your testimony here. However, based upon the representations made by the lawyer for the government here, there may be matters that you would be questioned about that would invoke consideration of the 5th Amendment right. And so when I say that, I ask again whether you have talked to a lawyer about any of these matters?
>
> THE WITNESS: No, ma'am.
>
> THE COURT: Okay. Do you wish to confer with a lawyer about this before you give any further testimony?
>
> THE WITNESS: No, ma'am.
>
> THE COURT: Can you explain to me why? Without going into details about the statement or anything about the gun, just tell me why you feel it is not necessary to talk to a lawyer.
>
> THE WITNESS: Because I'm just telling the truth about everything.
>
> THE COURT: I understand that. Has anyone advised you or talked to you about the consequences, the legal consequences that could occur if you give or make certain statements about the gun, the shotgun, and about your involvement with the shotgun?
>
> THE WITNESS: No, ma'am.
>
> THE COURT: All right. I'm going to--I'm not in a position to determine at this moment that this witness understands the nature of the 5th Amendment privilege. I think he needs counsel, and I'm not going to permit any further questioning until he has had an opportunity to confer with counsel....

The court then appointed an attorney to confer with the witness and recessed. The witness exercised his Fifth Amendment privilege against self incrimination after he conferred with his attorney. In *Serrano*, the Tenth Circuit held that this procedure did not violate the defendant's right to present a defense. 406 F.3d at 1214.

Second, if the witness intends to assert the Fifth Amendment privilege and decline to answer specific questions, the court should have the witness invoke the privilege outside the jury's presence. Jurors may not understand the invocation of the privilege and therefore may draw improper inferences from that invocation, possibly prejudicing the parties. *See Douglas v. Alabama* , 380 U.S. 415, 420 (1965); *Nezowy v. United States*, 723 F.2d 1120, 1124 (3d Cir. 1983); *Williams v. Government of the Virgin Islands*, 271 F.Supp.2d 696, 710-11(D.V.I. 2003).

Third, if the witness invokes the privilege in the jury's presence, the court may want to give the following cautionary instruction:

> You heard *(witness' name)(describe manner in which witness invoked Fifth Amendment privilege; e.g., decline to answer a question on the ground that the answer might tend to incriminate her)*. That was *(his)(her)* right under the Constitution, and you are not to draw any inference from that choice. A witness may make that choice for a number of reasons, and it would be improper for you to make any assumption or to try to guess why *(witness' name)* did so. You may not consider or discuss *(witness' name)*'s choice not to answer the question in deciding this case. It is not evidence.

In *Lionti v. Lloyd's Insurance Co.*, 709 F.2d 237, 243 (3d Cir. 1983), a witness asserted his Fifth Amendment privilege in the jury's presence. In discussing other evidentiary issues on appeal, the Third Circuit noted that the district court had reduced the impact of the exercise of the privilege by charging as follows:

> There is one more thing you should bear in mind with regard to this particular witness Brice McLane. He exercised his privilege against self-incrimination. That was his right and you are not to infer anything adverse to either the plaintiffs or anything adverse to the defendants by reason of what Brice McLane did. There may very well be a myriad of reasons why he would choose to exercise his privilege against self-incrimination, and it would be improper for you to make any assumption or to try to guess or to surmise or puzzle out why he chose to exercise that privilege. Accordingly, you are directed that Brice McLane's exercise of his constitutional privilege is to have no evidentiary value at all.

709 F.2d at 243. The Third Circuit has not addressed the question of whether such an instruction is required to be given either sua sponte or if requested. In *United States v. Castillo*, 615 F.2d 878 (9th Cir. 1980), the Ninth Circuit held that the trial court's failure to give a cautionary instruction concerning invocation of Fifth Amendment privilege sua sponte was harmless error.

2.22 Witness Who Has Pleaded Guilty to the Same or Related Charges

You have heard evidence that *(name of witness)* **pleaded guilty to charges arising from the events that are the subject of this trial. You must not consider** *(name of witness*)'s **guilty plea as any evidence of** *(name of defendant)*'**s guilt.** *(Name of witness*)'s **decision to plead guilty was a personal decision about** *(his)(her)* **own guilt. You should disregard** *(name of witness)*'s **guilty plea completely when considering** *(name of defendant*)'s **guilt or innocence.**

Instead, you may consider *(name of witness*)'s **guilty plea only for the purpose of** *(select appropriate purpose):*

determining how much, if at all, to rely upon *(his)(her)* **testimony;** *or*

foreclosing the suggestion that the party producing the witness was concealing evidence; *or*

rebutting the inference that the witness was not prosecuted and that *(name of defendant)* **was singled out for prosecution;** *or*

explaining the witness' firsthand knowledge of the events; *or*

rebutting the assertion that *(name of witness)* **was acting as a government agent while engaged in the activities that formed the basis of the guilty plea.**

You should give *(name of witness)*'s **testimony the weight you believe it deserves, keeping in mind that it must be considered with caution and great care.**

Comment

This instruction is derived from Eighth Circuit § 4.04 and Ninth Circuit § 4.9.

In some cases, the jury may learn that an accomplice has pleaded guilty. The instruction suggests some of the possible reasons the witness' plea may be relevant. The list is not exhaustive, and the court must determine on a case by case basis whether any of the reasons apply. In some cases, the court will not be able to determine the relevance of the witness' plea when it is offered mid-trial and should therefore give only the first paragraph of the instruction.

The government may be permitted to prove the guilty plea to help the jury evaluate the witness' credibility, to show that the defendant was not singled out for prosecution, or to explain how the witness has knowledge of the events. *See United States v. Universal Rehabilitation Services, Inc.,* 205 F.3d 657, 667 (3d Cir. 2000)(en banc). An accomplice's guilty plea may also serve to rebut the assertion that the accomplice was acting as a government agent while participating in the criminal conduct. *See United States v. Werme*, 939 F.2d 108, 113-14 (3d Cir. 1991). However, neither the witness' guilty plea nor the plea agreement may be considered as evidence of the defendant's guilt. *See Universal Rehabilitation Services,* 205 F.3d at 668; *United States v. Gaev*, 24 F.3d 473, 476 (3d Cir. 1994); *United States v. Gambino*, 926 F.2d 1355, 1363 (3d Cir. 1991).

The Third Circuit has emphasized the role of limiting instructions in controlling the prejudicial effect of the witness' guilty plea . *See Universal Rehabilitation Services.,* 205 F.3d at 668; *Gaev*, 24 F.3d at 478; *Werme*, 939 F.2d at 113-14 (holding failure to give limiting instruction was error, but concluding it was harmless). In *Gaev*, 24 F.3d at 475-76, the Third Circuit approved the court's instructions. At the time the witness testified, the trial court gave the following instruction:

> [Y]ou have just heard evidence that this witness has pled guilty to a charge of conspiring to fix prices with the defendant now on trial in this case.
> I caution you that although you may consider this evidence in assessing the credibility and testimony of this witness, giving it such weight as you feel it deserves, you may not consider this evidence against the defendant on trial, nor may any inference be drawn against him by reason of this witness' plea.

In its final charge, the trial court reiterated this caution and also instructed the jury concerning the testimony of accomplices and admitted felons who had entered into plea agreements with the government. *See* Instruction 4.__ (Credibility of Witnesses - Witness Who Has Pleaded Guilty to Same or Related Offense, Accomplices, Immunized Witnesses, Cooperating Witnesses).

