

COMMENT

OUT WITH THE OLD AND IN WITH THE NEW: A REVIEW
OF THE LATEST REVISIONS OF THE SEVENTH
CIRCUIT’S ACCOMPLICE LIABILITY JURY
INSTRUCTIONS

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Somewhere in a United States district court courtroom, a panel of jurors was recently instructed on the law to apply in deciding the fate of a criminal defendant. In some cases, the wording of a single instruction may dictate the jury’s ultimate verdict. The instructions the jury is given are likely the first and only time the jurors learn the law on which their decision—whether to convict or acquit—will be based. If the law presented in the jury instructions is inaccurate, inaccessible, or unclear to even one juror, there is a chance that a defendant will be found guilty or innocent when they might not have been otherwise.

In 2023, the Seventh Circuit published the most recent version of its pattern jury instructions. The Committee on Federal Criminal Jury Instructions of the Seventh Circuit added two new accomplice liability instructions, intended to be revisions of the prior version, instruction 5.06. The new instructions, 5.06(A) and 5.06(B), are a welcome revision of the instructions contained in 5.06(a) and (b) because they summarize the law more accurately, respond to changes within Seventh Circuit case law, and more closely align the Seventh Circuit with the other circuits’ tested accomplice liability instructions. While these changes are necessary corrections of flaws within the 5.06 instructions, the Committee failed to remove the older erroneous version despite indications that 5.06 caused confusion and proved problematic. This oversight jeopardizes the efficacy of the revisions. Furthermore, while the revisions present the law more accurately, the Committee failed to supply a workable definition of the ambiguous legal term, “willfully”—a word that is central to the new instruction. In the next version of the Seventh Circuit’s pattern jury instructions, it is imperative that the Committee supply a standard definition of this term.

Introduction	1656
I. The Complicated Nature of Accomplice Liability Jury	

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Instructions	1658
A. The History and Importance of Jury Instructions in Criminal Trials	1658
B. Brief Introduction to Accomplice Liability	1661
C. The Seventh Circuit’s 2023 Pattern Jury Instruction Revisions	1663
II. Old Versus New: The Language and Its Implications	1664
A. 5.06(a) Versus 5.06(A)	1665
1. Intent: The Problem with Knowledge	1666
2. Focusing the Jury on the Specific Crime Charged ..	1669
B. 5.06(b) Versus 5.06(B)	1672
1. Focusing the Jury on the Act Charged	1673
2. “Willfully” over “Knowingly”	1675
3. The Necessity of a Standard Definition of “Willful”	1679
4. Adding a Modified Version of the Elements of the Offense	1681
C. Out with the Old and in with the New	1683
Conclusion	1685

INTRODUCTION

“Unless it is necessary to give an instruction, it is necessary not to give it, so that the important instructions stand out and are remembered.”¹ Since these words were written in 2001, they have been the Seventh Circuit’s guiding star in its drafting and application of jury instructions.² However, this guidance begs an additional question: Who should decide what is necessary? Of course, in practice, the trial judge decides what is necessary. But can a trial judge, a person who has been steeped in legal jargon and interpretation for years, actually tell what is necessary for a juror, a person who has never done a second of formal legal analysis, to know and understand in order to decide whether a stranger’s life and liberty should be taken away?

To help them in this task, the trial judge often begins—and ends—with the pattern jury instructions written by a group of legal professionals in their circuit. But can a group consisting of judges, prosecutors, defense attorneys, and legal academics actually explain complex legal issues to a jury who has no experience with legal idiosyncrasies? While important

1. *United States v. Hill*, 252 F.3d 919, 923 (7th Cir. 2001).

2. *See id.*; *United States v. Blitch*, 773 F.3d 837, 847 (7th Cir. 2014); *United States v. McKnight*, 665 F.3d 786, 794 (7th Cir. 2011); *cf. United States v. McKnight*, 671 F.3d 664, 665–66 (7th Cir. 2012) (Posner, J. dissenting) (“[G]ratuitous instructions confuse, and should not be given.”); *see also* COMM. ON FED. CRIM. JURY INSTRUCTIONS OF THE SEVENTH CIR., THE WILLIAM J. BAUER PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT 2 (2023) [hereinafter SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS] (stating that juries should “be instructed [only] as much as is necessary”).

and necessary, jury instructions receive relatively little attention in the media and are not infrequently treated as routine and mundane by practitioners. Their importance, however, cannot be overstated, and changes made to them should be thoroughly scrutinized to ensure that neither the prosecution nor the defense is given an implicit upper hand.

In 2023, the Seventh Circuit published *The William J. Bauer Pattern Criminal Jury Instructions of the Seventh Circuit* (2023 edition).³ The Committee on the Federal Criminal Jury Instructions of the Seventh Circuit (the “Committee”) revised several instructions and added others, including two new accomplice liability instructions.⁴ The Committee did not, however, remove the prior versions of the accomplice liability instructions,⁵ causing confusion regarding which instructions should be used. Prior to the 2023 edition being released, there were indications that the old versions of the instructions were problematic and caused confusion.

The old versions of the accomplice liability instruction were problematic because they used the word “knowingly” instead of “willfully,” which is the word from which the statute it is derived from uses.⁶ While the 2023 edition does replace “willfully” for “knowingly,” it fails to supply a definition of “willfully,” which will cause problems of inconsistent interpretations in different courtrooms and jury deliberation rooms.⁷ Moreover, the new versions supplied no note or comment to explain how and when the new versions should be used as opposed to the older versions.⁸ This lack of explanation and instruction jeopardizes the usefulness of the revisions. Therefore, because the new versions of the instructions more accurately and correctly state the law, and due to the inefficiency and confusing nature of having two sets of the same instruction, the next version of pattern jury instructions for the Seventh Circuit should do away with instruction 5.06 altogether, focus use on instructions 5.06(A) and 5.06(B), and add a definition of the word “willfully.”

This Comment endeavors to explain the reason for and the likely effects of the new accomplice liability instructions. Part I of this Comment provides background information on the accomplice liability jury instructions in criminal trials and explores the issues that led the Committee to supplement the instructions with two new ones. Part II of this Comment compares 5.06(a) and 5.06(A), noting the differences

3. SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 2, at 1.

4. *See id.* at 1, §§ 5.06(A), 5.06(B).

5. *See id.* § 5.06.

6. *See United States v. Freed*, 921 F.3d 716, 721 (7th Cir. 2019).

7. SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 2, § 5.06(B) comm. cmt.

8. *See id.* § 5.06(B) comm. cmt.

between them and what the revisions are meant to accomplish. Part II of this Comment also compares 5.06(b) and 5.06(B), noting the differences between the instructions, explaining the reasoning behind the revisions, and suggesting that a further addition be made to the instruction. Finally, Part II of this Comment concludes by encouraging the Committee to remove 5.06(a) and (b) entirely in favor of concentrating the use of the revised, more accurate 5.06(A) and 5.06(B).

I. THE COMPLICATED NATURE OF ACCOMPLICE LIABILITY JURY INSTRUCTIONS

Jury instructions are a cornerstone of the American justice system because they tell the jury what they must find as true in order to acquit or convict a defendant. Complex legal concepts, however, present a great challenge to the drafting of jury instructions. One such complex legal concept is accomplice liability, the legal principle that holds a person criminally liable for a crime they themselves did not commit if they intentionally assisted in its commission. The Seventh Circuit is an example of a jurisdiction that has struggled to draft a jury instruction that correctly articulates the nuances of accomplice liability. Recently, the Seventh Circuit released an updated version of its pattern jury instructions to address concerns with some jury instructions. The updated version adds two new accomplice liability instructions.

A. *The History and Importance of Jury Instructions in Criminal Trials*

The importance of jury instructions in criminal cases cannot be overstated. “An improper [jury] instruction not only violates the accused’s Fifth Amendment Due Process rights to a fair trial, but also the derivative Sixth Amendment jury trial right.”⁹ A proper jury instruction states clearly and without error the law that jury members are tasked with applying.¹⁰ While there are several types of instructions, such as limiting instructions and curative instructions,¹¹ this Comment will focus on the instruction given at the close of evidence called the “jury charge.”

In federal jurisdictions, the procedure for deciding which instructions to give to the jury in the jury charge is set forth in the Federal

9. Michael M. Giel, *Avoiding Fundamentally Erroneous Jury Instructions: Pointers for Counsel in Criminal Trials and Appeals*, 81 FLA. BAR J. 61, 61 (2007).

10. See KEVIN F. O’MALLEY, JAY E. GRENIG & WILLIAM C. LEE, 1 FEDERAL JURY PRACTICE & INSTRUCTIONS: JURY TRIAL § 7:2 (6th ed. 2006).

