

## **Chapter 5:           Mental States**

### General Introduction to Mental State Instructions

5.01 Proof of Required Mental State

5.02 Knowingly

5.03 Intentionally

5.04 Motive Explained

5.05 Willfully

5.06 Willful Blindness

5.07 Good Faith Defense

5.08 Recklessly

5.09 Negligently

5.10 Failure to Act (*Omissions*)

## General Introduction to Mental State Instructions

The purpose of the instructions in this Chapter is to provide definitions of the mental states commonly used in federal offenses; intentionally, knowingly, or willfully, and less commonly recklessly or negligently.

The Chapter also includes instructions on related mental state principles. When using these Instructions, care must be given to conform the general definitions here to the elements of specific offenses, since statute or case law may establish a different or nuanced definition of the mental state element for the specific crime. Chapter 6 (Elements of Offenses) includes those specific definitions in the instructions for the specific federal crimes when appropriate. *See* Chapter 6 (Elements of Offenses). In tailoring the instructions to the mental state required for specific offenses, a determination must be made for each offense whether the mental state requirement applies to all or only some of the elements of the offense charged. *See United States v. Bailey*, 444 U.S. 394, 405 (1980). This determination should be made based upon the statutory language setting forth the elements of the offense and the relevant caselaw. It should be noted that the Court need only instruct the jury on the relevant mental state required by the statute and need not instruct on mental states that do not meet the statutory requirements. *See United States v. Maury*, 695 F. 3d 227, 263 (3d Cir. 2012) (“We have never held that a court must define a requisite mental state by defining and explicitly excluding all of the mental states that do not meet the threshold. . . . The jury need only receive those instructions necessary to its understanding of what conduct will suffice to support a conviction.”)

(Revised 12/2021)

## **5.01 Proof of Required State of Mind – Intentionally, Knowingly, Willfully**

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

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

## Comment

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

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

**Permissive Inferences Not Presumptions.** The instruction makes clear that the jury may or is permitted to find (or to draw an inference) that the defendant had the required state of mind from certain evidence presented at trial. The jury is permitted, but not required to make that finding or draw that inference. See, e.g., *Sandstrom v. Montana*, 442 U.S. 510 (1979); *United States v. United States Gypsum Co.*, 438 U.S. 422, 446 (1978). When instructing on proof of state of mind elements, care must be taken not to suggest to the jury that there is a presumption, either mandatory or rebuttable, that the evidence presented, whatever it might be, proves the required state of mind; *i.e.*, that the jury must find that the defendant had the required state of mind or must find that state of mind unless the defendant presents evidence to the contrary.

**Fifth Amendment Concerns:** Although this instruction provides that the trial court may instruct that the jury can consider, among other things, “what (*name*) said, what (*name*) did and failed to do,” the court should be careful not to instruct in a way that suggests that the jury can consider what the defendant failed to say in a context that implicates a defendant’s Fifth Amendment right to remain silent. An instruction that invites the jury to infer intent from a defendant’s silence in such a context may be a violation of the Fifth Amendment. In *United States v. Waller*, 654 F.3d 430 (3d Cir. 2011), the Third Circuit held that the Instruction given by the District Court in that case had invited the jury to infer intent from what the defendant failed to say when in the presence of law enforcement officers and found the latter violated the defendant’s a Fifth Amendment right, requiring reversal. The District Court had instructed the jury that, ““you may infer a defendant’s intent from all the surrounding circumstances. For example, in determining whether a defendant has had the intent to distribute controlled substances, you may consider, among other things, the quantity of the controlled substances involved, and the amount of cash involved. *You may also consider any statements made or omitted by the defendant*, as well as all other facts and circumstances in evidence which demonstrate the defendant's state of mind.”” 654 F.3d. at 434-35 (emphasis in original). The Third Circuit held that this instruction improperly allowed the jury to infer intent from the defendant’s silence post-arrest, post-*Miranda* warnings, in violation of his right to due process under the Fifth Amendment. 654 F.3d at 435. The Third Circuit reasoned:

The District Court is indeed correct in its assertion that the Third Circuit’s Pattern Instruction on intent is only minimally different from the challenged instruction in this case. But that minimal difference is of great legal significance. The Pattern Instruction conspicuously refrains from employing the very language that Waller argued was objectionable in the District Court’s instruction. Specifically, our Pattern Instruction

provides:

[T]o determine [the defendant's] state of mind (what [the defendant] intended or knew) at a particular time, you may consider evidence about what [the defendant] said, what [the defendant] did and failed to do, how [the defendant] acted, and all other facts and circumstances shown by the evidence that may prove what was in [the defendant's] mind at that time.

Third Circuit Model Criminal Jury Instructions, Ch. 5.01 (emphasis omitted). Thus, the Pattern Instruction permits the jury to take into account only those statements *actually made* by the defendant, as well as the defendant's failures to *act*, both of which are decidedly proper for the jury to consider in determining whether a defendant possessed the necessary intent to commit the crime charged. *See, e.g., United States v. Mendez-Zamora*, 296 F.3d 1013, 1018 (10th Cir.2002) ("To suggest that a person's state of mind can be inferred from his omissions (as well as his acts) is merely to utter common sense. We fail to see how the instruction reduces the government's burden to prove all elements of the offense beyond a reasonable doubt or how it in any way compels a defendant to incriminate himself."). The Pattern Instruction does *not* invite the jury to consider statements omitted by the defendant, or otherwise comment on the defendant's failure to speak. Accordingly, any similarities that may exist between the District Court's instruction and this Court's Pattern Instruction are immaterial to whether the challenged portion of the instruction employed in this case raises constitutional concerns.