In addition, if a witness testifies who is cooperating with the government, has entered a plea agreement with the government, or has received immunity, a promise of non-prosecution or some other benefit from the government, the trial court may want to caution the jury. The credibility issues raised by the testimony of such witnesses are addressed in Instructions 4.__ (Credibility of Witnesses - Witness Who Has Pleaded Guilty to Same or Related Offense, Accomplices, Immunized Witnesses, Cooperating Witnesses) and 4.__ (Credibility of Witnesses - Testimony of Informer), to be given in the final charge to the jury.

2.23 Defendant's Prior Bad Acts or Crimes (F.R.E. 404(b))

You have heard testimony that the defendant *(summarize the other act evidence).*

This evidence of other act*(s)* **was admitted only for a limited purpose. You may only consider this evidence for the purpose of deciding whether the defendant** *(describe the precise purpose for which the other act evidence was admitted: for example [Pick only those of the following that apply],*

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

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

acted with a common plan, scheme or design, or method of operation as evidenced by a unique pattern (*describe)*; *or*

did not commit the acts for which the defendant is on trial by accident or mistake; *or*

is the person who committed the crime charged in the indictment.

You may consider this evidence to help you decide *(describe how the evidence will be used to prove identity--e.g., whether the evidence that the defendant committed the burglary in which the gun that is the subject of this trial was stolen makes it more likely that the defendant was the person who placed the gun in the trunk of the car*).

Do not consider this evidence for any other purpose.

Of course, it is for you to determine whether you believe this evidence and, if you do believe it, whether you accept it for the purpose offered. You may give it such weight as you feel it deserves, but only for the limited purpose that I described to you.

The defendant is not on trial for committing these other acts. You may not consider the evidence of these other acts as a substitute for proof that the defendant committed the crime*(s)* **charged. You may not consider this evidence as proof that the defendant has a bad character or any propensity to commit crimes. Specifically, you may not use this evidence to conclude that because the defendant may have committed the other act,** *(he)(she)* **must also have committed the act***(s)* **charged in the indictment. Remember that the defendant is on trial here only for** *(state the charges briefly)*, **not for these other acts. Do not return a guilty verdict unless the government proves the crime***(s)* **charged in the indictment beyond a reasonable doubt.**

Comment

This instruction is derived from Sixth Circuit § 7.13

This instruction should be given at the time evidence of defendant's other crimes or acts is about to be or has been admitted under Federal Rules of Evidence Rule 404(b). Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

See also United States v. Givan, 320 F.3d 452, 460-61 (3d Cir. 2003). In *United States v. Scarfo*, 850 F.2d 1015 (3d Cir. 1988), citing *Huddleston v. United States*, 485 U.S. 681 (1988), the court summarized the steps necessary to admit evidence under Rule 404(b):

> [T]he Supreme Court has listed four guidelines for admissibility under the Rule. First, the other crimes evidence must have a proper purpose. Second, the proffered evidence must be relevant. Third, its probative value must outweigh its potential for unfair prejudice. Fourth, the court must charge the jury to consider the other crimes evidence only for the limited purpose for which it is admitted.

The instruction should not merely include a laundry list of permitted uses of other act evidence. Rather, it should specifically state the limited purpose for which the other act evidence is admitted. *Graham, Handbook of Federal Evidence*, § 404.5 note 56 (5th ed. 2001).

The instruction is most helpful if it explains to the jury the precise role of the other act evidence. In *Scarfo*, the Court approved the trial court's instructions.

> The trial judge charged the jury: 'Mr. Scarfo is not on trial here for any murders, for any gambling or any other kind of illegal activities.... [T]hose kinds of offenses would be dealt with in other tribunals than this.... I think you can understand that it would be utterly improper for you to take them into account in this case in the sense of saying to yourselves: 'Well, maybe he didn't do this extortion; but he did a lot of other stuff. So it doesn't much matter whether they prove this case. I am going to find him guilty anyway.' That obviously would be totally improper.'
>
> In instructing on the proper use of other crimes evidence, the judge explained that the testimony could be used to assess the nature of the relationship among Caramandi, DelGiorno, and defendant.
>
> > 'It is a position of the Government that Caramandi and DelGiorno were subordinates within this carefully organized and structured organization; that they did Mr. Scarfo's bidding; [that] they never would dream of doing anything this large without his approval; and that the tapes and other evidence in the case corroborate their testimony to the effect that he was involved and did approve.'
>
> The judge also told the jurors that they could use the evidence to decide whether defendant adopted a standardized scheme or mode of operation, to determine whether he had knowledge of or an intent to participate in the conspiracy, as well as to evaluate the witnesses' motives for cooperating with the government. Finally, the judge stated that the government had the right to reveal the witnesses' unsavory criminal records 'so as not to be accused of trying to hoodwink the jury by pretending that people like Caramandi and DelGiorno were Boy Scouts.'
>
> These clear, frank, and comprehensive instructions did all that was possible under the circumstances to place the other crimes evidence in proper perspective.

850 F.2d at 1020-21. For other Third Circuit decisions approving instructions on other act evidence, *see United States v. Cruz*, 326 F.3d 392 (3d Cir. 2003); *United States v. Givan*, 320 F.3d 452, 460-61 (3d Cir. 2003)*; United States v. Butch*, 256 F.3d 171 (3d Cir. 2001); *United States v. Palma-Ruedas,* 121 F.3d 841, 852 n. 11(3d Cir.1997).

In *United States v. Carter*, 401 F.2d 748 (3d Cir. 1968), the court held that failure to instruct on the limited purpose of other act evidence was not plain error. *See also* Graham, Handbook of Federal Evidence, § 404.5 at 364 (5th ed. 2001).

This instruction should not be given when the other act evidence was admitted under Rule 413 or 414 of the Federal Rules of Evidence. Those rules allow the prosecution to introduce evidence of similar acts in prosecutions for sexual assault or child molestation. The evidence of prior conduct admitted under those rules "may be considered for its bearing on any matter to which it is relevant." As a result, no limiting instruction should be given.

2.24 Impeachment of Defendant - Prior Bad Acts (F.R.E. 608(b))

Alternative 1:

You have heard evidence that the defendant *(name)* on a previous occasion committed (*describe bad act elicited on cross-examination of defendant*). **You may consider that evidence only to help you decide whether to believe** *(name)*'s **testimony and how much weight to give it. That evidence does not mean that** *(name)* **committed the crime charged here, and you must not use that evidence as any proof of the crime charged in this case.**

[This evidence may not be used in any way at all in connection with the other defendant(s)].

Alternative 2 *(to be given if the defendant denies the bad act):*

You heard the prosecutor ask *(name)* **whether on a previous occasion** *(he)(she)* **committed** (*describe bad act elicited on cross-examination of defendant*). **You also heard** *(name)* **deny committing that act. I remind you that questions by the lawyers are not evidence. It is the answer of the witness that provides evidence. There is therefore no evidence that** *(name of witness*) **committed** *(describe act).*

Commentary

This instruction is derived from Eighth Circuit 2.16.

This instruction should be used when the prosecution is permitted to cross-examine the defendant under Rule 608(b) of the Federal Rules of Evidence concerning prior bad acts that did not result in conviction. Rule 608(b) of the Federal Rules of Evidence provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence.