11. David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 408 (2013).

Rules of Criminal Procedure.¹² The federal rules require that counsel exchange proposed jury instructions at any time before, but not after, the close of evidence.¹³ After the exchange, both sides submit their proposed jury instructions to the court.¹⁴ The party requesting a particular instruction “on a specific statute has the burden to demonstrate the statute’s application, meaning, and effect on the case.”¹⁵ If there are any disagreements between the proposals (and there usually are), the court may call a conference to rule upon which instructions the jury will be given.¹⁶ The jury instruction conference gives a trial court the opportunity to hear arguments about which instructions should be used.¹⁷ It also gives counsel the opportunity to “make objections and raise claims of error as to either the [approved] instructions or the omission of an instruction.”¹⁸

Once the evidence has been presented and the instructions have been finalized, the jury is “charged” with the final instructions, either before or after closing arguments.¹⁹ Typically, the jury is given a printout of the instructions to refer to during deliberations, but they will receive no other legal resources in the deliberation room and must decide whether to convict or acquit based upon the law in the instructions alone.²⁰

The laws the jury instructions contain are largely the elements of the charged crime(s) and definitions of key legal terms.²¹ They are crafted to help guide the jury in evaluating the evidence and to explain complicated legal topics such as the state’s burden of proof.²² Jury instructions can be understood as a combination of a simplified version of the statute(s) the defendant has been charged with and the applicable appellate case law that has modified the statute(s)’s application.²³

Significantly, the instructions contain the only explanation and interpretation of the law governing the case available to the jurors. When deciding the verdict, the jurors are ordered to follow the laws and

12. FED. R. CRIM. P. 30. Each circuit and each district court may have their own preferences within the confines of the Rule.

13. FED. R. CRIM. P. 30(a).

14. *Id.*

15. 89 C.J.S. *Trial* § 789, Westlaw (database updated May 2025).

16. *Id.*

17. *Id.*

18. *Id.*

19. FED. R. CRIM. P. 30(c).

20. *See How Courts Work*, A.B.A. (Sep. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryinstruct/; *What Are Jury Instructions and How Do They Work?*, LEGALCLARITY (Aug. 29, 2025), <https://legalclarity.org/what-are-jury-instructions-and-how-do-they-work/> [<https://perma.cc/KZ38-QLUY>].

21. *Id.*

22. *Id.*

23. *See* O’MALLEY, GRENIG & LEE, *supra* note 10, § 7:2.

interpretations set out in the instruction, regardless of what they believe the law is or ought to be.²⁴ This means that for all intents and purposes, jury instructions outline the way the jury thinks through its decision of whether to convict or acquit a defendant.²⁵ For these reasons, even subtle differences in wording or phrasing can make a huge difference.

While jury instructions are arguably most important at the end of a trial, the impact of criminal jury instructions can be felt much earlier in the trial process as well. The way the instructions break down a crime and the particular words used in them can influence how the government presents their case.²⁶ As an example, the government may use the jury instructions to frame its argument and strategically repeat words within the jury instructions throughout the trial. If a jury instruction uses the word “knowingly,” the prosecution might use the word “know” throughout the trial instead of a synonym like “understand.” Additionally, jury instructions may influence whether and how the defense presents a case.²⁷ For example, in the same case where an instruction uses the word “knowingly,” the defense might choose to present a case that shows that their client did not have the ability to “know” their actions might cause a series of events.

Because there is so much importance placed on jury instructions, most federal circuits have officially published and authorized pattern jury instructions²⁸ for the administration of justice in their districts. In fact, only the Second and Fourth Circuits do not have published pattern jury instructions.²⁹ District court judges are not required to consider the pattern jury instructions, and it is best practice to revise instructions to reflect the issues of fact and law presented at a particular trial.³⁰ Pattern jury instructions are, however, a good and common starting place for practitioners and judges because the pattern instructions track federal

24. *How Courts Work*, *supra* note 20.

25. *See id.*

26. *See Sklansky*, *supra* note 11, at 420–21.

27. *See id.*

28. In many federal jurisdictions, the form jury instructions are called “pattern” jury instructions. In some jurisdictions, however, they are referred to as “model” jury instructions. *See, e.g.*, JUD. COUNCIL OF THE U.S. ELEVENTH JUD. CIR., ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS, CRIMINAL CASES (2025) [hereinafter ELEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS]; COMM. ON MODEL CRIM. JURY INSTRUCTIONS THIRD CIR., MODEL CRIMINAL JURY INSTRUCTIONS (2024) [hereinafter THIRD CIRCUIT CRIMINAL JURY INSTRUCTIONS].

29. *See Guide to Federal Court Resources*, U.S. DEP’T OF JUST. (July 15, 2025), <https://www.justice.gov/jmd/lis/federal#2nd> [<https://perma.cc/2F5J-QQDT>].

30. *See United States v. Hill*, 252 F.3d 919, 922 (7th Cir. 2001) (holding that the trial judge did not err by refusing to give the requested pattern jury instructions); *see also* 89 C.J.S. *Trial* § 683, Westlaw (database updated May 2025) (insisting that “[p]attern jury instructions may require modification or supplementation” depending on the facts presented at trial).

statutes and the case law of a particular circuit.³¹ The pattern instructions are also drafted in an attempt to prevent appealable error by maintaining uniformity and avoiding bias and manipulation.³² Consequently, counsel for both sides often rely primarily on pattern instructions when fashioning their proposals.

B. Brief Introduction to Accomplice Liability

For some crimes, it is particularly beneficial to rely on pattern jury instructions for help communicating the applicable law to the jury. One such crime is aiding and abetting, or acting through another.³³ Being held liable for aiding or abetting or acting through another is also known as accomplice liability.³⁴ Accomplice liability is liability that extends to “a person who knowingly, voluntarily, or intentionally gives assistance to another in . . . the commission of a crime.”³⁵ In most jurisdictions, including the federal government, “an accomplice is criminally liable to the same extent as the principal” actor.³⁶ Therefore, the importance of getting the law right and explaining it as precisely as possible to the jury cannot be overstated, and the ramifications for not doing so are extreme. The crimes of aiding and abetting and acting through another are codified in 18 U.S.C. § 2. The statute, titled “Principals,” states:

- (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
- (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.³⁷

The general concept of aiding and abetting liability long predates the enactment of the federal aiding and abetting statute. Legal scholars have traced the earliest federal statutory formulation to a 1790 statute involving murder, robbery, and piracy, and the earliest judicial

31. *See generally* SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 2 (indicating throughout the need and ability of judges to adapt proposed rules for a particular case).

32. *Jury Instructions*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/jury_instructions [<https://perma.cc/6283-MXBP>] (last visited Oct. 22, 2025).

33. This Comment will refer to these two crimes jointly as aiding and abetting.

34. *See Accomplice*, CORNELL L. SCH.: LEGAL INFO. INST., <https://www.law.cornell.edu/wex/accomplice> [<https://perma.cc/8X58-54QX>] (last visited Oct. 22, 2025).

35. *Id.*

36. *Id.*

37. 18 U.S.C. § 2.

formulation to the common law of the fourteenth-century England.³⁸ In 1909, Congress enacted the forerunner of what is now 18 U.S.C. § 2(a).³⁹ The common-law concept of criminal causation found in 18 U.S.C. § 2(b) was not codified by Congress until 1948.⁴⁰ In 1951, Congress amended the statute and replaced the phrase “is a principal” in § 2(a) and the phrase “is also a principal and punishable as such” in § 2(b) with the phrase “is punishable as a principal.”⁴¹ The 1951 amendments also added the word “willfully” to § 2(b) and only § 2(b).⁴² The subsection now reads as “[w]hoever willfully causes an act to be done.”⁴³ Congress has never included any explicit indication of the aider and abettor’s mental state in § 2(a), and as such, § 2(a) remains without a statutorily prescribed mental state.⁴⁴

The history of the accomplice liability statutes is important to the understanding of what the statute attempts to penalize, but that history cannot be communicated to jurors at the end of every aiding and abetting trial. As such, communicating the legal concept of aiding and abetting presents a challenge for practitioners and judges. The judge must explain to the jury, in a clear and concise manner through the jury instructions, that they can and must find a defendant guilty if the defendant has participated in any way in the furtherance of a crime, even if the defendant themselves did not actually commit the crime.⁴⁵ The idea of finding someone guilty of a crime they did not actually commit is counterintuitive for many, and the stakes for finding someone guilty are unmistakably high. According to the United States Federal Sentencing Guidelines, which track § 2, the offense level of someone convicted under § 2 is “the same level as that for the underlying offense.”⁴⁶ It is not always easy for jurors to understand how the person who drives the getaway car should be as guilty as the person who pulls the trigger. The

38. *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938).

39. Act of Mar. 4, 1909, ch. 321, § 332, 35 Stat. 1152 (codified as amended at 18 U.S.C. § 2(a)); see *Cent. Bank of Denv. v. First Interstate Bank of Denv.*, 511 U.S. 164, 181 (1994), *superseded by statute on other grounds*, 15 U.S.C. § 78t(e). Prior to this enactment, there was no general federal aiding and abetting statute. Instead, there were a number of few individual, substantive criminal statutes that by their terms applied to aiders and abettors as well. See, e.g., *Coffin v. United States*, 162 U.S. 664, 667–68 (1896).