654 F.3d at 435-36.

(Revised 12/2021)

## 5.02 Knowingly

**The offense(s) of (state offense or offenses that include knowingly or with knowledge) charged in the indictment requires that the government prove that (name of defendant) acted “knowingly” [“with knowledge”] with respect to an (the) (certain) element(s) of the offense(s). A person acts “knowingly” if that person acts voluntarily and intentionally and not because of mistake or accident or other innocent reason. This means that the government must prove beyond a reasonable doubt that (name) was conscious and aware of the nature of (his) (her) actions and of the surrounding facts and circumstances, as specified in the definition of the offense(s) charged.**

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

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

### Comment

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

In *United States v. Maury*, 695 F. 3d 227 (3d Cir. 2012), the Third Circuit upheld the trial court’s instruction on knowingly, citing this instruction. The Third Circuit stated: “We note at the outset that these proffered instructions are consistent with our own case law and our recommended jury instructions concerning ‘knowing’ conduct. See *W. Indies*, 127 F.3d at 310 (noting, in the context of the CWA, that ‘[a]n act is done knowingly if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.’); see also *United States v. Flores*, 454 F.3d 149, 160–61 (3d Cir.2006) (approving similar ‘knowing’ instruction);

Third Circuit Model Criminal Jury Instruction 5.02.” 695 F.3d at 262.

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

This instruction provides the most frequently given definition of “knowingly,” when it is used alone in a federal criminal statute. *See, e.g., United States v. Dixon*, 548 U.S. 1, 5 (2006) (“As we have explained, ‘unless the text of the statute dictates a different result, the term “knowingly” merely requires proof of knowledge of the facts that constitute the offense.’ *Bryan v. United States*, 524 U.S. 184, 193, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998).”); *Arthur Anderson v. United States*, 544 U.S. 696, 705 (2005) (Knowingly is “normally associated with awareness, understanding, or consciousness,” citing dictionaries); *United States v. Weiler*, 458 F.2d 474 (3d Cir. 1972). In *United States v. Cheeseman*, 600 F.3d 270, 281 (3d Cir. 2010), the Third Circuit rejected defendant’s argument that he did not knowingly violate 18 U.S.C. § 922(g)(3), as required for the forfeiture of firearms under 18 U.S.C. § 924(d)(1). The court stated:

This argument is unpersuasive because it discounts firmly established case law construing the term “knowing” to require “only that the act be voluntary and intentional and not [to require] that a person knows he is breaking the law.” *United States v. Sokolow*, 91 F.3d 396, 408 (3d Cir.1996) (internal quotation marks & citation omitted). . In essence, [defendant] invites the Court to read into § 924(d)(1) a willfulness requirement, which, if applied, would require him to have had actual knowledge that his prohibited conduct was illegal in order for the firearms to be forfeitable. . . . Here, Congress used the term “knowing” and not “willful” clearly indicating its preference for the lower scienter.

This instruction should be used with offenses that do not have a different definition of “knowingly.” The bracketed alternative language [*“with knowledge”*] should be used when the statute proscribing the offense charged employs that language.

The optional language at the end of the instruction explains that this most commonly used definition of knowingly does not require that the defendant know his or her conduct is against the law. In most cases this is not an issue and therefore this optional instruction is not required, but it may be given when this is an issue. In this regard, the most commonly used definition of knowingly differs from the most commonly used definition of “willfully.” *See, e.g., United States v. Dixon*, 548 U.S. 1, 126 S.Ct. 2437, 2441 (2006) (“As we have explained, ‘unless the text of the statute dictates a different result, the term “knowingly” merely requires proof of knowledge of the facts that constitute the offense.’ *Bryan v. United States*, 524 U.S. 184, 193, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998) (footnote omitted). And the term ‘willfully’ in §924(a)(1)(D) requires a defendant to have ‘acted with knowledge that his conduct was unlawful.’ *Ibid.*”); *United States v. Starnes*, 583 F.3d 196, 210 (3d Cir. 2009) (same). *See*

Instruction 5.05.

**Different Meaning of Knowingly for Some Offenses.** As to some federal offenses, “knowingly” has a meaning different from the meaning given in this instruction, because the statute proscribing the offense explicitly provides a different definition or because federal courts have interpreted knowingly in the statute as having a different meaning. Care must be given to conform the Instruction to the elements of specific offenses, since statute or case law may establish a different or nuanced definition of the mental state element for the specific crime. Chapter 6 (Elements of Offenses), when appropriate, includes those specific definitions in the instructions for the specific federal crimes. *See* Chapter 6 (Elements of Offenses). In tailoring the instructions to the mental state required for specific offenses, a determination must be made for each offense whether mental state requirement applies to all or only some of the elements of the offense charged. *See United States v. Bailey*, 444 U.S. 394, 405 (1980). This determination should be made based upon the statutory language setting forth the elements of the offense and the relevant caselaw.

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

**Fifth Amendment Concerns.** Although this instruction provides that the trial court may instruct that the jury can consider, among other things, “what (*name*) said, what (*name*) did and failed to do,” the court should be careful not to instruct in a way that suggests that the jury can consider what the defendant failed to say in a context that implicates a defendant’s Fifth Amendment right to remain silent. An instruction that invites the jury to infer intent from a defendant’s silence in that context may be a violation of the Fifth Amendment. *United States v. Waller*, 654 F.3d 430 (3d Cir. 2011). *See* discussion in Comment to Instruction 5.01 (Proof Of Required State of Mind – Intentionally, Knowingly, Willfully).

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### 5.03 Intentionally

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

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

#### Comment

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

**Fifth Amendment Concerns.** Although this instruction provides that the trial court may instruct that the jury can consider, among other things, “what *(name)* said, what *(name)* did and failed to do,” the court should be careful not to instruct in a way that suggests that the jury can consider what the defendant failed to say in a context that implicate a defendant’s Fifth Amendment right to remain silent. An instruction that invites the jury to infer intent from a defendant’s silence in such a context may be a violation of the Fifth Amendment. *United States v. Waller*, 654 F.3d 430 (3d Cir. 2011). See discussion in Comment to Instruction 5.01 (Proof Of Required State of Mind – Intentionally, Knowingly, Willfully).

**Different Meaning of Intentionally for Some Offenses..** Care must be given to conform the Instruction to the elements of specific offenses, since statute or case law may establish a different or nuanced definition of the mental state element for the specific crime. The bracketed alternative language [*with intent*] should be used when that is the language of the statute proscribing the offense charged. Chapter 6 (Elements of Offenses) includes those specific

definitions in the instructions for specific federal crimes, when appropriate. *See* Chapter 6 (Elements of Offenses).

