

## CHAPTER TWO

### DEFINITIONS/PRINCIPLES OF LIABILITY

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INSTRUCTION NO. [2-101]

**[Cohabit]**

"Cohabit" means to live together under the representation of being married.

GIVEN: \_\_\_\_\_  
DISTRICT JUDGE

SOURCE: MCJI 2-101 (2009)

Plaintiff's Proposed Instruction No. \_\_\_\_\_ Defendant's Proposed Instruction No. \_\_\_\_\_

Given as Instruction No. \_\_\_\_\_ Refused \_\_\_\_\_ Withdrawn \_\_\_\_\_ By \_\_\_\_\_

**[Cohabit, No. 2-101, 2009, Source and Comment]**

SOURCE: MCA § 45-2-101(7) (2007).

COMMENT: Cite as MCJI 2-101. This instruction should be given with Instruction No. 5-126 whenever the incest charged is based on a prohibited cohabitation.

INSTRUCTION NO. [2-102]

**[Deviate Sexual Relations]**

"Deviate sexual relations" means any form of sexual intercourse with an animal.

GIVEN: \_\_\_\_\_  
DISTRICT JUDGE

SOURCE: MCJI 2-102 (2009)

Plaintiff's Proposed Instruction No. \_\_\_\_\_ Defendant's Proposed Instruction No. \_\_\_\_\_

Given as Instruction No. \_\_\_\_\_ Refused \_\_\_\_\_ Withdrawn \_\_\_\_\_ By \_\_\_\_\_

**[Deviate Sexual Relations, No. 2-102, 2009, Source and Comment]**

SOURCE: MCA § 45-2-101(21) (2007).

COMMENT: Cite as MCJI 2-102. This instruction should be given with Instruction No. 5-125 and 5-125(a). After the Montana Supreme Court decision in *Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (1997), holding that criminalizing sexual contact or sexual intercourse between two persons of the same sex violates Montana's constitutional right of privacy, the Commission removed that portion from the instruction.

INSTRUCTION NO. [2-103]

**[Forcible Felony]**

"Forcible felony" means a felony that involves the use or threat of physical force or violence against any individual.

GIVEN: \_\_\_\_\_  
DISTRICT JUDGE

SOURCE: MCJI 2-103 (2009)

Plaintiff's Proposed Instruction No. \_\_\_\_\_ Defendant's Proposed Instruction No. \_\_\_\_\_

Given as Instruction No. \_\_\_\_\_ Refused \_\_\_\_\_ Withdrawn \_\_\_\_\_ By \_\_\_\_\_

**[Forcible Felony, No. 2-103, 2009, Source and Comments]**

SOURCE: MCA § 45-2-101(24) (2007).

COMMENT: Cite as MCJI 2-103. This definition first occurs in the code as part of the general definitions section. It is also duplicated in MCA § 45-3-101(2) (2007) because it is used extensively throughout that chapter.

The definition of "forcible felony" presents the problem because the definition itself states that the offense is a "felony." The Montana Supreme Court has ruled it improper to refer to an offense as a felony or misdemeanor. See also, *State v. Brodniak*, 221 Mont. 212, 718 P.2d 322 (1986). The Commission defers to the Legislature's decision to use such a definition.

INSTRUCTION NO. [2-104]

**[Knowingly]**

A person acts knowingly:

**[when the person is aware of his or her conduct]**

OR

**[with respect to a specific circumstance defined by an offense, when the person is aware of that circumstance.]**

OR

**[when the person is aware there exists the high probability that the person's conduct will cause a specific result]**

OR

**[with respect to a specific fact, when the person is aware of a high probability of that fact's existence].**

GIVEN: \_\_\_\_\_  
DISTRICT JUDGE

SOURCE: MCJI 2-104 (2009)

Plaintiff's Proposed Instruction No. \_\_\_\_\_ Defendant's Proposed Instruction No. \_\_\_\_\_

Given as Instruction No. \_\_\_\_\_ Refused \_\_\_\_\_ Withdrawn \_\_\_\_\_ By \_\_\_\_\_