40. Act of June 25, 1948, ch. 645, § 2(b), 62 Stat. 684, 684 (codified as amended at 18 U.S.C. § 2(b)).

41. *Id.*; Act of Oct. 31, 1951, ch. 655, § 17b, 65 Stat. 710, 717 (codified as amended at 18 U.S.C. § 2).

42. § 17b, 65 Stat. at 717.

43. 18 U.S.C. § 2(b).

44. See *id.* § 2(a).

45. 1 FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW § 251 (11th ed. 1912).

46. U.S. SENT’G GUIDELINES MANUAL § 2X2.1 (U.S. SENT’G COMM’N 2024).

instructions must also explain to the jury what the culpable mental state (*i.e.*, knowingly, willfully, or intentionally) is depending upon the circuit and the charge.⁴⁷ These legal distinctions likely do not make sense to all jury members, especially in complicated or close cases.

C. The Seventh Circuit's 2023 Pattern Jury Instruction Revisions

Due to their inherently complicated and central nature, drafting pattern jury instructions is a difficult task for all circuits, including the Seventh Circuit. The Seventh Circuit issues updates to its jury instructions regularly, and the last bound revision was revised in 2020.⁴⁸ In 2023, the Seventh Circuit disseminated its newest digital version of pattern criminal jury instructions.⁴⁹ The group tasked with revising and updating the jury instructions is called the Committee on the Federal Criminal Jury Instructions of the Seventh Circuit.⁵⁰ In a letter addressed to the Chief Judge of the Seventh Circuit, Honorable Diane Sykes, dated January 4, 2023, the Committee wrote that “[t]hese revised instructions are the product of more than a year of work by the judges, prosecutors, defense attorneys, and academics who served on the Committee.”⁵¹ The Committee submitted the “instructions for the Judicial Council’s authorization to publish them for use in connection with criminal trials in the district courts in [the Seventh] Circuit.”⁵²

In response to the Committee’s letter, Chief Judge Sykes wrote on March 6, 2023, that the “Circuit Executive . . . submitted the revisions to the Judicial Council requesting authorization for publication.”⁵³ Chief Judge Sykes also noted that, “the Council cannot and does not approve pattern jury instructions for use in any particular case;” however, “[t]he

47. See COMM. ON PATTERN JURY INSTRUCTIONS DIST. JUDGES ASS’N FIFTH CIR., PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) § 2.04 (2024) [hereinafter FIFTH CIRCUIT CRIMINAL JURY INSTRUCTIONS]; JUD. COMM. ON MODEL JURY INSTRUCTIONS FOR THE EIGHTH CIR., MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 5.01 (2023) [hereinafter EIGHTH CIRCUIT CRIMINAL JURY INSTRUCTIONS]; CRIM. PATTERN JURY INSTRUCTIONS COMM. OF THE U.S. CT. OF APPEALS FOR THE TENTH CIR., CRIMINAL PATTERN JURY INSTRUCTIONS § 2.06 (2025) [hereinafter TENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS].

48. SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 2, at 1.

49. *Id.*

50. *Id.*

51. Letter from Amy J. St. Eve, J., Chair, Comm. on Fed. Crim. Jury Instructions of the Seventh Cir., to Diane S. Sykes, C.J., U.S. Ct. of Appeals for the Seventh Cir. (Jan. 4, 2023), *in* SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 2.

52. *Id.*

53. Letter from Diane S. Sykes, C.J., U.S. Ct. of Appeals for the Seventh Cir., to Amy J. St. Eve, J., Chair, Comm. on Fed. Crim. Jury Instructions of the Seventh Cir. (Mar. 6, 2023), *in* SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 2.

Council has . . . reviewed the revisions and authorizes the committee to publish them as resources in connection with criminal trials in the district courts of the circuit.”⁵⁴ Chief Judge Sykes further noted that the Judicial Council’s “authorization shall not be construed as adjudicative approval of the content of the instructions, which must await case-by-case review by the courts.”⁵⁵

The 2023 edition included a number of additions and revisions.⁵⁶ In the pattern jury instruction’s introduction, the Committee wrote that “[t]his edition represents a substantial review and updating of the 2020 bound volume, as well as the 2022 digital update.”⁵⁷ It continued by noting that “[t]he changes in and additions to this edition reflect comments from the bench and bar, as well as a thorough review of developments in case law – particularly, though not exclusively, coming from the Supreme Court and the Seventh Circuit.”⁵⁸

The Committee also stated that the new edition “includes both revisions of prior instructions and several new instructions covering issues and offenses for which judges and lawyers practicing criminal law in [the] Circuit have expressed a need”⁵⁹ Among the revisions was the addition of two new accomplice liability instructions: 5.06(A) Aiding and Abetting and 5.06(B) Acting Through Another.⁶⁰ When adding the new accomplice liability instructions, the Committee did not, however, remove the prior version of the accomplice liability instructions, 5.06 Aiding and Abetting/Acting Through Another.⁶¹ This Comment attempts to explain the changes and provide guidance to practitioners on how to best use the two sets of instructions.

II. OLD VERSUS NEW: THE LANGUAGE AND ITS IMPLICATIONS

Some of the differences between 5.06(a) and (b) and their revisions in 5.06(A) and 5.06(B) are subtle, and others are more obvious; however, even the subtle changes have consequences that are anything but subtle. This Part will begin with a comparison of the aiding and abetting instructions in 5.06(a) and 5.06(A) and then move to a comparison of the acting through another instructions in 5.06(b) and 5.06(B). This Part will not only discuss the changes that were made, but also the things that the Committee left untouched. Both the words that

54. *Id.*

55. *Id.*

56. *See* Letter from Amy J. St. Eve to Diane S. Sykes, *supra* note 51.

57. SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 2, at 1.

58. *Id.*

59. *Id.*

60. *Id.* §§ 5.06(A), 5.06(B).

61. *Id.* § 5.06.

were changed and the ones that stayed the same act together to inform the jury on how to find someone guilty of a serious federal felony in the Seventh Circuit. As such, the importance of their combined effect cannot be overstated.

A. 5.06(a) Versus 5.06(A)

The instructions found in 5.06(a) and 5.06(A) are derived from § 2(a) which states that, “[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”⁶² The Seventh Circuit jury instruction 5.06(a) reads as follows:

5.06 AIDING AND ABETTING/ACTING THROUGH ANOTHER

(a) Any person who knowingly [aids; counsels; commands; induces; or procures] the commission of an offense may be found guilty of that offense if he knowingly participated in the criminal activity and tried to make it succeed.⁶³

Furthermore, 5.06(A) reads as follows:

5.06(A) AIDING AND ABETTING

A person may be found guilty of an offense by knowingly [aiding; counseling; commanding; inducing; or procuring] the commission of the offense if he knowingly participated in the criminal activity and tried to make it succeed.

In order for you to find [the; a] defendant guilty [of Count ———] on this basis, the government must prove each of the following elements beyond a reasonable doubt:

1. The crime of ——— was committed, as set forth on page ——— of these instructions.
2. The defendant participated in the criminal activity and tried to make it succeed.
3. The defendant did so knowingly.⁶⁴

This Section will walk through the differences between the two, beginning with the requisite intent, which controversially remained untouched in 5.06(A). In sum, the revisions made to 5.06(a), set out in 5.06(A), are appropriate and important. For this reason, 5.06(A) should be used in place of 5.06(a). However, the Committee should have

62. 18 U.S.C. § 2(a).

63. SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 2, § 5.06(a).

64. *Id.* § 5.06(A).

included a standardized definition of the term “knowingly” because it is a complicated legal concept. Therefore, in the next revision, the Committee should eliminate 5.06(a) in its entirety, leaving only 5.06(A).

1. Intent: The Problem with Knowledge

First, it is important to point out something that did not change between the two instructions. Both 5.06(a) and 5.06(A) use the word “knowingly,” even though “knowingly” does not appear in the statute itself. Section 2 establishes criminal liability for “[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission.”⁶⁵ Adding “knowingly” to the instructions adds an element of intentionality, or in legal-speak, a mens rea element. The debate over whether a mens rea element should be added to the crime of aiding and abetting dates back to at least 1870 when the Supreme Court examined whether a vendor who had sold military goods to the Confederate Army *intended* to aid the Confederates in treason.⁶⁶ The Court held that the act of selling to a purchaser with the knowledge that the purchaser would turn the goods over to the Confederates was sufficient to find the defendant guilty of aiding and abetting treason.⁶⁷

Almost half a century later, Congress enacted the federal aiding and abetting provision in 1909.⁶⁸ A few decades after its passage, in the landmark case of *United States v. Peoni*,⁶⁹ the Second Circuit held that knowledge alone was not enough to find someone guilty of aiding and abetting.⁷⁰ In *Peoni*, Judge Learned Hand held that the defendant must have had an actual, subjective desire to accomplish the prohibited act.⁷¹ This is because “[a]ll the words used—even the most colorless, ‘abet’—carry an implication of purposive attitude towards it.”⁷² Following *Peoni*, many subscribed to Judge Hand’s logic and treated the liability for aiding and abetting as limited to the purposeful actor.⁷³ In fact, the Supreme Court itself adopted Judge Hand’s approach several

65. 18 U.S.C. § 2(a).