In addition, when tailoring the instruction to the mental state required for specific offenses, a determination must also be made for each offense whether mental state requirement applies to all or only some of the elements of the offense charged. *See United States v. Bailey*, 444 U.S. 394, 405 (1980). This determination should be made based upon the statutory language setting forth the elements of the offense and the relevant caselaw.

When a statute requires a mental state above and beyond that set forth in the instruction, the charge should be modified to conform to that requirement. In doing so, however, the term “specific intent” should be avoided, since Courts have noted that it can be too general and has potential to mislead the jury. *Liparota v. United States*, 510 U.S. 135, 433 n.16, 114 S.Ct. 655, 126 L.Ed. 2d 615 (1994); *United States v. Starnes*, 583 F.3d 196, 209 (3d Cir. 2009).

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

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## **5.04 Motive Explained**

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

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

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

### **Comment**

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

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

In *United States v Baroni*, 909 F.3d 550, 583-4 (3d Cir. 2018) *rev'd on other grounds* \_\_\_ U.S. \_\_\_, 140 S. Ct. 1565, 206 L. Ed.2d 882 (2020)., the Court approved of the Third Circuit Model Criminal Jury Instruction §5.04 noting ““A defendant acts intentionally when he desires a particular result, without reference to the reason for such desire. Motive, on the other hand, is the reason why the defendant desires the result.”” 909 F. 3d at 584 [citations omitted]. The jury charge, the Court noted, correctly instructs the jury “that evidence of motive may be relevant to establishing *mens rea*, thus allowing a juror who found evidence of motive lacking to vote for acquittal.” 909 F.3d at 584.

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## 5.05 Willfully

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

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

### Comment

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

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

“Willfully” has been defined in various ways in different statutory contexts and, as such, is a word of notoriously elusive meaning. The important difference between willfully as defined in this instruction and the definition of knowingly, as stated in Instruction 5.02, is that willfully requires proof beyond a reasonable doubt that the defendant knew his or her conduct was unlawful and intended to do something that the law forbids; that the defendant acted with a purpose to disobey or disregard the law. *See, e.g., United States v. Dixon*, 548 U.S. 1, 126 S.Ct.

2437, 2441 (2006); *United States v. Starnes*, 583 F.3d 196, 210-11 (3d Cir. 2009).

When “willfully” has a meaning different from the meaning given in this instruction, because the statute proscribing the offense explicitly provides a different definition or because federal courts have interpreted knowingly in the statute as having a different meaning, care must be given to conform the Instruction to the elements of specific offenses, since statute or case law may establish a different or nuanced definition of the mental state element for the specific crime. In tailoring the instructions to the mental state required for specific offenses, a determination must be made for each offense whether the mental state requirement applies to all or only some of the elements of the offense charged. *See United States v. Bailey*, 444 U.S. 394, 405 (1980); *Ratzlaf v United States*, 510 U.S. 135 (1994); and *United States v. Retos*, 25 F.3d 1220, 1228-31 (3d Cir. 1994). This determination should be made based upon the statutory language setting forth the elements of the offense and the relevant caselaw.

Particular offenses whose elements include a mental state of willfulness, include the Firearms Owners’ Protection Act, [18 U.S.C. § 924\(a\)\(1\)\(D\)](#), *Bryan v. United States*, 524 U.S. 184 (1998); “structuring” under the Money Laundering Control Act, 31 U.S.C. § 5324, *Ratzlaf v. United States*, 510 U.S. 135 (1994); tax evasion, *Cheek v. United States*, 498 U.S. 192 (1991), *See* Instruction No. 6.26.7201-4 (Tax Evasion – Willfully Defined); filing a materially false tax return, *United States v. Stadtmayer*, 620 F.3d 238 3d Cir. 2010); failure to file a tax return, *United States v. Greenlee*, 517 F.2d 899 (3d Cir. 1975); false statements under 18 U.S.C 1001, *United States v. Starnes*, 583 F.3d 196, 210-11 (3d Cir. 2009), *United States v. Durham*, 432 Fed. Appx. 88, 93 (3d Cir. 2011) (non-precedential) (providing materially false statements to law enforcement, in violation of [18 U.S.C. § 1001](#)); and securities law violations, *United States v. Gross*, 961 F.2d 1097 (3d Cir. 1992). *See also*, *United States v. Curran*, 20 F.3d 560, 567-69 (3d Cir. 1994) (concluding that Supreme Court’s definition of willfully in *Ratzlaf* should be applied generally, and specifically to “willfully causing” under 18 U.S.C. § 2(b)), *see* Instruction 7.05 (Causing the Criminal Acts of Another (18 U.S.C. § 2(b))). With respect to the last sentence of the first paragraph of the instruction, *see, e.g.*, *United States v. Pompanio*, 429 U.S. 10 (1976) (federal tax evasion).

**Ignorance or Mistake of Law.** When “willfully” requires awareness of and a purpose to violate the law, ignorance or mistake about whether the conduct violates the law would negate the state of mind element. Thus, if the jury finds that the defendant made a mistake about or was ignorant whether his or her conduct violated the law, then the jury must find that the government failed to meet its burden of proving willfully beyond a reasonable doubt. The mistake or ignorance need not be reasonable, as long as it is honest or genuine. Of course, the jury can disbelieve the defendant’s claim of mistake, find that it was not honestly or genuinely held, and therefore find that the defendant did act willfully. *See Cheek v. United States*, 498 U.S. 192 (1991); Model Penal Code § 2.02(9). *See also* Instruction 5.07 (Good Faith) and Commentary to the Instruction.

