

4.09 DEFINITION OF WILLFULLY

Committee Comment

The Committee recommends that an instruction defining the word “willfully” not be given unless the word is in the statute defining the offense being tried. It should be noted that the word “willfully” is frequently included in the indictment even though not required by statute, and this practice should be discouraged. *United States v. Valencia*, 907 F.2d 671, 683 (7th Cir. 1990) lays down the Seventh Circuit rules for when to define “willfully” for the jury:

First, as we have noted, the term “willful” does not appear in the statute that defines Mr. Martinez’ charged offense. Thus, in general, the term need not be defined in the jury instructions Second, as we have stated earlier, the elements instructions given at the beginning of the jury charge, *supra* p. 681, adequately stated the mental state that the prosecution had to prove in order to secure a conviction . Third, we conclude that the evidence that Mr. Martinez did act willfully was so strong that any failure to define the term had no prejudicial effect on him.

United States v. Valencia, 907 F.2d 671, 683 (7th Cir. 1990).

In many cases, the court need not define “willful” because the concept of willfulness will be adequately explained in other instructions defining “knowingly”, “intentionally”, or “deliberately”, *United States v. Sirhan*, 504 F.2d 818, 820 (9th Cir. 1974). However, there are certain federal crimes which require willfulness as the only standard of purposeful conduct. For instance, the term “willful” in a failure to file an income tax return case is different from the willful involvement in a conspiracy. In the tax prosecution, “willful” should be defined as follows:

An act is done “willfully” if it is done voluntarily and intentionally with the purpose of avoiding a known legal duty.

This definition is taken primarily from *United States v. Pomponio*, 429 U.S. 10 (1976), as affirmed in *Cheek v. United States*, 498 U.S. 192, 201 (1991). The Supreme Court has discussed the various meanings of the term “willfulness” as used in the criminal tax statutes in *United States v. Bishop*, 412 U.S. 346 (1973). See *United States v. Harris*, 942 F.2d 1125, 1131-32 (7th Cir. 1991).

If the prosecution involves a perjury or conspiracy prosecution, the definition of “willful” may be different. For instance, the following definition may be appropriate in a perjury or contempt case:

An act is done “willfully” if done voluntarily and intentionally , and with the intent to do something the law forbids; that is to say with a purpose either to disobey or disregard the law.

This definition is taken essentially from *United States v. Patrick*, 542 F.2d 381 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977).

As used in various criminal statutes, the term “willful” has been construed to mean an act done voluntarily as distinguished from accidentally, with bad purpose, without justifiable excuse,

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without grounds for believing it was lawful, or with careless disregard whether or not one has the right so to act. See *United States v. Murdock*, 290 U.S. 389, 394-95 (1933); but see *Cheek*, 498 U.S. at 199-204 (“evil motive” or “bad purpose” does not require proof beyond an intentional violation of a known legal duty; a subjective misunderstanding of the legal duty may be enough to defeat willfulness, and objective reasonableness of position may be considered in determining whether subject misunderstanding actually existed). “Willful” has also been construed to mean an act done with specific intent to violate the law. *Screws v. United States*, 325 U.S. 91, 101 (1945).

Like the drafters of the Model Penal Code, the Committee was concerned with the confusion resulting from the use of the loose concept of “willfulness” to define criminal culpability. Model Penal Code § 2.02, comment (Tent. Draft No. 4, 1955).

Similarly, the Senate Judiciary Committee has expressed concern about confusion resulting from the various definitions of “willfulness” included under the “intentional” mental state. “One’s state of mind is intentional with respect to conduct or a result if engaging in such conduct or causing such result is one’s conscious objective.” S. 1437 (95th Cong. 1st Sess.). Elaborating on this definition, the Senate Committee noted that “. . . the word ‘intentional’ describes the mental attitude associated with an act to connote the meaning that the act is being done on purpose; it does not suggest that the act was committed for a particular purpose, evil in nature.” S.Rep.No. 95-605, at 58-59.

Judge Learned Hand stated, “The word ‘willful,’ even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.” *American Surety Co. v. Sullivan*, 7 F.2d 605, 606 (2d Cir. 1925) (cited with approval in *United States v. Hall*, 346 F.2d 875, 880 (2d Cir.), cert. denied, 382 U.S. 910 (1965); *Dennis v. United States*, 171 F.2d 986, 990 (D.C. Cir. 1948), aff’d, 339 U.S. 162 (1950); *Townsend v. United States*, 95 F.2d 352, 358 (D.C. Cir. 1938)).

In *United States v. Gris*, 247 F.2d 860, 864 (2d Cir. 1957), the Second Circuit explained, “It matters not whether appellant realized his conduct was unlawful. He knew exactly what he was doing; and what he did was a violation of the Federal Communications Act. He intended to do what he did, and that was sufficient.”

In *United States v. Keegan*, 331 F.2d 257, 261 (7th Cir.), cert. denied, 379 U.S. 829 (1964), the jury was instructed that, “The word ‘willfully’ means that the person knowingly and intentionally committed the acts which constitute the offenses charged.”

In cases involving willful violations of the securities laws, juries have been instructed that an act is done “willfully” if done knowingly and deliberately and that the defendant need not know he is breaking a particular law. *United States v. Peltz*, 433 F.2d 48, 54-55 (2d Cir. 1970), cert. denied, 401 U.S. 955 (1971); *Tarvestad v. United States*, 418 F.2d 1043, 1047 (8th Cir. 1969), cert. denied, 397 U.S. 935 (1970).

In *United States v. Falk*, 605 F.2d 1005 (7th Cir. 1979), cert. denied, 100 S.Ct. 1079 (1980), the Seventh Circuit deemed proper an instruction that “... the word ‘willful’ means ... deliberately and intentionally, as distinguished from something which is merely careless, inadvertent or negligent, that’s to say that the defendant must have known and specifically

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intended his return to be false when he caused it to be made and subscribed to by him." Id. at 1010.

A consideration of the word "willfully", without benefit of the many cases which have attempted to define it, can lead to the logical conclusion that "willfully" is limited to the deliberateness of the actor in performing the act alleged in the indictment and need not have any reference to his knowledge at the time that the conduct was in violation of law. Earlier cases support this approach to the definition of "willfully." More recent cases, however, have incorporated into the concept of "willfully" the notion of the knowing commission of a criminal act. All of these things being so, it is rarely desirable to give a general definition of "willfully." If the statute uses the term and it must be defined, it should be defined in a manner tailoring it to the details of the particular offense charged.

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5.01 RESPONSIBILITY

A person responsible for the conduct of another may be found guilty even though the one who it is claimed committed the crime has not been found guilty.