66. *Hanauer v. Doane*, 79 U.S. (12 Wall.) 342, 343–44 (1870).

67. *Id.* at 347.

68. U.S. Dep’t of Just., Crim. Res. Manual § 2470 (1998), <https://www.justice.gov/archives/jm/criminal-resource-manual-2470-general-history-aiding-and-abetting> [<https://perma.cc/M8SG-8U6E>].

69. 100 F.2d 401 (2d Cir. 1938).

70. *Id.* at 402–03.

71. *Id.* at 402.

72. *Id.*

73. See Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 FORDHAM L. REV. 1341, 1370, 1372–73, 1377–82, 1384–85 (2002).

years later, stating that “[i]n order to aid and abet another to commit a crime it is necessary that a defendant ‘in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about’”⁷⁴

Since then, the addition of a mens rea element to accomplice liability has been challenged several times.⁷⁵ However, as recently as 2014, in *Rosemond v. United States*,⁷⁶ the Supreme Court reiterated its agreement with Judge Hand’s interpretation.⁷⁷ In *Rosemond*, the Court held that “an aiding and abetting conviction requires not just an act facilitating one or another element, but also a state of mind extending to the entire crime.”⁷⁸ Under this standard, intent must go to the specific and entire crime the government alleges the defendant to have committed.⁷⁹ Therefore, the intent requirement is satisfied if a person actively participates in a criminal venture with full knowledge of the circumstances of the charged offense.⁸⁰ Most of the circuits’ jury instruction committees now cite *Rosemond* as their authority for the mens rea element in their aiding and abetting instructions.⁸¹

The *Rosemond* Court also held that the requisite amount and kind of knowledge a person must have is “advance knowledge.”⁸² Having advance knowledge means that the defendant was fully aware of the crime’s scope and still decided to join in the criminal venture and share in its benefits.⁸³ However, the defendant cannot be guilty of generally hoping a crime is committed; they must have enough knowledge about the specific offense to intend for that specific crime to succeed.⁸⁴ At the same time, the defendant does not have to endorse every aspect of the crime.⁸⁵ Deciding where the line is drawn is a question for the jury.

74. *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) (quoting *Peoni*, 100 F.2d at 402).

75. *See Standefer v. United States*, 447 U.S. 10, 14–19 (1980); *Cent. Bank of Denv. v. First Interstate Bank of Denv.*, 511 U.S. 164, 170, 173–77 (1994).

76. 572 U.S. 65 (2014).

77. *Id.* at 70, 75–78.

78. *Id.* at 75–76.

79. *Id.* at 77.

80. *Id.*

81. *See, e.g.*, FIFTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 47, § 2.04 note; SIXTH CIR. COMM. ON PATTERN CRIM. JURY INSTRUCTIONS, PATTERN CRIMINAL JURY INSTRUCTIONS § 4.01 comm. comment. (2025) [hereinafter SIXTH CIRCUIT CRIMINAL JURY INSTRUCTIONS]; SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 2, §§ 5.06 comm. cmt., 5.06(A) comm. cmt.; EIGHTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 47, § 5.01 comm. cmt.; TENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 47, § 2.06 cmt.

82. *Rosemond*, 572 U.S. at 77–78.

83. *Id.*

84. *Id.* at 77–79.

85. *Id.*

However, communicating this blurry line and task to the jury is complicated.

Knowing this, the Court has stated that “instructions should convey, . . . that the defendant has chosen, with full knowledge, to participate in the illegal scheme,” but the instructions do not need to convey “that, if all had been left to him, he would have planned the identical crime.”⁸⁶ For example, the Court explained that, if a defendant wants to rob a convenience store, but his associates convince him to help them rob a bank instead, “[w]hatever his original misgivings,” when he agrees to help them with the bank robbery, “he has the requisite intent to aid and abet [the] bank robbery,” not the convenience store robbery that he would have preferred to commit.⁸⁷ “The law does not, nor should it, care whether he participates with a happy heart or a sense of foreboding,” but the law *does* care that the defendant had the requisite advance knowledge of the specific crime he assisted in.⁸⁸

Therefore, if pattern jury instructions use the word “knowingly,” it is necessary that the instructions are accompanied by an explanation of how the jury must first find that the defendant had advance knowledge of the underlying crime, in order to find that the defendant knowingly aided or abetted in its commission. To do this, the jury must be directed to decide when and if the defendant obtained the requisite knowledge to have the necessary intent to further the crime charged.⁸⁹ The jury cannot be directed to accept as true that the defendant had any knowledge before the crime was committed. Luckily, the Committee has included a standard definition of the term “knowingly” in the pattern instructions.⁹⁰ It states:

A person acts “knowingly” if he realizes what he is doing and is aware of the nature of his conduct, and does not act through ignorance, mistake, or accident. [In deciding whether the defendant acted knowingly, you may consider all of the evidence, including what the defendant did or said.]

[You may find that the defendant acted knowingly if you find beyond a reasonable doubt that he believed it was highly probable that . . . and that he took deliberate action to avoid learning that fact. You may not find that the defendant acted knowingly if he was merely mistaken or careless in not

86. *Id.* at 79.

87. *Id.*

88. *Id.* at 79–80.

89. *Id.* at 81–82.

90. SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 2, § 4.10.

discovering the truth, or if he failed to make an effort to discover the truth.]]⁹¹

As a consequence, knowledge is an element that the state must prove.⁹² For example, an instruction phrased as the defendant “knew his cohort used a firearm” is wrong and misleading, but an instruction phrased as the defendant knew his cohort “would use a firearm” would be correct, as it would convey to the jury that the defendant would need advance knowledge.⁹³ Following this logic, “a person is liable under § 2 for aiding and abetting a crime if (and only if) [they] (1) take[] an affirmative act in furtherance of that offense” and (2) have the knowledge necessary to intend to “facilitat[e] the offense’s commission.”⁹⁴

2. Focusing the Jury on the Specific Crime Charged

When comparing instructions 5.06(a) and 5.06(A), the most obvious difference is the addition of a fill-in-the-blank-style outline which lists the elements that the jury must find to have occurred in order to find the defendant guilty. This list follows a paragraph that explains the criminal liability of someone who aids and abets. This first paragraph is basically the same as the entire instruction in 5.06(a). However, 5.06(a) lacks the step-by-step breakdown that 5.06(A) includes.

The most significant difference between 5.06(a) and the first paragraph in 5.06(A) is the degree of specificity of the words used in the new instruction. 5.06(A) uses words that focus on a specific person and act by using “a person” instead of “any person” and “the offense” instead of “an offense.”⁹⁵ This degree of specification properly focuses the jury on the offense that the defendant is charged with aiding and abetting, instead of implying that general culpability is good enough. This is especially important because in order to find the defendant guilty, the jury must find that the defendant had the advance knowledge necessary to form the intent to further the specific crime charged, not just general criminal conduct.

According to the Committee Comment, the new instruction is broken down into three distinct elements to address the Seventh Circuit’s indirect concern⁹⁶ that the 5.06(a) did not explicitly explain that an underlying crime was required to support the conviction of aiding and

91. *Id.*

92. *See id.* § 5.06(a).

93. *Rosemond*, 572 U.S. at 82 (cleaned up).

94. *Id.* at 71.

95. SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 2, §§ 5.06(a), 5.06(A).

96. *See id.* § 5.06(A) comm. cmt.

abetting.⁹⁷ This concern stems from *United States v. Freed*.⁹⁸ In *Freed*, the defendant was found guilty by a jury for bank fraud, mail fraud, and making false statements to a financial institution.⁹⁹ On appeal, the defendant argued that the jury instruction used by the district court “was deficient because it did not require the jury to find a crime was actually committed.”¹⁰⁰ The instruction stated “that the defendant must have knowingly participated in *the criminal activity* to be found guilty.”¹⁰¹ The instruction did not, however, specify what criminal activity the defendant must have knowingly participated in.¹⁰² The defendant argued that this lack of specificity could have led the jury to find him guilty if he knowingly participated in any criminal activity, rather than the specific criminal activity for which he was charged with aiding and abetting.¹⁰³ The Seventh Circuit acknowledged this issue in its decision, noting that the instruction “did not explicitly explain an underlying crime was required to support an aiding and abetting conviction,” but rather only “implied” as much.¹⁰⁴ For the defendant in *Freed*, the court found that the instruction’s mere implication was sufficient because it “logically require[d] underlying criminal activity,” but the Seventh Circuit’s strong language implied that it was not pleased with the instruction’s lack of specificity.¹⁰⁵ Therefore, in response, 5.06(A) incorporated the specific crime into the instruction.

This listing of the specific criminal activity the defendant is accused of aiding and abetting is the same approach taken by the majority of other circuits.¹⁰⁶ This is a positive change because the arguments made in *Freed* have also been made by defendants in most of the circuits.¹⁰⁷ For

97. *United States v. Freed*, 921 F.3d 716, 721 (7th Cir. 2019).

