JUDICIAL COUNCIL
OF
THE UNITED STATES ELEVENTH JUDICIAL CIRCUIT

JAMES P. GERSTENLAUER
CIRCUIT EXECUTIVE

TEL. 404/335-6535
56 FORSYTH STREET, NW
ATLANTA, GEORGIA 30303

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On 6 April 2016, the Judicial Council approved the Eleventh Circuit Pattern Jury Instructions, Criminal Cases, 2016 revision. On 9 December 2016, the Judicial Council approved the first set of revised and new instructions; which follow:

Offense Instructions

5.1 Bribery of a Public Official or Juror

5.2 Receipt of a Bribe by a Public Official or Juror

24.2 Bribery Concerning a Program Receiving Federal Funds

50.2 Mail Fraud: Depriving Another of an Intangible Right of Honest Services

70.2 Interference with Commerce by Extortion Hobbs Act: Racketeering (Color of Official Right)

40.3 Aggravated Identity Theft

49 Kidnapping

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NEW
117.1 Controlled Substances: Possession on Vessel of the United States or Subject to the Jurisdiction of the United States

NEW
117.2 Controlled Substances: Possession on Vessel by United States Citizen or Resident Alien

Special Instruction

NEW
19 Evidence of Flight

All other instructions in the 2016 Pattern Jury Instructions for Criminal Cases remain in effect. The 6 April 2016 resolution of the Judicial Council of the Eleventh Circuit applies limitations and conditions upon the use and approval of the 2016 pattern jury instructions. Those limitations and conditions also apply to the instructions listed above.

The Pattern Jury Instruction Builder found on the public website for the Eleventh Circuit Court of Appeals at http://pji.ca11.uscourts.gov has been updated to reflect these changes.

FOR THE JUDICIAL COUNCIL:

James P. Gerstenlauer
Secretary to the Judicial Council

S19
Evidence of Flight

Intentional flight or concealment by a person during or immediately after a crime has been committed, or after he is accused of a crime, is not, of course, sufficient in itself to establish the guilt of that person. But intentional flight or concealment under those circumstances is a fact which, if proved, may be considered by the jury in light of all the other evidence in the case in determining the guilt or innocence of that person.

Whether or not the Defendant's conduct constituted flight or concealment is exclusively for you, as the Jury, to determine. And if you do so determine, whether or not that flight or concealment showed a consciousness of guilt on his part, and the significance to be attached to that evidence, are also matters exclusively for you as a jury to determine.

I remind you that in your consideration of any evidence of flight or concealment, if you should find that there was flight or concealment, you should also consider that there may be reasons for this which are fully consistent with innocence. These may include fear of being apprehended, unwillingness to confront the police, or reluctance to confront the witness.

And may I also suggest to you that a feeling of guilt does not necessarily reflect actual guilt of a crime which you may be considering.

ANNOTATIONS AND COMMENTS

Evidence of flight is admissible to demonstrate consciousness of guilt and thereby guilt. *United States v. Blakey*, 960 F.2d 996, 1000 (11th Cir. 1992). This instruction is substantially identical to that considered by the Eleventh Circuit in *United States v. Borders*, 693 F.2d 1318, 1328 (11th Cir. 1982) ("This instruction correctly cautioned the jury that it was up to them to determine whether the evidence proved flight and the significance, if any, to be accorded such a determination . . . ."). *See also United States v. Williams*, 541 F.3d 1087 (11th Cir. 2008); *United States v. Stewart*, 579 F.2d 356 (5th Cir. 1978).

O5.1
Bribery of a Public Official
18 U.S.C. § 201(b)(1)

It's a Federal crime for anyone to bribe a public official.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant directly or indirectly [gave] [offered or promised] something of value to a public official; and

(2) the Defendant acted knowingly and corruptly, with intent [to influence an official act] [to influence the public official to allow or make an opportunity for the commission of a fraud on the United States] [to induce the public official to violate the public official's lawful duty by failing to do an act].

Anyone holding the position of [position], as described in the indictment, is a public official.

To qualify as an "official act," the public official must have [made a decision or taken an action] [agreed to make a decision or take an action] on a question, matter, cause, suit, proceeding, or controversy. Further, the question, matter, cause, suit, proceeding, or controversy must involve the formal exercise of governmental power. It must be similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. It must also be something specific which requires particular attention by a public official.