**[Knowingly, No. 2-104, 2009, Source and Comments]**

**SOURCE:** MCA § 45-2-101(35) (2007).

**COMMENT:** Cite as MCJI 2-104.

**CAUTION:** Purposely and Knowingly

Based on the Montana Supreme Court decisions in *State v. Rothacher*, 272 Mont. 303, 901 P.2d 82 (1995); *State v. Lambert*, 280 Mont. 231, 929 P.2d 846 (1996); and *State v. Patton*, 280 Mont. 278, 930 P.2d 635 (1996); the Commission believes that it is no longer acceptable to instruct on the mental states of purposely or knowingly by listing each of the alternative subsections, thus allowing the jury to select that which it believes is most applicable. If the crime is a “result” oriented crime, you should define the mental state with the subsection that relates to a result. For example, if the crime is deliberate homicide, purposely should be defined as: "...a person acts purposely with respect to a result if it is the person's conscious object to cause that result." Likewise, in the same situation, knowingly should be defined as: “A person acts knowingly with respect to the result of conduct described by a statute defining an offense when the person is aware that it is highly probable that the result will be caused by the person's conduct.”

For an example of a statute which requires a particular circumstance, see Accidents Involving Death or Personal Injuries, MCA § 61-7-103 (2007) which requires that an accident result in personal injury or death. See also, *State v. Stafford*, 208 Mont. 324, 678 P.2d 644 (1984), which required the State to prove knowledge that the accident resulted in personal injury or death.

See also, *State v. Azure*, 329 Mont. 536, 125 P.3d 1116 (2005), which essentially reaffirms the holding in *State v. Lambert*, that only a single applicable subsection should be given.

INSTRUCTION NO. [2-105]

**[Negligently]**

A person acts negligently when an act is done with a conscious disregard of the risk, or when the person should be aware of the risk by *[here insert applicable conduct related to the case]*.

The risk must be of a nature and degree that to disregard it involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. "Gross deviation" means a deviation that is considerably greater than lack of ordinary care.

GIVEN: \_\_\_\_\_  
DISTRICT JUDGE

SOURCE: MCJI 2-105 (2009)

Plaintiff's Proposed Instruction No. \_\_\_\_\_ Defendant's Proposed Instruction No. \_\_\_\_\_

Given as Instruction No. \_\_\_\_\_ Refused \_\_\_\_\_ Withdrawn \_\_\_\_\_ By \_\_\_\_\_

**[Negligently, No. 2-105, 2009, Source and Comment]**

SOURCE: MCA § 45-2-101(43) (2007).

COMMENT: Cite as MCJI 2-105.

INSTRUCTION NO. [2-106]

**[Purposely]**

A person acts purposely when it is the person's conscious object:

**[to engage in conduct of that nature]**

OR

**[to cause such a result].**

GIVEN: \_\_\_\_\_  
DISTRICT JUDGE

SOURCE: MCJI 2-106 (2009)

Plaintiff's Proposed Instruction No. \_\_\_\_\_ Defendant's Proposed Instruction No. \_\_\_\_\_

Given as Instruction No. \_\_\_\_\_ Refused \_\_\_\_\_ Withdrawn \_\_\_\_\_ By \_\_\_\_\_

**[Purposely, No. 2-106, 2009, Source and Comment]**

**SOURCE:** MCA § 45-2-101(65) (2007).

**COMMENT:** Cite as MCJI 2-106.

**CAUTION:** Purposely and Knowingly.

Based on the Montana Supreme Court decisions in *State v. Rothacher*, 272 Mont. 303, 901 P.2d 82 (1995); *State v. Lambert*, 280 Mont. 231, 929 P.2d 846 (1996); and *State v. Patton*, 280 Mont. 278, 930 P.2d 635 (1996), the Commission believes that it is no longer acceptable to instruct on the mental states of purposely or knowingly by listing each of the alternative subsections, thus allowing the jury to select that which it believes is most applicable. If the crime is a “result” oriented crime, you should define the mental state with the subsection that relates to a result. For example, if the crime is deliberate homicide, purposely should be defined as “...a person acts purposely with respect to a result if it is the person's conscious object to cause that result.” Knowingly should be defined as: “A person acts knowingly with respect to the result of conduct described by a statute defining an offense when the person is aware that it is highly probable that the result will be caused by the person's conduct.”

For an example of a statute which requires a particular circumstance, see Accidents Involving Death or Personal Injuries, MCA 61-7-103 (2007) which requires that an accident result in personal injury or death. See also, *State v. Stafford*, 208 Mont. 324, 678 P.2d 644 (1984), which required the State to prove knowledge that the accident resulted in personal injury or death.

