

66 From the Committee on Model Criminal Jury Instructions

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by November 1, 2021. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

PROPOSED

The Committee on Model Criminal Jury Instructions proposes a revision of Chapter 2 (Procedural Instructions) of the Criminal Jury Instructions. The current instructions have evolved over several decades with a number of additions, and have become quite repetitious. The Committee offers a slight re-write and re-organization of the procedural instructions that reduces linguistic duplication and flows more logically. The number and length of the jury instructions involved makes publication in the *Michigan Bar Journal* impossible. The proposal is published for public comment on the Michigan State Bar website, and may be found at:

<http://www.michbar.org/file/generalinfo/pdfs/Chapter2.pdf>

The instructions are divided into two sets on the site in hopes of making them more convenient to compare and review. The first set of instructions found on the website (pages 3 through 12) are the current instructions, M Crim JI 2.1 through 2.26. They are preceded (page 2) by a summary of the changes proposed by the Committee, and are followed (pages 14 through 24) by the proposed revised procedural instructions, M Crim JI 2.1 through 2.28, including two new instructions: M Crim JI 2.2 (Written Copy of Instructions per MCR 2.513(D)) and M Crim JI 2.13 (Notifying Court of Inability to Hear or See Witness).

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PROPOSED

The Committee proposes new instructions, M Crim JI 37.12 [Jury Tampering: MCL 750.120a(1)], M Crim JI 37.13 [Jury Tampering Through Intimidation: MCL 750.120a(2)], and M Crim JI 37.14 [Retaliating Against a Juror: MCL 750.120a(4)] for the crimes found in the Bribery and Corruption chapter of the Penal Code.

[NEW] M Crim JI 37.12 Jury Tampering

(1) The defendant is charged with willfully influencing or attempting to influence jurors outside of courtroom proceedings. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

[Select the option that applies:]¹

(2) First, that [identify juror or jurors] [was a member/were members] of the group of potential jurors that could decide the case of [state name of case] in the [identify court].

[Or]

(2) First, that [identify juror or jurors] [was a member/were members] of the jury that could decide the case of [state name of case] in the [identify court].

(3) Second, that the defendant willfully and intentionally made an argument or used persuasion with [that juror/those jurors] other than as part of the proceedings being held in open court.

(4) Third, that when the defendant made an argument or used persuasion with [identify juror or jurors], [he/she] was attempting to influence [his/her/their] decision in the case where [he was/she was/they were] sitting as [a juror/jurors].

Use Note

1. The operative statute, MCL 740.120a(1), may include persons on either the jury venire or the petit jury that ultimately decides the case. See *People v Wood*, 506 Mich 116; 954 NW2d 494 (2020). Use the first option where the juror or jurors were on the jury venire but were not seated on the petit jury, and use the second option where the juror or jurors were on the petit jury.

[NEW] M Crim JI 37.13 Jury Tampering Through Intimidation

(1) The defendant is charged with willfully influencing or attempting to influence jurors outside of courtroom proceedings by using intimidation. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

[Select the option that applies:]¹

(2) First, that [identify juror or jurors] [was a member/were members] of the group of potential jurors that could decide the case of [state name of case] in the [identify court].

[Or]

(2) First, that [identify juror or jurors] [was a member/were members] of the jury that could decide the case of [state name of case] in the [identify court].

(3) Second, that the defendant willfully and intentionally communicated with [that juror/those jurors] other than as part of the proceedings being held in open court. To “communicate” means to interact by spoken or written words or by any conduct or behavior that would lead a reasonable person to believe that a message was being conveyed or expressed.

(4) Third, that when the defendant communicated with [identify juror or jurors], [he/she] was attempting to influence [his/her/their] decision in the case where [he was/she was/they were] sitting as [a juror/jurors].

(5) Fourth, that the defendant attempted to influence the decision of the [juror/jurors] by using intimidation. Using intimidation means that the defendant’s conduct would lead a reasonable person to be placed in fear.