The public official's [decision or action] [agreement to make a decision or take an action] on that question, matter, cause, suit, proceeding, or controversy

may include using [his/her] official position to exert pressure on another official to perform an official act, or to advise another official, knowing or intending that such advice will form the basis for an official act by another official. But setting up a meeting, talking to another official, or organizing an event (or agreeing to do so) – without more – is not an official act.

[It is not necessary that the public official *actually* make a decision or take an action. It is enough that [he/she] agrees to do so. The agreement need not be explicit, and the public official need not specify the means [he/she] will use to perform [his/her] end of the bargain. Nor must the public official in fact intend to perform the official act, so long as [he/she] agrees to do so.]

To act "corruptly" means to act knowingly and dishonestly for a wrongful purpose.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 201(a)(1) and (b)(1) provide:

> §201. Bribery of public officials
>
> (a) For the purpose of this section - -
>
> (1) the term "public official" means… an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof…;
>
> * * * * *
>
> (b) Whoever - -
>
> (1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public

official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent - -

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person [shall be guilty of an offense against the United States].

For a definition of "fraud on the United States" *see* the Annotations and Comments to Offense Instruction 13.6, *infra*.

The definition of "official act" is taken from *McDonnell v. United States*, 136 S. Ct. 2355 (2016). The precise wording of the instruction should be adjusted based on the official act at issue.

Maximum Penalty: Fifteen (15) years imprisonment and applicable fine, which may be enhanced to three times the monetary value of the amount of the bribe. Thus, under the principle of Apprendi, if the indictment alleges the amount of the bribe as a means of enhancing the maximum fine, the instruction should be modified to submit that issue to the jury. Consideration should also be given in such a case to the possible use of Special Instruction 10, Lesser Included Offense.

O5.2
Receipt of a Bribe by a Public Official
18 U.S.C. § 201(b)(2)

It's a Federal crime for a public official to [demand or seek] [receive or accept] [agree to receive or accept] a bribe.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant was a public official;

(2) the Defendant [demanded or sought] [received or accepted] [agreed to receive or accept] either personally or for another person or entity, something of value; and

(3) the Defendant did so knowingly and corruptly in return for [being influenced in the performance of an official act] [being influenced to allow or make an opportunity for the commission of a fraud on the United States] [being induced to violate the Defendant's lawful duty by failing to do some act].

Anyone holding the position of _____, as described in the indictment, would be a public official.

To qualify as an "official act," the public official must have [made a decision or taken an action] [agreed to make a decision or take an action] on a question, matter, cause, suit, proceeding, or controversy. Further, the question, matter, cause, suit, proceeding, or controversy must involve the formal exercise of governmental power. It must be similar in nature to a lawsuit before a court, a

determination before an agency, or a hearing before a committee. It must also be something specific which requires particular attention by a public official.

The public official's [decision or action] [agreement to make a decision or take an action] on that question, matter, cause, suit, proceeding, or controversy may include using [his/her] official position to exert pressure on another official to perform an official act, or to advise another official, knowing or intending that such advice will form the basis for an official act by another official. But setting up a meeting, talking to another official, or organizing an event (or agreeing to do so) – without more – is not an official act.

[It is not necessary that the public official *actually* make a decision or take an action. It is enough that [he/she] agrees to do so. The agreement need not be explicit, and the public official need not specify the means [he/she] will use to perform [his/her] end of the bargain. Nor must the public official in fact intend to perform the official act, so long as [he/she] agrees to do so.]

To act "corruptly" means to act knowingly and dishonestly for a wrongful purpose.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 201(a)(1) and (b)(2) provide:

§201. Bribery of public officials

(a) For the purpose of this section - -

(1) the term "public official" means… an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof…;

* * * * *

(b) Whoever - -

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person [shall be guilty of an offense against the United States].

For a definition of "fraud on the United States" *see* the Annotations and Comments to Offense Instruction 13.6, *infra*.

The definition of "official act" is taken from *McDonnell v. United States*, 136 S. Ct. 2355 (2016). The precise wording of the instruction should be adjusted based on the official act at issue.

Maximum Penalty: Fifteen (15) years imprisonment and applicable fine, which may be enhanced to three times the monetary value of the amount of the bribe. Thus, under the principle of Apprendi, if the indictment alleges the amount of the bribe as a means of enhancing the maximum fine, the instruction should be modified to submit that issue to the jury. Consideration should also be given in such a case to the possible use of Special Instruction 10, Lesser Included Offense.

