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4.01 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

See Ninth Circuit § 2.3. For variations, *see* Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, *Modern Federal Jury Instructions - Criminal Volumes* (Matthew Bender 2003) [hereinafter, Sand et al., *supra*], 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 4.02 (Stipulation of Fact) if the stipulation is as to an issue of fact.

4.02 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 Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1A *Federal Jury Practice and Instructions* [hereinafter O'Malley et al., *supra*] § 12.03; Sand, et al., *supra*, 5-6, and Ninth Circuit § 2.4. For variations, see Ninth Circuit (Criminal) § 2.4 and Federal Judicial Center § 12. See also *United States v. Higdon*, 638 F.3d 233, 237 n.2 (3d Cir. 2011) (citing Instruction 4.02)

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 Court of Appeals 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. The fact that the defendant stipulates to an element of the offense does not necessarily remove that element from the jury's consideration. See *United States v. Higdon*, 638 F.3d 233, 240 (3d Cir. 2011).

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 the judge may wish to ascertain that the defendant understands the contents of the stipulation and agrees to it.

(Revised 10/2012)

4.03 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 cannot reasonably be disputed. You may accept this fact as proven, but are not required to do so. As with any fact the final decision whether or not to accept it is for you to make and you are not required to agree with me.**

Comment

See Eighth Circuit § 2.04. For variations, *see* O'Malley et al., *supra*, § 12.03; Sand et al., *supra*, 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:

The court may judicially notice a fact that is not subject to reasonable dispute because it:

- (1) is generally known within the trial court's territorial jurisdiction; or
- (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.¹

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.

¹ Before the restyling of the Federal Rules of Evidence, Rule 201(b) provided:

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.

Rule 201(g) directs that “[i]n a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.”² 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 Before the restyling of the Federal Rules of Evidence, Rule 201(g) provided 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.”

4.04 Audio/Video Recordings - Consensual

During the trial you heard *(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 et al., supra, 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.

4.05 Audio/Video Recordings - Non-consensual

During the trial, you heard recordings of conversations with the defendant(s) which were made 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, et al., supra, 5-11.

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.

4.06 Audio/Video Recordings - Transcripts

You have heard (*audio*)(*video*) recordings that were received in evidence, and you were given written transcripts of the recordings.

Keep in mind that the transcripts are not evidence. They were given to you only as a guide to help you follow what was being said. The recordings themselves are the evidence. If you noticed any differences between what you heard on the recordings and what you read in the transcripts, you must rely on what you heard, not what you read. And if you could not 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 you actually heard speaking in the recording. The names on the transcript were used simply for your convenience.]

Comment

See Sixth Circuit § 7.17 and Eighth Circuit § 2.06. For variations, see O'Malley, et al., supra, § 14.09; Sand, et al., supra, 5-9; 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))). Of course, the court should not admit a recording if the risk of unfair prejudice flowing from the evidence substantially outweighs its probative value in the case. F.R.E. 403; *United States v. Bailey*, 840 F.3d 99 (3d Cir. 2016).

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); *United States v. LaBoy*, 505 F. App’x. 182, 2012 WL 5937448 (3d Cir. 2012) (non-precedential) (noting that trial court gave appropriate limiting instructions).

Instruction 2.07 (Audio/Video Recordings - Transcripts) should be given when the recording is played. This instruction 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, and the court therefore admits two alternative versions, the court should replace the second paragraph of this instruction with 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 is 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.

(Revised 2017)

4.07 Transcript of Recording In Foreign Language

During the trial, you listened to a tape recording in *(language used)*. Each of you was given a transcript of the recording which was admitted into evidence. The transcript was a translation of the foreign language tape 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

See Ninth Circuit § 2.8.

This instruction should be given when recordings in a foreign language were 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).

4.08 Opinion Evidence (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.

In this case, you heard testimony from *(state the name of the person(s) who offered 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) (was)(were)* permitted to offer a(n) 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 discussed in these 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; O'Malley et al., *supra*, § 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 if a witness was permitted to give an opinion under F.R.E. 702. For a comparable instruction that should be given at the time the witness testifies, see Instruction 2.09 (Opinion Evidence (Expert Witnesses)). Instruction 2.10 (Opinion Evidence (Lay Witnesses)) addresses lay opinion testimony. If both expert and lay witnesses were permitted to give opinion testimony, both sets of instructions should be given.

The instruction avoids 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 Fed. R. Evid. 702 advisory committee’s note (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 O’Malley et al., *supra*, § 14.01, 248-49.

Fed. R. Evid. 703 provides that facts or data which are the basis for an expert’s opinion but are otherwise inadmissible may nonetheless be disclosed to the jury if the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect. In that situation, the comment to the 2000 amendments to the rule states: “If the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes.” See *Pineda v. Ford*, 520 F. 3d 237, 247 n. 14 (3d Cir. 2008) (civil case discussing Rule 703 limiting instruction); *United States v. Gradys*, 357 F. App’x. 481, 482-83 (3d Cir. 2009) (non-precedential) (finding that the defendant’s Rule 703 argument was not raised in the trial court and was not plain error).

(Revised 11/10)

4.09 Opinion Evidence (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 permitted *(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 discussed in these instructions for weighing and considering whether to believe the testimony of witnesses.

Comment

Federal Rule of Evidence 701 provides:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.³

F.R.E. 701. *See generally United States v. Jackson*, 849 F.3d 540 (3d Cir. 2017) (holding trial court committed error by admitting lay opinion); *Hirst v. Inverness Hotel*

³ Before the Federal Rules of Evidence were restyled, Rule 701 provided 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.”

Corp., 544 F.3d 221 (3d Cir. 2008) (discussing requirements for admission of lay opinion); *United States v. Hoffecker*, 530 F.3d 137, 170-71 (3d Cir. 2008) (discussing Rule 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 4.08 (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 during the trial, *see* Instruction 2.10 (Opinion Evidence (Lay Witnesses)).

(Revised 2017)

4.10 Summaries - Underlying Evidence Admitted

(The parties)(The government)(The defendant) **presented certain**
(charts)(summaries) **in order to help explain the facts disclosed by the** *(describe*
the admitted evidence that provided the basis for the summaries; e.g., books,
records, documents) **which were admitted as evidence in the case. The**
(charts)(summaries) **are not themselves evidence or proof of any facts. If the**
(charts)(summaries) **do not correctly reflect the evidence in the case, you**
should disregard them and determine the facts from the underlying evidence.

Comment

See Ninth Circuit § 4.18.

This instruction should be given when charts or summaries of admitted evidence are presented to the jury. The instruction reminds the jury that the admitted exhibits and testimony constitute the evidence in the case and that the chart or summary itself does not. *See United States v. Washington*, 2013 WL 4437604 (3d Cir. 2013) (holding that court properly admitted summary and instructed jury where defendant disputed accuracy of summary).

The instruction is not appropriate when the underlying documents or records have not been introduced into evidence as permitted under Federal Rule of Evidence 1006. *See Instruction 4.11 (Summaries – Underlying Evidence Not Admitted)*.

(Revised 11/2013)

4.11 Summaries – Underlying Evidence Not Admitted (F.R.E. 1006)

Certain *(charts)(summaries)* **offered by** *(the parties)(the government)(the defendant)* **were admitted as evidence. You may use those** *(charts)(summaries)* **as evidence, even though the underlying documents and records have not been admitted into evidence.**

[However, the (accuracy)(authenticity) of those (charts)(summaries) has been challenged. You must decide how much weight, if any, you will give to them. In making that decision, you should consider the testimony you heard about the way in which the (charts)(summaries) were prepared.]

Comment

See Eighth Circuit § 4.12.

This instruction may be given when summaries or charts are admitted under Rule 1006 of the Federal Rules of Evidence and the underlying records are not admitted. Rule 1006 provides:

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.⁴

⁴ Before the Federal Rules of Evidence were restyled, Rule 1006 provided:

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

The Third Circuit has upheld the use of summaries under Rule 1006. *See, e.g., United States v. Worrells*, 94 F. App'x. 927 (3d Cir. 2004); *United States v. Syme*, 276 F.3d 131, 151 (3d Cir. 2002). The court has not addressed the question of whether and how to instruct the jury concerning the summaries.

Under the rule, the summaries or charts should be based on admissible evidence. The party relying on the summary must establish its accuracy to the court's satisfaction. *See Graham, Handbook of Federal Evidence* § 1006.1 (5th ed. 2001). In *S.E.C. v. Hughes Capital Corp.*, 124 F.3d 449, 456 (3d Cir. 1997), the Third Circuit held that the trial court acted within its discretion when it refused to admit summaries of documents that the trial court held inadmissible as insufficiently trustworthy. The court stated that the trial court "did not abuse its discretion by refusing to admit a summary based on inadmissible evidence." 124 F.3d at 456. Nevertheless, in some cases, the opposing party may challenge the accuracy or authenticity of the summary. The bracketed portion of this instruction should be given if the accuracy or authenticity has been challenged.

(Revised 11/2013)

4.12 Chain of Custody

The defense has raised the issue of defects in the chain of custody of *(describe evidence in question; e.g., the firearm, the drugs)*. **You may consider any defects in determining the authenticity of this evidence and what weight to give it. The government must prove beyond a reasonable doubt that the** *(describe evidence in question)* *(is)(are)* **the same as the** *(describe evidence)* *(alleged in the indictment)(introduced during the trial)*.

Comment

This instruction may be given if a colorable question is raised at trial concerning the authentication of a critical item of evidence.

Chain of custody is initially a question for the court. In order to admit certain items of evidence, the court must determine that there is sufficient evidence of their authentication to satisfy Rule 901 of the Federal Rules of Evidence. Rule 901(a) provides:

To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.⁵

The mere fact that there is enough evidence of authentication to support admitting the evidence does not foreclose the possibility that a question of authenticity may also be raised at trial. For example, in *United States v. Dent*, 149 F.3d 180 (3d Cir. 1998), the defendant argued that the government had failed to establish a reliable chain of custody. The Third Circuit stated that “[t]o establish a chain of custody, the government need only show that it took reasonable precautions to preserve the evidence in its original condition,” and need not exclude all possibility of tampering. 149 F.3d at 188. A defect in the chain of custody goes to the weight of the evidence, not its admissibility. *See*

⁵ Before the Federal Rules of Evidence were restyled, Rule 901 provided:

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

United States v. Briley, 319 F.3d 360, 363 (8th Cir. 2003); *United States v. Gorman*, 312 F.3d 1159, 1163 (10th Cir. 2002); *United States v. Rodriguez*, 162 F.3d 135, 144 (1st Cir. 1998). Thus questions about the chain of custody might cause the jury to acquit even though the evidence was properly admitted.

If the defendant offers evidence that must be authenticated, the same principles govern. The court must assure adequate evidence of authenticity to satisfy the rules of evidence. Even if the evidence is properly admitted, the government may argue to the jury that it is not actually authentic. Of course, the defendant has no burden of proof, but the government may persuade the jury that the defendant's evidence has no probative value.

4.13 Fingerprints, Handwriting, and DNA Evidence

When the identity of the person who committed a crime is in question, the parties may introduce *(fingerprint)(DNA)(handwriting)* evidence to try to prove who committed the crime. To do this, a party may present a “known” sample of a person’s *(fingerprint)(DNA)(handwriting)*, one that is *(proved)(admitted)* to come from that person. This known *(fingerprint)(DNA)(handwriting)* sample is then compared with any *(fingerprint)(DNA)(handwriting)* being introduced to prove who committed the crime. In this case *(describe evidence produced; e.g., the “known” sample is the fingerprint card and testimony produced by the government which, if believed, establishes that the fingerprints on the card are the defendant’s and the disputed evidence is the fingerprint that was found at the scene of the crime.)*

[In this case you also heard the testimony of a witness who claims special qualification in the field of (fingerprint identification)(DNA analysis)(handwriting identification). The witness was allowed to express an opinion in order to help you decide whether the disputed (fingerprint)(DNA)(handwriting) connected to the crime in question is (the defendant)(name of suspect other than defendant)’s (fingerprint)(DNA)(handwriting). You may therefore consider the witness’ opinion in reaching your independent decision on this issue.]

Comment

See O'Malley et al., supra, § 14.12 and Sand et al., supra, 7-22.

The instruction may be given if either the government or the defense introduces evidence of handwriting, fingerprints, or DNA in an effort to establish the identity of the perpetrator. Usually, the party will also introduce the testimony of an opinion witness to help establish that the known sample of handwriting, fingerprints, or DNA matches the sample that is connected to the crime. In that case, the court should include the bracketed language and should also give Instruction 4.08 (Opinion Evidence (Expert Witnesses)).

If the defendant submits handwriting exemplars that are disguised, the court may consider giving Sand et al., supra, Instruction 6-13 on Consciousness of Guilt From Disguised Handwriting:

There has been evidence that the defendant submitted examples of his handwriting to the government for analysis and comparison with the handwriting on other documents in evidence. In this connection, there has been testimony from a handwriting expert that the handwriting exemplars submitted by the defendant were not true samples of the defendant's handwriting.