> They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness . . . .

If the court permits the prosecutor to cross-examine the defendant concerning prior bad acts under Rule 608(b), the court should instruct the jury concerning the cross-examination, whether or not requested, after consultation with the defendant. The appropriate instruction depends on whether the defendant admits or denies the prior conduct in response to the questions asked on cross-examination. Alternative 1 should be given if the defendant admits committing those acts. The instruction simply limits the jury's consideration of the prior acts to the defendant's believability. The Third Circuit has not determined whether failure to give the instruction if requested is reversible error or whether failure to give the instruction if the defendant does not request it is plain error. The bracketed language in Alternative 1 should be given in a multi-defendant case.

Alternative 2 should be given if the prosecutor asks about the prior acts on cross-examination and the defendant denies committing the prior acts. Rule 608(b) precludes the introduction of extrinsic evidence to complete the impeachment with bad acts. As a result, if the prosecutor is permitted to ask about the prior bad acts on cross-examination and the defendant denies committing the acts, the prosecution can go no further with the subject. *See United States v. McNeill*, 887 F.2d 448, 453 (3d Cir. 1989); *United States v. Anderson,* 859 F.3d.1171, 1178 (3d Cir. 1988).

Caution: This instruction should not be given when the defendant has been impeached with a prior conviction under Rule 609 of the Federal Rules of Evidence. *See* Instruction 2.25 (Impeachment of Defendant - Prior Conviction (F.R.E. 609)). Nor should this instruction be given when evidence of other crimes has been admitted to prove motive, opportunity, intent or the like under Rule 404(b) of the Federal Rules of Evidence. Instead, the jury should be specifically instructed on the purpose for which such evidence was admitted. *See* Instruction 2.23 (Defendant's Prior Bad Acts or Crimes (F.R.E. 404(b))). If evidence of the defendant's prior conduct or conviction has been admitted under Rule 404(b) or Rule 609 *and* the defendant is impeached with prior bad acts under Rule 608(b), this instruction should be given in conjunction with Instructions 2.23 and 2.25, respectively. If evidence has been admitted under all three rules, all three instructions should be given, highlighting the difference in relevance for the jury.

Rule 608(b) permits inquiry only concerning prior acts that are probative of untruthful conduct. To fall within the rule, the acts "will normally involve dishonesty or false statement as employed in Rule 609(a)(2)." Graham § 608.4 at 146-47. The Third Circuit has held that Rule 609(a)(2) applies only to crimes that "bear on the witness' propensity to testify truthfully." *See United States v. Johnson*, 388 F.3d 96 (3d Cir. 2004). In *United States v. Irizarry*, 341 F.3d 343 (3d Cir. 2003), the court noted that the trial court properly allowed the prosecutor to cross-examine the defendant about his possession of identification in someone else's name and about his possession of blank Social Security cards. *Id.* at 312. The Third Circuit stated that the evidence tended to show deceit and therefore fell within Rule 608(b).

The Third Circuit has also held that the decision whether to allow cross-examination under Rule 608(b) falls within the trial court's discretion. *See United States*

v. McNeill, 887 F.2d 448, 453 (3d Cir. 1989). In *Johnson v. Elk Lake School District*, 283 F.3d 138 (3d Cir. 2002), the court held that the trial court acted within its discretion when it precluded plaintiff's counsel from cross-examining a key witness concerning a lie on his resume. *Id.* at 145 n. 2. The court noted that the trial court's ruling was reviewed under an abuse of discretion standard with "substantial deference" to the trial court. The court stated that "the trial court was within its discretion to conclude that Stevens' lying on his resume, although duplicitous and wrong, was not so indicative of moral turpitude as to be particularly probative of his character for untruthfulness." *Id.* This result is criticized in Graham who states that "the exercise of discretion should very rarely if ever be exercised to exclude an undisputed act of 'lying'" such as that in *Johnson*. Graham § 608.4 n. 5.

The inquiry under Rule 608(b) should focus on the actual acts that suggested untruthfulness and not any third party action, such as suspension from a job, that resulted from those acts. *See United States v. Davis*, 183 F.3d 231, 257 n. 12 (3d Cir. 1999). The court may preclude inquiry concerning prior acts if they are remote in time. *See Johnson v. Elk Lake School District*, 283 F.3d 138, 145 n.2 (3d Cir. 2002).

Cross-examination may be limited by the Fifth Amendment; Rule 608(b) provides that no witness, including the accused, waives the Fifth Amendment privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness. *See United States v. Hudson*, 422 F.Supp. 395 (E.D.Pa. 1976), *affirmed* 556 F.2d 566, *affirmed* 556 F.2d 569, *cert. denied*, 431 U.S. 922, *cert. denied*, 434 U.S. 839 (1977). The Third Circuit appears not to have addressed this aspect of the rule.

2.25 Impeachment of Defendant - Prior Conviction (F.R.E. 609)

You *(are about to hear)(heard)* **evidence that the defendant** *(name)* **was previously convicted of** *(a)* **crime***(s)*. **You may consider evidence of** *(name)*'s **previous conviction of a crime only to help you decide whether to believe** *(name)*'s **testimony and how much weight to give it. That evidence does not mean that** *(name)* **committed the crime charged here, and you must not use that evidence as any proof of the crime charged in this case.**

[This evidence may not be used in any way at all in connection with the other defendant(s)].

Comment

This instruction is derived from Eighth Circuit 2.16. For variations, *see* 1A O'Malley §§ 11.12 and 15.08, Sand § 7-13, Federal Judicial Center § 41, First Circuit 2.04, Fifth Circuit § 1.11, Sixth Circuit 7.05A, Seventh Circuit § 3.05, Ninth Circuit § 4.6, and Eleventh Circuit 6.4.

This instruction should be used when the defendant's prior conviction will be or has been admitted to attack the defendant's credibility under Rule 609 of the Federal Rules of Evidence. If evidence of the prior conviction is elicited during cross-examination of the defendant, the word "heard" should be substituted for "are about to hear."

It is important to distinguish between the two subsections of Rule 609(a). Rule 609(a)(1) permits impeachment with felony conviction in the judge's discretion. The Rule allows impeachment by convictions of crimes punishable by death or imprisonment greater than one year if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant." *See Government of the Virgin Islands v. Bedford*, 671 F.2d 758 (3d Cir. 1982).

Rule 609(a)(2) applies to crimes of dishonesty or false statement and makes admission of the evidence mandatory. If the crime falls within (a)(2), the trial court must admit the prior conviction. *See United States v. Wong*, 703 F.2d 65, 68 (3d Cir.), *cert. denied,* 464 U.S. 842 (1983). Rule 609(a)(2) is interpreted narrowly and does not include crimes such as theft that do not "bear on the witness' propensity to testify truthfully." *See United States v. Johnson*, 388 F.3d 96 (3d Cir. 2004)(quoting from the Conference Committee notes).

Rule 609 also includes a time restriction. If more than ten years has passed since the date of conviction or release, the prior conviction is not admissible unless the proponent gives written notice and "the court determines, in the interests of justice, that the probative value of the conviction . . . substantially outweighs its prejudicial effect." F.R.E. 609(b).