[Use the following paragraphs where the prosecutor has charged the applicable aggravating element]

(6) Fifth, that the defendant attempted to influence the decision of the [juror/jurors] by using intimidation in a case involving the crime of [state alleged crime in case].²

(6) Fifth, that when the defendant attempted to influence the decision of the [juror/jurors] by using intimidation, the defendant [committed or attempted to commit the crime of (state other offense) as I have previously described to you/threatened to kill or injure someone or to cause damage to property].³

Use Note

1. The operative statute, MCL 750.120a, may include persons on either the jury venire or the petit jury that ultimately decides

the case. See *People v Wood*, 506 Mich 116; 954 NW2d 494 (2020). Use the first option where the juror or jurors were on the jury venire but were not seated on the petit jury, and use the second option where the juror or jurors were on the petit jury.

2. MCL 750.120a(2)(b) provides that a person who uses intimidation to influence jurors in the trial of a criminal case where the maximum penalty is 10 years or more or life faces an enhanced penalty. Whether the charged offense at the trial had a penalty of 10 years or more or life is a matter of law, and the court should identify the crime itself for the jury to determine whether the defendant's conduct occurred during the trial for that charge.

3. MCL 750.120a(2)(c).

[NEW] M Crim JI 37.14 Retaliating Against a Juror

(1) The defendant is charged with retaliating against a juror for performing his or her duty. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [identify juror] was a member of the jury that heard evidence to decide the case¹ of [state name of case] in the [identify court].

(3) Second that the defendant retaliated, attempted to retaliate, or threatened to retaliate against that juror for performing [his/her] duty as a juror.

Retaliate means that, because of the juror's performance of [his/her] duty as a juror, the defendant:

[Choose one or more according to the charges and evidence:]

(a) threatened to kill any person or threatened to cause property damage.

(b) committed or attempted to commit the crime of [identify other crime(s) alleged], or a lesser offense, on which I have previously instructed you in Count [identify appropriate count in the Information].² It is not necessary, however, that the defendant be convicted of that crime.

Use Notes

1. If a juror who was a sworn member of the panel but did not sit on the petit jury that heard the evidence at trial is retaliated against for some act in performance of his or her duty as a juror, this language may be

modified to provide "was a member of the of the group of potential jurors from which the jury in [state name of case] in the [identify court] was selected." See *People v Wood*, 506 Mich 116; 954 NW2d 494 (2020).

2. If the crime committed or attempted as retaliation is not charged in a separate count, its elements and included offenses should be instructed on here.

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PROPOSED

The Committee proposes new instructions, M Crim JI 38.2 [Hindering Prosecution of Terrorism (MCL 750.543h)], M Crim JI 38.3 [Soliciting Material Support for an Act of Terrorism (MCL 750.543k)], and M Crim JI 38.3a [Providing Material Support for an Act of Terrorism (MCL 750.543k)] for crimes found in the Michigan Anti-Terrorism Act.

[NEW] M Crim JI 38.2 Hindering Prosecution of Terrorism

(1) The defendant is charged with the crime of hindering the prosecution of terrorism. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

[Select the option that applies:]

(2) First, that [identify other person] committed the crime of [state felony]. For the crime of [state felony], the prosecutor must prove each of the following elements beyond a reasonable doubt: [state elements of felony]. It does not matter whether [identify other person] was convicted of the crime.

[Or]

(2) First, that [identify other person alleged to have been a material witness] was wanted as a material witness in connection with an act of terrorism.

An act of terrorism is a violent felony¹ that is dangerous to human life and that is

intended to intimidate or coerce a civilian population or intended to influence or affect the conduct of government or a unit of government through intimidation or coercion. [Identify violent felony crime] is a violent felony. You must decide whether committing the crime was dangerous to human life and whether the defendant intended to intimidate or coerce a civilian population or intended to influence or affect the conduct of government or a unit of government through intimidation or coercion by committing this felony.

(3) Second, that the defendant knew or had reason to know that [identify other person] [committed the crime of (identify criminal conduct under Anti-Terrorism Act)/was wanted as a material witness in connection with an act of terrorism].