INSTRUCTION NO. [2-107]

**[Sexual Contact]**

“Sexual Contact means touching of the sexual or other intimate parts of the person of another, directly or through clothing, in order to knowingly or purposely:

**[cause bodily harm to or humiliate, harass, or degrade another]**

OR

**[arouse or gratify the sexual response or desire of either party].**

GIVEN: \_\_\_\_\_  
DISTRICT JUDGE

SOURCE: MCJI 2-107 (2009)

Plaintiff's Proposed Instruction No. \_\_\_\_\_ Defendant's Proposed Instruction No. \_\_\_\_\_

Given as Instruction No. \_\_\_\_\_ Refused \_\_\_\_\_ Withdrawn \_\_\_\_\_ By \_\_\_\_\_

**[Sexual Contact, No. 2-107, 2009, Source and Comment]**

SOURCE: MCA § 45-2-101(67) (2007).

COMMENT: Cite as MCJI 2-107. This instruction should be given whenever "sexual contact" is used in another instruction. See *State v. Weese*, 189 Mont. 464, 616 P.2d 371 (1980), for definition of term "sexual or other intimate parts."

The definition was amended in 1999 to include touching through clothing, and expanded to include the two optional subsections included in the bracketed language. Select the provision that is most applicable to the facts of the case.

INSTRUCTION NO. [2-108]

**[Mental State Inference]**

Purpose and knowledge ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the Defendant's state of mind, including his/her purpose and knowledge, from the Defendant's acts and all other facts and circumstances in evidence which indicate his/her state of mind.

GIVEN: \_\_\_\_\_  
DISTRICT JUDGE

SOURCE: MCJI 2-108 (2009)

Plaintiff's Proposed Instruction No. \_\_\_\_\_ Defendant's Proposed Instruction No. \_\_\_\_\_

Given as Instruction No. \_\_\_\_\_ Refused \_\_\_\_\_ Withdrawn \_\_\_\_\_ By \_\_\_\_\_

**[Mental State Inference, No. 2-108, 2009, Source and Comment]**

SOURCE:            *State v Arthun*, 274 Mont. 82, 906 P.2d 216 (1995); *State v Hall*, 249 Mont. 366, 816 P.2d 438 (1991); *State v. Rathbun*, 317 Mont. 66, 75 P.3d 334 (2003).

INSTRUCTION NO. [2-109]

**[Responsibility--Intoxicated Condition]**

A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the Defendant proves that he/she did not know that it was an intoxicating substance when he or she **[consumed]**, **[smoked]**, **[sniffed]**, **[injected]**, or **[otherwise ingested]** the substance causing the condition.

GIVEN: \_\_\_\_\_  
DISTRICT JUDGE

SOURCE: MCJI 2-109 (2009)

Plaintiff's Proposed Instruction No. \_\_\_\_\_ Defendant's Proposed Instruction No. \_\_\_\_\_

Given as Instruction No. \_\_\_\_\_ Refused \_\_\_\_\_ Withdrawn \_\_\_\_\_ By \_\_\_\_\_

**[Responsibility - Intoxicated Condition, No. 2-109, 2009, Source and Comment]**

SOURCE: MCA § 45-2-203 (2007).

COMMENT:

This provision was amended in 1987 and substantially restricts the circumstances under which a Defendant can utilize being in a drugged or intoxicated condition as a defense to criminal charges.

In *State v. Egelhoff*, 272 Mont. 114, 900 P.2d 260 (1995), the Montana Supreme Court found the statute upon which this instruction is based unconstitutional because it deprived the jury of the opportunity to consider intoxication in terms of whether the Defendant had the requisite mental state, thus relieving the prosecution of its burden of proof relative to mental state. However, the United States Supreme Court **reversed** in *Montana v. Egelhoff*, 518 U.S. 37, 116 S.Ct. 2013 (1996), disagreeing with Defendant's contention that the statute and instruction violated due process.

In *State v. McCaslin*, 322 Mont. 350, 96 P.3d 722 (2004), (*overruled in part on other grounds by State v. Herman*, 343 Mont. 494 (2008)) the Montana Supreme Court addressed the issue on state constitutional grounds. It held, in effect, that the statute does not violate a defendant's due process rights under the state constitution. Note, however, that Justice Cotter, in her dissent, criticized the instruction offered by the state, which was based on a revised version of the statute. Justice Cotter writes at ¶ 52 "...where a jury instruction is premised upon a statute...then the instruction should mirror the statutory language *and* punctuation in all significant respects."