O24.2
Bribery Concerning a
Program Receiving Federal Funds
18 U.S.C. § 666(a)(1)(B)

It's a Federal crime for anyone who is an agent of a[n] [organization] [State government] [local government] [Indian tribal government] [any agency thereof] receiving significant benefits under a Federal assistance program, to corruptly [solicit or demand] [accept] [agree to accept] anything of value from any person when the agent intends to be influenced or rewarded in connection with certain transactions of the [organization] [government] [agency].

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant was an agent of [name of entity claimed by the government to be the affected entity];

(2) [same name of entity as above] was a[n] [organization] [State government] [local government] [Indian tribal government] [any agency thereof] that received in any one-year period benefits in excess of $10,000 under a Federal program involving [a grant] [a contract] [a subsidy] [a loan] [a guarantee] [insurance] [other form of Federal assistance];

(3) during that period the Defendant [solicited or demanded] accepted] [agreed to accept] a thing valued at approximately $ _____ from someone other than [entity's name];

(4) in return for the [acceptance] [agreement], the Defendant intended to be influenced or rewarded for a transaction or series of transactions of [entity's name] involving something worth $5,000 or more; and

(5) the Defendant acted corruptly

To act "corruptly" means to act voluntarily, deliberately, and dishonestly to either accomplish an unlawful end or result or to use an unlawful method or means to accomplish an otherwise lawful end or result.

An "agent" is a person authorized to act on behalf of another person, organization, or a government and, in the case of an organization or government, includes a servant or employee, partner, officer, or director.

[A "government agency" is a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, bureau, and a corporation or other legal entity established and subject to control by a government or governments for the execution of a governmental or intergovernmental program.]

["Local" means of or pertaining to a political subdivision within a State.]

["State" means a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.]

"In any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

It is not necessary to prove that the Defendant's conduct directly affected the funds received by the [organization] [government] [agency] under the Federal program.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 666(a)(1)(B) and (b) provides:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists - -
>
> > (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof - -
> >
> > > (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more [shall be guilty of an offense against the United States].
>
> (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one-year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

Maximum Penalty: Ten (10) years imprisonment and applicable fine.

In *McDonnell v. United States*, 136 S. Ct. 2355 (2016), the Supreme Court held that, in prosecutions for bribery of public officials to influence official acts (18 U.S.C. § 201), district courts should clearly define the type of conduct that constitutes official acts. Depending upon the facts of a particular case, *McDonnell* could be applicable to a § 666 prosecution. The definition of official act is found in Offense Instruction 5.1 and 5.2.

In *United States v. Fischer*, 168 F.3d 1273 (11th Cir. 1999), *aff'd., Fischer v. United States*, 529 U.S. 667 (2000), the Court held that Medicare disbursements are "benefits" within the meaning of the statute, and that the Government is not required to prove a direct link between the federal assistance and the fraudulent conduct in issue.

O40.3
Aggravated Identity Theft
18 U.S.C. § 1028A(a)(1)

It's a Federal crime to commit aggravated identity theft.

The Defendant can be found guilty of aggravated identity theft only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant knowingly transferred, possessed, or used another person's [means of identification] [identification documents];

(2) without lawful authority; and

(3) during and in relation to [the eligible felony alleged in the indictment].

[A "means of identification" is any name or number used, alone or together with any other information, to identify a specific person, including a name, social security number, date of birth, officially issued driver's license or identification number, alien registration number, passport number, employer or taxpayer identification number, or electronic identification number or routing code. It can also include a fingerprint, voice print or other biometric data.]

[An "identification document" is a document made or issued by or for the United States Government, a state or foreign government or political subdivision.]

The Government must prove that the Defendant knew that the [means of identification] [identification documents], in fact, belonged to another actual person, [living or dead,] and not a fictitious person.

The Government must prove that the Defendant knowingly transferred, possessed, or used another person's identity "without lawful authority." The Government does not have to prove that the Defendant stole the [means of identification] [identification documents]. The Government is required to prove the Defendant transferred, possessed, or used the other person's [means of identification] [identification documents] for an unlawful or illegitimate purpose.