98. 921 F.3d 716 (7th Cir. 2019).

99. *Id.* at 720.

100. *Id.* at 721.

101. *Id.* (cleaned up).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *See, e.g.*, THIRD CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 28, § 7.02; SIXTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 81, § 4.01; EIGHTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 47, § 5.01.

107. *See, e.g.*, *United States v. Soto*, 539 F.3d 191, 194–97 (3d Cir. 2008) (discussing defendant’s argument that he lacked the requisite intent because he did not know his actions were criminal); *United States v. Morrow*, 923 F.2d 427, 436 (6th Cir. 1991) (“Absent a showing of some active participation or encouragement, or some affirmative act by [the defendant] designed to further the [crime], the aiding and abetting conviction cannot stand.”); *United States v. Jordan*, 945 F.3d 245, 262 (5th Cir. 2019) (“When a combination crime is involved, an aiding and abetting conviction requires that the defendant’s intent go to the specific and entire crime charged.” (cleaned up) (quoting *United States v. Carbins*, 882 F.3d 557, 566 (5th Cir. 2018))).

example, the First Circuit added a space to insert the specific crime the defendant allegedly aided and abetted into their pattern instruction after its decision in *United States v. Geronimo*.¹⁰⁸ In that case, the defendant made a similar argument as the defendant in *Freed*, insisting that the omission of the specific principle offense in the aiding and abetting instructions may have misled the jury into convicting him for assisting in the commission of *any* crime.¹⁰⁹ Similar to the Seventh Circuit, the First Circuit held that the omission of the specific crime was not a reversible error, but “that it would be preferable for an aiding and abetting instruction to refer specifically to the principal offense . . . rather than generically to ‘a crime.’”¹¹⁰ Now, the First Circuit’s aiding and abetting instruction begins as follows:

To “aid and abet” means intentionally to help someone else commit the charged crime. To establish aiding and abetting, the government must prove beyond a reasonable doubt:

First, that the crime of [insert charged crime] was actually committed by someone;

Second, that [defendant] took an affirmative act to help or cause [insert charged crime]; and

Third, that [defendant] intended to help or cause the commission of [insert charged crime].¹¹¹

The Seventh Circuit’s instruction after *Freed* is similar in its listing of the specific offense to the First Circuit’s after *Geronimo*.

The Eighth Circuit has taken this standardization of modification of pattern jury instructions on aiding and abetting to a new, powerful level. Following its pattern instruction, the Eighth Circuit’s committee features an extensive section on “Notes on Use” and “Comments.”¹¹² This true mad-lib-style instruction gives judges and practitioners numerous ways to appropriately customize an instruction based upon the circumstances presented in an individual case.¹¹³ The instruction is annotated throughout and supplies clear directions for customizing the instruction for cases involving: self-defense or entrapment defenses, evidence that shows that more than one person performed acts necessary in the commission of the

108. 330 F.3d 67 (1st Cir. 2003); FIRST CIR. JUD. COUNCIL PATTERN JURY INSTRUCTIONS COMM., PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE FIRST CIRCUIT § 4.18.02(a) (2024) [hereinafter FIRST CIRCUIT CRIMINAL JURY INSTRUCTIONS].

109. *Geronimo*, 330 F.3d at 74–75.

110. *Id.* at 75.

111. FIRST CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 108, § 4.18.02(a).

112. EIGHTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 47, § 5.01 notes on use & comm. cmts.

113. *Id.*

offense, and a dispute regarding whether the defendant acted before or after the crime was completed.¹¹⁴ Importantly, the instruction also contains explicit language regarding the necessity for the aider and abettor to share in the same mental state required by the principal offense.¹¹⁵ Perhaps partly for this reason, a number of circuits have referenced the Eighth Circuit's instruction in the comments of their instructions and in their opinions.¹¹⁶ Instead of just citing the Eighth Circuit's instruction, the Seventh Circuit should compile and add a list of possible customizations to the instruction.

While 5.06(A) does not contain any other significant modifications, the changes that were made were necessary and will have important consequences for defendants in the Seventh Circuit. The small changes of swapping “*any* person” to “*a* person” and “*an* offense” to “*the* offense” will no doubt focus the jury's attention on the specific crime the defendant is charged with aiding and abetting.¹¹⁷ The effort to focus the jury's attention is furthered by the inclusion of the title of the specific charge that the defendant is charged with having aided and abetted.¹¹⁸ This change is imperative to the fair administration of justice because if the jury's attention is not focused on the particular crime charged, they might extend criminal liability to the defendant for any crime, not just the one that the defendant has had an opportunity to mount a defense against. Therefore, 5.06(A) is an appropriate and important revision to 5.06(a).

B. 5.06(b) Versus 5.06(B)

This Part now turns to 5.06(b) and 5.06(B): Acting Through Another. Criminal liability for acting through another stems from § 2(b) which states that “[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.”¹¹⁹ In the Seventh Circuit pattern criminal jury instructions, 5.06(b) reads as follows:

5.06 AIDING AND ABETTING/ACTING THROUGH ANOTHER.

114. *Id.*

115. *Id.*

116. *See, e.g.*, SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 2, §§ 5.06(A) comm. cmt., 5.06(B) comm. cmt.; THIRD CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 28, § 7.02 cmt.; *Geronimo*, 330 F.3d at 75.

117. *See* SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 2, §§ 5.06(a), 5.06(A).

118. *See id.* § 5.06(A).

119. 18 U.S.C. § 2(b).

(b) If a defendant knowingly causes the acts of another, then the defendant is responsible for those acts as though he personally committed them.¹²⁰

Additionally, 5.06(B) reads:

5.06(B) ACTING THROUGH ANOTHER

If a defendant willfully causes another person to commit an act, which if committed by the defendant would be a crime, then the defendant is responsible under the law even though he did not personally commit the act.

[The court should now give a modified version of the elements instruction for the offense to indicate that the defendant “willfully caused” any acts he is not alleged to have personally committed, and requiring that defendant has the requisite mental state for the crime charged. See the Committee Comment for an example.]

[The government need not prove that the person who committed [the charged offense/act(s)] did so intending to commit a crime. That person may be [a law enforcement agent; an innocent intermediary]. But the government must prove beyond a reasonable doubt that the defendant intended to commit the charged crime.]

[A defendant who causes the commission of a crime may be convicted of committing the crime even though the person who he caused to commit the criminal act(s) did not himself violate the law because he did not intend to commit a crime.]¹²¹

5.06(B) made several large modifications to 5.06(b). First, and most subtle, is the general rephrasing of the first paragraph. Second is the change from “knowingly” to “willfully.” Third is the addition of three paragraphs of additional instruction for the court on how to structure the instruction. This Section will break down each change in turn.

1. Focusing the Jury on the Act Charged

Ignoring for the moment the change from “knowingly” to “willfully,” the Committee appreciably modified 5.06(b) by rephrasing part of the first paragraph of the instruction. The first rephrasing is the change from 5.06(b)’s “causes the acts of another” to 5.06(B)’s “causes another person to commit an act.”¹²² This modification is subtle, and the

120. SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 2, § 5.06(b).

121. *Id.* § 5.06(B).

122. *Id.* §§ 5.06(b), 5.06(B).

Committee gives no reason for its modification.¹²³ However, based on the reasons contained for other modifications in 5.06(A) and 5.06(B), it is likely that the Committee appropriately sought to focus the jury's attention on the specifics of the charged crime(s) in the particular case it is tasked with deciding. The words "the acts of another" are somewhat less specific than the words "another person to commit an act." Specifically, the change from "acts" to "an act" focuses the jury's attention on the act charged and will help avoid the jury convicting someone for generally causing the acts of another.

More conspicuously, 5.06(B) qualifies the act that was committed with the statement "which if committed by the defendant would be a crime."¹²⁴ 5.06(b) does not include any such qualifying language.¹²⁵ This addition meaningfully qualifies for the lay juror that the act that the defendant allegedly caused to occur through another must be a criminal act. While this qualification might seem unnecessary to many, as stated previously, the consequences of a criminal conviction are so tremendous that jury instructions should be as precise as possible. Including this line in the instructions will help jury members once again focus their attention on the crime(s) the defendant is charged with committing, instead of convicting the defendant because they were convinced that the defendant had caused another to act in some way, but not necessarily in a criminal manner.

The last rephrasing within the first paragraph directs the jury to find the defendant guilty if they are responsible "under the law even though he did not personally commit the act" instead of 5.06(b)'s responsibility "for those acts as though he personally committed them."¹²⁶ This rephrasing makes the legal criteria for the criminal liability imposed by § 2(b) more digestible to a lay juror because it removes the legalese of the criminality of the acts. Specifically, the conversion from 5.06(b)'s legalistic wording of "as though he personally committed them" into the more colloquial "even though he did not personally commit the act" will make the instruction more easily digestible to the lay juror. Additionally, while the phrase "under the law" is unnecessary because it is obvious to any competent juror that they are working "under the law," the phrase is not unduly prejudicial because it is so obvious. Therefore, the unnecessary words are not enough of a detriment not to use the new more precise version, but they could—and should—be removed in the next revision.