INSTRUCTION NO. [2-110]

(and Instruction No. 1-007)

**[Voluntary Act]**

A material element of every offense is a voluntary act, which includes an omission to perform a duty which the law imposes and which is physically capable of being performed by the Defendant.

GIVEN: \_\_\_\_\_  
DISTRICT JUDGE

SOURCE: MCJI 2-110 (2009)

Plaintiff's Proposed Instruction No. \_\_\_\_\_ Defendant's Proposed Instruction No. \_\_\_\_\_

Given as Instruction No. \_\_\_\_\_ Refused \_\_\_\_\_ Withdrawn \_\_\_\_\_ By \_\_\_\_\_

**[Voluntary Act, No. 2-110, 2009, Source and Comment]**

SOURCE: MCA § 45-2-202 (2007).

COMMENT: Cite as MCJI 2-110 or 1-007. In 1987 the legislature revised MCA §45-2-202 as it applies to felony murder and possession offenses. To reflect those changes when dealing with felony murder cases, to the general rule stated above add:

[In this case the state is only required to prove the Defendant acted voluntarily as to the offense of \_\_\_\_\_.]

In cases involving possession, note the bracketed sentence below, which comes directly from the statute defining a voluntary act. This definition varies somewhat from the general definition specified in § 45-2-101.

INSTRUCTION NO. [2-111]

**[Causal Relationship Between Conduct and Result]**

If purposely or knowingly causing [**here describe the result caused, such as death in a deliberate homicide case**] was not within the contemplation or purpose of the Defendant, either element can nevertheless be established if the result involves the same kind of harm or injury as contemplated but the precise harm or injury was different or occurred in a different way, unless the actual result is too remote or accidental to have a bearing on the Defendant's liability or on the gravity of the offense.

GIVEN: \_\_\_\_\_  
DISTRICT JUDGE

SOURCE: MCJI 2-111 (2009)

Plaintiff's Proposed Instruction No. \_\_\_\_\_ Defendant's Proposed Instruction No. \_\_\_\_\_

Given as Instruction No. \_\_\_\_\_ Refused \_\_\_\_\_ Withdrawn \_\_\_\_\_ By \_\_\_\_\_

**[Causal Relations Between Conduct and Result, 2005, Source and Comments]**

SOURCE: MCA § 45-2-201(2)(b); *State v. Rothacher*, 272 Mont. 303, 901 P.2d 82 (1995).

COMMENT: The Montana Supreme Court decision in *Rothacher* indicates that this instruction should be given in any case in which causation is at issue as it was in *Rothacher*, a case in which the Defendant claimed, through other witnesses, that he did not intend to cause the death of the victim; instead he only hit and kicked him, and his resulting death was caused when his head struck the ground. The Court stated: "...that the requirement of purposeful and knowing causation [for the offense of deliberate homicide] can occur without intending a specific result, so long as the same type of harm or injury was contemplated." ***Rothacher*, 272 Mont. at 313, 901 P.2d at 88.**"

The definition of the offense should also be given, as well as the elements instruction, the applicable mental states, and the voluntary act instruction contained in this Chapter and defined in MCA § 45-2-202.

INSTRUCTION NO. [2-112]

[Consent as a Defense]

The consent of       (victim's name)       is a defense to the offense of       (name of offense)      .

Such consent will not be a defense if:

1.       (victim's name)       by reason of [**youth**] [**mental disease or defect**] [**intoxication**] was, at the time of the alleged offense, unable to make a reasonable judgment as to the nature or harmfulness of the conduct which is charged to constitute the offense; or
2.       (victim's name)       was induced to give consent by [**force**] [**duress**] [**deception**].

GIVEN: \_\_\_\_\_  
DISTRICT JUDGE

Source: MCJI 2-112 (2009)

Plaintiff's Proposed Instruction No. \_\_\_\_\_ Defendant's Proposed Instruction No. \_\_\_\_\_

Given as Instruction No. \_\_\_\_\_ Refused \_\_\_\_\_ Withdrawn \_\_\_\_\_ By \_\_\_\_\_

**[Consent as a Defense, No. 2-112, 2009, Source and Comment]**

SOURCE: MCA § 45-2-211 (2007).

COMMENT: Cite as MCJI 2-112. The statute lists four different grounds on which consent will be ineffective, only two of which have been included in this instruction. The two excluded bases for finding consent ineffective are the legal incompetence of the person giving consent to authorize the conduct constituting the offense and the public policy prohibiting or allowing effective consent to certain kinds of harm. They are excluded on the grounds they are questions of law only.