(4) Third, that the defendant [harbored or concealed (identify other person)/warned (identify other person) that (he/she) was about to be discovered or apprehended/provided (identify other person) with money, transportation, a weapon, a disguise, false identification, or any other means of avoiding discovery or apprehension/by force, intimidation, or deception prevented or obstructed anyone from performing an act that might aid in the discovery, apprehension, or prosecution of (identify other person)/concealed, altered, or destroyed any physical evidence that might aid in the discovery, apprehension, or prosecution of (identify other person)/participated or aided in jury bribing, jury tampering, or witness intimidation in a trial of (identify other person)/participated or aided in an escape of (identify other person) from jail or prison].

(5) Fourth, that when the defendant [harbored or concealed (identify other person)/warned (identify other person) that (he/she) was about to be discovered or apprehended/provided (identify other person) with money, transportation, a weapon, a disguise, false identification, or any other means of avoiding discovery or apprehension/by force, intimidation, or deception prevented or obstructed anyone from performing an act that might aid in the discovery, apprehension, or prosecution of (identify other person)/concealed, altered, or destroyed any physical evidence that might aid in the discovery, apprehension, or prosecution of (identify other person)/participated or aided in

jury bribing, jury tampering, or witness intimidation in a trial of (*identify other person*)/participated or aided in an escape of (*identify other person*) from jail or prison], [he/she] intended to avoid, prevent, hinder, or delay the discovery, apprehension, prosecution, trial, or sentencing of [*identify other person*].

Use Note

1. Under MCL 750.543b(a)(i), an act of terrorism requires that a person must have committed a “violent felony.” The definitional statute, MCL 750.543b(h), provides that a “violent felony” is one that has an element of the use, attempted use, or threatened use of physical force against an individual, or of the use, attempted use, or threatened use of a harmful biological substance, a harmful biological device, a harmful chemical substance, a harmful chemical device, a harmful radioactive substance, a harmful radioactive device, an explosive device, or an incendiary device. Whether the crime is a “violent felony” appears to be a question of law for the court to decide.

[NEW] M Crim JI 38.3 Soliciting Material Support for an Act of Terrorism

(1) The defendant is charged with the crime of soliciting material support for an act of terrorism. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant intentionally raised, solicited, or collected material support or resources in the form of currency or other financial securities, financial services, lodging, training, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, including any related physical assets or intangible property, or expert services or expert assistance.¹

(3) Second, that when the defendant raised, solicited, or collected the material support or resources, [he/she] knew that the material support or resources would be used by a person or organization that engaged in or was about to engage in an act that would be a violent felony,² which was or would be dangerous to human life and was intended to intimidate or coerce a civil-

ian population or influence or affect the conduct of government or a unit of government through intimidation or coercion. [*Identify violent felony crime*] is a violent felony. You must decide whether the crime [was/would have been] dangerous to human life and whether the defendant intended to intimidate or coerce a civilian population or intended to influence or affect the conduct of government or a unit of government through intimidation or coercion by committing this felony.

Use Note

1. The forms of material support listed here are found in MCL 750.543b(d). The court may select from those according the evidence or may add other forms of material support according to the charges and the evidence.

2. The definition of a *violent felony* is found in MCL 750.543b(h).

[NEW] M Crim JI 38.3a Providing Material Support for an Act of Terrorism

(1) The defendant is charged with the crime of providing material support for an act of terrorism. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant provided material support in the form of currency or other financial securities, financial services, lodging, training, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, including any related physical assets or intangible property, or expert services or expert assistance¹ to [(*identify person*)/another person].

(3) Second, that when the defendant provided material support to [(*identify person*)/another person], [he/she] knew that [(*identify person*)/the other person] would use that support or those resources at least in part to plan, prepare, carry out, facilitate, or avoid apprehension for committing an act of terrorism against the United States or its citizens, Michigan or its citizens, a political subdivision or agency of Michigan, or a local unit of government.

An act of terrorism is committing or attempting to commit the violent felony of

[*identify crime*]² that was or would be dangerous to human life and was intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.³ [*Identify violent felony crime*] is a violent felony. You must decide whether the crime [was/would have been] dangerous to human life and whether the defendant intended to intimidate or coerce a civilian population or intended to influence or affect the conduct of government or a unit of government through intimidation or coercion by committing this felony.

Use Note

1. The forms of material support listed here are found in MCL 750.543b(d). The court may select from those according the evidence or may add other forms of material support according to the charges and the evidence.