The overall rephrasing of the first paragraph of 5.06(b) into what is now 5.06(B) will help focus the jury's attention on the specifics of the

123. *See id.* § 5.06(B).

124. *Id.*

125. *See id.* § 5.06(b).

126. *Id.* §§ 5.06(b), 5.06(B).

crimes they are tasked with deciphering. It will move attention away from general acts and toward the act that the defendant is charged with. It will also reiterate that the acts the defendant helped cause were actually criminal acts and make the instruction more easily digestible for a lay juror. Because jury instructions are meant to be accurate simplifications of the law, 5.06(B)'s rephrasing of the first paragraph is necessary.

2. "Willfully" over "Knowingly"

As stated previously, Judge Hand in *United States v. Peoni* famously stated that the language of the aiding and abetting statute conveys the "implication of purposive attitude."¹²⁷ Today, this purposive attitude is largely indicated through the inclusion of "knowingly" or "willfully" in jury instructions.¹²⁸ However, the evolution of case law has ignited debate and confusion concerning the difference between the mens rea required for one who acts "knowingly" as opposed to one who acts "willfully."¹²⁹ At first glance, these words may seem synonymous, but the choice between them in a jury instruction can have grave consequences for defendants. The difference lies in the fact that the two words ask the jury to find distinct elements: "Knowingly" asks for a comprehension of the law, and "willfully" asks for comprehension of the act. Because "willfully" is the word that appears in the statute that criminalizes aiding and abetting, the Committee correctly revised 5.06(B) to use "willfully" instead of "knowingly." However, because "willfully" is not a word many jurors automatically understand the nuance of, the Committee erred by not adding a definition of "willfully" to its instruction. This error will lead to confused jurors. It also has left trial courts within the circuit to create their own definition. The inconsistency and unfairness in having each individual district court judge create a definition for the operative term in a jury instruction deciding whether or not they will be convicted of a federal crime is profound. Therefore, the Committee's timid approach to supplying a definition for "willfully" should be abandoned, and it must propose an educated definition in its next revision.

The debate between the terms "willful" and "knowing" is made increasingly complicated by the fact that the terms have not been uniformly construed by the courts.¹³⁰ A review of the case law reveals

127. *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938).

128. See SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 2, §§ 5.06, 5.06(A), 5.06(B); *United States v. Freed*, 921 F.3d 716, 721 (7th Cir. 2019).

129. See Weiss, *supra* note 65, at 1373–76.

130. See *Screws v. United States*, 325 U.S. 91, 103, 107 (1945); *United States v. Benjamin*, 328 F.2d 854, 862–63 (2d Cir. 1964); *United States v. English*, 92 F.3d 909, 915–16 (9th Cir. 1996) (no reversible error when district judge did not charge jury on element of willfulness); *United States v. Fauls*, 65 F.3d 592, 598–99 (7th Cir. 1995) (holding that, in a criminal trial of a broker alleging securities fraud, a "deliberate

how the courts have struggled with the meaning of willfulness as a mens rea requirement for criminal offenses.¹³¹ In fact, the Court has stated that the term “willful . . . is a word of many meanings, [and] its construction [is] often being influenced by its context.”¹³² For this reason, over the years the Court has blurred the term “willfully” into having a meaning more akin to “knowingly.”¹³³ For the sake of this Comment, “knowingly” generally means that a person had some knowledge of the law,¹³⁴ and “willfully” means “consciousness of the act but not . . . consciousness that the act is unlawful.”¹³⁵ Therefore, the element of mens rea by which “willfully” can be distinguished from “knowingly” is the element of knowledge of the law.

As stated previously, § 2(b) imposes criminal liability on “[w]hoever *willfully* causes an act to be done.”¹³⁶ The older Seventh Circuit § 2(b) jury instruction, 5.06(b), states that “[i]f a defendant *knowingly* causes the acts of another” then they are responsible for the crime as a principal.¹³⁷ In *Freed*, the Seventh Circuit found that 5.06(b)’s wording was “obviously problematic” due to its usage of the term

indifference” jury instruction was properly given); *United States v. Gross*, 961 F.2d 1097, 1103 (3d Cir. 1992) (no error for failure to give jury instruction on good faith defense as good faith would be incompatible with the government carrying its burden on knowing and willful action); *United States v. Faulhaber*, 929 F.2d 16, 18–19 (1st Cir. 1991) (applying “willfully” definition); *United States v. Rennert*, No. Crim.A. 96–51, 1997 WL 597854, at *19 (E.D. Pa. 1997), *aff’d*, 202 F.3d 255 (3d Cir. 1999) (holding that a willful instruction was proper).

131. See *Bryan v. United States*, 524 U.S. 184, 189–92 (1998); see also *Ratzlaf v. United States*, 510 U.S. 135, 140–41 (1994) (discussing lower courts’ errors in their treatment of “willfulness”); *United States v. Phillips*, 19 F.3d 1565, 1576–84 (11th Cir. 1994) (noting the difficulty in defining “willfully” and discussing the term in various contexts).

132. *Spies v. United States*, 317 U.S. 492, 497 (1943) (citing *United States v. Murdock*, 290 U.S. 389 (1933)).

133. See Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 364, 387–88 (1998). This Comment focuses more narrowly on which term is more correct for the Seventh Circuit jury instructions.

134. *Liparota v. United States*, 471 U.S. 419, 423–25 (1985) (holding that a person accused of knowing possession of food stamps in manner unauthorized by 7 U.S.C. § 2024(b)(1) must be shown to have known the possession was unlawful); *United States v. Marvin*, 687 F.2d 1221, 1227–28 (8th Cir. 1982) (same).

135. *Cheek v. United States*, 498 U.S. 192, 209 (1991) (Scalia, J., concurring in the judgment); see also *Am. Surety Co. of N.Y. v. Sullivan*, 7 F.2d 605, 606 (2d Cir. 1925) (L. Hand, J.) (“The word ‘willful’ . . . means no more than that the person charged with the duty knows what he is doing,” not that “he must suppose that he is breaking the law.”); MODEL PENAL CODE § 2.02(8) (A.L.I. 1985) (“A requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears.”).

136. 18 U.S.C. § 2(b) (emphasis added).

137. See SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 2, § 5.06(b) (emphasis added).

“knowingly” instead of “willfully.”¹³⁸ The Court reasoned that, because the statute uses “willfully,” the substitution of “knowingly” is unlawful.¹³⁹

The *Freed* court was correct, as the use of “knowingly” in 5.06(b) instructs the jury to find beyond a reasonable doubt that the defendant had the knowledge that what they were helping the principal accomplish was against the law in order for the defendant to be found guilty. If the instruction used the word “willfully,” the jury would instead be asked to decide whether the defendant consciously aided and abetted the principal regardless of whether they know said act was illegal.¹⁴⁰ In response to *Freed*, the Committee added 5.06(B) which reads that “[i]f a defendant *willfully* causes” the acts of another, then they are responsible for the crime as a principal.¹⁴¹ This change is necessary and proper because it better aligns the instruction with the relevant criminal statute and therefore focuses the jury on the correct purposive attitude.

Overall, the use of “knowingly” versus “willfully” makes an enormous difference. Chief among the ramifications of this textual choice is the fact that it is more difficult for prosecutors to prove that a defendant knew the *unlawfulness* of their actions than to prove that a defendant had *consciousness* of what they were doing. In short, the change from “knowingly” to “willfully” lowers the prosecutorial bar. This has implications for decisions regarding indictment, plea bargaining, and whether or not to go to trial. If the public and lawmakers are uncomfortable with such the bar being so concerningly low, an amendment to § 2(b) should be made. As tempting as it might be, it is not the role of trial courts to rewrite the elements of the law.

The crime of check fraud provides a fruitful example. Using “knowingly,” a prosecutor would have to prove both that a defendant (1) knew the checks were fraudulent and (2) cashed the fraudulent checks. Using “willfully,” a prosecutor would only have to prove that the defendant knew they were cashing checks. It would not necessarily matter whether or not the defendant knew that the checks were fraudulent.¹⁴²

138. *United States v. Freed*, 921 F.3d 716, 721 (7th Cir. 2019); *see also* SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 2, § 5.06(b) (addressing the fact that the Seventh Circuit held that the previous version was problematic).

139. *See Freed*, 921 F.3d at 721.

140. *Id.*; *see Am. Surety Co. of N.Y. v. Sullivan*, 7 F.2d 605, 606 (2d Cir. 1925) (Hand, J.).

141. SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 2, § 5.06(B) (emphasis added).

142. There is controversy regarding whether prosecutors should have to prove that a defendant knew that their assistance to a principal was illegal. However, because the statute, as the Seventh Circuit pointed out, uses the word “willfully” and now knowingly, 5.06(B) is a more correct instruction than 5.06(b). *See* 18 U.S.C. § 2(b);

Additionally, dropping “knowingly” brings the Seventh Circuit in line with a majority of the other circuits. Before this revision, the Seventh Circuit was behind the curve as other circuits had already adopted “willfully” and chosen not to use “knowingly.”¹⁴³ For example, the First Circuit, Sixth Circuit, Ninth Circuit, and Eleventh Circuit all use some variation of “willful” in their § 2(b) instructions.¹⁴⁴ These circuits’ jury instruction committees either took the word “willfully” directly from the statute or responded to holdings in which their respective circuit court held that willfulness was required for § 2(b) liability.¹⁴⁵

Notably, the Fifth, Eighth, and Tenth Circuits leave out both “knowingly” and “willfully,” using words such as “voluntarily” and “intentionally” instead.¹⁴⁶ This is likely due to either their lack of separate jury instruction for § 2(a) and § 2(b) or discomfort with the implications of either word.¹⁴⁷ For example, the Fifth Circuit held that “[i]t is not necessary . . . that one charged as an aider and abettor commit the overt acts that . . . accomplish the offense or that he have knowledge of the particular means his principals . . . employ to carry out the criminal

Freed, 921 F.3d at 721. For more discussion on the controversy, see Andrea Tuwiner Vavonese, Comment, *The Medicare Anti-Kickback Provision of the Social Security Act—Is Ignorance of the Law an Excuse for Fraudulent and Abusive Use of the System?*, 45 CATH. U. L. REV. 943, 950 (1996) (discussing whether “willfully” should require knowledge of the unlawfulness of the act or simply the consciousness of the act itself); Thomas A. Hagemann & Joseph Grinstein, *The Mythology of Aggregate Corporate Knowledge: A Deconstruction*, 65 GEO. WASH. L. REV. 210, 210 (1997) (arguing that willful blindness to factual information is a prerequisite for knowledge of a crime); Gregory M. Gilchrist, *Willful Blindness as Mere Evidence*, 54 LOY. L.A. L. REV. 405, 408 (2021) (arguing that evidence that amounts to willful blindness does not demand an inference of actual knowledge).

143. See *United States v. Leppo*, 177 F.3d 93, 95 (1st Cir. 1999); see also SIXTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 81, § 4.01 comm. cmt.; NINTH CIR. JURY INSTRUCTIONS COMM., MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT § 4.2 (2022) [hereinafter NINTH CIRCUIT CRIMINAL JURY INSTRUCTIONS].

144. FIRST CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 108, § 4.18.02(b); SIXTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 81, § 4.01A; NINTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 143, § 4.2; ELEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 28, § S7.

145. See *Leppo*, 177 F.3d at 95 (noting that “willfulness” is required for § 2(b) liability); see also SIXTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 81, § 4.01 comm. cmt. (“The word ‘willfully’ . . . is taken from the statute”); NINTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 143, § 4.2 cmt. (citing case law establishing that “willfully” should be used in the instruction).

146. FIFTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 47, § 2.04; EIGHTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 47, § 5.02; TENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 47, § 2.06.

147. See FIFTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 47, § 2.04; EIGHTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 47, § 5.02; TENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 47, § 2.06.

activity.”¹⁴⁸ In keeping with this holding, the Fifth Circuit has refrained from using both “willful” or “knowledge” and instead accompanies the elements of the crime with a longer description of what the law requires the jury to find in order for the defendant to be guilty.¹⁴⁹

The Fifth Circuit’s approach is not as precise as using the term written into the statute; instead, it provides an example of an alternative path the Seventh Circuit could take. However, because the Seventh Circuit has already opined on the inclusion of “willfully” in its accomplice liability instruction, this may be an easier target for defendants on appeal within the Seventh Circuit.¹⁵⁰ Additionally, because “knowingly” is still less accurate than “willfully,” 5.06(B) is still the clear choice when compared with 5.06(b).

3. The Necessity of a Standard Definition of “Willful”

Unlike most other circuits who use the term “willful,” the Seventh Circuit does not supplement their willful instruction with a definition or explanation of the term. In the comments, the Committee acknowledges the lack of a definition by stating:

A problem with this approach is that “willfully” is a term that has variable meanings, and the Seventh Circuit has not defined “willfully” under § 2(b). Jurors may also have different understandings of this term, and trial judges may get questions from deliberating juries asking for a definition. In the absence of guidance from the Seventh Circuit, the Committee takes no position at this point regarding the correct definition.¹⁵¹

While decent to acknowledge their lack of a definition, the Committee is clearly avoiding the difficult task of creating a workable definition. This dereliction will likely lead to confused jurors and district courts creating their own definition of a complicated term. As such, it is inevitable that defendants will receive disparate outcomes based upon the definition that juries are supplied with.

The Committee’s lack of action is made worse by the fact that it would be easy for the Committee to review other circuit’s definitions and include one that has been tested in other jurisdictions. For example, the First Circuit defines “willfully” as an act done “voluntarily and

148. *United States v. Sanders*, 952 F.3d 263, 277 (5th Cir. 2020) (ellipses in original) (quoting *United States v. Austin*, 585 F.2d 1271, 1277 (5th Cir. 1978)).

149. *See id.*; FIFTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 47, § 2.04.

150. *United States v. Freed*, 921 F.3d 716, 721 (7th Cir. 2019).

151. SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 2, § 5.06(B) comm. cmt.

intentionally with the intent that something the law forbids be done – that is to say with bad purpose, either to disobey or disregard the law.”¹⁵² The Eleventh Circuit gives a thorough and flexible definition of “willfully” by including a separate instruction that defines the term. The instruction reads as follows:

[The word “willfully” means that the act was committed voluntarily and purposely, with the intent to do something the law forbids; that is, with the bad purpose to disobey or disregard the law. While a person must have acted with the intent to do something the law forbids before you can find that the person acted “willfully,” the person need not be aware of the specific law or rule that [his] [her] conduct may be violating.]¹⁵³

Clearly, the Seventh Circuit Committee had several pretested options to choose from. The Eleventh Circuit’s definition is a good starting point.

Furthermore, the Committee’s suggestion that it failed to include a definition because the Seventh Circuit has not opined on the definition of “willfully” is imprudent. First, it is self-evident that the Seventh Circuit has not opined on the topic because, until the latest revision, the pattern jury instructions had used the word “knowingly” and had not had an opportunity to decide the matter.¹⁵⁴ Moreover, it is essentially in the Committee’s commission to create instructions and definitions for difficult legal concepts.¹⁵⁵ Instead of fulfilling its commission by engaging in the complex inquiry, the Committee eschews the complexities to busy practitioners and district judges who likely do not have the time, resources, or ability to bounce thoughts and ideas off of a committee of leading criminal practitioners and scholars in the circuit.¹⁵⁶

Furthermore, if the Committee is fearful of being overruled by the Seventh Circuit, it should know that any definition it puts forward will be tested by the Seventh Circuit, so suggesting an informed definition will likely help more than it could hurt. Lastly, as a safeguard, even if the Seventh Circuit had proposed a definition that did not fit a particular case, district judges already have the ability to tweak pattern jury instructions as necessary for the case before them.¹⁵⁷ The strain and confusion that the lack of a standard definition will create within the

152. FIRST CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 108, § 4.18.02(b).

153. ELEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 28, § B9.1A.

154. SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 2, § 5.06.

155. *Id.* at 1–4.

156. *See id.* § 5.06(B) comm. cmt.

157. *See How Courts Work*, *supra* note 20.

Seventh Circuit is unnecessary and has real consequences for defendants whose lives and liberty are at stake. If it is conceivable for jury deliberation to center not on whether a person committed the crime they are accused of committing, but rather on what the judge means by “willful,” then the Seventh Circuit and the Committee have fallen short. For these reasons, the Committee’s timid approach to supplying a definition should be abandoned, and the Committee must propose an appropriate definition in their next revision.

4. Adding a Modified Version of the Elements of the Offense

The last difference between 5.06(b) and 5.06(B) is the Committee’s inclusion of three additional paragraphs of bracketed instruction after its statement of the law. These bracketed paragraphs are meant to “address the interplay between § 2(b) and the mens rea requirement for the underlying offense.”¹⁵⁸ In the first bracketed paragraph, the Committee instructs the district court to “give a modified version of the elements instruction for the offense to [show] that the defendant ‘willfully caused’ any acts he is not alleged to have personally committed.”¹⁵⁹ This is intended to require the jury to find “that [the] defendant has the requisite mental state for the crime charged.”¹⁶⁰

The Committee supplies an example. In its example, the full jury instruction asks the jury to consider three different mental states: willful, knowingly, and intentional.¹⁶¹ The elements of knowledgeable and intentional come from the instruction on the underlying offense, while willful comes from the addition of accomplice liability instruction.¹⁶² The example is as follows:

[I]n a prosecution for passing counterfeit money, 18 U.S.C. § 472, the elements would be modified as follows:

1. The defendant willfully caused [actor] to pass counterfeited United States currency;
2. The defendant knew at the time that the United States Currency was counterfeited; and
3. The defendant did so with the intent to defraud.¹⁶³

158. See SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 2, § 5.06(B) comm. cmt.

159. *Id.* § 5.06(B) (emphasis omitted).