Ordinarily, evidence of the defendant's prior conviction is admissible only for the limited purpose of attacking credibility. As a result, the defendant is entitled, upon request, to an instruction limiting the jury's consideration of the conviction to the purpose for which it was admitted. The Third Circuit has not addressed the question of whether it is plain error not to give this instruction if the defendant fails to request it. Professor Graham opines that failure to give the instruction "will more likely result in plain error where the conviction is similar." *Graham, Handbook of Federal Evidence* § 609.6 at pp. 227-28 (5th ed. 2001).

In some cases, a defendant's prior criminal record is introduced for other purposes. In those cases, this instruction should not be given. Instead, the jury should be specifically instructed on the purpose for which the evidence was admitted. A prior conviction may be required to establish an element of the offense charged, as when the defendant is charged under 18 U.S.C. § 922(g) or (h). *See* Instruction 2.13 (Prior Conviction of Defendant Charged with Possession of a Firearm by a Convicted Felon (18 U.S.C.A. § 922 (g))). Evidence of other crimes may also be admitted to prove motive, opportunity, intent or the like under Rule 404(b) of the Federal Rules of Evidence. *See* Instruction 2.23 (Defendant's Prior Bad Acts or Crimes (F.R.E. 404(b))).

The bracketed language should be given in a multi-defendant case.

2.26 Impeachment of Defendant - Prior Inconsistent Statement Taken in Violation of *Miranda*

<u>Alternative 1:</u> You just heard the defendant, *(name)*, **testify on** *(his)(her)* **own behalf. You also heard evidence that** *(name)* **made** *(a statement)(certain statements)* **before trial.** *(Name)* **admitted making** *(this)(these)* **statement***(s)*. *(This)(These)* **earlier statement***(s)(is)(are)* **brought to your attention only to help you decide if you believe what the defendant testified to here in court. You may consider** *(this)(these)* **statement***(s)* **as you decide if what** *(name)* **said here in court was true. You must not, however, consider the earlier statement***(s)* **as evidence of** *(name)*'s **guilt. The government must use other evidence to prove, beyond a reasonable doubt, that the defendant committed the crime.**

<u>Alternative 2:</u> You will recall that the defendant, *(name)*, **testified on** *(his)(her)* **own behalf. You are about to hear evidence that** *(name)* **made** *(a statement)(certain statements)* **before trial.** *(This)(These)* **earlier statement***(s)* **by** *(name) (is)(are)* **brought to your attention only to help you decide if you believe what the defendant testified to here in court.** *(Name)* **has denied making** *(this)(these)* **statement***(s)*. **If you find that** *(name)* **made statement***(s)* **before trial that are different from** *(name)*'s **testimony here at trial,** *then* **you may consider** *(this)(these)* **statement***(s)* **as you decide if what** *(name)* **said here in court was true. You must not, however, consider the earlier statement***(s)* **as evidence of** *(name)*'s **guilt. The government must use other evidence to prove, beyond a reasonable doubt, that the defendant committed the crime.**

Comment

This instruction is derived from Federal Judicial Center § 42. For variations, *see* 1A O'Malley §11.13, Eighth Circuit § 2.17.

Normally, prior statements of the defendant are admissible without limitation under Rule 801(d)(2)(A) of the Federal Rules of Evidence. If the defendant's prior statement is admitted without limitation, no instruction is necessary. However, if a statement is obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and the defendant successfully moves to suppress it, the statement is not admissible substantively, but may nevertheless be admitted to impeach the defendant if the defendant elects to testify. *Harris v. New York*, 401 U.S. 222 (1971).

One of these instructions should then be used during the trial either before or immediately after the statement is introduced, to restrict the statement to its limited role. In addition, Instruction 4.__(Impeachment of Defendant - Prior Inconsistent Statement Taken in Violation of Miranda) should be given as part of the final instructions.

Which alternative to use depends on the procedure followed at trial as well as the defendant's testimony. Rule 613 of the Federal Rules of Evidence provides that extrinsic evidence of the prior statement "is not admissible unless the witness is afforded an opportunity to explain or deny" the statement. Therefore, it is likely that the prosecution will question the defendant concerning the statement on cross-examination in order to lay the foundation for introducing extrinsic evidence of the statement during rebuttal. The court should use **Alternative 1** if the defendant is asked about the prior statement on direct or cross-examination and admits making the statement(s). The instruction should be given immediately after the defendant testifies concerning the statement(s). The court should use **Alternative 2** if the defendant denies making the statement(s) and the prosecution introduces extrinsic evidence of the statement(s) in rebuttal. In that case, the court should give the instruction immediately before the prosecution introduces its evidence that the defendant made the statement(s).

If other prior statements of the defendant have been introduced without limitation, the court should give Instruction 2.11 (Limited Admissibility: Evidence Admitted for a Limited Purpose) with this instruction to emphasize the difference in the relevance of the two sets of statements.

2.27 Prior Statement of Defendant – Single Defendant on Trial

The government has introduced evidence that the defendant *(name of defendant)* **made a statement to** *(name of person who took statement)*. **You must decide whether** *(name of defendant)* **did in fact make the statement. If you find that** *(name of defendant)* **did make the statement, then you must decide what weight, if any, you feel the statement deserves. In making this decision, you should consider all matters in evidence having to do with the statement, including those concerning** *(name of defendant)(himself)(herself)* **and the circumstances under which the statement was made.**

[If, after considering the evidence, you determine that a statement, was made voluntarily, you may give it such weight as you feel it deserves under the circumstances. On the other hand, if you determine that the statement was not made voluntarily, you must disregard it. In determining whether any alleged statement was made voluntarily, you should consider (name of defendant)'s age, training, education, occupation, and physical and mental condition, and (his)(her) treatment while in custody or under interrogation as shown by the evidence in the case. Also consider all other circumstances in evidence surrounding the making of the alleged statement.]

Comment

This instruction was derived from Seventh Circuit § 3.02 and 1A O'Malley § 14.03.

This instruction should not ordinarily be given during trial. Instead, the subject will be covered in the final instructions. *See* 4.__ (Statement of Defendant - Single Defendant on Trial).

If the court held a pretrial proceeding on a motion to suppress the defendant's statement, the court may be aware of the issues that will be raised concerning the voluntariness of the defendant's statement or the weight it should be accorded. The court may chose to give the instruction during the trial if the prosecution introduces a defendant's confession or similar statement and the defendant raises questions about the weight that the jury should accord that evidence. The bracketed language should be included if the defendant raises a colorable question of whether the statement was given voluntarily. In *Crane v. Kentucky*, 476 U.S. 683 (1986), the Supreme Court noted that the pretrial determination that the defendant's confession is voluntary is not conclusive and held that the trial court violated the defendant's constitutional rights when it precluded the defendant from introducing evidence relating to the circumstances of the confession at trial. The evidence "will often be germane to its probative weight, a matter that is exclusively for the jury to assess." *Id.* at 688. Congress has spoken to this issue in 18 U.S.C. § 3501(a), which provides in part:

> [T]he trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

In *Government of the Virgin Islands v. Gereau*, 502 F.2d 914 (3d Cir. 1974), the Third Circuit held that the trial court properly instructed the jury to consider the voluntariness of the defendant's confessions and to disregard them if they were not given voluntarily. If a question of voluntariness is raised, the trial court must admit the relevant evidence and instruct the jury on the question.