If there is a significant issue in the case about whether the defendant made an honest mistake or had an honest misunderstanding about whether he or she was doing something illegal, the trial judge may want to instruct as follows (*see Sand, Modern Federal Jury Instructions-Criminal P 3A.03* (2022)):

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

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

**Knowledge of Specific Statute Making Conduct Criminal.** The bracketed, second paragraph of the instruction recognizes that in some situations the Supreme Court has interpreted federal criminal statutes either as requiring or as not requiring proof that the actor knew not only that what he or she did was generally against the law, but also that he or she knew of the existence and meaning of the statute making the unlawful conduct criminal. *See, e.g., United States v. Starnes*, 583 F.3d 196, 211 (3d Cir. 2009) (“[I]n some rare instances involving highly technical statutes that present the danger of ensnaring individuals engaged in apparently innocent conduct, such as the federal criminal tax and anti-structuring provisions, “willfully” has been read to require proof that the defendant actually knew of the specific law prohibiting the conduct. *See Bryan*, 524 U.S. at 194-95 (discussing, among other cases, *Ratzlaf*, 510 U.S. at 138, 149 (anti-structuring statutes) and *Cheek v. United States*, 498 U.S. 192, 199-201, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991) (criminal tax statutes)). *Compare Bryan v. United States*, 524 U.S. 184 (1998) (“willfully” in firearms act does not require proof that defendant knew the existence of the federal statute that made it criminal) with *Ratzlaf v. United States*, 510 U.S. 135 (1994) (“willfully” in Money Laundering Control Act of 1986 requires proof that defendant knew of the existence and meaning of the criminal statute he was charged with violating; Congress later amended the statute to disavow the Court’s interpretation; see Money Laundering Suppression Act of 1994). The jury may well have difficulty with this distinction, therefore it is included in the model instruction as alternative language. If the jury does not need to consider this issue, the bracketed second paragraph need not be given. However, the trial court should instruct on this point if the issue is fairly raised at trial and is supported by the evidence.

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

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## 5.06 Willful Blindness [*Deliberate Ignorance*]

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

**No one can avoid responsibility for a crime by deliberately ignoring what is obvious. Thus, you may find that (name) knew (state the fact or circumstance, knowledge of which is required for the offense charged) based on evidence which proves that: (1) (name) (himself) (herself) [actually,] subjectively believed that there was a high probability that this (fact) (circumstance) existed, and (2) (name) consciously took deliberate actions to avoid learning [used deliberate efforts to avoid knowing] about the existence of this (fact) (circumstance).**

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

*(fact) (circumstance) existed, or that (name) should have known that the (fact) (circumstance) existed, or that a reasonable person would have known of a high probability that the (fact) (circumstance) existed. It is not enough that (name) may have been reckless or stupid or foolish, or may have acted out of inadvertence or accident. You must find that (name) (himself) (herself) [actually,] subjectively believed there was a high probability of the existence of (state the fact or circumstance, knowledge of which is required for the offense charged), consciously took deliberate actions to avoid learning [used deliberate efforts to avoid knowing] about it, and did not actually believe that it did not exist.*

#### **Comment**

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

**When to Give Willful Blindness Instruction.** The mental state requirements knowingly, intentionally, and willfully each includes some aspect of awareness or knowledge of pertinent facts or circumstances. See Instructions 5.02, 5.03, and 5.05. “Willful blindness” may be used to prove the knowledge or awareness aspect of any of these mental states. *See United States v. Caraballo-Rodriguez*, 726 F.3d 418, 420 n.2 (3d Cir. 2013) (“[T]he government could satisfy the ‘knowledge’ requirement by demonstrating actual knowledge or willful blindness, which is ‘a subjective state of mind that is deemed to satisfy a scienter requirement of knowledge.’ *United States v. Wert–Ruiz*, 228 F.3d 250, 255 (3d Cir.2000)”). *See also United States v. Onque*, 665 Fed. Appx. 189, 197 (3d Cir. 2016) (non-precedential). “Willful blindness” could also be used to prove the awareness of substantial and unjustifiable risk aspect of recklessly. See Instruction 5.08. Thus, when supported by the evidence, this willful blindness instruction should be given together with the instruction on the appropriate mental state element, either the general mental state instruction included in this chapter or the more specific mental state instruction for the particular crime charged, included in Chapter 6. The Third Circuit has also held that, if supported by the evidence, it is not inconsistent for a court to give instructions on both actual knowledge and willful blindness, because if the jury does not find actual knowledge, it might still find willful blindness. *See, e.g., United States v. Caraballo-Rodriguez*, 726 F.3d . at 426; *United States v. Wert-Ruiz*, 228 F.3d 250, 255 (3d Cir. 2000); *United States v. Onque*, 665 Fed. Appx. 189, 197 (3d Cir. 2016) (non-precedential); *United States v. Sempf*, 649 Fed. Appx. 270, 272 (3d Cir. 2016) (non-precedential).

Direct evidence of conscious avoidance is not required to warrant giving the instruction. *United States v. Stadtmauer*, 620 F.3d 238, 259 (3d Cir. 2010). The evidence can be completely circumstantial. *United States v. Singh*, 222 F.3d 6, 11 (1<sup>st</sup> Cir. 2000) (cited by Third Circuit in *United States v. Stadtmauer*, 620 F.3d at 259).

A helpful decision procedure is set forth in *United States v. Heredia*, 483 F.3d 913, 922 (9<sup>th</sup> Cir. 2007) (*en banc*):

In deciding whether to give a particular instruction, the district court must view the evidence in the light most favorable to the party requesting it. When a party requests instructions on alternative theories, the district judge must consider the instructions separately and determine if the evidence could support a verdict on either ground. When knowledge is at issue in a criminal case, the court must first determine whether the evidence of defendant's mental state, if viewed in the light most favorable to the government, will support a finding of actual knowledge. If so, the court must instruct the jury on this theory. Actual knowledge, of course, is inconsistent with willful blindness. The deliberate ignorance instruction only comes into play, therefore, if the jury rejects the government's case as to actual knowledge. In deciding whether to give a willful blindness instruction, in addition to an actual knowledge instruction, the district court must determine whether the jury could rationally find willful blindness even though it has rejected the government's evidence of actual knowledge. If so, the court may also give a *Jewell* instruction.