If you find that the defendant disguised his handwriting you may, but you need not, infer that the defendant believed that he was guilty. You may not, however, infer on the basis of this alone, that the defendant is, in fact, guilty of the crime for which he is charged.

Whether or not evidence that the defendant disguised his handwriting shows that the defendant believed that he was guilty and the significance, if any, to be given to such evidence, are matters for you, the jury, to decide.

Other acts that evidence a consciousness of guilt are addressed in Instruction 4.30 (Consciousness of Guilt (Flight, Concealment, Use of an Alias, etc.)).

4.14 Specific Investigation Techniques Not Required

During the trial you heard testimony of witnesses and argument by counsel that the government did not use specific investigative techniques such as *(mention omitted techniques that have been addressed in testimony or argument; e.g., fingerprint analysis, DNA analysis, the use of recording devices)*. **You may consider these facts in deciding whether the government has met its burden of proof, because as I told you, you should look to all of the evidence or lack of evidence in deciding whether the defendant is guilty. However, there is no legal requirement that the government use any of these specific investigative techniques or all possible techniques to prove its case. There is no requirement to** *(mention omitted techniques; e.g., attempt to take fingerprints or offer fingerprint evidence, gather DNA evidence or offer DNA analysis, or use recording devices or offer recordings in evidence)*.

Your concern, as I have said, is to determine whether or not the evidence admitted in this trial proves the defendant's guilt beyond a reasonable doubt.

Comment

See Sand et al., supra, 4-4.

Jurors may arrive at the trial with preconceptions about the use of specific investigative techniques and may expect the government to present evidence such as fingerprint, fiber or DNA analysis to help resolve the case. As a result, they may be reluctant to rely on other types of evidence, particularly witness testimony, either to

convict or to acquit. These expectations should not be permitted to prejudice the government. If the defendant has argued that the government's case is deficient because of the failure to use one or more specific investigative techniques, this instruction may be appropriate. If the court decides to give this instruction, the court must be careful not to place its imprimatur on the investigative choices of either party.

In *United States v. Brown*, 658 F.App'x. 100 (3d Cir. 2016) (non-precedential), and *United States v. Gorny*, 655 F.App'x. 920 (3d Cir. 2016) (non-precedential), the Third Circuit rejected challenges to the model instruction. In *Gorny*, the court noted that the instruction accurately stated the law. In both decisions, the court held that the instruction did not improperly shift the burden to the defendant and recognized that other circuits have approved the use of such an instruction. The court also held that defense arguments targeting the government investigation in each of the cases made it appropriate for the trial court to give the "anti-CSI" instruction.

In *Brown*, the defendant also challenged the following alteration of the last sentence of the instruction: "Your concern ... is to determine whether or not the eyewitness testimony which has been admitted as evidence in this trial proves the Defendant's guilt beyond a reasonable doubt." The court acknowledged that "[r]ead in isolation, that sentence might support Brown's theory that the instruction impermissibly shifted the Government's burden of proof by directing the jury to focus on the eyewitness testimony as opposed to the lack of evidence," but held that the instructions read as a whole adequately addressed the defendant's concern. *Brown*, 658 F.App'x. 100.

In *United States v. Saldarriaga*, 204 F.3d 50, 51-52 (2d Cir. 2000), the Second Circuit approved a similar instruction. In *Saldarriaga*, defense counsel had highlighted the government's failure to employ certain investigative techniques. The Second Circuit rejected the defendant's challenge to the instruction and characterized the instruction as "legally sound."

In rare cases, a question may arise concerning the defendant's failure to employ specific investigative techniques. The court should not instruct on this question unless the defendant consents. Any comment may interfere with the defendant's right not to present evidence.

If the missing evidence that is highlighted is the testimony of an absent witness, the court should not give this instruction. Instead, the court should consider whether to give Instruction 4.16 (Missing Witness).

(revised 2016)

4.15 Eyewitness Identification of the Defendant - See Note below

One of the (*most important*) **issues in this case is whether** (*name of defendant*) **is the same person who committed the crime(s) charged in** (*Count(s) ___ of*) **the indictment. The government, as I have explained, has the burden of proving every element, including identity, beyond a reasonable doubt. Although it is not essential that a witness testifying about the identification** (*himself*)(*herself*) **be free from doubt as to the accuracy or correctness of the identification, you must be satisfied beyond a reasonable doubt based on all the evidence in the case that** (*name of defendant*) **is the person who committed the** *crime(s)* **charged. If you are not convinced beyond a reasonable doubt that** (*name of defendant*) **is the person who committed the crime(s) charged in** (*Count(s) ___ of*) **the indictment, you must find** (*name of defendant*) **not guilty.**

Identification testimony is, in essence, the expression of an opinion or belief by the witness. The value of the identification depends on the witness' opportunity to observe the person who committed the crime at the time of the offense and the witness' ability to make a reliable identification at a later time based on those observations.

You must decide whether you believe the witness' testimony and whether you find beyond a reasonable doubt that the identification is correct.

You should evaluate the testimony of a witness who makes an identification in the same manner as you would any other witness. In addition, as you evaluate a witness' identification testimony you should consider the following questions as well as any other questions you believe are important (*include only those called for by the facts of the case*):

(First), you should ask whether the witness was able to observe and had an adequate opportunity to observe the person who committed the crime charged. Many factors affect whether a witness has an adequate opportunity to observe the person committing the crime; the factors include the length of time during which the witness observed the person, the distance between the witness and the person, the lighting conditions, how closely the witness was paying attention to the person, whether the witness was under stress while observing the person who committed the crime, whether the witness knew the person from some prior experience, whether the witness and the person committing the crime were of different races, and any other factors you regard as important.

(Second), you should ask whether the witness is positive in the identification and whether the witness' testimony remained positive and unqualified after cross-examination. If the witness' identification

testimony is positive and unqualified, you should ask whether the witness' certainty is well-founded.

[(Third), you should ask whether the witness's identification of (name of defendant) after the crime was committed was the product of the witness' own recollection. You may take into account both the strength of the later identification and the circumstances under which that identification was made. You may wish to consider how much time passed between the crime and the witness' later identification of the defendant. You may also consider (whether the witness gave a description of the person who committed the crime) (how the witness' description of the person who committed the crime compares to the defendant). (You may also consider whether the witness was able to identify other participants in the crime.) If the identification was made under circumstances that may have influenced the witness, you should examine that identification with great care. Some circumstances which may influence a witness' identification are whether the witness was presented with more than one person or just (name of defendant); whether the witness made the identification while exposed to the suggestive influences of others; and whether the witness identified (name of defendant) in conditions that created the impression that (he)(she) was involved in the crime.]

[(Fourth), you should ask whether the witness failed to identify (name of defendant) at any time, identified someone other than (name of defendant) as the person who committed the crime, or changed his or her mind about the identification at any time.]

[The court should also give the following admonition if the witness' opportunity to observe was impaired or if the witness' identification is not positive, was shaken on cross-examination, or was weakened by a prior failure to identify the defendant or by a prior inconsistent identification:

You should receive the identification testimony with caution and scrutinize it with care.]

If after examining all of the evidence, you have a reasonable doubt as to whether (name of defendant) is the individual who committed the crime(s) charged, you must find (name of defendant) not guilty.

Comment

Note: The Third Circuit has appointed a Task Force on Eyewitness Identification. The Task Force has been directed to “make recommendations regarding jury instructions, use of expert testimony, and other procedures and policies intended to promote reliable practices for eyewitness identification and to effectively deter unnecessarily suggestive identification procedures, which raise the risk of a wrongful conviction.” The press release announcing the formation of the task force can be found at <http://www.ca3.uscourts.gov/news/press-release-establishing-third-circuit-task-force-eyewitness-identifications>. An order extending the term of the task force can be found at http://www.ca3.uscourts.gov/sites/ca3/files/extend_TF_eyewitness.pdf.

This instruction is derived from O'Malley et al., supra, § 14.10, which is based on the instruction recommended in *United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972) (set out below), which the Third Circuit cited with approval in *United States v.*

Wilford, 493 F.2d 730, 734 n.9 (3d Cir. 1974).

This instruction should be given in any case in which eyewitness identification of the defendant is an issue. The Third Circuit has recognized the problems with eyewitness identification testimony as well as the important role of expert testimony in helping jurors evaluate eyewitness identification of the defendant in a criminal case. See *United States v. Brownlee*, 454 F.3d 131 (3d Cir. 2006); *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985). In *Brownlee*, the court held that the exclusion of portions of the defense expert's proffered testimony on eyewitness identification required reversal of the defendant's conviction even though the trial court permitted the expert to testify as to some factors that challenged the government's identification witnesses. 454 F.3d at 144. The court emphasized that "jurors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable." 454 F.3d at 142 (quoting Rudolph Koch, Note, *Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony*, 88 Cornell Law Review 1097, 1099 n.7 (2003)).

In *United States v. Barber*, 442 F.2d 517 (3d Cir. 1971), the Third Circuit addressed the importance of instructing the jury on identification testimony:

[W]e recognize a compelling need for guidelines which will obviate skeletal, pattern instructions and assure the essential particularity demanded by the facts surrounding each identification. Accordingly, we approve for use in this circuit the approach taken by the Pennsylvania courts concerning jury instructions on identification, and require, for prospective application only, that such instructions satisfy the following:

In any case raising the question whether the defendant was in fact the criminal actor, the jury will be instructed to resolve any conflict or uncertainty on the issue of identification. The jury will be instructed that identification may be made through the perception of any of the witness' senses, and that it is not essential that the witness himself be free from doubt as to the correctness of his opinion. The identification testimony may be treated by the jury as a statement of fact by the witness: (1) if the witness had the opportunity to observe the accused; (2) if the witness is positive in his identification; (3) if the witness' identification testimony is not weakened by prior failure to identify or by prior inconsistent identification; and (4) if, after cross-examination, his testimony remains positive and unqualified. In the absence of any one of these four conditions, however, the jury will be admonished by the court that the witness' testimony as to identity must be received with caution and scrutinized with care. The burden of proof on the prosecution extends to every element of the crime charged, including the burden of proving

beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime for which he stands charged.

442 F.2d at 528 (citations omitted).

In *United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972), the D.C. Circuit, building on *Barber*, recommended that the following instruction be adapted to the facts of the case and given in any case where eyewitness identification of the defendant is an issue:

Appendix: Model Special Instructions on Identification

One of the most important issues in this case is the identification of the defendant as the perpetrator of the crime. The Government has the burden of proving identity, beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his statement. However, you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty.

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later. In appraising the identification testimony of a witness, you should consider the following:

(1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past. [In general, a witness bases any identification he makes on his perception through the use of his senses. Usually the witness identifies an offender by the sense of sight-but this is not necessarily so, and he may use other senses.]

(2) Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next

opportunity of the witness to see defendant, as a factor bearing on the reliability of the identification.

[You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.]

(3) You may take into account any occasions in which the witness failed to make an identification of defendant, or made an identification that was inconsistent with his identification at trial.

(4) Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony. I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime with which he stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.

See United States v. Wilford, 493 F.2d 730, 734 n.9 (3d Cir. 1974) (citing with approval *Telfaire*, 469 F.2d 552 (D.C. Cir. 1972)).

(Note added 2016 and revised 2017)

4.16 Missing Witness

You have heard evidence about *(name of missing witness)*, who has not been called to testify. The defense has argued that *(name of missing witness)*'s testimony could have been important to this case and that *(name of missing witness)* was available as a witness only to the government and not to the defense.

If you find that the government could have called *(name of missing witness)* as a witness and that *(name of missing witness)* would have given important new testimony, and you also find that *(name of missing witness)* was available as a witness only to the government and not to the defense and that the government failed to call *(name of missing witness)*, you are permitted, but you are not required, to infer that *(name of missing witness)*'s testimony would have been unfavorable to the government.

You must decide whether you believe that *(name of missing witness)* would have testified unfavorably to the government. You should not draw such a conclusion if the witness was equally available to both parties or if the witness' testimony would have merely repeated the testimony of other witnesses or evidence already presented in the case.

Comment

This instruction is derived from Sand et al., supra, 6-5.

Ordinarily, the inference to be drawn from failure to call a witness should be left to argument of counsel and should not be a topic of instruction. When the question arises during trial, the court should inquire whether the witness is equally available to either party. If the government agrees to make a witness within its control available to the defendant yet neither party calls the witness, the instruction should not be given. This instruction should never be given to call attention to the defendant's failure to call a witness.

Several requirements must be satisfied before this instruction is appropriate:
The witness was available to one party and not the other;
The party to whom the witness is available does not call the witness and provides no explanation for that failure;
The witness is not prejudiced against that party; and
The witness would give relevant and non-cumulative testimony.