2.28 Prior Statement of a Defendant – Multi-Defendant Trial

The government has introduced evidence that the defendant *(name of defendant)* **made a statement to** *(name of person who took statement)*. **I caution you that you may consider** *(name of defendant)*'s **statement only in resolving the case against** *(name of defendant)*. **You must not consider or discuss this evidence in any way with respect to** *(name of co-defendant, if there is only one)(any of the other defendants on trial)*.

[You must decide whether (name of defendant) did in fact make the statement. If you find that (name of defendant) did make the statement, then you must decide what weight, if any, you feel the statement deserves. In making this decision, you should consider all matters in evidence having to do with the statement, including those concerning (name of defendant)(himself)(herself) and the circumstances under which the statement was made.]

[If, after considering the evidence, you determine that a statement, was made voluntarily, you may give it such weight as you feel it deserves under the circumstances. On the other hand, if you determine that the statement was not made voluntarily, you must disregard it. In determining whether any alleged statement was made voluntarily, you should consider (name of defendant)'s age, training, education, occupation, and physical and mental condition, and (his)(her) treatment while in custody or under interrogation as shown by the evidence in the case. Also consider all other circumstances in evidence surrounding the making of the alleged statement.]

Comment

This instruction is derived from Seventh Circuit § 3.02 and Sand § 5-20. For variations, *see* 1A O'Malley §14.04, Fifth Circuit § 1.27, Eighth Circuit § 2.15, and Eleventh Circuit § 2.2.

This instruction should be given during the trial in a multiple defendant trial when one defendant's confession which names or implicates the other defendant(s) is admitted in a joint trial unless it is clear that the confessing defendant will testify. A defendant is deprived of his right under the Confrontation Clause when a nontestifying co-defendant's incriminating confession is introduced at their joint trial even if the jury is instructed to consider that confession only against the co-defendant. Limiting instructions are normally inadequate to protect the defendant against the risk that the jury will misuse the co-defendant's confession and consider it as evidence against the defendant. *See Bruton v. United States*, 391 U.S. 123 (1968); *see also Cruz v. New York*, 481 U.S. 186, 194 (1987)(protection applies even if the defendant also confessed). However, if the prosecution adequately redacts the co-defendant's statement, removing language that the jury could understand as referring to the defendant without further evidentiary linkage, the co-defendant's confession may be admitted in a joint trial. *See Richardson v. Marsh*, 481 U.S. 200 (1987)(holding redaction adequate to protect defendant); *Priester v. Vaughn*, 382 F.3d 394 (3d Cir. 2004)(concluding redaction provided adequate protection); *but see Gray v. Maryland*, 523 U.S. 185 (1998)(redaction inadequate); *United States v. Richards*, 241 F.3d 335 (3d Cir. 2001)(redaction inadequate). When such a confession is admitted, this instruction is necessary to protect the defendant's rights under the Confrontation Clause.

The language in the bracketed paragraphs may be given if appropriate. The first bracketed paragraph may be appropriate if the defendant raises a question concerning whether the statement was made or the circumstances under which it was made. The second bracketed paragraph should be included if the defendant raises a colorable question of whether the statement was given voluntarily.

2.29 Photographs, Inflammatory

This photograph *(these photographs) (was)(were)* **admitted in evidence for the purpose of helping you understand the testimony by** *(describe purpose, e.g., showing you the conditions at the alleged scene of the crime, showing the nature of the wounds received by the deceased, showing you what (name of witness) was referring to.)* **It is not a pleasant photograph to look at. You should not let it stir up your emotions to the prejudice of the defendant. Your verdict must be based on a rational and fair consideration of all the evidence and not on passion or prejudice against the defendant, the government, or anyone else connected with this case.**

Comment

This instruction is derived from Pennsylvania Suggested Standard Jury Instructions - Criminal § 3.18.

Photographs may be admitted even though they are inflammatory if their probative value is sufficient. *See United States v. Lopez*, 271 F.3d 472, 482 (3d Cir. 2001); *Government of Virgin Islands v. Albert*, 241 F.3d 344 (3d Cir. 2001). Before admitting a potentially inflammatory photograph the trial court must determine (1) that it is relevant and (2) that the need for the picture and its probative value are not substantially outweighed by the likelihood of unfair prejudice to the defendant. When admitting a photograph the court should take measures to minimize the risk of prejudice, such as masking portions and limiting the time the jury is allowed to look at it.

This instruction reduces the likelihood of improper use or influence of the photograph. It directs the jurors' attention to the purpose for which the photograph was admitted and cautions them not to permit it to stir up their emotions to the defendant's prejudice. Although it appears that a limiting instruction may not be required, the court should provide a limiting instruction to minimize the prejudicial impact of the evidence. *See Government of Virgin Islands v. Albert*, 89 F.Supp. 2d 658, 665 (V.I. 2000)(upholding conviction even though the trial court admitted a gruesome videotape of the murder scene and gave no limiting instruction other than to direct the jury not to listen to the audio narration on the tape, but expressing concern about the risk of unfair prejudice and possible reversal).

2.30 Photograph of Defendant ("Mug Shots")

[Select whichever of the following applies:

((Name of witness) testified that (he)(she) viewed a photograph of (name of defendant) which was shown to (him)(her) by the (police)(law enforcement agents).)

(You were shown a picture of (name of defendant) that was taken by (the government).)]

The government collects pictures of many people from many different sources and for many different purposes. The fact that the government had *(name of defendant)*'s **picture does not mean that** *(he)(she)* **committed this or any other crime, and it must have no effect on your consideration of the case.**

Comment

This instruction is derived from Eighth Circuit § 2.21.

This instruction may be given if the jury sees or learns of a law enforcement booking photograph – mug shot – of the defendant. The committee recommends that this instruction not be given unless specifically requested by the defense.

In some cases, the jury will learn that law enforcement had a mug shot of the defendant before the defendant was charged with the offense for which the defendant is on trial. For example, if identification is an issue in the trial, the jury may hear testimony concerning pre-charge photo identification of the defendant using a mug shot. *See United States v. Hines*, 470 F.2d 225 (3d Cir. 1973). The decision about whether to admit the evidence should be approached with caution. If the defendant's mug shot is introduced in evidence or if the jury is informed that law enforcement had a photograph of the defendant, the jury may conclude that the defendant has a criminal record. *United States v. Hines*, 470 F.2d 225, 227-28 (3d Cir. 1973). Nevertheless, the evidence is properly admitted if its probative value outweighs the risk of unfair prejudice. *See United States v. Dunbar*, 767 F.2d 72 (3d Cir. 1985); *United States v. Gimelstob*, 475 F.2d 157 (3d Cir. 1973). One way to reduce the risk of unfair prejudice is to redact the photograph, removing indications that it is a mug shot.

A cautionary instruction may also reduce the risk of unfair prejudice. In *United States v. Amorosa*, 167 F.2d 596, 599 (3d Cir. 1948), the Third Circuit concluded that the

defendant had not been prejudiced by the government's use of two F.B.I. photographs of the defendant. The court commented on the trial court's instruction to the jury:

> The trial judge in his charge instructed the jury as to the F.B.I. number on the picture, 'You are not to infer because of that number that the defendant is guilty of this crime or of any other crime. In other words, you are to predicate no finding of fact on the mere fact that on the front of the picture there appears this F.B.I. number. You will, for the purpose of this case, completely disregard the fact that one of the pictures bears a number.'