483 F.3d at 922 (citations omitted).

Cases in which the Third Circuit has found sufficient evidence to warrant instructing on willful blindness include situations in which the defendant claims lack of knowledge as to a fact or circumstance that is required by the particular offense, but there is evidence that could support a jury finding of deliberate ignorance. For example, *United States v. Brodie*, 403 F.3d 123 (3d Cir. 2005) (case involving conspiracy to violate the Trading with Enemy Act and Cuban Assets Control Regulations, in which the defendant claimed he believed the transactions were being handled lawfully through a United States company. However, there was evidence that the defendant recognized the likelihood that the United States entity was involved in illegal transactions with Cuba “yet deliberately avoided learning the true facts.” This included evidence suggesting that the defendant tried to ensure that he never saw a direct reference to Cuba, that the corporate culture was to refer to Cuba by “code words,” that the defendant failed to ask the “natural follow-up question[s]” to references to the “Caribbean,” and never instigated any follow-up to his own instruction to ensure that his company was not transacting business with Cuba. The Third Circuit held that the trial judge properly instructed the jury on willful blindness.); *United States v. Onque*, 665 Fed. Appx. 189, 197-198 (3d Cir. 2016) (non-precedential) (Court found no error in the District Court’s giving willful blindness instruction in face of defendant’s claim that there was no evidence that “she took steps to ‘avoid learning’ of the fraudulent nature of the transactions,” reasoning that there was ample evidence from which “a jury could infer from [defendant’s] failure to investigate these transactions, as well as her participation in other, similar transactions ... that she suspected that the transactions were probably fraudulent and did not wish to have her suspicions confirmed through inquiry. This is

sufficient to find willful blindness, which can be a ‘purely psychological avoidance, a cutting off of one's normal curiosity by an effort of will.’”).

For other cases in which the Third Circuit has upheld the giving of willful blindness instructions, *see, e.g., United States v. Caraballo-Rodriguez*, 786 F.3d 418, 434 (3d Cir. 2013) (evidence of defendant’s travel plans flying from Puerto Rico to Philadelphia with only a small bag but picking up 2 large suitcases that he had not checked, a co-conspirator’s testimony about his matching activity on the same day, phone records, and expert testimony about organized drug trafficking and couriers warranted jury finding of knowledge based on willful blindness); *United States v. Bansal*, 663 F.3d 634, 669 (3d Cir. 2011) (willful blindness instruction warranted by the evidence, where defendant’s staunch denial of his knowledge of criminal activity in the face of overwhelming contrary evidence strongly suggests that he closed his eyes to what would otherwise have been obvious to him); *United States v. Stadtmauer*, 620 F.3d 238, 259-60 (3d Cir. 2010) (trial court did not abuse its discretion in concluding that a willful blindness instruction was warranted on charges of willfully filing materially false or fraudulent federal tax returns, where “there was abundant evidence that [defendant] was intimately involved with the operations of the partnerships and was aware of how the partnerships characterized capital expenditures, charitable contributions, gift and entertainment expenses, and “non-property” expenses in the general ledgers and financial statements. There was also evidence that, despite this knowledge . . . [he] spent very little time reviewing the partnerships' tax returns, and never asked questions. . . .” All this evidence supported an “inference . . . that [defendant] deliberately avoided ‘ask[ing] the natural follow-up question[s]’ . . . despite his awareness of a high probability of that fact.”); *United States v. Wasserson*, 418 F.3d 225, 237-39 (3d Cir. 2005) (with respect to defendant charged with causing, and aiding and abetting, the disposal of hazardous waste without a permit in violation of the Resource Conservation and Recovery Act, it was reasonable for the jury to conclude that defendant knew or was willfully blind about whether hazardous wastes would be disposed of at an unpermitted facility where, knowing of the presence of hazardous waste in his company’s warehouse and of the requirements for proper disposal of that waste, defendant told an unknowing employee to find someone to clean out the warehouse); *United States v. Titchell*, 261 F.3d 348 (3d Cir. 2001) (in a prosecution for mail fraud and conspiracy to commit mail fraud based on fraudulent advertising invoices, defendant denied knowledge of the falsity of statements he had made); *United States v. Wert-Ruiz*, 228 F.3d 250 (3d Cir. 2000) (conspiracy to commit money laundering by generating false receipts in connection with remitting drug trafficking proceeds funds from US to overseas; jury could have concluded that defendant deliberately avoided learning that she was dealing with the proceeds of illegal activity and that the transactions were designed to conceal the illicit source of those funds; jury could rationally conclude that using code words for transactions, minimizing dollar amounts, and receiving large amounts of cash in gym bags must have alerted defendant to the possibility that her money transfer activities were actually in service of a money laundering operation, and that her failure to inquire further evinced willful blindness.); *United States v. Stewart*, 185 F.3d 112 (3d Cir. 1999) (in prosecution for mail fraud, wire fraud, money laundering, and racketeering based on a complicated series of fraudulent transactions involving insolvent insurance companies, defendant argued that he lacked the intent to defraud because he relied on the findings of solvency reported in state examinations and audit reports, but evidence permitted the jury to conclude that he recognized the likelihood of insolvency yet deliberately avoided learning the true facts); *United States v. Caminos*, 770 F.2d 361 (3d Cir. 1985) (at trial

for knowingly importing cocaine and possessing cocaine with intent to distribute, evidence was sufficient to allow the jury to find that defendant deliberately ignored the probability that something other than a \$60 wood carving was involved, where evidence showed defendant was approached by two men who were willing to pay over \$1,000 to ensure that the wood carving, in which cocaine was concealed, was delivered to Pittsburgh).