See United States v. Ariza-Ibarra, 651 F.2d 2, 15-16 (1st Cir. 1981); *United States v. Adigun*, --- F.Supp.2d ---- 2014 WL 644456 (M.D. Pa. 2014) (discussing when to give missing witness instruction at defendant's request).

In *Ariza-Ibarra*, the First Circuit explained the rationale and application of the missing witness instruction:

In the absence of a satisfactory explanation, when a party fails to call a witness whom that party would ordinarily produce if the facts known by the witness were favorable to that party, the jury may infer that the absent witness's testimony would have been adverse to that party. This adverse inference may not reasonably be drawn, however, unless the evidence shows that the witness is available to testify on behalf of the party, that the testimony of the witness would be relevant and noncumulative, and that the witness is not prejudiced against the nonproducing party. Because the occasion for drawing such an inference arises when both parties have failed to call a material witness, if the jury is to attribute negative consequences to only one party's failure to do so, it must determine which of the parties is likely to be withholding damaging testimony. Thus, the jury may draw an inference adverse to a party toward whom the missing witness is "favorably disposed," because the party would normally be expected to produce such a witness. In addition, the jury may draw an adverse inference when a party fails to produce a material witness who is peculiarly available to that party. [A] party's ability to produce a witness is often dependent on the witness's predisposition toward that party. However, when a party having exclusive control over a witness who could provide relevant, noncumulative testimony fails to produce the witness, it

is permissible to draw an adverse inference from that party's failure to do so, even in the absence of any showing of the witness's predisposition toward the party. Typically, what is referred to as "an absent witness" or "missing witness" instruction deals only with "control," not with "predisposition."

651 F.2d at 15-16 (citations omitted). In *Ariza-Ibarra*, the court concluded that the instruction was not appropriate because the witness was equally available to both parties. 651 F.2d at 16. If the witness is technically available to both parties but can be expected to be hostile to one party because of the witness' connection to the other party or some other reason, the instruction is not warranted based on the party's failure to call a hostile witness. See *United States v. Wilson*, 322 F.3d 353, 363 n.14 (5th Cir. 2003).

In *United States v. Drozdowski*, 313 F.3d 819, 825 n.3 (3d Cir. 2002), the Third Circuit remarked that "the 'absent witness' jury instruction is to be given in a case where the government fails to produce evidence, and the instruction tells the jury that the failure to produce this evidence creates a presumption that the evidence would be favorable to the defendant" but concluded that the instruction was not appropriate where the witness had fled and was therefore unavailable to both parties. 313 F.3d at 825 n.3 (citing *Graves v. United States*, 150 U.S. 118 (1893)).

It is not clear whether the defendant is entitled to a missing witness instruction or whether the trial court has discretion to determine whether to give the instruction. However, the Third Circuit has noted that a party may decide not to call a witness for a wide range of reasons. See *United States v. Busic*, 587 F.2d 577, 586 (3d Cir. 1978), *rev'd on other grounds*, 446 U.S. 398 (1980). As a result, the better course seems to be to treat the question as falling within the court's discretion.

Applying similar reasoning, the trial court may instruct on spoliation of evidence in appropriate cases. Cf. *United States v. Nelson*, 2012 WL 2019166 (3d Cir. 2012) (non-precedential).

(Revised 2014)

4.17 Child Witness

You have heard the testimony of *(child's name)*. A child may be permitted to testify even though *(he)(she)* is very young. You must determine, as with any witness, whether you believe *(child's name)*'s testimony and how much weight, if any, you think it deserves. Did *(he)(she)* understand the questions? Did *(he)(she)* accurately perceive the events? Does *(he)(she)* have a good memory? Does *(he)(she)* understand *(his)(her)* duty to tell the truth?

It is up to you to decide whether *(child's name)* understood the seriousness of *(his)(her)* appearance as a witness at this criminal trial. In addition, is up to you to decide whether *(child's name)* understood the questions asked of *(him)(her)* and was truthful.

Comment

See Federal Judicial Center § 28. For variations, *see* O'Malley et al., supra, § 15.13; Sixth Circuit § 7.10; Seventh Circuit § 1.03; and Ninth Circuit § 4.15 (recommending no instruction be given).

A child is not rendered incompetent to testify merely because of age. In addition to Rule 601 of the Federal Rules of Evidence, which provides that all witnesses are competent, Section 3509(c) of title 18 governs the competency examination of a witness under the age of eighteen who is a victim of physical abuse, sexual abuse, or exploitation or is a witness to a crime committed against another person. 18 U.S.C.A. § 3509(a) and (c). Section 3509(c)(2) provides that a child is presumed to be competent. Sections 3509(c)(3) and (4) provide that a child can be examined for competency only after written notice, an offer of proof of incompetency, and a determination by the court that there are compelling reasons other than the child's age for the examination. Section 3509(c) then sets out the requirements for the competency examination:

(5) Persons permitted to be present.--The only persons who may be

permitted to be present at a competency examination are--

- (A) the judge;
- (B) the attorney for the Government;
- (C) the attorney for the defendant;
- (D) a court reporter; and
- (E) persons whose presence, in the opinion of the court, is necessary to the welfare and well-being of the child, including the child's attorney, guardian ad litem, or adult attendant.

(6) Not before jury.--A competency examination regarding a child witness shall be conducted out of the sight and hearing of a jury.

(7) Direct examination of child.--Examination of a child related to competency shall normally be conducted by the court on the basis of questions submitted by the attorney for the Government and the attorney for the defendant including a party acting as an attorney pro se. The court may permit an attorney but not a party acting as an attorney pro se to examine a child directly on competency if the court is satisfied that the child will not suffer emotional trauma as a result of the examination.

(8) Appropriate questions.--The questions asked at the competency examination of a child shall be appropriate to the age and developmental level of the child, shall not be related to the issues at trial, and shall focus on determining the child's ability to understand and answer simple questions.

Finally, the statute precludes psychological and psychiatric examinations to assess the competency of the child witness absent a showing of compelling need. 18 U.S.C.A. § 3509(c)(9).

In *United States v. Allen J.*, 127 F.3d 1292 (10th Cir. 1997), the Tenth Circuit concluded that the trial court properly allowed a young witness to testify. The witness had not responded to the court's questions concerning truth-telling, but the prosecutor conducted the following examination:

The prosecutor began with simple questions (“[W]hat is your last name?”, “How old are you?”, and “Where do you live?”), which the victim answered. After about thirty questions along these lines, almost all of which the victim was able to answer correctly, the prosecutor shifted to questions relating to the difference between the truth and lies. Among other questions, the prosecutor asked the victim if she understood she had promised to tell the truth in court, to which the victim responded affirmatively. After this series of questions, which established the victim

knew the difference between a truth and a lie, knew she was to tell the truth in court, and knew she would be punished if she told a lie, the court directed the prosecutor to proceed to the heart of her case.

The court held that this questioning satisfied the requirement of Rule 603 of the Federal Rules of Evidence that the witness understand and affirm the obligation to testify truthfully and established the witness' competence.

One source recommends the following questions to determine whether the child understands the obligation to tell the truth:

THE COURT: Were you here in this courtroom last week? (Or any other obvious misstatement of past fact.)

THE CHILD: No, I've never been here before.

THE COURT: Is that the truth?

THE CHILD: Yes.

THE COURT: If you told me you were here last week, when you really were somewhere else, would that be a lie?

THE CHILD: Yes.

THE COURT: We will be depending on you today to tell us the truth about what you remember. Can we count on you to tell the truth?

THE CHILD: Yes.

Lucy S. McGough, Child Witnesses: Fragile Voices in the American Legal System, 117 (1994).

When a child testifies, the court may want to instruct the jury concerning how to approach the task of assessing this witness' credibility. The Third Circuit has not addressed the question of an instruction on the credibility of a child witness. Other circuits have held that the trial court has discretion to determine whether to give such an instruction. See *United States v. Pacheco*, 154 F.3d 1236, 1239 (10th Cir. 1998); *Guam v. McGravey*, 14 F.3d 1344, 1348 (9th Cir. 1995). In *Joseph v. Government of the Virgin Islands*, 2005 U.S. Dist. LEXIS 11039 (D.V.I. 2005), the court rejected the defendant's argument that the trial court erred by refusing to give an instruction on the credibility of the child victim. Citing *McGravey*, the court noted that the trial court had properly instructed the jury concerning "the appropriate weight of each witness's testimony" and held that the trial court has the discretion to determine both whether and how to instruct the jury regarding the credibility of a child witness. *Joseph*, 2005 U.S. Dist. LEXIS 11039 (D.V.I., 2005).

In *United States v. Butler*, 56 F.3d 921 (8th Cir. 1995), the court gave the following instruction:

As with other witnesses, you are the sole judge of the credibility of a child who testifies. You may consider not only the child's age, but the demeanor on the stand, the capacity to observe facts and to recollect them, the ability to understand questions put to the child and to answer them intelligently, whether the child impresses you as having an accurate memory and recollection, whether the child impresses you as a truth-telling individual, and any other facts and circumstances which impress you as significant in determining the credibility of the child. You may give the child's testimony such weight, if any, as you feel it deserves.

The Eighth Circuit held that the trial court had acted within its discretion in giving the instruction and that the instruction did not improperly highlight or bolster the testimony of the child witness.

4.18 Credibility of Witnesses - Law Enforcement Officer

You have heard the testimony of a(n) law enforcement officer(s). The fact that a witness is employed as a law enforcement officer does not mean that (his)(her) testimony necessarily deserves more or less consideration or greater or lesser weight than that of any other witness. [At the same time, it is quite legitimate for defense counsel to try to attack the believability of a law enforcement witness on the ground that (his)(her) testimony may be colored by a personal or professional interest in the outcome of the case.] You must decide, after reviewing all the evidence, whether you believe the testimony of the law enforcement witness and how much weight, if any, it deserves.

Comment

See Sand et al., supra, 7-16.

In *United States v. Bethancourt*, 65 F.3d 1074, 1080 n.3 (3d Cir. 1995), *cert. denied*, 516 U.S. 1153 (1996), the trial court gave this instruction. The Third Circuit noted with approval that the trial court had instructed the jury that “the government witnesses’ testimony was not entitled to any greater consideration because of their federal employment,” in addition instructing the jurors that they were the sole judges of credibility. These two instructions persuaded the court that the prosecutor’s improper argument that the government’s law enforcement witnesses did not lie was harmless error.

4.19 Credibility of Witnesses - Witness Who Has Pleaded Guilty to Same or Related Offense, Accomplices, Immunized Witnesses, Cooperating Witnesses

You have heard evidence that *(name of witness)* [Include as many of the following that apply:

is an alleged (accomplice)(co-conspirator), someone who says

(he)(she) participated in the crime charged; or

has made a plea agreement with the government; or

has received a promise from the government that

(he)(she) will not be prosecuted; or

has received a promise from the government that

(his)(her) testimony will not be used against (him)(her) in a criminal case; or

received a benefit from the government in exchange

for testifying.]

(His)(Her) testimony was received in evidence and may be considered by you. The government is permitted to present the testimony of someone who has *(describe the witness' situation, e.g., reached a plea bargain with the government, received a benefit from the government)* **in exchange for** *(his)(her)* **testimony, but you should consider the testimony of** *(name of witness)* **with great care and caution. In evaluating** *(name of witness)'s* **testimony, you**

should consider this factor along with the others I have called to your attention. Whether or not *(his)(her)* testimony may have been influenced by the *(plea agreement)(government's promise)(alleged involvement in the crime charged)* is for you to determine. You may give *(his)(her)* testimony such weight as you think it deserves.

*[You must not consider *(name of witness)*'s guilty plea as any evidence of *(name of defendant)*'s guilt. *(His)(her)* decision to plead guilty was a personal decision about *(his)(her)* own guilt. Such evidence is offered only to allow you to assess the credibility of the witness; to eliminate any concern that *(the defendant)* *(any of the defendants)* has been singled out for prosecution; and to explain how the witness came to possess detailed first-hand knowledge of the events about which *(he)(she)* testified. You may consider *(name of witness)*'s guilty plea only for these purposes.]*

Comment

See Sand et al., supra, Instruction 7-10, Eighth Circuit § 4.04, and Ninth Circuit § 4.9.

This instruction should be used when a government witness has made a plea agreement with the government, has received immunity (a promise that the witness will not be prosecuted or that the witness' testimony will not be used against the witness), or has received any other benefit from the government in exchange for testifying. If the witness is an informant who received benefits for providing information, Instruction 4.20 (Credibility of Witnesses - Testimony of Informer) should be given instead.

There are two aspects to this instruction. First, it instructs the jury to view with caution the testimony of a witness who has received a benefit from the government for testifying or who has entered a plea agreement with the government. Second, the bracketed language instructs the jury that an accomplice's guilty plea is not evidence of the defendant's guilt.