Nevertheless, it does not appear that a cautionary instruction is required. The Third Circuit has rejected arguments based on the prejudicial impact of the defendant's mug shot without considering whether the trial court gave a cautionary instruction. *See United States v. Gimelstob*, 475 F.2d 157 (3d Cir. 1973); *United States v. Hines*, 470 F.2d 225, 227-28 (3d Cir. 1973).

2.31 Dismissal During Trial of Some Charges Against Single Defendant

At the beginning of the trial, I described the charges against the defendant. At this time, the charge*(s)* **of** *(describe dismissed count(s)) (is)(are)* **no longer before you. You should not be concerned with nor should you speculate about the reason the charge***(s) (is)(are)* **no longer part of this trial.**

The defendant is on trial only for the charge*(s)* **of** *(remaining count(s))*. **You may consider the evidence presented in the case only as it relates to the remaining charge***(s)*.

Comment

This instruction is derived from Ninth Circuit § 2.12. For variations, *see* Sand § 2-20 and Eighth Circuit § 2.11.

This instruction may be given during the trial when charges are dismissed, most likely after the close of the government's case-in-chief. If those charges were called to the jury's attention in the preliminary instructions or opening statements, or if evidence was introduced that relates only to those charges, the jury may expect the defendant to respond to the charges or to the evidence offered to establish the charges. This instruction explains to the jury that the charges are no longer part of the trial and thereby lets the jurors know why there will be no response to those aspects of the government's case. If more than one defendant is on trial, Instruction 2.32 (Disposition During Trial of All Charges Against One or More Co-Defendant*(s)*) should be given instead.

If evidence is stricken as a result of the dismissal of charges, the court may want to instruct the jury on that point. The Eighth Circuit suggests the following language: "The following evidence is now stricken by me, and is thus no longer before you and may not be considered by you: (Describe stricken evidence)." When describing the stricken evidence, the court risks being either over inclusive or under inclusive. The Committee therefore suggests that, if the court elects to give such an instruction, it do so only if the parties agree to the description of the stricken evidence.

2.32 Disposition During Trial of All Charges Against One or More Co-Defendant(s)

The co-defendant*(s)(name(s)) (is)(are)* **no longer on trial and you are not being asked to reach a verdict as to** *(name(s)).* **You are not to be concerned with nor are you to speculate about why** *(he)(she)(they) (is)(are)* **no longer part of this trial. This fact should not affect or influence your verdict with respect to the remaining defendant***(s)*. **You must base your verdict as to** *(name(s) of remaining defendant(s))* **solely on the basis of the evidence or lack of evidence against** *(him)(her)(them)*.

Comment

This instruction is derived from Sand § 2.19. For variations, *see* 1A O'Malley §§ 11.14 and 12.16, Eighth Circuit § 2.12, and Ninth Circuit § 2.13.

When charges against a co-defendant are disposed of after the jury has been empaneled, the court should instruct the jury that the co-defendant's case is no longer before them and caution the jury not to draw any inference from that fact. *See United States v. Gambino*, 926 F.2d 1355, 1364 (3d Cir. 1991)(concluding that trial court's instruction to jurors that they should infer nothing from absence of defendant who had pleaded guilty adequately protected remaining defendants from prejudicial inference). The disposition of charges may result from causes as different as the entry of a judgment of acquittal on grounds of insufficient evidence or the entry of a conviction based on a guilty plea. The jury should not normally be informed of the reason. *See United States v. Restaino*, 369 F.2d 544 (3d Cir. 1966)(concluding trial court's cautionary instructions adequately protected defendant when court informed jury that co-defendants had pleaded guilty). This instruction avoids any reference to the reason for the disposition of the co-defendant's case.

In *United States v. Ragbir*, 2002 WL 1273657 at *2 (3d Cir. June 7, 2002), a non-precedential decision, the Third Circuit approved the following instruction after a co-defendant pleaded guilty partway through the trial:

> You'll notice that neither Mr. Robert Kosch nor his attorney, Mr. DeGroot, are seated at the defense table. They will be absent from this court for the remainder of the trial. I instruct you that the charges against Robert Kosch are no longer part of the Government's case and they are not to be considered by you at the time of your deliberations. You should not speculate or concern yourselves about the reason for the absence of Mr. Kosch.
>
> You are not to consider his absence in any way when you hear the rest of this case or when you deliberate on a verdict as to Mr. Ragbir. The

> Government has an absolute obligation under the United States Constitution to prove every element of every offense charged against Mr. Ragbir beyond a reasonable doubt. Again I instruct you emphatically that in considering the evidence as to Mr. Ragbir, you shall not take into account the absence of Mr. Kosch. To do otherwise would be to violate your oaths as jurors.

If some, but not all, charges against a defendant in a multi-defendant case are dropped, an instruction may be unnecessary, since the defendant will still be before the jury. If the court chooses to give an instruction in such a case, the court should adjust the language of the instruction accordingly. *See* Eighth Circuit § 2.13 for suggested language.

If evidence is stricken as a result of the dismissal of charges, the court may want to instruct the jury on that point. The Eighth Circuit suggests the following language: "The following evidence is now stricken by me, and is thus no longer before you and may not be considered by you: (Describe stricken evidence)." When describing the stricken evidence, the court risks being either over inclusive or under inclusive. The Committee therefore suggests that, if the court elects to give such an instruction, it do so only if the parties agree to the description of the stricken evidence.

2.33 Previous Proceeding (Trial) of Defendant

You *(will hear)*(*have heard)* **that there was a prior proceeding** *(trial)* **in this case. You should not, however, concern yourself with this fact.**

Your verdict must be based solely on the evidence in the present trial in accordance with the Court's instructions without any regard to what may have occurred earlier.

Comment

This instruction is based on 1A O'Malley § 10.08.

This instruction should only be given if it is clear that the jury will, for some reason, learn of an earlier trial. When used, this instruction should be given at the time of the first reference to the earlier trial or proceeding.

It is preferable to refer to the earlier trial simply as a proceeding. The Committee recommends that the court suggest to the attorneys in the case that they should avoid references to a prior "trial" and that they so instruct their witnesses. The attorneys should, if necessary, instruct the witnesses to refer to the prior trial as a "prior proceeding." If reference is made to a prior trial, the language of the instruction should be adapted accordingly.

In some cases, it will be difficult or impossible not to let the jury know that the case has been previously tried. For example, in *United States v. Hykel*, 463 F.2d 1192, 1194 (3d Cir. 1972), the trial followed an earlier trial that ended in a mistrial. A number of witnesses had testified at the first trial and were likely to mention that fact. The prosecutor therefore mentioned to the jury that the trial would be the defendant's second one for the same offense. The defendant argued to the Third Circuit that these remarks prejudiced his case. In *United States v. Hykel*, 461 F.2d 721, 726 (3d Cir.1972), the Third Circuit affirmed and commented favorably on the trial court's instruction:

> The remarks, which do not appear on the record, were brought to the attention of the District Court, which cautioned the jury that:
>
> > [T]he fact that this is the second trial of this case should mean nothing to you. Do you understand that? No inference of any kind should be drawn from that.
>
> We believe that the District Court's cautionary words were sufficient to cure whatever prejudice, if any, the prosecutor's remarks may have caused in the absence of the caution.