Importantly, although willful blindness can be used to satisfy an element of an offense that requires a defendant's knowledge of a fact or of a legal duty, it cannot be used to satisfy the requirement that the defendant "willfully and intentionally violated that duty." See *United States v. Stadtmauer*, 620 F.3d 238, 258-59 (3d Cir. 2010) (affirming defendant's conviction of filing materially false or fraudulent federal tax returns, the Third Circuit held that with respect to willfully, a willful blindness instruction can apply both to the defendant's knowledge of facts and also to his knowledge of the law. The court also stated, however, that the willful blindness instruction cannot apply to the additional requirement of willfully that the defendant have specific intent or purpose to violate, disobey or disregard the law.) Also see *United States v. Basile*, 570 Fed. Appx. 252, 257 fn. 6 (2014) (non-precedential) ("Even more clearly than in *United States v. Stadtmauer*, where we affirmed in the face of a similar argument, 'the Court's instructions made clear that willful blindness applied only to the element of knowledge.' 620 F.3d 238, 258 (3d Cir. 2010).").

**Instruction Does Not Unconstitutionally Shift Burden of Proof.** The Third Circuit held in *United States v. Tai*, 750 F.3d 309, 314-15 (3d Cir. 2014), that the trial court's instruction on willful blindness, which employed the language of this model instruction, did not unconstitutionally shift the burden to the defendant to prove the mental state element of the offenses charged (mail and wire fraud). The Court concluded that the language of this model instruction "did not impose any burden, implicit or explicit, on [defendant] to prove or disprove his knowledge," when considered in the context of the instructions as a whole and it was given after the trial judge told the jury that the government had the burden to prove the defendant acted knowingly and with intent to defraud.

**The Content of the Willful Blindness Instruction.** In *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S.Ct. 2060, 2068-9 (2011) the Supreme Court made clear that willful blindness requires that the defendant must subjectively believe that there is a high probability that a fact exists. The Court explained:

While the Courts of Appeals articulate the doctrine of willful blindness in slightly different ways, all appear to agree on two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact. We think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence. Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts. See G. Williams, *Criminal Law* § 57, p. 159 (2d ed. 1961) ("A court can properly find willful blindness only where it can almost be said that the defendant actually knew"). By contrast, a reckless defendant is one who merely knows of a substantial and unjustified risk of such wrongdoing, see ALI,

Model Penal Code § 2.02(2)(c) (1985), and a negligent defendant is one who should have known of a similar risk but, in fact, did not, see § 2.02(2)(d).

131 S.Ct. at 2070-71(footnote omitted). See also *United States v. Tai*, 750 F.3d 309, 314-15 (3d Cir. 2014) (rejecting constitutional challenge to the District Court’s willful blindness charge that tracked this Instruction).

The instruction, which follows both *Global Tech Appliances* and prior Third Circuit cases, counters the language with respect to the defendant’s subjective awareness of a high probability required for willful blindness with language that makes clear that the test is not one of negligence. For example, in *United States v. Wert-Ruiz*, 228 F.3d 250, 255 (3d Cir. 2000), the court stated:

Such instructions must be tailored . . . to avoid the implication that a defendant may be convicted simply because he or she should have known of facts of which he or she was unaware. Willful blindness is not to be equated with negligence or a lack of due care, see *id.* at 809 n. 13, for “willful blindness is a subjective state of mind that is deemed to satisfy a scienter requirement of knowledge,” *id.* at 808. The instruction “must make clear that the defendant himself was subjectively aware of the high probability of the fact in question, and not merely that a reasonable man would have been aware of the probability.” *United States v. Caminos*, 770 F.2d 361, 365 (3d Cir.1985). If such a charge is supported by sufficient evidence, it is not inconsistent for a court to give a charge on both willful blindness and actual knowledge, for if the jury does not find the existence of actual knowledge, it might still find willful blindness. See *United States v. Stewart*, 185 F.3d 112, 126 (3d Cir.1999).

228 F.3d at 255. Also see, e.g., *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 434 (“[T]he jury received a willful blindness instruction, which permitted it to infer knowledge if the evidence showed that ‘the defendant . . . was subjectively aware of the high probability of the fact in question, and not merely that a reasonable man would have been aware of the probability.’” quoting *Caminos*, 770 F.2d at 365); *United States v. Stadtmauer*, 620 F.3d 238, 257 (3d Cir. 2010) (The willful blindness instruction in this case “adhered to our precedent requiring that such an instruction “ ‘ make clear that the defendant himself was subjectively aware of the high probability of the fact in question, and not merely that a reasonable man would have been aware of the probability.’ ” *Wert-Ruiz*, 228 F.3d at 255 (quoting *Caminos*, 770 F.2d at 365). The [District] Court instructed the jury that it must find beyond a reasonable doubt that [defendant] (1) ‘was aware of a high probability that the tax returns at issue were false or fraudulent as to a material matter,’ and (2) ‘consciously and deliberately tried to avoid learning about this fact.’ The Court told the jury that it could not find the element of knowledge satisfied if it found only that [defendant] ‘*should have known* that the tax returns at issue were false as to a material matter[,] or that a *reasonable person would have known* of a high probability of that fact.’ . . . A showing of negligence or of a good-faith mistake of law is not . . . sufficient to support a finding of . . . knowledge.’ (emphasis added));

This instruction is phrased in terms of “act(s)” or “action(s).” If the government’s theory

is that the defendant committed the crime by a failure to act or an omission, instead of a positive action, Instruction 5.10 (Failure to Act (Omissions)) should be given.

(Revised 12/2021)

## 5.07 Good Faith Defense

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

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

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

***(Name)* does not have the burden of proving “good faith.” Good faith is a defense because it is inconsistent with the requirement of the offense(s) charged, that *(name)* acted *(describe the required mental state)*. As I have told you, it is the government's burden to prove beyond a reasonable doubt each element of the**

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

#### **Comment**

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

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

**“Good Faith” in Tax Cases.** In *Cheek v. United States*, 498 U.S. 192 (1991), a tax evasion and failure to file income tax return case, the Supreme Court held that the defendant could not be convicted if the jury found that he honestly believed the tax laws did not make his conduct criminal, even if that belief was unreasonable. *See* Comment to Instruction 5.05. In tax cases, the trial judge should give Instruction 6.26.7201-4 (Tax Evasion – Willfully Defined), supplemented, if need be under the circumstances of the case, by this instruction. Although the Supreme Court held in *Cheek* that a jury instruction cannot require a tax evasion defendant’s claimed good-faith belief to be objectively reasonable in order to negate the government’s evidence of willfulness, it recognized that the jury can consider reasonableness in determining whether the belief was honestly held noting, “[o]f course, the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws and will find that the

Government has carried its burden of proving knowledge.” 492 U.S. at 203–04. As a result, the Third Circuit held in *United States v. Basile*, 570 Fed. Appx 252 (3d Cir. 2014) (non-precedential), that a jury instruction stating, “A belief need not be objectively reasonable to be held in good faith; nevertheless, you may consider whether the Defendant’s stated belief about the tax statutes was reasonable as a factor in deciding whether the belief was honestly or genuinely held,” was “an accurate statement of law under *Cheek*.” 570 Fed. Appx. at 255-56.