The Government also must prove that the [means of identification] [identification document] was possessed "during and in relation to" the crime alleged in the indictment. The phrase "during and in relation to" means that there must be a firm connection between the Defendant, the [means of identification] [identification documents], and the crime alleged in the indictment. The [means of identification] [identification documents] must have helped with some important function or purpose of the crime, and not simply have been there accidentally or coincidentally. The [means of identification] [identification documents] at least must facilitate, or have the potential of facilitating, the crime alleged in the indictment.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1028A(a)(1)provides:

> (a) Offenses. - -
>
> > (1) In general. - - Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers,

> possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

The definitions of "means of identification" and "identification document" are taken from 18 U.S.C. § 1028(d). The Committee has not included "telecommunication identifying information or access device" as a "means of identification," *see* 18 U.S.C. § 1028(d)(7)(D), because it is unlikely to occur often and otherwise creates confusion in the pattern instruction.

In *United States v. Zitron*, 810 F.3d 1253, 1260 (11th Cir. 2016) (per curiam), the Eleventh Circuit found that the defendant used the victim's identity "without lawful authority" in two ways: (1) the defendant did not have permission to use the victim's identity, and (2) the defendant used the victim's means of identification for an unlawful purpose. *See also United States v. Joseph*, 567 F. App'x 844, 848 (11th Cir. 2014) (per curiam) (unpublished).

The Supreme Court recently clarified the elements of an offense under § 1028A(a)(1), and held that it "requires the Government to show that the defendant *knew* that the 'means of identification' he or she unlawfully transferred, possessed, or used, in fact, belonged to 'another person.'" *Flores-Figueroa v. United States*, 556 U.S. 646, 657 (2009) (emphasis in original). This part of the holding is contrary to *United States v. Hurtado*, 508 F.3d 603 (11th Cir. 2007) (per curiam), in which the Eleventh Circuit had held that the Government was not required to show that the Defendant used identification documents that he knew had actually been assigned to another individual, as opposed to a fictitious person.

Hurtado's holding that § 1028A(a)(1) does not require the Government to prove that the defendant obtained another person's identification documents by "stealing" has not been overruled. *See id*. at 608. In other words, the phrase "without lawful authority" prohibits methods of obtaining another person's identification beyond stealing. *See id*.; *see also Flores-Figueroa*, 556 U.S. at 655 (noting that examples of identity theft identified in the legislative history of § 1028A include "dumpster diving," "accessing information that was originally collected for an authorized purpose," "hack[ing] into computers," and "steal[ing] paperwork likely to contain personal information" (citing H. R. Rep No. 108-528, at 4-5 (2004))).

Accordingly, the elements of this offense (as originally set forth in *Hurtado*) have been modified and combined, as the Supreme Court requires. *See also United States v. Gomez*, 580 F.3d 1229 (11th Cir. 2009).

O49
Kidnapping
18 U.S.C. § 1201(a)(1)

It's a Federal crime for anyone to kidnap [seize] [confine] [inveigle] [decoy] [abduct] [carry away] another person and then transport that person in interstate commerce.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant knowingly and willfully kidnapped [seized] [confined] [inveigled] [decoyed] [abducted] [carried away] the victim, [victim's name];

(2) the Defendant kidnapped [seized] [confined] [inveigled] [decoyed] [abducted] [carried away] the victim with the intent to secure a ransom, reward, or other benefit and held the victim for that reason; and

(3) the victim was willfully transported in interstate commerce while being kidnapped [seized] [confined] [inveigled] [decoyed] [abducted] [carried away], or the Defendant traveled in or used the mail or any means, facility, or instrumentality of interstate commerce in kidnapping [seizing] [confining] [inveigling] [decoying] [abducting] [carrying away] the victim or in furtherance of kidnapping the victim.

To "kidnap" a person means to forcibly and unlawfully hold, keep, detain, and confine that person against the person's will. Involuntariness or coercion related to taking and keeping the victim is an essential part of the crime.

[To "inveigle" a person means to lure, or entice, or lead the person to do something by making false representations or promises, or using other deceitful means.]

The Government doesn't have to prove that the Defendant committed the kidnapping for ransom or any kind of personal financial gain. It only has to prove that the Defendant intended to gain some benefit from the kidnapping.

"Interstate commerce" means business or travel between one state and another.

A person is "transported in interstate commerce" if the person is moved from one state to another, in other words, if the person crosses a state line.

The Government does not have to prove that the Defendant knew [he] [she] took the victim across a state line. It only has to prove the Defendant was intentionally transporting the victim.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1201(a)(1) provides:

> Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when the person is willfully transported in interstate or foreign commerce, regardless of whether the person was alive when transported across a State boundary, or the offender travels in interstate or foreign commerce or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense [shall be guilty of an offense against the United States].