**Note that specific statutory defenses to sex crimes set forth in MCA § 45-5-501 et seq. are covered by Instruction No. 5-507(2).**

INSTRUCTION NO. [2-113]

**[Compulsion]**

It is a defense to the charge made against the Defendant that Defendant was compelled by the threat or menace of imminent infliction of death or serious bodily harm. That is, the Defendant reasonably believed death or serious bodily harm would be inflicted upon Defendant if he/she did not perform the conduct with which the Defendant is charged.

The defense of compulsion is an affirmative defense and the Defendant has the burden of proving the defense by a preponderance of the evidence.

GIVEN: \_\_\_\_\_  
DISTRICT JUDGE

Source: MCJI 2-113 (2009)

Plaintiff's Proposed Instruction No. \_\_\_\_ Defendant's Proposed Instruction No. \_\_\_\_

Given as Instruction No. \_\_\_\_ Refused \_\_\_\_ Withdrawn \_\_\_\_ By \_\_\_\_

**[Compulsion, No. 2-113, 2009, Source and Comment]**

SOURCE: MCA § 45-2-212 (2007); *State v. Stuit*, 176 Mont. 84, 576 P.2d 264 (1978); *State v. Owens*, 182 Mont. 338, 597 P.2d 72 (1979).

COMMENT: Cite as MCJI 2-113. Giving this instruction may not be proper in cases where the offense is punishable by death. See the language of MCA § 45-2-212.

INSTRUCTION NO. [2-114]

**[Accountability for Conduct of Another]**

A person is legally accountable for the conduct of another when:

[1] he or she purposely or knowingly causes another to perform the conduct, regardless of the legal capacity or mental state of the other person;

**OR**

[2] the statute defining the offense makes the person so accountable;

**OR**

[3] either before or during the commission of an offense, and with the purpose to promote or facilitate such commission, the person solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense.

GIVEN: \_\_\_\_\_  
DISTRICT JUDGE

Source: MCJI 2-114 (2009)

Plaintiff's Proposed Instruction No. \_\_\_\_\_ Defendant's Proposed Instruction No. \_\_\_\_\_

Given as Instruction No. \_\_\_\_\_ Refused \_\_\_\_\_ Withdrawn \_\_\_\_\_ By \_\_\_\_\_

**[Accountability for Conduct of Another, No. 2-114, 2009, Source and Comment]**

SOURCE: MCA § 45-2-302 (2007).

INSTRUCTION NO. [2-115]

**[Issues--Accountability for the Conduct of Another]**

To convict the Defendant of \_\_\_\_\_ by being legally accountable for the conduct of another, the State must prove the following elements:

1. That the crime of \_\_\_\_\_ as defined in Instruction No. \_\_\_\_\_ has been committed; and
2. that the statute makes the Defendant so accountable.

**[OR]**

that the Defendant purposely or knowingly caused another to commit the act;

**[OR]**

that the Defendant, , either before or during the commission of an offense, and with the purpose to promote or facilitate such commission solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense.

If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

GIVEN: \_\_\_\_\_  
DISTRICT JUDGE

Source: MCJI 2-115 (2009)

Plaintiff's Proposed Instruction No. \_\_\_\_\_ Defendant's Proposed Instruction No. \_\_\_\_\_

Given as Instruction No. \_\_\_\_\_ Refused \_\_\_\_\_ Withdrawn \_\_\_\_\_ By \_\_\_\_\_

**[Issues -- Accountability for the Conduct of Another, No. 2-115, 2009, Source and Comment]**

SOURCE: MCA § 45-2-302 (2007).

INSTRUCTION NO. [2-116]

**[Accountability for Conduct of Another--Withdrawal]**

A person is not legally accountable for the conduct of another if:

the person is a victim of the offense committed;

**[OR]**

before the commission of the offense, the person terminates his or her effort to promote or facilitate such commission and **[wholly deprives the person's prior efforts of effectiveness in commission of the crime]**, or **[gives timely warning to the proper law enforcement authorities]**, or **[otherwise makes proper effort to prevent the commission of the offense]**.