**“Good Faith” in fraud cases.** The defense has also been used commonly in the context of fraud type offenses, such as mail fraud, securities fraud, bankruptcy fraud, bank fraud and the like, as well as false statement crimes. For instructions on the intent requirement for mail, wire, and bank fraud, see Instructions 6.18.1341-4 (Mail or Wire Fraud – “Intent to Defraud” Defined) and 6.18.1344-1 (Bank Fraud – “Intent to Defraud” Defined). In *United States v. Jimenez*, 513 F.3d 62, 75 (3d Cir. 2008), where the defendants were convicted of bank fraud, the Third Circuit held that:

Read as a whole, the jury instructions did not deny the defendants their requested defense of good faith, but accurately reflected the law and appropriately informed the jury of the relevance of the evidence. The district court explicitly told the jury that good faith was a complete defense to bank fraud because good faith negated the element of intent to defraud required for a bank fraud conviction . . . , and that the Government bore the burden of proving beyond a reasonable doubt that the defendants acted with the requisite intent to defraud, negating a good faith defense.

See also *United States v. Gross*, 961 F.2d 1097 (3d Cir.), cert. denied, 506 U.S. 965 (1992) (involving making false statements to the Securities and Exchange Commission and conspiring to violate the securities laws, offenses that required proof that the defendant had conspired to knowingly make false statements and willfully defraud).

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

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

The majority of circuits have held that an instruction setting forth all of the elements of a “knowledge” crime is sufficient and, hence, that a district court does not abuse its discretion in refusing to instruct on the good faith defense. See *United States v. McElroy*, 910 F.2d 1016, 1025-26 (2d Cir.1990); *United States v. Rochester*, 898 F.2d 971, 978-79

(5th Cir.1990); *United States v. Nivica*, 887 F.2d 1110, 1125 (1st Cir.1989); *United States v. Green*, 745 F.2d 1205, 1209 (9th Cir.1984); *United States v. McGuire*, 744 F.2d 1197, 1201-02 (6th Cir.1984); *United States v. Gambler*, 662 F.2d 834, 837 (D.C.Cir.1981). Two circuits, however, have held that a district court abuses its discretion by refusing to give a good faith defense charge even if the court has already given an instruction on the elements of the crime. See *United States v. Casperson*, 773 F.2d 216, 223-24 (8th Cir.1985); *United States v. Hopkins*, 744 F.2d 716, 718 (10th Cir.1984) (en banc).

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

961 F.2d at 1102-03. See also *United States v. Leahy*, 445 F. 3d 634, 651-52 (3d Cir. 2006) (Third Circuit held that where the district court instructed completely and properly regarding the knowledge element of fraud crimes, it did not abuse its discretion in refusing to give a specific good faith instruction, as any "good faith instruction would have been unnecessary and duplicative."); *United States v. James*, 712 Fed. Appx. 154, 157-8 (3d Cir. 2017) (non-precedential) (trial judge did not err in failing to give good faith instruction where "jury was properly instructed on the knowledge elements of each offense and the District Court even added a special additional instruction that, in context, approximated a good faith instruction."); *United States v. Clendine*, 699 Fed. Appx. 109 (3d Cir. 2017) (non-precedential) (trial court did not err in failing to give good faith instruction where "the court gave 'a detailed instruction on the elements of the crime,' including knowledge and willfulness"); *United States v. Cocchiola*, 358 Fed. Appx. 376, 380-81 (3d Cir. 2009) (non-precedential) (holding trial court properly denied good faith instruction where other instructions adequately covered requisite intent); *United States v. Evans*, 356 Fed. Appx. 580, 585 (3d Cir. 2009) (non-precedential) (trial judge did not err in refusing to give defendant's proposed good faith, willfulness, and theory-of-the-defense instructions, where "the [District] Court's explanation of willfulness in the jury charge substantially covered the relevant points and allowed Evans to argue his theory of the case.")

(Revised 12/2021)

## 5.08 Recklessly

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

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

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

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

### Comment

Instructions defining “recklessly” are not included in O’Malley et al, supra, or in the pattern jury instructions of other circuits. This instruction is based on the definition of “recklessly” in Model Penal Code § 2.02(2)(c). Although Congress has not adopted the Model Penal Code, the Supreme Court, the Third Circuit, and other federal court decisions have been guided by the Model Penal Code definition of recklessly. In addition to defining recklessly as consciously disregarding a substantial and unjustifiable risk that the material element exists or will result from defendant’s conduct, the Code also states that “the risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.” Although the Third Circuit does not seem to have included this further definition in its few cases discussing recklessly, the trial court could

include it in an instruction on recklessly if it thinks a further explanation is necessary.