Maximum Penalty: Imprisonment for any term of years or for life or if the death of any person results, shall be punished by death or life imprisonment.

The government does not have to prove that the kidnapping was committed for ransom or personal financial gain. *See United States v. Healy*, 376 U.S. 75, 82 (1964) (holding kidnapping does not have to be for a pecuniary or illegal benefit); *United States v. Griffin*, 547 F. App'x 917, 921-922 (11th Cir. 2013) (holding kidnapping for revenge and intimidation to be benefits in accordance with the "or otherwise" portion of 18 U.S.C. § 1201); *United States v. Lewis*, 115 F.3d 1531, 1536 (11th Cir. 1997) (holding kidnapping for companionship was sufficient to establish the defendant acted for a benefit); *United States v. Duncan*, 855 F.2d 1528, 1536 (11th Cir. 1988) ("The motivation of rape is admissible to show that the defendant kidnapped for a benefit, a required element of a § 1201 offense.").

An additional element, prompted by the *Apprendi* doctrine, is required when the indictment alleges that the kidnapping resulted in the death of a person and the prosecution is seeking the death penalty. If a disputed issue is whether a death resulted, the Court should consider giving a lesser included offense instruction.

Inveiglement or decoying someone across state lines is not in and of itself conduct proscribed by the federal kidnapping statute. "Inveiglement" becomes unlawful under the federal kidnapping statute, "when the alleged kidnapper interferes with his victim's action, exercising control over his victim through the willingness to use forcible action should his deception fail." *United States v. Boone*, 959 F.2d 1550, 1555 n.5 (11th Cir. 1992). However, the mere fact that physical force was not ultimately necessary does not take such conduct outside of the statute. *See id*. at 1556.

See United States v. Lewis, 115 F.3d 1531, 1535 (11th Cir. 1997) (setting forth elements of crime of kidnapping and transporting in interstate commerce under 18 U.S.C. § 1201): "(1) the transportation in interstate commerce (2) of an unconsenting person who is (3) held for ransom, reward, or otherwise, (4) with such acts being done knowingly and willfully." "Knowledge of crossing state lines is not an essential element… The requirement that an offender cross state lines merely furnishes a basis for the exercise of federal jurisdiction." *Id*.; *United States v. Broadwell*, 870 F.2d 594, 601 n.16 (11th Cir. 1989) (recognizing that crime of kidnapping is complete upon transportation across state lines).

Note that Section 1201 also sets out four other jurisdictional circumstances in subparts (a)(2) through (a)(5), and this instruction will need to be modified to fit those if the charge is not under subpart (a)(1).

O50.2
Mail Fraud:
Depriving Another of an Intangible
Right of Honest Services
18 U.S.C. §§ [1341] and 1346
Public Official/Public Employee

It's a Federal crime to use [the United States mail] [a private or commercial interstate carrier] to carry out a scheme to fraudulently deprive someone else of a right to honest services.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant knowingly devised or participated in a scheme to fraudulently deprive the public of the right to honest services of the Defendant through bribery or kickbacks;

(2) the Defendant did so with an intent to defraud the public of the right to the Defendant's honest services; and

(4) the Defendant used [the United States Postal Service by mailing or by causing to be mailed] [a private or commercial interstate carrier by depositing or causing to be deposited with the carrier or transmitting or causing to be transmitted] some matter, communication or item to carry out the scheme to defraud.

A "scheme" means any plan or course of action intended to deceive or cheat someone.

To "deprive someone else of the right of honest services" is to violate a duty to provide honest services to the public by participating in a bribery or kickback scheme.

Public officials and public employees have a duty to the public to provide honest services. If an [official] [employee] does something or makes a decision that serves the [official's] [employee's] personal interests by taking or soliciting a bribe or kickback, the official or employee defrauds the public of honest services, even if the public agency does not suffer any monetary loss.

Bribery and kickbacks involve the exchange of a thing or things of value for an official act by a public official. Bribery and kickbacks also include solicitations of things of value in exchange for an official act, even if the thing of value is not accepted or the official act is not performed. That is, bribery and kickbacks include the public [official's] [employee's] solicitation or agreement to accept something of value, whether tangible or intangible, in exchange for an official act, whether or not the payor actually provides the thing of value, and whether or not the public official or employee ultimately performs the requested official act or intends to do so.