The government may introduce the testimony of accomplices or co-conspirators, and the uncorroborated testimony of such witnesses is sufficient to sustain a conviction. *See United States v. Perez*, 280 F.3d 318 (3d Cir. 2002). However, when the prosecution calls a witness who has entered into a plea agreement with the government, received formal or informal immunity, or received some other benefit in exchange for testifying, the court should instruct the jury to view the witness' testimony with caution. In *Caminetti v. United States*, 242 U.S. 470, 495 (1917), the Supreme Court held it was not reversible error to deny the defendant's request to instruct the jury that "the testimony of the two girls was that of accomplices, and to be received with great caution and believed only when corroborated by other testimony adduced in the case." Nevertheless, the Court noted that "it [is] the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to such evidence." Similarly, in *United States v. Isaac*, 134 F.3d 199, 204-05 (3d Cir. 1998), the Third Circuit held that it was not reversible error to deny the defendant's request to instruct the jury to weigh the testimony of two witnesses "with greater care" because they were accomplices and had been immunized, but noted that it "may well be the better practice to give an instruction if requested." The court also commented that "warning the jury to consider the testimony of an accomplice with great care and caution before relying on it is appropriate," but concluded that other instructions adequately addressed credibility concerns. *Id. See also United States v. Mack*, 629 F.App'x. 443 (3d Cir. 2015) (non-precedential) (noting that instructing jury to view accomplice testimony "with great care and caution" was sufficient). Whether to give the instruction is entrusted to the discretion of the trial court. *Id.* at 205. *See also United States v. Wilson*, 347 F. App'x. 778 (3d Cir. 2009) (non-precedential) (refusal to give accomplice instruction not abuse of discretion).

The bracketed language should be included in the instruction if the jury has learned that an accomplice or co-conspirator pleaded guilty. 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. Jackson*, 849 F.3d 540 (3d Cir. 2017); *United States v. Universal Rehabilitation Services, Inc.*, 205 F.3d 657, 667 (3d Cir. 2000) (en banc). However, neither the witness' guilty plea nor the plea agreement may be considered as evidence of the defendant's guilt. *See United States v. Jackson*, 849 F.3d 540 (3d Cir. 2017); *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 prejudicial effect of the witness' guilty plea should be

addressed through a curative instruction to the jury. *See Universal Rehabilitation Service.*, 205 F.3d at 668; *Gaev*, 24 F.3d at 478; *United States v. Chaffo*, 452 F. App'x 154 (3d Cir. 2012) (non-precedential) (discussing admissibility of codefendant's guilty plea and cautionary instruction). In *Gaev*, the Third Circuit approved the court's instructions. 24 F.3d at 475-76. 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 the final charge to the jury, the trial court further instructed the jury as follows:

I instruct you, as I previously instructed you after the conclusion of each of their testimony or direct examination, that you are instructed that you are to draw no conclusions or inferences of any kind about the guilt of the defendant on trial from the facts that a prosecution witness pled guilty to similar charges. That witness' decision to plead guilty was a personal decision about his own guilt. It may not be used by you in any way as evidence against or unfavorable to the defendant on trial here.

The trial court also instructed the jury concerning the testimony of accomplices and admitted felons who had entered into plea agreements with the government.

In *Universal Rehabilitation Services*, the Third Circuit further stated:

The jury in such cases should be instructed that it may not consider the guilty plea and/or plea agreement as evidence that the defendant is guilty of the offenses with which he/she is charged, but rather that such evidence is offered only to allow the jury to assess the witness's credibility, to eliminate any concern that the defendant has been singled out for prosecution, or to explain how the witness possessed detailed first-hand knowledge regarding the events about which he or she testifies.

205 F.3d at 668.

In *United States v. Crim*, 451 F. App'x. 196 (3d Cir. 2011) (non-precedential), the court held it was not error to omit the italicized portion of the instruction where the trial court had "repeatedly instructed the jury to 'separately consider the evidence against each defendant in each offense charged,'" the prosecution had "stressed to the jurors that they

‘need to consider each defendant separately’ when determining guilt,” and defense counsel had similarly cautioned the jury.

(Revised 2017)

4.20 Credibility of Witnesses - Testimony of Informer

You have heard evidence that *(name of witness)* has an arrangement with the government under which *(he)(she)* *(gets paid)(receives)* *(describe benefit)* for providing information to the government. *(Name of witness)*'s testimony was received in evidence and may be considered by you. The government is permitted to present the testimony of someone who *(gets paid)(receives)* *(describe benefit)* for providing information to the government, but you should consider the testimony of *(name of witness)* with great care and caution. In evaluating *(name of witness)*'s testimony, you should consider this factor along with the others I have called to your attention. You may give the testimony such weight as you think it deserves. It is for you to determine whether or not *(name of witness)*'s information or testimony may have been influenced by *(his)(her)* arrangement with the government.

Comment

See Eighth Circuit § 4.06.

The government may lawfully employ paid informers to assist in the investigation of crime and may call an informer as a witness at trial. *See Hoffa v. United States*, 385 U.S. 293, 312 (1966); *United States v. Harris*, 210 F.3d 165 (3d Cir. 2000). The court should instruct the jury to approach the informer's testimony with caution. In *Hoffa*, the Court noted favorably that the trial court had given the jury the following instruction:

You should carefully scrutinize the testimony given and the circumstances under which each witness has testified, and every matter in evidence

which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, his motives, state of mind, his demeanor and manner while on the witness stand. Consider also any relation each witness may bear to either side of the case * * * . All evidence of a witness whose self-interest is shown from either benefits received, detriments suffered, threats or promises made, or any attitude of the witness which might tend to prompt testimony either favorable or unfavorable to the accused should be considered with caution and weighed with care.

385 U.S. at 312 n.14. The Third Circuit has not decided whether it is error to refuse the instruction when requested. *See United States v. Isaac*, 134 F.3d 199, 204 (3d Cir. 1998). Failure to give the instruction if not requested is not plain error. *See United States v. Wright*, 921 F.2d 42, 47 (3d Cir. 1990).

4.21 Credibility of Witnesses - Testimony of Addict or Substance Abuser

Evidence was introduced during the trial that *(name of witness)* [*(was using drugs)(addicted to drugs)(abusing alcohol) when the events took place (was abusing (drugs)(alcohol) at the time of trial)*]. **There is nothing improper about calling such a witness to testify about events within** *(his)(her)* **personal knowledge.**

On the other hand, *(his)(her)* **testimony must be considered with care and caution. The testimony of a witness who** *(describe circumstances)* **may be less believable because of the effect the** *(drugs)(alcohol)* **may have on** *(his)(her)* **ability to perceive, remember, or relate the events in question.**

After considering *(his)(her)* **testimony in light of all the evidence in this case, you may give it whatever weight, if any, you find it deserves.**

Comment

See Sand et al., supra, Instruction 7-9.1.

This instruction may be given if a witness is shown to be an addict or an abuser of drugs or alcohol. The Third Circuit recommends instructing the jury “to receive the testimony of an addict-informant witness with caution and to scrutinize it with care.” *United States v. Miele*, 989 F.2d 659, 666 (3d Cir. 1993); *see also Government of the Virgin Islands v. Hendricks*, 476 F.2d 776, 779-80 (3d Cir. 1973). Nevertheless, the court is not required to give the instruction. *See United States v. Miles*, 2002 WL 31501847 (3d Cir. 2002) (noting that the court “has never held in a published opinion that a district court is required to give a special cautionary instruction regarding the testimony of a drug addict, even when the defendant requests such an instruction”). This instruction addresses the concern that drugs or alcohol may impair the witness’ perception, memory, and narrative ability. If the witness has received some benefit, such as an agreement not to prosecute or a reduced sentence, the court should give Instruction 4.20 (Credibility of

Witnesses - Testimony of Informer).

Of course, the instruction is only necessary if there is evidence that the witness is an addict or an abuser of drugs or alcohol. In *United States v. Urian*, 858 F.2d 124, 127 n.2 (3d Cir. 1988), the Third Circuit noted that the trial court properly refused the requested instruction where other instructions advised the jury to evaluate their testimony with caution and there was no evidence that the witnesses were addicted at the time of trial. In *Urian*, the evidence established only that the witnesses were addicted at the time of the criminal transactions. The court may want to give this instruction even as to a witness who is no longer abusing substances simply to call to the jury's attention the possible impact of the substance abuse on the witness' perception and memory. In determining whether to give an instruction addressing a witness' addiction, courts also consider the extent to which the witness' testimony is corroborated. See *United States v. Miles*, 2002 WL 31501847 (3d Cir. 2002).

In *Hendricks*, the Third Circuit emphasized that the instruction should "set out the rationale for examining the testimony of such a witness with special caution." 476 F2d. at 780. This instruction calls the jury's attention to the reason for examining the testimony with care - that the substance abuse may impair the witness' perception or memory. Concerns of bias and self-interest are addressed in Instructions 4.19 (Credibility of Witnesses - Witness Who Has Pleaded Guilty to Same or Related Offense, Accomplices, Immunized Witnesses, Cooperating Witnesses) and 4.20 (Credibility of Witnesses - Testimony of Informer).

4.22 Impeachment of Witness - Prior Inconsistent Statement for Credibility Only

You have heard the testimony of certain witnesses *(if only one witness was impeached with a prior inconsistent statement, include name of witness)*. **You have also heard that before this trial** *(they)(he)(she)* **made** *(statements)(a statement)* **that may be different from** *(their)(his)(her)* **testimony in this trial. It is up to you to determine whether** *(these statements were)(this statement was)* **made and whether** *(they were)(it was)* **different from the witness(es)' testimony in this trial.** *(These earlier statements were)(This earlier statement was)* **brought to your attention only to help you decide whether to believe the witness(es)' testimony here at trial. You cannot use it as proof of the truth of what the witness(es) said in the earlier statement(s). You can only use it as one way of evaluating the witness(es)' testimony in this trial.**

[You also heard evidence that (this witness)(certain witnesses) made statements before this trial that were (describe condition satisfying Federal Rules of Evidence, Rule 801(d)(1)(A); e.g., made under oath, given before the grand jury) and that may be different from (his)(her) testimony at trial. When a statement is (describe condition; made under oath, made before the grand jury), you may not only use it to help you decide whether you believe the witness' testimony in this trial but you may also use it as evidence of the truth of what the

witness(es) said in the earlier statement(s). 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(es) said in the earlier statement(s).]

Comment

See Sixth Circuit § 7.04 and Seventh Circuit § 3.09. For variations, see Sand et al., *supra*, 7-19; First Circuit § 2.02; Fifth Circuit § 1.10; Eighth Circuit § 3.04; and Eleventh Circuit § 6.1.

This instruction should be given when a prior inconsistent statement is admitted only for the purpose of impeaching a witness. If the witness being impeached is the defendant, see Instructions 4.37 (Impeachment of Defendant - Prior Inconsistent Statement Taken in Violation of Miranda) and 4.38 (Impeachment of Defendant - Prior Inconsistent Statement Not Taken in Violation of Miranda).

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 penalty of perjury at a trial, hearing, or other proceeding or in a deposition."⁶ If the prior inconsistent 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

⁶ Before the Federal Rules of Evidence were restyled, Rule 801(d)(1)(A) allowed a prior inconsistent statement to be used substantively if it was "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition."

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); cross reference. 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 O'Malley et al., supra, § 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].

4.23 Impeachment - Bad Character for Truthfulness (F.R.E. 608(a))

Reputation evidence: You heard evidence concerning the reputation for truthfulness or untruthfulness of *(name of witness being impeached)*.

You may consider this evidence in deciding whether or not to believe *(name of witness being impeached)*. You should give this evidence whatever weight you decide is appropriate.

Opinion evidence: You heard opinion evidence concerning whether *(name of witness being impeached)* is a truthful or an untruthful person. You may consider this evidence in deciding whether or not to believe *(name of witness being impeached)*. You should give this evidence whatever weight you decide is appropriate.

Comment

See Sand et al., supra, 5-17 and 5-18. For variations, see O'Malley et al., supra, § 15.09; Seventh Circuit § 3.12; Eighth Circuit § 4.02; Ninth Circuit § 4.7; and Eleventh Circuit § 6.7.

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

A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.⁷

⁷ Before the Federal Rules of Evidence were restyled, Rule 608(a) provided:
The credibility of a witness may be attacked or supported by evidence in the form of

Any witness, including the defendant, may be impeached with evidence of bad character for truthfulness. *See United States v. Lollar*, 606 F.2d 587, 588 (3d Cir. 1979). The character witness may testify to the reputation of or an opinion concerning the bad character for truthfulness of the witness being impeached. F.R.E. 405; *Lollar*, 606 F.2d at 589. If a witness' character for truthfulness is attacked, evidence of the witness' good character for truthfulness is then admissible.