“Recklessly” is not frequently used to define the state of mind requirement in federal criminal statutes. As a result, few Third Circuit or other federal appellate court cases discuss the meaning of “recklessly.” Nevertheless, the federal courts that have discussed recklessly in federal criminal cases have looked to the Model Penal Code for guidance. Thus, for example, in *United States v. Johnstone*, 107 F.3d 200 (3d Cir. 1997) (upholding jury instructions on mental state element of 18 U.S.C. § 242, where state police officers were convicted of using excessive force in violation of that section), the Third Circuit recognized, based on Supreme Court precedent, that “willfully” in § 242 (which prohibits willfully depriving civil rights under color of law) required the government to prove that “the defendant had the particular purpose of violating a protected right made definite by rule of law *or recklessly disregarded the risk that he would violate such a right.*” *Id.* at 210 (emphasis added). Also see *United States v. Figueroa*, 729 F.3d 267, 278 (3d Cir. 2013) (citing and quoting *Johnstone* in upholding jury instruction on mental state element under 18 U.S.C. § 242). The Third Circuit noted that although the Supreme Court had not defined “reckless disregard” under § 242, the Court had stated in dicta in *Farmer v. Brennan*, 511 U.S. 825, (1994), that in criminal cases reckless disregard required subjective awareness and disregard of risk, *id.* at 836-37, and that this definition was appropriate in criminal prosecutions under 18 U.S.C. § 242. *Id.* at 839 n.7. Also see, e.g., *United States v. Dise*, 763 F.2d 586, 592 (3d Cir. 1985) (defendant can be criminally liable under § 242 “if he acted in reckless disregard of the law as he understood it”).

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

Other circuits have reasoned like the Third Circuit in *Johnstone*. For example, in *United States v. Albers*, 226 F.3d 989 (9<sup>th</sup> Cir. 2000), the Ninth Circuit interpreted “recklessly” in a Department of Interior regulation prohibiting disorderly conduct in national parks and concluded “that the relevant inquiry in finding recklessness here is whether the defendants deliberately

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

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

(Revised 1/2014)

## 5.09 Negligently

**The offense(s) of *(state offense or offenses that include negligently)* charged in the indictment require(s) that the government prove that *(name of defendant)* acted “negligently.” This means that the government must prove beyond a reasonable doubt that the defendant *(name)* failed to exercise, in the given circumstances, that degree of care which a person of ordinary prudence would exercise under similar circumstances *[failed to use the care that a reasonably prudent and careful person would use under similar circumstances]*. Negligence may be the doing of an act which an ordinary prudent person *[reasonably prudent and careful person]* would not have done, or the failure to do that which the ordinary prudent person *[reasonably prudent and careful person]* would have done, under the circumstances then existing.**

### Comment

Instructions defining “negligently” are not included in O’Malley et al, *supra*, or in the model instructions of other circuits. This model instruction is based on the Third Circuit’s decision in *United States v. Maury*, 695 F.3d 227, 255-58 (3d Cir. 2012), and replaces an earlier version of the model “negligently” instruction.

In *Maury*, the Third Circuit concluded that the definition of negligently stated in this instruction was the appropriate definition of the term for misdemeanor violations of the Clean Water Act (CWA), 33 U.S.C. § 1319(c)(2)(A) and, by implication, for other similar offenses where the statute defining the crime does not state a higher standard of negligence and there is no other evidence that Congress intended a higher standard.

The defendants in *Maury* were indicted for felony, “knowing,” violations of the CWA, but the trial judge granted the defendants’ request to instruct the jury also on the lesser included misdemeanor offenses and gave the “negligently” instruction, like that stated in this instruction, using the language requested by the defendants. On appeal, however, defendants argued that the trial judge should have given a “criminal” or “gross” negligence instruction in accordance with the Model Penal Code and the earlier version of this model instruction. The Third Circuit held that this argument was barred by the invited error doctrine and, even if the court were to excuse the application of that doctrine, the defendants’ argument would still fail under plain error review.

In concluding that simple, civil negligence was the mental state requirement for

misdeemeanor violations of the CWA, 33 U.S.C. § 1319(c)(2)(A), the Third Circuit relied on the Ninth Circuit decision in *United States v. Hanousek*, 176 F.3d 1116 (9th Cir.1999), and similar decisions of other circuits. *See, e.g., United States v. Pruett*, 681 F.3d 232, 242 (5th Cir.2012) (per curiam); *United States v. Ortiz*, 427 F.3d 1278, 1283 (10th Cir.2005). These courts interpreted “negligently” in accordance with what they concluded was the plain, ordinary meaning of the statutory text – “negligently” plainly, ordinarily means simple negligence, a failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance – rather than gross negligence. *See, e.g., United States v. Hanousek*, 176 F. 3d at 1120-21 (“Neither section defines the term ‘negligently,’ nor is that term defined elsewhere in the CWA. In this circumstance, we ‘start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.’ . . . The ordinary meaning of ‘negligently’ is a failure to use such care as a reasonably prudent and careful person would use under similar circumstances. *See Black’s Law Dictionary* 1032 (6th ed.1990); *The Random House College Dictionary* 891 (Rev. ed.1980).”). In *Hanousek*, the Ninth Circuit also reasoned that Congress had deliberately used the lesser, simple negligence standard for the misdemeanor under § 1319(c)(1), because Congress had explicitly provided in the CWA’s civil provisions for increased civil penalties against violators who demonstrated “gross negligence” or “willful misconduct,” showing that Congress used the phrase “gross negligence” when it meant to require that standard. The Ninth Circuit “also noted that Congress passed the Clean Water Act as a form of public welfare legislation, allowing it to ‘render criminal “a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community’s health or safety.” ’ ” *United States v. Maury*, 695 F.3d at 257, quoting *Hansousek*, 176 F.3d at 1121 (other citations omitted).

When the statute defining the offense charged does state a higher standard of negligence or there is other evidence that Congress intended a higher standard, then the trial judge should give the following instruction to define negligently:

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

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

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

(Revised 12/2021)

## 5.10 Failure to Act (*Omissions*)

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

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

### **Comment**

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

There do not appear to be any Third Circuit cases discussing omissions as a basis for criminal responsibility, except in limited situations related to specific offenses. *See, e.g., United States v. Curran*, 20 F.3d 560, 566 (3d Cir. 1994) (to convict for concealing a material fact in a matter within the jurisdiction of a federal agency or department, in violation of 18 U.S.C. § 1001, “the government must show that a defendant had a legal duty to disclose the facts at the time he was alleged to have concealed them.”).

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