To qualify as an official act, the public official must have [made a decision or taken an action] [agreed to make a decision or take an action] on a question, matter, cause, suit, proceeding, or controversy. Further, the question, matter, cause, suit, proceeding, or controversy must involve the formal exercise of governmental power. It must be similar in nature to a lawsuit before a court, a determination

before an agency, or a hearing before a committee. It must also be something specific which requires particular attention by a public official.

The public official's [decision or action] [agreement to make a decision or take an action] on that question, matter, cause, suit, proceeding, or controversy may include using [his/her] official position to exert pressure on another official to perform an official act, or to advise another official, knowing or intending that such advice will form the basis for an official act by another official. But setting up a meeting, talking to another official, or organizing an event (or agreeing to do so) – without more – is not an official act.

[It is not necessary that the public official *actually* make a decision or take an action. It is enough that [he/she] agrees to do so. The agreement need not be explicit, and the public official need not specify the means [he/she] will use to perform [his/her] end of the bargain. Nor must the public official in fact intend to perform the official act, so long as [he/she] agrees to do so.]

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive someone, usually for personal financial gain or to cause financial loss to someone else. [A "private or commercial interstate carrier" includes any business that transmits, carries, or delivers matters, communications or items from one state to or through another state. It doesn't matter whether a matter,

communication or item actually moves from one state to or through another as long as the matter, communication or item is delivered to the carrier.]

The Government does not have to prove all the details alleged in the indictment about the precise nature and purpose of the scheme. The Government doesn't have to prove the matter, communication or item [mailed] [deposited with or transmitted by an interstate carrier] was itself false or fraudulent; or that the use of the [mail] [interstate carrier] was intended as the specific or exclusive way to carry out the alleged fraud; or that the Defendant actually [mailed] [deposited] [transmitted] the matter, communication or item. And the Government doesn't have to prove that the alleged scheme actually succeeded in defrauding anyone.

To "cause" [the mail] [an interstate carrier] to be used is to do an act knowing that the use of [the mail] [an interstate carrier] will follow in the ordinary course of business or where that use can reasonably be expected to follow.

Each separate use of [the mail] [an interstate carrier] as a part of the scheme to defraud is a separate crime.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post-office or authorized depository for mail matter, any matter or thing

> whatever to be sent or delivered by the Postal Service [by any private or commercial interstate carrier] [shall be guilty of an offense against the laws of the United States].

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

18 U.S.C. § 1346 provides:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

This instruction is prepared for mail fraud involving the "right of honest services," but may be modified to fit the other types of fraud.

In addition to property rights, the statute protects the intangible right to honest services as a result of the addition of 18 U.S.C. § 1346 in 1988. The Supreme Court had ruled in *McNally v. United States*, 483 U.S. 350, 360 (1987), that Section 1341 was limited in scope to the protection of property rights and did not prohibit schemes to defraud citizens of their intangible right to honest and impartial government. Thus, Congress passed Section 1346 to overrule *McNally* and reinstate prior law. Defrauding one of honest services typically involves government officials depriving their constituents of honest governmental services. Such "public sector" fraud falls into two categories: first, "a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud;" second, "an individual without formal office may be held to be a public fiduciary if others rely on him because of a special relationship in the government and he in fact makes governmental decisions." *United State v. deVegter*, 198 F.3d 1324, 1328 n.3 (11th Cir. 1999) (quoting *McNally* and addressing wire fraud); *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (addressing mail fraud). Public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest. "If the official instead secretly makes his decision based on his own personal interests - - as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest - - the official has defrauded the public of his honest services." *Lopez-Lukis*, 102 F.3d at 1169.

In *Skilling v. United States*, 561 U.S. 358, (2010), the Supreme Court interpreted 18 U.S.C. § 1346 to criminalize only schemes to defraud that are based on bribes and kickbacks. The definition of "official act" is taken from *McDonnell v. United States*, 136 S. Ct. 2355 (2016), and should be used when the predicate bribery or kickback is based on the federal bribery statute, 18 U.S.C. § 201. However, there is authority that honest services fraud prosecutions can be based on state law bribery offenses. *See United States v. Teel*, 691 F.3d 578, 584 (5th Cir. 2012); *United States v. Sanchez*, 502 F. App'x 375, 381 (5th Cir. 2012). In that event, *McDonnell*'s definition of official act may not be

applicable. However, courts should be aware that the Supreme Court in *McDonnell* rejected the argument that the honest services statute is unconstitutionally vague because the application of the bribery statute's official act requirement cured any vagueness concerns. Thus, an instruction that does not precisely define the type of conduct that can give rise to the offense could be problematic.