In *Renda v. King*, 347 F.3d 550 (3d Cir. 2003), the Third Circuit discussed the application of Rule 608(a). The court noted:

Evidence of a witness's good character for truthfulness is not admissible absent an attack on the witness's character for truthfulness due to the cost of engaging in a fruitless "swearing match," particularly in light of the fact that a witness is presumed to tell the truth until his character for truthfulness is attacked. Under Rule 608(a), whether a witness's credibility has been attacked depends on the nature of the opponent's impeaching evidence. Direct attacks on a witness's veracity in the particular case do not open the door for evidence of the witness's good character. For example, evidence of bias or prior inconsistent statements generally does not open the door for evidence of good character for truthfulness. The reason that evidence of bias does not open the door for evidence of good character for truthfulness is because evidence of bias only relates to a motive to lie in the particular case, not a general predisposition to lie. Similarly, prior inconsistent statements do not open the door for evidence of good character for truthfulness because there can be a number of reasons for the error, such as defects in knowledge or memory, a bias or interest to lie in this particular instance, or a general character trait for untruthfulness. Thus, although the inconsistency may be due to a dishonest character, it is not necessarily, or even probably, due to this cause. Thus, the relatively minor value of permitting a response to such an inference does not justify the cost of litigating the tangential issue of character for truthfulness.

Renda, 347 F.3d at 554 (citations omitted). The court also noted that indirect attacks on truthful character may open the door to evidence of good character for truthfulness. *See Renda*, 347 F.3d at 554. *See also United States v. Murray*, 103 F.3d 310, 320-21 (3d Cir. 1997) (holding defendant opened door and prosecution properly introduced evidence of witness' truthful character). If the witness' character for truthfulness is attacked, it is an

opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

abuse of discretion to exclude evidence of truthful character.

If character evidence is admitted under Rule 404(a) of the Federal Rules of Evidence, Instruction 4.39 (Defendant's Character Evidence) should be given instead of this instruction.

4.24 Impeachment of Witness - Prior Bad Acts (F.R.E. 608(b))

You 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.

Comment

See Ninth Circuit § 4.8.

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

Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

- (1) the witness; or
- (2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.⁸

⁸ Before the Federal Rules of Evidence were restyled, Rule 608(b) provided:

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, or
- (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

Rule 608(b) governs 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 at the time of the cross-examination. *See* Instruction 2.18 (Impeachment of Witness - Prior Bad Acts). In addition, if the witness admits the prior conduct in response to the questions asked on cross-examination, this instruction should be given in the final charge.

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)." *See Graham, Handbook of Federal Evidence* § 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 273 (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*, *supra*, § 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.

4.25 Impeachment of Witness - Prior Conviction (F.R.E. 609)

You heard evidence that *(name)*, a witness, was previously 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

See Ninth Circuit (Criminal) § 4.8 and First Circuit § 2.03. For variations, see O'Malley et al., supra, § 15.07; Sand et al., supra, 7-12; Fifth Circuit § 1.12; Sixth Circuit § 7.05B; Seventh Circuit § 3.11; Eighth Circuit (Criminal) § 2.18; and Federal Judicial Center § 30.

This instruction should be given as part of the final charge when a witness has been 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(a), which governs the admissibility of prior convictions to impeach, provides:

The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

- (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
 - (A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and
 - (B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and
- (2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving--or the witness's admitting--a

dishonest act or false statement.⁹

See *United States v. Gilmore*, 553 F.3d 266, 272-73 (3d Cir. 2009) (discussing application of Rule 609). 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. See *Government of the Virgin Islands v. Bedford*, 671 F.2d 758 (3d Cir. 1982) (discussing application of Rule 609(a)(1)). 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). As amended, the rule precludes inquiry into the manner in which a crime was committed to establish that it was a crime of dishonesty or false statement. Instead, the nature of the crime must be readily determined.

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 “its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.”¹⁰ 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).

(Revised 11/2010)

⁹ Before the Federal Rules of Evidence were restyled, Rule 609(a) provided:

For the purpose of attacking the character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

¹⁰ Before the Federal Rules of Evidence were restyled, Rule 8609(b) provided that convictions over ten years old could be admitted if the party provided notice and “the court determines, in the interests of justice, that the probative value of the conviction . . . substantially outweighs its prejudicial effect.”

4.26 False in One, False in All (*Falsus in Uno, Falsus in Omnibus*)

If you believe that a witness knowingly testified falsely concerning any important matter, you may distrust the witness' testimony concerning other matters. You may reject all of the testimony or you may accept such parts of the testimony that you believe are true and give it such weight as you think it deserves.

Comment

This instruction is derived from O'Malley et al., supra, § 15.06.

The Third Circuit has recognized the *falsus in uno, falsus in omnibus* instruction. See *Lambert v. Blackwell*, 387 F.3d 210, 256 (3d Cir. 2004); *United States v. Rockwell*, 781 F.2d 985 (3d Cir. 1986). The other circuits are divided on this instruction. Compare *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1059 (9th Cir. 2005) (noting that the law “has long recognized that a person who is deemed unbelievable as to one material fact may be disbelieved in all other respects”) with *Yongo v. INS.*, 355 F.3d 27, 33 (1st Cir. 2004) (referring to *falsus in uno, falsus in omnibus* as “a longstanding but overstated precept”), and *United States v. Jackson*, 69 F. App'x. 630, 632 (4th Cir. 2003) (stating the courts disfavor the instruction). In *Parker v. United States*, 801 F.2d 1382, 1385 (D.C. Cir. 1986), then-Judge Scalia wrote that “[w]hile the falsus in uno instruction has been criticized frequently as superfluous and potentially confusing,” the trial court has discretion to give the charge, and giving it is not ground for reversal. The court suggested that there might be a problem if the charge specifically referred to the defendant, appearing to suggest that the court questioned the defendant's testimony. 801 F.2d at 1385-86.

If the court gives the instruction, it “must clearly state that the evidence in question must be material,” although it need not necessarily use the word “material.” *Dressler v. Busch Entertainment Corp.*, 143 F.3d 778, 781 (3d Cir. 1998). Provided that the jury instructions on credibility are thorough, the trial court has discretion to refuse the *falsus in uno, falsus in omnibus* instruction. See *United States v. Leon*, 739 F.2d 885, 893 (3d Cir. 1984).

4.27 Defendant's Choice not to Testify or Present Evidence

(Name of defendant)(A defendant) **did not testify** *(did not present evidence)* **in this case. A defendant has an absolute constitutional right not to testify** *(or to present any evidence)*. **The burden of proof remains with the prosecution throughout the entire trial and never shifts to the defendant. The defendant is never required to prove that he is innocent. You must not attach any significance to the fact that *(name of defendant)* **did not testify. You must not draw any adverse inference against** *(him)(her)* **because** *(he)(she)* **did not take the witness stand. Do not consider, for any reason at all, the fact that *(name of defendant)(a defendant)* **did not testify. Do not discuss that fact during your deliberations or let it influence your decision in any way.******

Comment

See California Criminal Jury Instructions § 355 and § 5.21. For variations, see O'Malley et al., supra, § 15.14; First Circuit § 3.03; Sixth Circuit § 7.02A; Seventh Circuit § 3.01; and Ninth Circuit § 3.3.

Under the Constitution, the defendant in a criminal case has the right to choose whether to testify and the right not to present any evidence. Neither the court nor the prosecutor may comment on the defendant's election to remain silent at trial. See *Griffin v. California*, 380 U.S. 609, 614-15 (1965); *Lesko v. Lehman*, 925 F.2d 1527 (3d Cir. 1991). But see *United States v. Hasting*, 461 U.S. 400, 510-11 (1983) (holding error harmless). If the defendant chooses not to testify, the defendant may also decide to request an instruction directing the jury to draw no negative inference from the defendant's decision not to take the witness stand. The trial court must give such an instruction if requested. See *Carter v. Kentucky*, 450 U.S. 288, 299-303 (1981); *Bruno v. United States*, 308 U.S. 287, 293-94 (1939). Failure to give the requested instruction is

error, but the Third Circuit has held that it may be harmless. *See Lewis v. Pinchak*, 348 F.3d 355 (3d Cir. 2003).

Conversely, a defendant who chooses not to testify may prefer not to have the jury's attention drawn to that fact through an instruction. It is not error to give the instruction over the defendant's objection. *See Lakeside v. Oregon*, 435 U.S. 333, 340-41 (1978). Nevertheless, if the defendant prefers not to have the instruction given, the better practice is to comply with the defendant's wishes. *See Lakeside*, 435 U.S. at 340.

The instruction contains alternative language – “a defendant” – to be used in a multi-defendant trial where some defendants testify and some do not. The instruction also contains bracketed language to be used when the defendant presents no evidence.

If the defendant testifies, *see* Instruction 4.28 (Defendant's Testimony).

4.28 Defendant's Testimony

In a criminal case, the defendant has a constitutional right not to testify. However, if *(he)(she)* chooses to testify, *(he)(she)* is, of course, permitted to take the witness stand on *(his)(her)* own behalf. In this case, *(name of defendant)* testified. You should examine and evaluate *(his)(her)* testimony just as you would the testimony of any witness.

Comment

See O'Malley et al., supra, § 15.12 and Sand et al., supra, 7-4.

Sand's instruction also includes the following language concerning the defendant's interest in the outcome of the case:

You should examine and evaluate his testimony just as you would the testimony of any witness with an interest in the outcome of this case. You should not disregard or disbelieve his testimony simply because he is charged as a defendant in this case.

Authority is divided on whether it is proper or desirable to instruct the jury concerning the defendant's interest in the case. In *Reagan v. United States*, 157 U.S. 301, 304-05 (1895), the Supreme Court approved the following instruction:

You should especially look to the interest which the respective witnesses have in the suit, or in its result. Where the witness has a direct personal interest in the result of the suit, the temptation is strong to color, pervert, or withhold the facts. The law permits the defendant, at his own request, to testify in his own behalf. The defendant here has availed himself of this privilege. His testimony is before you, and you must determine how far it is credible. The deep personal interest which he may have in the result of the suit should be considered by the jury in weighing his evidence, and in determining how far, or to what extent, if at all, it is worthy of credit.

Nevertheless, the circuits do not agree on whether the instruction is proper. *Compare United States v. Wiggins*, 566 F.2d 944, 945 (5th Cir. 1978) (holding instruction proper),

with *United States v. Bear Killer*, 534 F.2d 1253, 1259-60 (8th Cir. 1976) (holding instruction improperly singled out defendant and was therefore error). In a non-precedential decision, *United States v. Jones*, 2010 WL 1220960 (3d Cir. 2010), the Third Circuit rejected a challenge to such an instruction but noted that an instruction singling out the defendant's interest is "not advisable." In *Jones*, the defendant argued unsuccessfully that the trial court had "unfairly singled out [the defendant's] testimony as potentially biased" when the court instructed the jury as follows:

[t]he defendant, Chesney Jones, has taken the witness stand. You should examine and evaluate her testimony just as you would the testimony of any witness. It is for you to decide to what extent, if at all, Ms. Jones's interest in the result of her prosecution may have affected or colored her testimony.

The trial court had also given a general charge on witness credibility which called attention to the interest of both the parties in the case, The Third Circuit characterized the separate instruction concerning the defendant's testimony as unnecessary and inadvisable, but held it was not reversible error, citing *Reagan*. The court also noted that other Courts of Appeals have expressed concern about similar instructions but have not held them to constitute reversible error. See also *United States v. King*, 2012 WL 213 0032 (3d Cir. 2012) (non-precedential) (criticizing as "inadvisable and unnecessary" and declining to endorse instruction that addressed defendant's self-interest). In *King*, the court recommended giving the Model Instruction.

(Revised 10/2012)

4.29 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(s). You may consider this evidence only for the purpose of deciding whether the defendant (*describe the precise purpose or purposes for which the other act evidence was admitted: for example (Pick those of the following, or other reasons, that apply)),*

had the state of mind, knowledge, 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

was preparing or planning to commit the acts charged in the indictment;

or

acted with a 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 B 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(s), (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

See Sixth Circuit § 7.13. See United States v. Lee, 612 F.3d 170 (3d Cir. 2010) (commenting that trial court's instruction based on Model Instruction 4.29 was not error).

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

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial--or during trial if the court, for good cause, excuses lack of pretrial notice.¹¹

Evidence admitted under Rule 404(b) is allowed for a limited purpose, and the court should instruct the jury accordingly. *See United States v. Givan, 320 F.3d 452, 460-61 (3d Cir. 2003); United States v. Scarfo, 850 F.2d 1015 (3d Cir. 1988); United States v.*

¹¹ Before the Federal Rules of Evidence were restyled, Rule 404(b) provided:

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.

Morena, 547 F.3d 191 (3d Cir. 2008) (reversing conviction where government exceeded limited purpose for which other act evidence was admissible by repeatedly injecting prejudicial references to defendant’s drug use and collateral drug transactions in firearms case). *See also United States v. Ferguson*, 394 F. App’x. 873, 2010 WL 3638928 (3d Cir. 2010) (non-precedential) (noting that court must give limiting instruction if it admits other act evidence but holding that trial court did not commit error by delaying instruction to end of trial). However, 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).

Admissibility of other act evidence. 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.