GIVEN: \_\_\_\_\_  
DISTRICT JUDGE

Source: MCJI 2-116 (2009)

Plaintiff's Proposed Instruction No. \_\_\_\_\_ Defendant's Proposed Instruction No. \_\_\_\_\_

Given as Instruction No. \_\_\_\_\_ Refused \_\_\_\_\_ Withdrawn \_\_\_\_\_ By \_\_\_\_\_

**[Accountability for Conduct of Another -- Withdrawal, No. 2-116, 2009, Source and Comment]**

SOURCE: MCA § 45-2-302(3) (2007).

COMMENT: This instruction should be given in conjunction with Instruction No. 2-114 when there is evidence of withdrawal.

INSTRUCTION NO. [2-117]

**[Accountability for Conduct of Another--Actor not Prosecuted]**

A person who is legally accountable for the conduct of another which is an element of an offense may be convicted upon proof that the offense was committed and that the person was so accountable, although the other person alleged to have committed the offense **[has not been prosecuted] [has not been convicted] [has been convicted of a different offense] [is not amenable to justice] [has been acquitted]**.

GIVEN: \_\_\_\_\_  
DISTRICT JUDGE

Source: MCJI 2-117 (2009)

Plaintiff's Proposed Instruction No. \_\_\_\_\_ Defendant's Proposed Instruction No. \_\_\_\_\_

Given as Instruction No. \_\_\_\_\_ Refused \_\_\_\_\_ Withdrawn \_\_\_\_\_ By \_\_\_\_\_

**[Accountability for Conduct of Another -- Actor Not Prosecuted, No. 2-117, 2009,  
Source and Comment]**

SOURCE: MCA § 45-2-303 (2007).

COMMENT: This instruction should be given with Instructions 2-114 and 2-115

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INSTRUCTION NO. [2-118]

**[Entrapment]**

One of the issues in this case is whether the Defendant was entrapped. If the Defendant was entrapped, he/she must be found not guilty. The state has the burden of proving beyond a reasonable doubt that the Defendant was not entrapped.

If before contact with law enforcement, the Defendant did not have any intent or disposition to commit the crime charged and was induced or persuaded by **[officer/agent]** to commit that crime, then she/he was entrapped.

On the other hand, if before contact with law enforcement, the Defendant did have an intent or disposition to commit the crime charged, then he/she was not entrapped, even though **[officer/agent]** provided a favorable opportunity to commit the crime or made committing the crime easier or even participated in acts essential to the crime.

GIVEN: \_\_\_\_\_  
DISTRICT JUDGE

Source: MCJI 2-118 (2009)

Plaintiff's Proposed Instruction No. \_\_\_\_\_ Defendant's Proposed Instruction No. \_\_\_\_\_

Given as Instruction No. \_\_\_\_\_ Refused \_\_\_\_\_ Withdrawn \_\_\_\_\_ By \_\_\_\_\_

**[Entrapment, No. 2-118, 2009, Source and Comments]**

SOURCE: *State v. Brandon*, 264 Mont. 231, 870 P.2d 734 (1994); *Jacobsen v. United States*, 503 U.S. 540, 112 S.Ct. 1535 (1992); *U.S. v. Mkhsian*, 5 F.3d 1306 (1993), (*overruled on other grounds by U.S. v. Keys*, 133 F.2d 1282 (1998)).

COMMENT: The former MCJI 9-101(b) has been revised to conform to *Jacobsen*, in which the U.S. Supreme Court held that the government must prove that the accused was predisposed to commit the criminal act prior to contact with law enforcement officers. In *Brandon*, the Montana Supreme Court emphasized that it is the government's burden (once evidence of inducement is shown by the Defendant) to prove that the Defendant was predisposed to violate the law before the government intervened.

INSTRUCTION NO. [2-119]

[Alibi]

The Defendant has introduced evidence for the purpose of showing that the Defendant was not present at the time and place of the commission of the alleged offense for which the Defendant is here on trial. If, after considering all the evidence, you have a reasonable doubt that the Defendant was present at the time the crime was committed, you should find the Defendant not guilty.

GIVEN: \_\_\_\_\_  
DISTRICT JUDGE

Source: MCJI 2-119 (2009)

Plaintiff's Proposed Instruction No. \_\_\_\_\_ Defendant's Proposed Instruction No. \_\_\_\_\_

Given as Instruction No. \_\_\_\_\_ Refused \_\_\_\_\_ Withdrawn \_\_\_\_\_ By \_\_\_\_\_

**[Alibi, No. 2-119, 2009, Source and Comment]**

SOURCE: CALJIC 4.50, Spring 2008 Edition.