2. The definition of a *violent felony* is found in MCL 750.543b(h).

3. MCL 750.543b(a) defines *act of terrorism*.

The Committee on Model Criminal Jury Instructions has adopted the following new model criminal jury instructions, M Crim JI 39.8 (threatening to commit an offense involving explosives) and M Crim JI 39.8a (threatening to poison or commit a harmful substance offense), addressing crimes charged under MCL 750.411a(2). The instructions are effective August 1, 2021.

ADOPTED

[NEW] M Crim JI 39.8 Threatening to Commit an Offense Involving Explosives

(1) The defendant is charged with making a threat to commit a crime involving explosives. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [communicated/caused (another person/[*identify person who made report*]) to communicate] with [*identify recipient(s) of communication*] by speech, writing, gestures, or conduct.

(3) Second, that during the course of the communication, [the defendant/the other

person/[*identify person who made report*]] threatened to

[*Choose from the following alternatives according to the charges and the evidence:*]

(a) order, send, take, transport, convey, or carry concealed as freight or baggage dynamite, nitroglycerine fulminate in bulk in dry condition, or any other explosive substance that explodes by concussion or friction on a passenger boat, railroad car, motor vehicle, or other vehicle used to carry passengers or articles of commerce.¹

(b) order, send, take or carry, or attempt to order, send, take, or carry dynamite, nitroglycerine, or any other explosive substance that explodes by concussion or friction, concealed in any manner, either as freight or baggage, on a passenger boat, railroad car, motor vehicle, or other vehicle used to carry passengers or articles of commerce.²

(c) send an explosive substance or any other dangerous thing with the intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person, or with the intent to damage or destroy any real or personal property.³

(d) construct a device that appeared to be a bomb or an explosive or incendiary device.⁴

(e) handle an explosive material while intoxicated.⁵

(f) place an explosive substance in or near any real or personal property with the intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person, or with the intent to damage or destroy any real or personal property.⁶

(g) possess an explosive substance or device in a public place to terrorize, frighten, intimidate, threaten, harass, or annoy another person.⁷

(h) carry or possess an explosive or combustible substance with the intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person, or with the intent to damage or destroy any real or personal property without the permission of the property owner or, if the property is public property, without the permission of the governmental agency having authority over that property.⁸

(i) manufacture, buy, sell, furnish, or possess a Molotov cocktail or any similar device with the intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill any per-

son, or with the intent to damage or destroy any real or personal property.⁹

(j) manufacture, buy, sell, furnish, or possess a device designed to explode or that would explode upon impact or with the application of heat or a flame or that is highly incendiary with the intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person, or with the intent to damage or destroy any real or personal property.¹⁰

(k) manufacture, sell, keep, or offer for sale any unbranded or unmarked or falsely branded or marked high explosive.¹¹

(l) kill a person by placing gun powder or any other explosive substance in, on, under, against, or near a building.¹²

(4) Third, that the communication was made or caused [for the purpose of making a threat/knowing the communication would be viewed as a threat].

A threat does not have to be stated in any particular terms but must express a warning of danger or harm. Further, it must have been a true threat, not merely idle talk, or a statement made in jest, or solely a political comment. It must have been made under circumstances where a reasonable person would take the threat seriously as expressing an intent to inflict harm or damage.

It does not matter whether the defendant or some other person actually could commit the act or actually intended to commit the act, but only whether the defendant threatened to commit the act or have some other person commit the act.

Use Note

1. MCL 750.201
2. MCL 750.327
3. MCL 750.204
4. MCL 750.204a
5. MCL 750.204c
6. MCL 750.207
7. MCL 750.209a
8. MCL 750.210
9. MCL 750.211a(1)(a)
10. MCL 750.211a(1)(b)
11. MCL 750.212
12. MCL 750.328

[NEW] M Crim JI 39.8a Threatening to Poison or Commit a Harmful Substance Offense

(1) The defendant is charged with threatening to commit a crime involving poison

or harmful substances. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [communicated/caused (another person/[*identify person who made report*]) to communicate] with [*identify recipient(s) of communication*] by speech, writing, gestures, or conduct.