See also United States v. Repak, 852 F.3d 230 (3d Cir. 2017) (outlining steps for assessing admission of other act evidence); *United States v. Caldwell*, 760 F.3d 267 (3d Cir. 2014) (stating steps for admitting other act evidence). Under Rule 404(b), the court may admit proof of conduct that allegedly occurred either before or after the charged offense; other act evidence is not limited to prior, as distinct from subsequent, conduct. *See United States v. Bergrin*, 682 F.3d 261, 281 n.25 (3d Cir. 2012). In ruling on the admissibility of evidence under Rule 404(b), the court should not assess the credibility or weight of the other act evidence but should only determine whether the jury could reasonably find the necessary facts by a preponderance of the evidence. *See Bergrin*, 682 F.3d at 278-79.

The Third Circuit “favor[s] the admission of such evidence, ‘if relevant for any other purpose than to show a mere propensity or disposition on the part of the defendant to commit the crime.’” *United States v. Long*, 574 F.2d 761, 766 (3d Cir. 1978). *See also United States v. Daraio*, 445 F.3d 253, 263 (3d Cir. 2006) (confirming that admission of 404(b) evidence is favored); *United States v. Johnson*, 199 F.3d 123, 128 (3d Cir. 1999) (noting that rules favor admission). The Third Circuit has held that Rule 404(b) is a rule of inclusion rather than exclusion, and the purposes for which such evidence may be offered are not limited to those listed in the rule. *See, e.g., United States v. Jemal*, 26 F.3d 1267, 1272 (3d Cir. 1994); *Scarfo*, 850 F.2d at 1019. The court has also stated that “the Government has broad latitude to use ‘other acts’ evidence to prove a

conspiracy.” *United States v. Cross*, 308 F.3d 308, 324 (3d Cir. 2002). In some instances, the use of other act evidence is governed by different rules. *See, e.g., United States v. Gilmore*, 553 F.3d 266, 271 (3d Cir. 2009) (approving use of prior drug convictions to impeach defendant by contradicting his testimony that he had never sold drugs and noting that admission of the evidence is governed by Rules 607 and 403).

The trial court’s ruling under Rule 404(b) will be reviewed for abuse of discretion. *See United States v. Bailey*, 840 F.3d 99 (3d Cir. 2016); *United States v. Balter*, 91 F.3d 427, 437 (3d Cir. 1996). If the record does not provide a basis for reviewing the trial court’s exercise of discretion, the court “may undertake to examine the record and perform the required balancing [itself].” *Becker v. ARCO Chemical Co.*, 207 F.3d 176, 181 (3d Cir. 2000). However, improper use of other act evidence may be reversible error. *See, e.g., United States v. Brown*, 765 F.3d 278 (3d Cir. 2014) (holding that trial court committed harmful error by admitting other act evidence); *United States v. Davis*, 726 F.3d 434, 440-46 (3d Cir. 2013) (holding that defendant’s prior possession convictions were not properly admitted as other act evidence to prove intent or knowledge and vacating conviction); *United States v. Smith*, 725 F.3d 340, 344-49 (3d Cir. 2013) (reversing conviction because court improperly admitted other act evidence); *United States v. Morena*, 547 F.3d 191 (3d Cir. 2008) (reversing conviction where government exceeded limited purpose for which other act evidence was admissible by repeatedly injecting prejudicial references to defendant’s drug use and collateral drug transactions in firearms case). *See also United States v. Steiner*, 2017 847 F.3d 103 (3d Cir. 2017) (holding that trial court committed error by admitting evidence of defendant’s prior arrest, but concluding error was harmless).

The proponent of evidence of prior acts “must clearly articulate how that evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged.” *United States v. Morley*, 199 F.3d 129, 133 (3d Cir. 1999). *See also United States v. Himelwright*, 42 F.3d 777, 782 (3d Cir. 1994).

The district court should also articulate its reasoning; the court should explain the permissible inference, unless the purpose of the evidence is “plainly obvious,” and balance the probative value of the evidence against any prejudicial impact. *Daraio*, 445 F.3d at 263. *See also Scarfo*, 850 F.2d at 1019 (noting that one factor under Rule 403 balance is government’s genuine need for the evidence which the court must balance against the risk that the other act evidence will influence the jury to convict on improper grounds). If the trial court does not explain its grounds for ruling on an objection under Rules 404(b) and 403, the Third Circuit will not defer to the ruling unless the reasons are apparent from the record. *See Becker*, 207 F.3d at 181.

The government sometimes argues that evidence should be admitted over an objection under Rule 404(b) because it is intrinsic to the charged offense. In *United*

States v. Green, 617 F.3d 233 (3d Cir. 2010), the Third Circuit considered this argument. In *Green*, the court discussed whether evidence that the defendant had threatened to kill an undercover officer was properly admitted as intrinsic evidence of the charged offense in the defendant’s trial for attempted narcotics possession. The court noted that labeling evidence as intrinsic serves only to deprive the defendant of the procedural protections that accompany admission under Rule 404(b): notice from the prosecution and a limiting instruction from the court. In determining whether the evidence was intrinsic to the charged offense, the Third Circuit rejected as unhelpful the “inextricably intertwined” test used in some other circuits. Instead, the court adopted a limited definition of intrinsic evidence, applying it to only two categories of evidence: 1) evidence that directly proves the charged offense and thus does not fall in the realm of “other crimes, wrongs, or acts” governed by Rule 404(b); and 2) uncharged acts performed contemporaneously with the charged crime provided the uncharged act facilitates the commission of the charged crime. The court held that the threat evidence in *Green* was not intrinsic to the charged offense but was properly admissible as proof of motive under Rule 404(b) or as proof of bias. *See also United States v. Bailey*, 840 F.3d 99 (3d Cir. 2016) (concluding that other act evidence was not intrinsic).

The instruction. 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 n.56 (5th ed. 2001). *See also United States v. Davis*, 726 F.3d 434, 440-46 (3d Cir. 2013) (criticizing instruction that included list of uses as not providing sufficient guidance to jury); *United States v. Lee*, 612 F.3d 170 (3d Cir. 2010) (Rendell, J. dissenting) (criticizing trial court for failing to specify limited purpose).

The instruction is most helpful if it explains to the jury the precise role of the other act evidence. In *Scarfo*, the Third Circuit 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); *United States v. Ferguson*, 2010 WL 3638928 (3d Cir. 2010) (non-precedential); *United States v. Major*, 293 F. App'x. 160, 2008 WL 4229933 (3d Cir. 2008) (non-precedential) (approving admission of other act evidence to prove intent and approving instruction). *But see United States v. Morena*, 547 F.3d 191 (3d Cir. 2008) (concluding that court's instruction was not adequate and reversing conviction).

Other act evidence admitted under Rule 413 or 414. 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 on any matter to which it is relevant." As a result, no limiting instruction should be given.

(Revised 2017)

4.30 Consciousness of Guilt (Flight, Concealment, Use of an Alias, etc.)

You have heard testimony that after the crime was supposed to have been committed, (*name of defendant*) (*describe the conduct proven; e.g., shaved his beard and cut his hair, went to Los Angeles*).

If you believe that (*name of defendant*) (*describe the conduct proven*), then you may consider this conduct, along with all the other evidence, in deciding whether the government has proved beyond a reasonable doubt that (*he*)(*she*) committed the crime charged. This conduct may indicate that (*he*)(*she*) thought (*he*)(*she*) was guilty of the crime charged and was trying to avoid punishment. On the other hand, sometimes an innocent person may (*describe the conduct proven*) for some other reason. Whether or not this evidence causes you to find that the defendant was conscious of (*his*)(*her*) guilt of the crime charged, and whether that indicates that (*he*)(*she*) committed the crime charged, is entirely up to you as the sole judges of the facts.

Comment

See Sixth Circuit § 7.14. For variations, *see* O'Malley et al., *supra*, § 14.08; Sand et al., *supra*, 6-9 and 6-10; First Circuit § 2.09; Eight Circuit § 4.09; and Seventh Circuit § 3.20 and Ninth Circuit § 4 (recommending that no instruction be given).

Certain types of behavior by a defendant may suggest consciousness of guilt and therefore be admissible as evidence that the defendant acted out of awareness of guilt of the charged offense, which in turn may be used by the jury as evidence of guilt. This category includes evidence of the defendant's flight or concealment, use of an alias, concealment or destruction of evidence, making false exculpatory statements, and threatening or tampering with a witness or juror. This instruction explains to the jury the

inference to be drawn from the admitted evidence. The instruction should be tailored to the evidence admitted in the trial. *See United States v. Moorefield*, 683 F. App'x. 99 (3d Cir. 2017) (non-precedential) (approving instruction as fair and balanced in case where defendant had fled police).

The court should generally apply Rule 403 of the Federal Rules of Evidence to this evidence, asking whether the evidence generates a risk of unfair prejudice that substantially outweighs the fair probative value. In addition, the admissibility of these types of evidence will sometimes need to be evaluated under Rule 404(b) of the Federal Rules of Evidence, which allows introduction of other act or crime evidence if it is probative for a purpose other than proof of character.

The law views evidence of flight as an admission by conduct reflecting consciousness of guilt. *See United States v. Miles*, 468 F.2d 482 (3d Cir. 1972). In *United States v. Scarfo*, 711 F. Supp. 1315, 1321 (E.D. Pa. 1989), the court noted that the probative value of flight evidence

depends upon whether there is sufficient evidence to establish the following four inferences: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to the actual guilt of the crime charged. (citations omitted).

See also United States v. Green, 25 F.3d 206 (3d Cir. 1994) (evidence of defendant's flight was properly admitted to show consciousness of guilt when defendant fled upon spotting federal authorities); *United States v. Pungitore*, 910 F.2d 1084, 1151 (3d Cir. 1990) (evidence of defendant's flight admissible to prove his consciousness of guilt in RICO trial); *United States v. Levy*, 865 F.2d 551, 558 (3d Cir. 1989) (evidence of use of false identity admissible in drug case).

In *United States v. Miles*, 468 F.2d 482 (3d Cir. 1972), having admitted evidence of the defendant's flight, the trial court instructed the jury as follows:

The flight or concealment of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by the jury in the light of all other proved facts in deciding the question of his guilt or innocence. Whether or not evidence of flights or concealment shows a consciousness of guilt, and the significance if any to be attached to such a circumstance, are matters for determination by you, the jury.

In thus instructing you upon the subject of flight or concealment, let it be

understood that I do not declare to you, or even remotely suggest, that the Defendant did either so take flight or so conceal himself immediately after the commission of the offenses defined in Count I and Count II of the indictment, or either of such counts, or at any other time. Whether he did so take flight or so conceal himself, you will determine from all of the evidence in the case. And, unless you find that he did so take flight or conceal himself, you will entirely disregard my instruction just imparted to you upon those questions. (emphasis added).

The Third Circuit concluded that there was sufficient evidence to justify the trial court's instruction to the jury on the issue of flight and that the instruction was proper and protected the rights of the defendant. *United States v. Miles*, 468 F.2d 482, 489-90 (3d Cir. 1972) (citation omitted). *See also United States v. Terry*, 518 F. App'x. 125, 2013 WL 2166117 (3d Cir. 2013) (non-precedential) (holding that instruction was warranted even though officer tackled defendant as he started to flee).

In *United States v. Katzin*, 94 F. App'x. 134, 138 (3d Cir. 2004), a non-precedential decision, the Third Circuit affirmed the admissibility of flight evidence to prove consciousness of guilt when the trial court properly instructed the jury on how to weigh such evidence and approved the trial court's instruction on the evidence, stating:

We have consistently held that "evidence of a defendant's flight after a crime has been committed is admissible to prove the defendant's consciousness of guilt." We hold such evidence admissible as circumstantial evidence of guilt to be considered with the other facts of the case. In fact, the District Court charged the jury to consider the evidence only for proper purposes. ("Whether or not evidence of flight or concealment shows a consciousness of guilt, and the significance, if any, to be attached to such a circumstance are matters for determination by you, the jury."). Evidence of flight is not considered inadmissible under Fed.R.Evid. 404(b). We find no error here.

An instruction addressing this evidence may not be required. *See United States v. Rothberg*, 896 F. Supp. 450, 456 (E.D. Pa. 1995) (no instruction given addressing evidence of use of alias admissible as consciousness of guilt).

(Revised 2017)

4.31 Consciousness of Guilt (False Exculpatory Statements)

You have heard testimony that *(name of defendant)* made certain statements outside the courtroom to law enforcement authorities in which *(he)(she)* claimed that *(his)(her)* conduct was consistent with innocence and not with guilt. The government claims that these statements are false.

If you find that *(name of defendant)* made a false statement in order to direct the attention of the law enforcement officers away from *(himself)(herself)*, you may, but are not required to conclude that *(name of defendant)* believed that *(he)(she)* was guilty. It is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish *(his)(her)* innocence. You may not, however, conclude on the basis of this alone, that *(name of defendant)* is, in fact, guilty of the crime for which *(he)(she)* is charged.