160. *Id.* (emphasis omitted).

161. *Id.* § 5.06(B) comm. cmt.

162. *Id.*; 18 U.S.C. §§ 2, 472.

163. SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 2, § 5.06(B) comm. cmt.

In the example, the 5.06(B) instruction appears in the first element and supplies willful. This is followed by the other elements required for the underlying offense outlined in 18 U.S.C. § 472, which includes findings of knowledge and intent.¹⁶⁴

Highlighting that § 2(b) liability requires proof that the defendant had the mens rea required for the underlying offense brings the Seventh Circuit more in line with the instructions of the other circuits.¹⁶⁵ In fact, it seems the Seventh Circuit followed the Eighth Circuit's example and notes on use.¹⁶⁶ In its accomplice liability instruction, the Eighth Circuit instructs practitioners to modify the elements instruction "to indicate that the defendant voluntarily and intentionally caused any acts he did not personally do."¹⁶⁷ Thus, for example, an instruction on accomplice liability for mail theft would read:

One, the letter was in the United States mail;
Two, the defendant *voluntarily and intentionally caused* John Doe to take the letter from the mail;
Three, in so doing the defendant intended to deprive the addressee temporarily or permanently of the letter.¹⁶⁸

Therefore, when compared to the Eighth Circuit's approach, the novelty of the Seventh Circuit's approach lies in the fact that the Committee proposes an introductory statement in its instruction before the listing of the underlying offense elements. As stated previously, this introductory statement flags that if defendant's willful conduct causes another person to commit an act, then they are responsible for the commission of the crime even though they did not personally commit it.¹⁶⁹ The Seventh Circuit's approach is an improvement on the Eighth Circuit's because it clarifies what specific crime the defendant must be

164. *Id.*; 18 U.S.C. § 472.

165. *See* FIRST CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 108, § 4.18.02(b); EIGHTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 47, § 5.02 notes on use; *United States v. Gumbs*, 283 F.3d 128, 135–36 (3d Cir. 2002).

166. *See* SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 2, § 5.06(B) comm. cmt.; EIGHTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 47, § 5.02 notes on use. This borrowing from other circuits' approach is a stark contrast to their approach for supplying a definition for the word "willful." In fact, the Committee states that, like the meaning of the word willful, "the *mens rea* requirement for the underlying offense [is] another point the Seventh Circuit has yet to address." SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 2, § 5.06(B) comm. cmt. However, in this arena they were willing to take survey of other jurisdictions and make an educated suggestion. *See id.* This was well done but makes it even more confusing why they were not willing to do the same for "willful."

167. EIGHTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 47, § 5.02.

168. *Id.* § 5.02 notes on use.

169. *See* SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 2, § 5.06(B). *But see* EIGHTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 47, § 5.02.

found guilty of aiding and abetting. This might help the jury determine whether the defendant had the requisite mens rea, but it certainly does not explicitly spell out the mens rea they need to find.

For that reason, this condensed instruction can lead to conflation or confusion about which mens rea element goes with which part of the offense—the underlying offense or the accomplice liability. The Committee attempts to ameliorate this by stating that this reorganization of the elements addresses the Seventh Circuit’s concerns about a situation arising in which “the jury believe[] they could convict [the defendant] for a *mens rea* other than the one described by the district court in detailing the requirements of each substantive offense.”¹⁷⁰ The Committee hopes that through the combination of the instruction for criminal liability and the elements of the underlying substantive offense, it will be more obvious to the jury what mens rea it is required to find.¹⁷¹ However, the Committee might be asking too much of the jury. The jury could just as easily believe that the jury instructions are merely recounting the elements of the substantive offense and may not make the mental leap that the list is meant to imply the requisite mens rea. Adding a definition is a clearer way to communicate the requisite mens rea to the jury and would leave no room for confusion regarding what they must find in order to decide whether a defendant is guilty or innocent.

These revisions and additions to 5.06(b) and the resulting inclusion of a more accurate 5.06(B) are helpful, necessary, and a step in the right direction. However, further revisions are crucial. The most important being the addition of a workable definition of “willful.” However, in total, 5.06(B) was a helpful and necessary revision of 5.06(b).

C. Out with the Old and in with the New

In the Seventh Circuit’s next revision of its pattern jury instructions, it must get rid of 5.06 and instead rely solely upon 5.06(A) and 5.06(B), which are more accurate and precise statements of the law. If the Committee continues to endorse two version of the same instruction, practitioners will likely continue to use the older version. But there is no reason why there should be two versions of the same instruction—especially when one is no longer accurate and having two sets of instructions leads to confusion in the circuit. Additionally, continuing to publish outdated, inaccurate instructions opens the door to avoidable challenges on appeal of the instructions and threatens the fair and just administration of law in the Seventh Circuit.

170. SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 2, § 5.06(B) comm. cmt. (quoting *United States v. Freed*, 921 F.3d 716, 722 (7th Cir. 2019)).

171. SEVENTH CIRCUIT CRIMINAL JURY INSTRUCTIONS, *supra* note 2, § 5.06(B) comm. cmt.

The confusion regarding how to use 5.06(a) and (b) is due in part to the fact that the two forms of accomplice liability are listed under the same 5.06 umbrella in the older version.¹⁷² In fact, the only “general note” the Committee supplies on 5.06 usage addresses this issue.¹⁷³ It states that the reason for the split in the revision between 5.06(A) and 5.06(B) is that “[o]ver the years, the previous version of the § 2(b) instruction [5.06] has tended to become a ubiquitous ‘agency’-type instruction given in many cases in which § 2(b) does not appropriately come into play.”¹⁷⁴ The Committee continues, stating that “[i]t should be remembered that § 2(b) is not a general agency statute but rather is focused on causing another to commit a *criminal act*.”¹⁷⁵ Through this general note, the Committee itself is essentially admitting that the older version is confusing, yet, at the same time, it refuses to remove the older version in favor of the less-confusing newer one. Thus, this Comment urges that any future version of the pattern instructions should do away with the confusing instruction.

Moreover, if 5.06 continues to be included in future editions of the Seventh Circuit’s pattern jury instructions, practitioners may be tempted to continue to use 5.06 instead of the revised versions. Since they have been around and therefore have been used longer than the new versions, practitioners and judges in the district are likely more familiar and comfortable with using 5.06(a) and (b).¹⁷⁶ Continuing to endorse 5.06 provides no obvious impetus for practitioners and judges to use 5.06(A) and 5.06(B) over the more familiar 5.06(a) and (b). However, if 5.06 were to be removed, it would flag the fact that there were deficiencies in 5.06 and encourage the use of the more accurate revised instructions.

By focusing use on the new versions of the accomplice liability instructions, the Seventh Circuit could avoid appellate challenges. There is hardly an easier path to an appeal than to challenge the accuracy of jury instructions that have already been found as inaccurate statements of the law. While the Committee cannot ensure perfection in all aspects of jury instructions, certainly removing instructions it knows to be inaccurate is doable.

Most importantly however, having inaccurate and confusing statements of law in jury instructions has extreme implications for criminal defendants. It is easy to get lost in an esoteric world of legal jargon and forget that the words presented to a jury will be the words on which the future of human beings are decided. A person’s life and liberty are too important for the Committee to allow there to be even a moment’s

172. *Id.* §§ 5.06, 5.06(A), 5.06(B).

173. *Id.* § 5.06(B) comm. cmt.

174. *Id.*

175. *Id.*

176. *See id.* § 5.06.

confusion over the law, especially if such confusion could be easily alleviated. For this reason, 5.06 should be removed from the Seventh Circuit pattern jury instructions, and a definition of “willfully” should be added to 5.06(B).

CONCLUSION

The new instructions, 5.06(A) and 5.06(B), are a welcome revision of the instructions contained in 5.06(a) and (b) because they summarize the law more accurately, respond to changes within the case law, and more closely align the Seventh Circuit with the other circuits. These changes were necessary because of deficiencies within the 5.06 instructions. However, the Committee failed to remove the prior versions of the accomplice liability instructions from the pattern jury instructions.¹⁷⁷ This is despite indications that the older versions of the instructions had caused confusion and proved problematic. This jeopardizes the usefulness of the revisions.

Therefore, although they are not perfect and still require further development, the Seventh Circuit should do away with 5.06 and only recommend the usage of 5.06(A) and 5.06(B) in the circuit. The new versions of the aiding and abetting instructions are more accurate statements of the law; it is inefficient and confusing to have two sets of the same instruction, and it is dangerous and unjust to have inaccurate statements of law put forth in a set of pattern jury instructions. In addition to getting rid of 5.06 in its entirety, the Seventh Circuit must supply a standard definition of the term “willfully” in its next version of the Seventh Circuit’s Pattern Jury Instructions. This would help ameliorate confusion, conflation, and disparate outcomes for similarly situated defendants in different courtrooms.

There is nothing more important than getting the law correct when someone’s life and liberty is at stake, so out with the old and in with the new.

177. *See id.* § 5.06.

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