(3) Second, that during the course of the communication, [the defendant/the other person/[*identify person who made report*]] threatened to

[*Choose from the following alternatives according to the charges and the evidence:*]

(a) manufacture, deliver, possess, transport, place, use, or release [a harmful biological substance or a harmful biological device/a harmful chemical substance or a harmful chemical device/a harmful radioactive material or a harmful radioactive device/a harmful electronic or electromagnetic device].¹

(b) manufacture, deliver, possess, transport, place, use, or release [a chemical irritant or a chemical irritant device/a smoke device/ an imitation harmful substance or device].²

(c) cause another individual to believe that [he/she] had been exposed to a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, or harmful electronic or electromagnetic device when it was untrue that the individual had been exposed to such a substance or device.³

(d) place an offensive or injurious substance or compound* in or near to any real or personal property intending to wrongfully injure or coerce another person or to injure the property or business of another person, or to interfere with another person's use, management, conduct, or control of his or her business or property.⁴

(e) [place pins, needles, razor blades, glass, or other harmful objects in any food with intent to harm the consumer of the food/place a harmful substance in any food with intent to harm the consumer of the food/knowingly furnish any food containing a harmful object or substance to another person].⁵

(f) [mingle a poison or harmful substance with a food, drink, nonprescription medicine, or pharmaceutical product/place

70 From the Committee on Model Criminal Jury Instructions

a poison or harmful substance in a spring, well, reservoir, or public water supply, knowing or having reason to know that it may be consumed or used by a person and result in injury].⁶

(g) dishonestly tell another individual that a poison or harmful substance had been or would be placed in a food, drink, nonprescription medicine, pharmaceutical product, spring, well, reservoir, or public water supply, knowing that the information was false and that it would likely be disseminated to the public.⁷

*[Provide a definition by selecting from paragraphs (i) through (ix).]*⁸

(i) A “harmful biological device” means a device designed or intended to release a harmful biological substance.

(ii) A “harmful biological substance” means a bacteria, virus, or other microorganism or a toxic substance derived from or produced by an organism that can be used to cause death, injury, or disease in humans, animals, or plants.

(iii) A “harmful chemical device” means a device that is designed or intended to release a harmful chemical substance.

(iv) A “harmful chemical substance” means a solid, liquid, or gas that through its chemical or physical properties, alone or in combination with one or more other

chemical substances, can be used to cause death, injury, or disease in humans, animals, or plants.

(v) A “harmful radioactive material” means material that is radioactive and that can be used to cause death, injury, or disease in humans, animals, or growing plants by its radioactivity.

(vi) A “harmful electronic or electromagnetic device” means a device designed to emit or radiate or that, as a result of its design, emits or radiates an electronic or electromagnetic pulse, current, beam, signal, or microwave that is intended to cause harm to others or cause damage to, destroy, or disrupt any electronic or telecommunications system or device, including, but not limited to, a computer, computer network, or computer system.

(vii) A “harmful radioactive device” means a device that is designed or intended to release a harmful radioactive material.

(viii) A “chemical irritant” means a solid, liquid, or gas that, through its chemical or physical properties, alone or in combination with one or more other substances, can be used to produce an irritant effect in humans, animals, or plants.

(ix) A “chemical irritant device” means a device designed or intended to release a chemical irritant.

(4) Third, that the communication was made or caused [for the purpose of making a threat/knowing the communication would be viewed as a threat].

A threat does not have to be stated in any particular terms but must express a warning of danger or harm. Further, it must have been a true threat, not merely idle talk, or a statement made in jest, or solely a political comment. It must have been made under circumstances where a reasonable person would take the threat seriously as expressing an intent to inflict harm or damage.

It does not matter whether the defendant or some other person actually could commit the act or actually intended to commit the act, but only whether the defendant threatened to commit the act or have some other person commit the act.

Use Note

1. MCL 750.200i
2. MCL 750.200j
3. MCL 750.200l
4. MCL 750.209
5. MCL 750.397a
6. MCL 750.436(1)(a)
7. MCL 750.436(1)(b)
8. See MCL 750.200h for definitions.

*There is no statutory definition for an offensive or injurious substance or compound.

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