You must decide whether or not the evidence as to *(name of defendant)* shows that *(he)(she)* believed that *(he)(she)* was guilty, and the significance, if any, to be attached to this evidence. In your evaluation, you may consider that there may be reasons - fully consistent with innocence - that could cause a person to give a false statement that *(he)(she)* did not commit a crime. Fear of law enforcement, reluctance to become involved, or simple mistake may cause an innocent person to give such a statement or explanation.

Comment

See Sand et al., *supra*, 6-11; O'Malley et al., *supra*, § 14.06.

In most cases, this issue is best left to the arguments of the parties. Indeed, some circuits recommend that no instruction be given. See, e.g., Seventh Circuit § 3.22; Eighth Circuit § 4.15. The Third Circuit appears to have considered questions concerning false exculpatory statements only rarely. In *Government of the Virgin Islands v. Lovell*, 378 F.2d 799, 806 (3d Cir. 1967), the court cited Wigmore for the settled proposition that false exculpatory statements may be admitted as circumstantial evidence of the defendant's "consciousness that his case is a weak or unfounded one." The court noted with approval that the trial court's instruction came directly from Mathes & Devitt, Federal Jury Practice and Instructions § 8.14 at 99-100 (1965 ed.). *Id.* at 807. The Court further commented that other circuit courts had approved similar instructions. *Id.* at 807 n.9. In *United States v. Battles*, 514 F. App'x. 242, 2013 WL 718750 (3d Cir. 2013), a non-precedential decision, the Third Circuit held that the instruction given, which largely tracked this instruction, was not plain error and was sufficiently supported by the evidence in the case. See also *United States v. MacInnes*, --- F.Supp.2d ----, 2014 WL 2439336 (E.D. Pa. 2014) (discussing propriety of giving false exculpatory statements instruction).

In *United States v. Chaney*, 446 F.2d 571, 576 (3d Cir. 1971), the defendant conceded that "exculpatory statements made upon interrogation with intent to divert suspicion or mislead the police, when shown to be false, are circumstantial evidence of guilty consciousness and have independent probative value," but argued that the prosecutor had improperly commented on his failure to testify. Concluding that the comments did not constitute plain error, the court noted that the trial court had clarified the prosecutor's meaning by instructing the jury as follows:

The government also asks me to point out to you the government's contention that, in addition to the other evidence that they argue with respect to Chaney, it is their contention that his statements . . . were false and that is indicative of guilt.

Id. at 576.

The instruction states that the false statements were made outside the courtroom. This language is particularly important if the defendant testifies at trial, as the instruction would not be appropriate to cast doubt on the defendant's testimony at trial. *United States v. Clark*, 45 F.3d 1247, 1251 (8th Cir. 1995).

(Revised 2014)

4.32 Prior Statement of Defendant - Single Defendant on Trial

The government 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

See Seventh Circuit § 3.02 and O'Malley et al., supra, § 14.03.

This instruction should be given when 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.

4.33 Prior Statement of Non-testifying Defendant in Multi-Defendant Trial

The government 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 to** *(name of person who took statement)* **only in resolving whether** *(name of defendant)* **is guilty or not guilty. You may not consider or discuss this evidence in any way in resolving whether** *(name of co-defendant, if there is only one)* *(any of the other defendants on trial)* **(is)(are) guilty or not guilty.** *(Name of defendant)*'s **statement is evidence only against** *(name of defendant)* **and not against** *(name of co-defendant)(any other defendant)*.

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

See Seventh Circuit § 3.02 and Sand et al., supra, 5-20. For variations see O'Malley et al., supra, §14.04; Fifth Circuit § 1.27; Eighth Circuit § 2.15; and Eleventh Circuit § 2.2.

This instruction should be given in a multiple defendant trial when one defendant's testimonial statement is admitted in a joint trial and the defendant who made the statement does not testify. A defendant is deprived of his right under the Confrontation Clause when a non-testifying co-defendant's incriminating testimonial statement is introduced at their joint trial even if the jury is instructed to consider that statement only against the co-defendant. Limiting instructions are normally inadequate to protect the defendant against the risk that the jury will misuse the codefendant's statement 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, because this protection rests on the Confrontation Clause, it applies only if the statement is testimonial. See *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (holding that Confrontation Clause applies only to testimonial statements); *United States v. Berrios*, 676 F.3d 118 (3d Cir. 2012) (recognizing limitation on confrontation protection and applying it to *Bruton* claim); see also *Ohio v. Clark*, 135 S.Ct. 2173 (2015) (discussing how to determine whether a statement is testimonial); *Michigan v. Bryant*, 562 U.S. 344 (2011) (same); *Waller v. Varano*, 562 F.App'x. 91 (3d Cir. 2014) (rejecting *Bruton* claim

where statement was not testimonial).

Moreover, if the prosecution adequately redacts the codefendant's statement, removing language that the jury could understand as referring to the defendant without further evidentiary linkage, the codefendant'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).

The bracketed language should be included if the defendant raises a colorable question of whether the statement was given voluntarily.

(revised 2016)



4.34 Silence in the Face of Accusation

You heard evidence that *(name of person who made accusatory statement)* **made a statement accusing** *(name of defendant)* **of the crime charged in the indictment, and that** *(name of defendant)* **did not** *(deny the accusation)(object to the statement)(contradict the statement)*. **If you find that** *(name of defendant)* **was present and actually heard and understood the statement, and that it was made under such circumstances that** *(name of defendant)* **would be expected to** *(deny the accusation)(object to the statement)(contradict the statement)* **if it was not true, then you may consider whether** *(name of defendant)* **'s silence was an admission of the truth of the statement.**

Comment

This instruction is derived from Eighth Circuit § 4.14. For variations and other approaches, *see* O'Malley et al., *supra*, § 14.05; Seventh Circuit § 3.03; Ninth Circuit § 4.2; and Sixth Circuit § 7.15 (recommending no instruction be given).

An instruction on this topic should be given only rarely and always with great caution. In criminal cases, courts must carefully assess the admissibility of a statement that would otherwise be hearsay on the basis that the defendant adopted the statement by silence under Federal Rules of Evidence, Rule 801(d)(2)(B). In some instances, the defendant's silence in the face of accusation is admissible. In others, admitting the evidence would violate the defendant's constitutional rights. When the evidence is properly admitted, this instruction may be given to guide the jury's evaluation of the defendant's silence.

In criminal cases, the admissibility of the defendant's silence turns on the precise circumstances in which the defendant remained silent. The cases fall into two broad categories: 1) silence in the face of accusation outside the presence of law enforcement officers, in which the court should apply the general rule, and 2) silence in the presence

of law enforcement officers, in which the court must consider whether the Constitution permits evidentiary use of the defendant's silence.

In *United States v. Ward*, 377 F.3d 671, 675 (7th Cir. 2004), the Seventh Circuit summarized the general law governing adoption by silence:

Under Federal Rule of Evidence 801(d)(2)(B), a statement is not hearsay if it is offered against a party and is “a statement of which the party has manifested an adoption or belief in its truth.” It is not necessary for one to use any specific language to adopt another's statement. Rather, a statement may be adopted as long as the statement was made in the defendant's presence, the defendant understood the statement, and the defendant has the opportunity to deny the statement but did not do so.

A defendant's silence in the face of accusation after arrest raises constitutional questions which are explored at length below. Outside of that context, a defendant's silence in the face of accusation by someone other than a law enforcement officer may be admissible as an adoptive admission if the statement was made in the defendant's presence, the defendant heard and understood the statement, the circumstances called for a denial, the defendant had the opportunity to deny the statement, and the defendant did not deny the statement. See *United States v. Ward*, 377 F.3d 671, 675 (7th Cir. 2004); *United States v. Hoosier*, 542 F.2d 687 (6th Cir. 1976). For example, in *Ward*, the court admitted testimony that the defendant's sister stated “that's the money they got when they robbed the bank” in the defendant's presence and he did not deny it. 377 F.3d at 675. The Third Circuit does not appear to have discussed the admissibility of a defendant's silence under Federal Rule of Evidence 801(d)(2)(B).

If the defendant's silence occurred in the presence of law enforcement officers, the court must consider with care and great caution the constitutionality of using the evidence. Admissibility often turns on whether the silence occurred after the defendant had received *Miranda* warnings. See *Salinas v. Texas*, 133 S. Ct. 2174 (2013) (discussing and allowing use of silence in non-custodial, non-*Miranda* questioning). It is clear that the government cannot use evidence that a defendant maintained silence after receiving *Miranda* warnings as substantive evidence of guilt or, under most circumstances, to impeach the defendant. To do so violates the defendant's right to due process. See *Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993); *Doyle v. Ohio*, 426 U.S. 610 (1976); *United States v. Lopez*, 818 F.3d 125 (3d Cir. 2016) (holding that use of defendant's post-*Miranda* silence was plain error); *United States v. Shannon*, 766 F.3d 346 (3d Cir. 2014); *United States v. Johnson*, 302 F.3d 139, 145 (3d Cir. 2002); *United States v. Balter*, 91 F.3d 427 (3d Cir. 1996). If a prosecutor refers to a defendant's post-*Miranda* silence, the court should consider whether to grant a mistrial. At the very least, the court must give a curative instruction ordering the jury to disregard the prosecutor's questions and not to consider the defendant's post-arrest silence for any

reason. In *Johnson*, the prosecutor improperly questioned the defendant concerning his post-*Miranda* silence, but the court avoided a constitutional violation by precluding further questioning and giving the following instruction:

Members of the Jury, as I instructed you and advised you in the beginning, in a criminal case a Defendant is under no obligation or duty to testify. Likewise, a Defendant is under no obligation or duty to respond at any time or to say anything.

In this particular instance the thrust of [the prosecutor's] question, did Mr. Johnson say it was not his coat, was objected to by [defense counsel] and quite properly so. I'm instructing you that that should be disregarded by you as a piece of information in this case or a piece of evidence. [The prosecutor] is essentially withdrawing that question. So you should strike it from your minds as something that is to be considered in this case.

See Johnson, 302 F.3d at 148; *see also Greer v. Miller*, 483 U.S. 756, 764-65 (1987) (holding no *Doyle* violation where court sustained objection to improper question and cautioned jury to disregard evidence); *Hassine v. Zimmerman*, 160 F.3d 941, 948 (3d Cir. 1998) (finding *Doyle* violation where “the trial court gave no curative instructions at all” after the prosecutor asked three questions concerning the defendant’s post-arrest, post-*Miranda* warnings silence but holding the violation to be harmless). *See also United States v. Waller*, 654 F.3d 430 (3d Cir. 2011) (concluding that intent instruction improperly permitted jury to consider defendant’s post-*Miranda* silence).

However, the Third Circuit has recognized that a defendant’s post-*Miranda* silence can be used to impeach the defendant if the defendant “testifies to an exculpatory version of events and claims to have told the police the same version upon arrest.” *See Hassine* at 949 (quoting *Doyle*, 426 U.S. at 619 n.11). The Third Circuit emphasized that the exception is limited:

[T]he prosecution [may] use post-arrest silence to impeach the credibility of the defendant’s version of what he did following arrest; the government cannot use the silence to impeach the exculpatory story itself or to draw inferences suggesting the defendant’s guilt.

See Hassine at 949; *see also United States v. Shannon*, 766 F.3d 346 (3d Cir. 2014) (holding that use of defendant’s silence was harmful constitutional error and rejecting argument that defendant opened the door to impeachment with his post-*Miranda* silence); *Government of Virgin Islands v. Davis*, 561 F.3d 159, 163-65 (3d Cir. 2009) (holding that admission of defendant’s post-arrest, post-*Miranda* silence violated defendant’s right to due process). If the defendant’s silence is admitted only to impeach, this instruction should not be given. Instead, the court should adapt Instruction 4.22

(Impeachment of Witness - Prior Inconsistent Statement for Credibility Only).

By contrast, the defendant's pre-*Miranda* silence is more likely to be admissible. The protection established in *Doyle* applies only to post-arrest, post-*Miranda* warnings silence and not to post-arrest silence before receiving *Miranda* warnings. See *Brecht*, 507 U.S. at 628; *Fletcher v. Weir*, 455 U.S. 603 (1982); *Johnson*, 302 F.3d at 146. A defendant's silence after arrest but before receiving the *Miranda* warnings is admissible to impeach the defendant if the defendant testifies. Likewise, a defendant's pre-arrest silence may be admissible to impeach the defendant's exculpatory testimony at trial. See *Jenkins v. Anderson*, 447 U.S. 231 (1980); *United States v. Balter*, 91 F.3d 427, 431 (3d Cir. 1996) (citing *Jenkins* for the proposition that a defendant's pre-arrest silence is admissible to impeach).

The Supreme Court on occasion has, as a matter of federal evidentiary law, found impeachment on the basis of prior silence inappropriate where the circumstances of the silence were not in fact inconsistent with the defendant's testimony. See *Jenkins*, 447 U.S. at 235 (citing *United States v. Hale*, 422 U.S. 171, 180-81 (1975)); *Stewart v. United States*, 366 U.S. 1, 5 (1961); *Grunewald v. United States*, 353 U.S. 391, 424 (1957).