2.34 Disruptive Defendant

<u>Inappropriate verbalization:</u> You just *[describe behavior; e.g., heard the defendant speak to the witness]***. The defendant's statements are not evidence in this case. You must disregard any statement that the defendant makes in this courtroom unless** *(he)(she)* **is testifying as a witness.**

<u>Inappropriate conduct requiring restraint of defendant:</u> You may notice that the defendant *[describe restraints; e.g., is wearing handcuffs in the courtroom]*. **You must not consider this fact in deciding the issues in this case. It is not evidence in the case and should not be discussed by you in your deliberations. It has no bearing on defendant's guilt or innocence.**

<u>Inappropriate conduct requiring removal of defendant</u>: You may notice that the defendant is no longer in the courtroom. The defendant's absence is unrelated to *(his)(her)* **guilt or innocence and is not evidence in the case. You must not consider this fact in deciding the issues in this case.**

Comment

Defendants sometimes disrupt the orderly process of trial with inappropriate verbal or physical conduct. The Benchbook for U.S. District Court Judges suggests a protocol for handling disruptive defendants. Benchbook for U.S. District Court Judges § 5.01 (March 2000 rev.). Whether and how to instruct the jury will depend on the type and severity of the defendant's misconduct as well as the court's response to that misconduct.

First, in the case of a verbal outburst, the court may simply want to direct the jury to disregard it. For example, in *Norde v. Keane*, 294 F.3d 401, 405 (2d Cir. 2002), the Second Circuit quoted from the state court's caution to the jury after the defendant's outburst:

> Now ladies and gentlemen, you just heard the defendant yell out in the courtroom. He's been instructed by me not to do that. And I am going to instruct you to disregard any statements that the defendant makes in this courtroom[] other than if he should take the stand and testify. Just disregard it.

In *Norde*, the Second Circuit held that the defendant's rights had been protected, but disapproved the trial court's further elaboration to the jury discussing the defendant's expressed desire to be represented by a different lawyer. 294 F.3d at 412.

Second, in some cases, the defendant's conduct may prompt the court to order the disruptive defendant restrained. Such action does not necessarily violate the defendant's rights, but it may prejudice the defendant in the eyes of the jury. *See Szuchon v. Lehman*, 273 F.3d 299 (3d Cir. 2001); *see also Deck v. Missouri,* 125 S.Ct. 2007 (2005); *Illinois v. Allen*, 397 U.S. 337 (1970). To the extent possible, the court should rely on restraints not visible to the jury. In *Wilson v. McCarthy*, 770 F.2d 1482 (9th Cir. 1985), the Ninth Circuit held that the trial court was not required to instruct the jury concerning the shackles used on the defendant in the absence of a defense request. Nevertheless, an instruction may be helpful. In *Szuchon*, the Third Circuit noted that the trial court had "carefully instructed the jury to remain focused solely on the evidence." 273 F.3d at 315. *See also United States v. Taylor*, 562 F.2d 1345 (2d Cir. 1977)(noting that the trial court had cured possible prejudice after jurors inadvertently observed the defendants in manacles through cautionary instruction "pointing out that the reason for some defendants (not identified by the court) being in custody while others were not was that some defendants were able to afford bail and others were not and that the jury was to draw no inference from whether or not a defendant was able to afford bail"); *United States v. Larkin*, 417 F.2d 617 (1st Cir. 1969)(noting that trial court gave cautionary instruction after jurors observed the defendant being transported in handcuffs, directing jury to disregard the fact that defendant was in custody and "that such custody was not unusual in this kind of case and had no bearing on defendant's guilt or innocence").

Finally, in some cases, the defendant's disruptive behavior may be so severe and persistent that the trial court removes the defendant from the courtroom. *See* Benchbook, § 5.01. The court should then instruct the jury that the absence is not related to the defendant's guilt on the charges and is not evidence in the case. The court must permit the absent defendant to communicate with counsel, either directly during the proceedings or at least at frequent intervals. In addition, if possible, the court should arrange a connection – video or at least audio – to allow the absent defendant to observe the court proceedings.

2.35 Discharge of Defense Counsel During Trial

Even though *(name of defendant)* **was represented by a lawyer when this trial began,** *(he)(she)* **has decided to continue the trial representing** *(himself)(herself)* **and not to use the services of a lawyer.** *(He)(She)* **has a constitutional right to do that.** *(His)(Her)* **decision has no bearing on whether** *(he)(she)* **is guilty or not guilty, and it must not affect your consideration of the case.**

Because *(name of defendant)* **has decided to act as** *(his)(her)* **own lawyer, you will hear** *(him)(her)* **speak at various times during the trial.** *(He)(She)* **may make** *(a)(an) (opening statement and)* **closing argument.** *(He)(She)* **may ask questions of witnesses, make objections, and argue to the court. I want to remind you that when** *(name of defendant)* **speaks in these parts of the trial** *(he)(she)* **is acting as a lawyer in the case, and** *(his)(her)* **words are not evidence. The only evidence in the case is the testimony of witnesses under oath and exhibits admitted into evidence.**

Comment

This instruction is derived from Eighth Circuit § 2.22 and Federal Judicial Center § 6.

This instruction should be given when a defendant exercises the constitutional right under *Faretta v. California*, 422 U.S. 806 (1975), to waive the Sixth Amendment right to assistance of counsel and proceed pro se. In order to assure that the waiver is valid, the court should engage in a colloquy with the defendant such as the one suggested in § 1.02 of the *Benchbook for U.S. District Court Judges* (4th ed. 2000).

The instruction informs the jury of the defendant's choice to proceed pro se. In addition, it directs the jury to treat the words spoken by the defendant while functioning as counsel like those of any other lawyer and not to treat them as evidence in the case.

The court may appoint standby counsel to assist the pro se defendant. A pro se defendant is not constitutionally entitled to standby counsel or to hybrid representation,

in which the defendant shares the role of counsel with standby counsel. *See McKaskle v. Wiggins*, 465 U.S. 168 (1984). Nevertheless, the trial court has discretion to permit either and may even appoint standby counsel over the defendant's objection. *See McKaskle*, 465 U.S. at 182-83; *Faretta*, 422 U.S. at 834 n.46. If the court appoints standby counsel, the court may wish to inform the jury of standby counsel's role in the case.

2.36 Prejudicial Publicity During Trial

I am advised that reports about this trial are appearing *(in the newspapers) and/or (on radio and television) and/or (on the Internet).* **The reporter responsible for the story may not have listened to all of the testimony as you have and may be getting information from people who will not testify under oath and subject to cross-examination in this trial. In addition, the reporter may emphasize an unimportant point or may simply be wrong.**

As I have instructed you *(throughout)(previously during)* **this trial, you must avoid listening to or reading any media accounts of this trial on the radio, television or the internet and in the newspaper. You are required to disregard any and all reports which you have** *[(read)(seen)(heard)] [(in the newspapers) and/or (on radio and television) and/or (on the Internet)]* **and any statements or inferences contained therein. Such information is not part of the evidence in this case. You must not permit such information to influence your judgment in arriving at a true verdict in this case.**

Do not read anything or listen to anything or watch anything with regard to this trial. If you are exposed to any publicity about this case, you must not discuss anything which you have seen, heard, or read with your fellow jurors at any time during the trial or your deliberations. The case must be decided by you solely and exclusively on the evidence which will be received here in court.