COMMENT: Cite as MCJI 2-119.

INSTRUCTION NO. [2-120]

**[Mental Disease or Defect]**

Mental disease or defect means an organic, mental, or emotional disorder that is manifested by a substantial disturbance in behavior, feeling, thinking, or judgment to such an extent that the person requires care, treatment, and rehabilitation. It does not include an abnormality manifested only by repeated criminal or other antisocial behavior, a developmental disability, or drug or alcohol intoxication or addiction.

GIVEN: \_\_\_\_\_  
DISTRICT JUDGE

Source: MCJI 2-120 (2009)

Plaintiff's Proposed Instruction No. \_\_\_\_\_ Defendant's Proposed Instruction No. \_\_\_\_\_

Given as Instruction No. \_\_\_\_\_ Refused \_\_\_\_\_ Withdrawn \_\_\_\_\_ By \_\_\_\_\_

**[Mental Disease or Defect, No. 2-110, 2009, Source and Comment]**

SOURCE: MCA § 46-14-101(2007).

COMMENT: The definition in this instruction was added to the provisions of MCA § 46-14-101 in the 2003 legislative session. Previously, there had been no specific code definition.

INSTRUCTION NO. [2-121]

**[Mental Disease or Defect - Capacity to Act with Purpose or Knowledge]**

The Defendant has asserted that due to a mental disease or defect, he/she could not have had a particular state of mind which is an element of the offense, that is, he/she could not have acted purposely or knowingly in committing the acts constituting the offense. Evidence concerning the Defendant's state of mind at the time of the offense may be considered by you in determining whether the Defendant acted purposely or knowingly.

A person with a mental disease or defect may nevertheless act purposely or knowingly. Whether the Defendant had a mental disease or defect and whether he/she acted purposely or knowingly at the time of the commission of the offense are determinations of fact to be made by the jury alone. If you determine that the Defendant had a mental disease or defect at the time of the commission of the offense, you must also determine if the mental disease or defect prevented the Defendant from acting purposely or knowingly.

If you find beyond a reasonable doubt that the Defendant acted purposely or knowingly, even though he/she did have a mental disease or defect, you may not find him/her not guilty by reason of mental disease or defect.

If, on the other hand, you have a reasonable doubt about whether the Defendant did act purposely or knowingly as the result of a mental disease or defect, you must find him/her "not guilty" by reason of mental disease or defect.

As used in this instruction, the terms mental disease or defect do not include an abnormality manifested only by repeated criminal or other anti-social conduct.

GIVEN: \_\_\_\_\_  
DISTRICT JUDGE

Source: MCJI 2-121 (2009)

Plaintiff's Proposed Instruction No.\_\_\_\_ Defendant's Proposed Instruction No.\_\_\_\_

Given as Instruction No.\_\_\_\_ Refused \_\_\_\_ Withdrawn\_\_\_\_ By \_\_\_\_

**[Mental Disease or Defect - Capacity to Act with Purpose or Knowledge, No. 2-121, 2009, Source and Comment]**

SOURCE: MCA § 46-14-101 et seq (2007); *State v. Cowan*, 260 Mont. 510, 861 P.2d 884 (1993); *State v. Byers*, 261 Mont. 17, 861 P.2d 860 (1993), (*overruled on other grounds in State v Rothacher*, 272 Mont. 303, 901 P.2d 82 (1995)).

INSTRUCTION NO. [2-122]

**[Child or Children]**

“Child” or “children” means any individual or individuals under 18 years of age, unless a different age is specified.

GIVEN: \_\_\_\_\_  
DISTRICT JUDGE

SOURCE: MCJI 2-122 (2009)

Plaintiff's Proposed Instruction No. \_\_\_\_\_ Defendant's Proposed Instruction No. \_\_\_\_\_

Given as Instruction No. \_\_\_\_\_ Refused \_\_\_\_\_ Withdrawn \_\_\_\_\_ By \_\_\_\_\_

**[Child or children, No. 2-122, 2009, Source and Comment]**

**SOURCE:** MCA § 45-2-101(6) (2007).

**COMMENT:** The 2005 legislature added a definition of child or children to the general definitions in MCA § 45-2-101, to assist in understanding the changes made to the provisions of MCA § 45-5-625, Sexual Abuse of Children, and other offenses in which the terms “child” or “children” may be used.