It is not clear whether the defendant's pre-*Miranda* silence is admissible as substantive evidence of the defendant's guilt. The circuits are split as to whether the prosecution can use pre-*Miranda* silence in its case in chief. See *Combs v. Coyle*, 205 F.3d 269, 283-84 (6th Cir. 2000) (summarizing authority). The Third Circuit has not indicated whether substantive use of pre-*Miranda* silence is constitutional or how to instruct the jury regarding the introduction of a defendant's post-arrest, pre-*Miranda* warnings silence. However, in *United States v. Traitz*, 871 F.2d 368, 400-01 (1989), the Third Circuit appeared to assume that using a defendant's pre-arrest silence could violate the defendant's Fifth Amendment privilege against self-incrimination. See also *United States v. Cumiskey*, 728 F.2d 200, 204 (3d Cir. 1984) (suggesting in dictum that such proof may be prohibited).

The Third Circuit has not discussed how to instruct the jury regarding the use for impeachment of pre-*Miranda* silence.

(Revised 2016)

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

You 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).]

Comment

See Eighth Circuit § 2.16.

This instruction should be given 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:

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

Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness’s conduct in order to attack or support the witness’s character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

- (1) the witness; or
- (2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege

against self-incrimination for testimony that relates only to the witness's character for truthfulness.¹²

If the court permits the prosecutor to cross-examine the defendant concerning prior bad acts under Rule 608(b) and the defendant admits committing those acts, the court should instruct the jury concerning the cross-examination, whether or not requested, after consultation with the defendant. The instruction simply limits the jury's consideration of the prior acts to the defendant's believability. The Third Circuit has not considered 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 should be given in a multi-defendant case.

If the prosecutor asks about the prior acts on cross-examination, a cautionary instruction should be given at the time of the testimony. *See* Instruction 2.24 (Impeachment of Defendant - Prior Bad 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. In that event, the court should give Alternative 2 of Instruction 2.24 during the trial. If the defendant admits committing the acts, the court should give Alternative 1 of Instruction 2.24 during the trial and this instruction in the final charge to the jury.

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). 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). 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 Instruction 4.29 (Defendant's Prior Bad

¹² Before the Federal Rules of Evidence were restyled, Rule 608(b) provided:

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, or
- (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

Acts or Crimes) respectively. If different evidence has been admitted under all three rules, all three instructions should be given, highlighting the difference in relevance for the jury. If the same evidence is admitted under Rule 608(b) and another of these rules, the instructions should be modified to reflect the multiple bases for admission.

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 273 (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), *aff’d* 556 F.2d 566, 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.

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

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

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

Comment

See Eighth Circuit § 2.16. For variations, see O’Malley et al., supra, §§ 11.12 and 15.08; Sand et al., supra, 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 has been admitted to attack the defendant’s credibility under Rule 609 of the Federal Rules of Evidence.

Rule 609(a), which governs the admissibility of prior convictions to impeach, provides:

The following rules apply to attacking a witness’s character for truthfulness by evidence of a criminal conviction:

- (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
 - (A) must be admitted, subject to Rule 403, in a civil case or in a

criminal case in which the witness is not a defendant; and
(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and
(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving--or the witness's admitting--a dishonest act or false statement.¹³

See *United States v. Gilmore*, 553 F.3d 266, 272-73 (3d Cir. 2009) (discussing application of Rule 609).

It is important to distinguish between the two subsections of Rule 609(a). Rule 609(a)(1) permits 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) (establishing four-factor balancing test to assess admissibility of prior conviction to impeach defendant). See also *United States v. Caldwell*, 760 F.3d 267 (3d Cir. 2014) (discussing heightened balancing test that applies when government offers prior conviction to impeach defendant).

Rule 609(a)(2) applies only 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). As amended, the rule precludes inquiry into the manner in which a crime was committed to establish that it was a crime of dishonesty or false statement. Instead, the nature of the crime must be readily determined.

¹³ Before the Federal Rules of Evidence were restyled, Rule 609(a) provided:

For the purpose of attacking the character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

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 “its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.”¹⁴ 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 6.18.922G-3 (Evidence of Prior Conviction of Defendant Charged with Possession of a Firearm by a Convicted Felon (18 U.S.C. § 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 4.29 (Defendant’s Prior Bad Acts or Crimes). *See also United States v. Gilmore*, 553 F.3d 266, 271-72 (3d Cir. 2009) (approving use of prior convictions to impeach defendant by contradiction).

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

(Revised 2014)

¹⁴ Before the Federal Rules of Evidence were restyled, Rule 8609(b) provided that convictions over ten years old could be admitted if the party provided notice and “the court determines, in the interests of justice, that the probative value of the conviction . . . substantially outweighs its prejudicial effect.”

4.37 Impeachment of Defendant - Prior Inconsistent Statement Taken in Violation of Miranda

You will recall that the defendant, *(name)*, testified during the trial on *(his)(her)* own behalf. You will also recall that there was evidence that the defendant made *(a statement)(certain statements)* before trial. *(Name)* *(admitted)(denied)* making *(this)(these)* earlier statement(s). *(Name)*'s earlier statement(s) *(was)(were)* brought to your attention only to help you decide if you believe what *(name)* testified to here in court. If you find that *(name)* once said something different, then you should decide if what *(name)* said here in court was true. You must not, however, consider the earlier statement(s) as evidence of the defendant's guilt. The government must use other evidence to prove, beyond a reasonable doubt, that the defendant committed the crime.

Comment

See Federal Judicial Center § 42. For variations, *see* O'Malley et al., *supra*, §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. *But see* Instruction 2.11. However, if a statement is obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), or in violation of the defendant's Sixth Amendment rights, 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. *See Kansas v. Ventris*, 556 U.S. 586 (2009); *Harris v. New York*, 401 U.S. 222 (1971). This instruction should then be used during the concluding instructions to restrict the statement to its limited role. In addition, Instruction 2.26 (Impeachment of Defendant - Prior

Inconsistent Statement Taken in Violation of Miranda) should be given during the trial, at the time the prior statement is introduced.

If other prior statements of the defendant are 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.

4.38 Impeachment of Defendant - Prior Inconsistent Statement Not Taken in Violation of *Miranda*

You will recall that *(name of defendant)* testified during the trial on *(his)(her)* own behalf. You will also recall that there was evidence that *(name of defendant)* made *(a statement)(certain statements)* before trial. *(Describe the statement(s) to differentiate it from those admitted just to impeach.) (This)(These)* earlier statement(s) by *(name of defendant)* *(was)(were)* brought to your attention in part to help you decide if you believe what the defendant testified to here in court. If you find that *(name of defendant)* once said something different, then you should decide if what *(he)(she)* said here in court was true. In addition, however, you may consider the earlier statement(s) as evidence of *(name of defendant)*'s guilt.

Comment

See Seventh Circuit § 3.10 and Federal Judicial Center § 42. For variations, *see* O'Malley et al., *supra*, §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. Generally, no instruction is necessary if the defendant's prior statement is admitted without limitation. However, if any statement of the defendant is also admitted only to impeach, this instruction should be given to differentiate between the statement admissible generally and that admitted for a limited purpose. 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 be admitted to impeach the defendant if the defendant elects to testify. *See Harris v. New York*, 401 U.S. 222 (1971). This instruction should then be used during the concluding instructions to distinguish between the statements that play a limited role and those admissible substantively. In addition, Instruction 2.26 (Impeachment of Defendant - Prior Inconsistent Statement Taken in Violation of

Miranda) Alternative 1 and/or 2 should be given to define the limited role of the statement taken in violation of *Miranda*.

4.39 Defendant's Character Evidence

You have heard (*reputation*)(*opinion*)(*reputation and opinion*) **evidence about whether the defendant has a character trait for** (*name trait, such as truthfulness, peacefulness, honesty, being a law-abiding citizen, etc.*).

You should consider this character evidence together with and in the same way as all the other evidence in the case in deciding whether the government has proved the charge(s) beyond a reasonable doubt.

Comment

See Sixth Circuit § 7.09, Seventh Circuit § 3.06, and Ninth Circuit § 4.4. For variations, *see* O'Malley et al., *supra*, § 15.15; Sand et al., *supra*, 5-14 and 5-15; Fifth Circuit § 1.09; Eighth Circuit § 4.03; and Eleventh Circuit § 12.

This instruction should be included in the final charge to the jury when the defendant has introduced evidence of good character under Rule 404(a)(1) of the Federal Rules of Evidence. *See United States v. Spangler*, 838 F.2d 85, 87 (3d Cir.), *cert. denied*, 487 U.S. 1224 (1988). Under Rule 404, the government is precluded from introducing evidence of the defendant's bad character unless the defendant first introduces evidence of good character. Rule 404(a)(2) allows a defendant to introduce evidence of a pertinent character trait to establish action in conformity therewith. Rule 405 allows character witnesses to testify either to the defendant's reputation or to their own opinions as to defendant's character. The defendant's character evidence "constitutes substantive evidence which, under certain circumstances, can raise a reasonable doubt as to his guilt, even though it does not relate to the specific criminal act of which he is accused." *United States v. Logan*, 717 F.2d 84, 88 (3d Cir. 1983). Under Rule 405, character witnesses are not permitted to testify to good acts. *See* Instruction 2.17 (Impeachment of Defendant's Character Witness).

There is disagreement concerning whether the jury should be instructed that proof of defendant's good character, standing alone, may be sufficient to create a reasonable doubt. In *Edgington v. United States*, 164 U.S. 361, 364 (1896), the Court held that the trial court committed error by instructing the jury that evidence of good character played a role only when the "commission of the crime was doubtful" and further noted that evidence of good character could raise a reasonable doubt. *Id.* at 366; *see also Michelson*

v. United States, 335 U.S. 469, 476 (1948). However, the Court has never held that the jury must be instructed that character evidence may raise a reasonable doubt, although *Michelson* includes dictum to that effect. 335 U.S. at 476. The views of the various circuits range from the position that the defendant is entitled to the instruction to the view that the instruction is improper. See *Spangler v. United States*, 487 U.S. 1224 (1988) (White, J., dissenting from denial of certiorari) (summarizing division of authority). In *United States v. Spangler*, 838 F.2d 85 (3d Cir.), cert. denied, 487 U.S. 1224 (1988), the Third Circuit held that the trial court may decline to give the “standing alone” instruction provided the court gives an instruction that “calls the jury’s attention to its duty to take character evidence into account with all of the other evidence in deciding whether the government has proved its charge beyond a reasonable doubt.” *Id.* at 87.

Most recently, the Third Circuit addressed the character evidence instruction in a non-precedential opinion, *United States v. Long Fei Lin*, 104 F. App’x. 241 (3d Cir. 2004). The court stated that *Spangler* is dispositive on the question of the “standing alone” instruction and held that the following instruction, which “largely mirrored” the instruction approved in *Spangler*, was not clearly erroneous:

You have heard testimony that a defendant has a good reputation in his community for being honest and law-abiding. You may consider such evidence, along with all other evidence in the case, in reaching your verdict. Evaluate such character evidence, along with all of the other evidence in this case, in deciding whether the government has proved the crime charged beyond a reasonable doubt.

See also *United States v. Morrow*, 351 F. App’x. 649, 651 (3d Cir. 2009) (non-precedential) (holding defendant not entitled to instruction that character evidence alone was sufficient to create reasonable doubt).

(Revised 11/2010)

4.40 Impeachment of Defendant's Character Witness

If character witness testified to reputation: 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.

If character witness testified to opinion: 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

See O'Malley et al., supra, § 11.15, Sand et al., supra, 5-16, and Eighth Circuit § 2.10.

This instruction should be included in the concluding instructions if the prosecutor was permitted to cross-examine the defendant's character witness concerning prior instances of the defendant's conduct. Instruction 2.17 (Impeachment of Defendant's Character Witness) should be given to the jury at the time of the cross-examination.

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 4.39 (Defendant's Character Evidence) 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). As a result, it is improper to allow the prosecutor to ask a reputation witness a guilt-assuming hypothetical. *See United States v. Kellogg*, 510 F.3d 188, 196 (3d Cir. 2007)

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." Guilt-assuming hypotheticals may be allowed on cross-examination of an opinion witness. *See United States v. Kellogg*, 510 F.3d 188, 196 (3d Cir. 2007)

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. 612 F.2d at 781.

If the prosecutor is permitted to cross-examine the defendant's character witness, the court should make a ruling as to what the prosecutor may ask a character witness on cross-examination. The court should consider making a preliminary ruling on the content of the cross examination of defense character witnesses to ensure that questions of such witnesses are based on accurate information and are not substantially more prejudicial than probative. *See United States v. Curtis*, 644 F.2d 263, 268 n.2 (3d Cir. 1981).

(Revised 10/2012)