Comment

This instruction is derived from 1A O'Malley § 11.08, Sand § 2-16 Publicity--Reminder (Alternate Form), and *United States v. DeLarosa*, 450 F.2d 1057 (3d Cir. 1971), *cert. denied,* 419 U.S. 1120 (1975).

The preliminary charge instructs the jury to consider only evidence deemed competent by the court and disregard any form of media coverage outside the courtroom. *See* Instruction 1.10 (Credibility of Witnesses). If jurors are later exposed to prejudicial publicity during the trial, the fairness of the trial has not necessarily been compromised, and the trial court has broad discretion to determine whether the defendant's right to a fair trial has been impaired. *United States v. DeLarosa*, 450 F.2d 1057 (3d Cir. 1971) *cert. denied,* 419 U.S. 1120 (1975). Typically, the trial court will voir dire the jury concerning exposure to the prejudicial publicity and give a cautionary instruction.

The Third Circuit addressed the appropriate measures in *United States v. DeLarosa*, 450 F.2d 1057 (3d Cir. 1971). In *DeLarosa*, two local newspapers reported on the second day of trial that shots were fired into the home of the government's chief witness. 450 F.2d at 1061. Upon learning of the publicity, the trial court conducted a voir dire and discovered that four jurors had seen the articles. *Id.* The court then asked: "'With the knowledge that you have of that article, do you feel that you are able to continue as a juror in this case, and decide the facts, and bring in a verdict based solely upon the facts you have heard in the courtroom and the evidence which has been adduced in the courtroom without being influenced . . . [by the articles].'" *Id.* at 1062 (quoting). When the jurors responded in the affirmative and assured the court that they had not shared the contents of the article with other jury members, the trial court denied motions for a mistrial. *Id.*

In determining whether the trial court abused its discretion, the Third Circuit considered the cautionary instruction given by the court. *Id.* Defense counsel had requested the following instruction:

> You must disregard any and all reports which you have read, seen or heard in or through the news media; any statements or inferences contained therein. Such matters are not facts in evidence in this case because they are not relevant, competent or material to the issues which have been developed in this Courtroom. You must not permit such matters to influence your judgment in arriving at a true verdict in this case. *Id.* at 1062 n.3.

The trial court denied the request and, instead, instructed the jury:

> You would violate your sworn duty if you base your verdict on anything but the evidence heard in the courtroom and these instructions on the law. *Id.* at 1062.

The Third Circuit held that the combination of the voir dire and the instruction was sufficient to dispel any prejudice, but nevertheless remarked that "[I]t would have been better practice to give the charge requested [by counsel], which unmistakably prohibited consideration by the jury of information obtained from the news media." *Id.*

Similarly, in *United States v. Jackson*, 649 F.2d 967 (3d Cir. 1981), the Third Circuit held that the steps taken by the trial court adequately responded to the prejudicial publicity. In *Jackson*, many news reports concerning the case were circulating, and the unsequestered jury was on weekend recess. *Id.* at 974. When the trial resumed, defense counsel asked the court to inquire into whether the individual jurors had seen or heard news coverage of the

case during the recess. *Id.* The trial court observed that it had "specifically, on more than one occasion, instructed the jury that they were not to read any newspaper accounts concerning the trial or listen to any radio or television accounts," and agreed to "inquire as to whether any of them have (read or listened to newspaper, radio and TV reports)," but would conduct an individual voir dire of only those jurors who said they had been exposed to publicity about the case. *Id.* at 974-75. The court addressed the jurors as follows:

> Members of the jury, I want to again instruct you that during the course of the trial you must not discuss the case in any manner among yourselves or with anyone else, and you must not permit anyone to attempt to discuss it with you or in your presence, and insofar as the lawyers are concerned as well as others whom you may come to recognize as having some connection with the case, you are instructed that in order to avoid even the appearance of impropriety you should have no conversation whatever with those persons while you are serving on the jury.
>
> You must also avoid reading any newspaper articles that might be published about the case now that the trial is in progress, and you must also avoid listening to or observing any broadcast news program on either television or radio because of the possibility that mention might be made of this case during such a broadcast.
>
> The reasons for these cautions, of course, lies (sic) in the fact that it will be your duty to decide this case solely on the basis of the testimony and evidence presented during the trial without consideration of any other matters whatsoever.
>
> If at any time during the trial you read or hear something outside the courtroom that you think will influence your decision, please bring it to my attention through the bailiff, Mrs. Flaherty.
>
> Have any members of the jury since the beginning of this trial read any newspaper accounts or heard or listened to any radio or television accounts concerning this case and this trial?

Id. at 975. There was no response, and the trial proceeded. The Third Circuit upheld the trial court's actions, stating:

> To require the trial court to conduct an individual voir dire of all of the jurors, who have been repeatedly and properly instructed regarding news media reports, whenever there are prejudicial news media reports, rather than to limit the voir dire to jurors, if any, who have seen or heard such reports, is not consistent with the 'large discretion' needed by the court to move the trial along both expeditiously and fairly.

Id. at 975-76. Thus, the district court's general inquiry concerning the effect of media coverage on the bias of the jury, coupled with proper limiting instructions, did not amount to an abuse of discretion by the court. *Id.* at 976.

If a juror acknowledges being exposed to publicity regarding the trial, the court should question that juror individually in the presence of counsel and the defendant. At that time, the court should consider including the following questions and admonition:

1. What publicity about the case have you read, seen or heard?

2. As a result of what you (read)(saw)(heard), have you been influenced in this case in any way?

3. As a result of what you have (read)(seen)(heard), have you formed an opinion as to the guilt or innocence of the defendant?

4. Can you disregard the publicity which you (read)(saw)(heard) and decide the case based solely on the evidence presented in court?

5. Have you discussed this publicity or your feelings about it with any of the other jurors? If so, what did you say to them and what response did you receive from them?

6. Do not discuss the publicity which you (read)(saw)(heard) or anything with reference to this discussion with any of the other jurors.

In combination with the suggested cautionary instruction, this inquiry and admonition should protect the trial from the effect of the prejudicial publicity.

2.37 Instructions Prior to Closing Arguments

Members of the jury, you have heard and seen all the evidence in this case. The lawyers now have the opportunity to present their closing arguments. Under the Rules of Criminal Procedure, the government will argue first, then the defense will present its closing argument*(s)*, and finally the government may, if it chooses, argue in response or in rebuttal to the defense's argument*(s)*.

Closing arguments are designed to present to you the parties' theories about what the evidence has shown and what conclusions may be drawn from the evidence. Remember, what is said in closing arguments is not evidence. You have already heard and seen all the evidence in this case.

After the lawyers present their closing arguments, I will give you my final instructions concerning the law that you must apply to the evidence in reaching your verdict. Although the lawyers may mention points of law in their closing arguments, the law that you must follow in reaching your verdict is the law that I will give you in my final instructions. If there is any difference between what the lawyers say about the law and what I tell you in my final instructions, you must follow my instructions.

Comment

Neither O'Malley nor any of the other Circuits suggest model instructions to be given before closing arguments. This instruction is included here for trial judges who may want to explain again the nature, purpose, and limits of closing arguments. The points covered are also covered in certain preliminary and final instructions. *See* Instructions 1.02 (Role of the Jury), 1.07 (Description of Trial Proceedings), 1.08 (Evidence(What Is; Is Not)) 3.01 (Role of the Jury) and 3.02 (Evidence). This instruction should be modified if final instructions will be given before closing arguments.