In a public sector honest services fraud case involving a bribe, the Eleventh Circuit appears to have held that materiality is not an element of the offense. *United States v. Langford*, 647 F.3d 1309, 1321 n.7 (11th Cir. 2011). The Committee believes this to be the correct approach; if a public official or employee accepts a bribe or kickback, the breach of fiduciary duty is inherently material. Accordingly, the pattern charge does not include a materiality element. Nevertheless, the Supreme Court has held that materiality is an essential element of the crimes of mail fraud, wire fraud and bank fraud and must be decided by the jury. *Neder v. United States*, 527 U.S. 1, 25 (1999). Because honest services fraud is a species of mail and wire fraud, this has led some circuits to hold that materiality is an element of honest services fraud. If a materiality element is included, the Committee suggests the following: the scheme to defraud had a natural tendency to influence, or was capable of influencing, a decision or action by the Defendant's employer.

O70.2
Interference with Commerce by Extortion
Hobbs Act: Racketeering
(Color of Official Right)
18 U.S.C. § 1951(a)

It's a Federal crime to extort something from someone else and in doing so to obstruct, delay, or affect interstate commerce.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant caused [person's name] to part with property;

(2) the Defendant did so knowingly by using extortion under color of official right; and

(3) the extortionate transaction delayed, interrupted, or affected interstate commerce.

"Property" includes money, other tangible things of value, and intangible rights that are a source or element of income or wealth.

"Extortion under color of official right" is the wrongful taking or receipt of money or property by a public officer who knows that the money or property was taken or received in return for [doing] [not doing] an official act. It does not matter whether or not the public officer employed force, threats, or fear. To qualify as an official act, the public official must have [made a decision or taken an action] [agreed to make a decision or take an action] on a question, matter, cause, suit, proceeding, or controversy.

Further, the question, matter, cause, suit, proceeding, or controversy must involve the formal exercise of governmental power. It must be similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. It must also be something specific which requires particular attention by a public official.

The public official's [decision or action] [agreement to make a decision or take an action] on that question, matter, cause, suit, proceeding, or controversy may include using [his/her] official position to exert pressure on another official to perform an official act, or to advise another official, knowing or intending that such advice will form the basis for an official act by another official. But setting up a meeting, talking to another official, or organizing an event (or agreeing to do so) – without more – is not an official act.

[It is not necessary that the public official *actually* make a decision or take an action. It is enough that [he/she] agrees to do so. The agreement need not be explicit, and the public official need not specify the means [he/she] will use to perform [his/her] end of the bargain. Nor must the public official in fact intend to perform the official act, so long as [he/she] agrees to do so.]

"Wrongful" means to get property unfairly and unjustly because the person has no lawful claim to it.

"Interstate commerce" is the flow of business activities between one state and anywhere outside of that state.

The Government doesn't have to prove that the Defendant specifically intended to affect interstate commerce in any way. But it must prove that the natural consequences of the acts described in the indictment would be to somehow delay, interrupt, or affect interstate commerce. If you decide that there would be any effect at all on interstate commerce, then that is enough to satisfy this element. The effect can be minimal.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1951(a) provides:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce,… by extortion [shall be guilty of an offense against the United States].

18 U.S.C. § 1951(b)(2) provides:

> The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

In *United States v. Martinez*, 14 F.3d 543 (11th Cir. 1994), the Eleventh Circuit acknowledged that a Hobbs Act conviction for extortion under color of official right requires proof of a quid pro quo. *See Evans v. United States*, 504 U.S. 255, 112 S. Ct. 1881, 119 L. Ed. 2d 57 (1992); *McCormick v. United States*, 500 U.S. 257, 111 S. Ct. 1807, 114 L. Ed. 2d 307 (1991). Fulfillment of the quid pro quo is not an element of the offense. The quo in a Hobbs Act extortion under color of official right prosecution is doing or not doing or agreeing to do or not do an official act. The definition of official act is taken from *McDonnell v. United States*, 136 S. Ct. 2355 (2016).

In *United States v. Kaplan*, 171 F.3d 1351, 1356-58 (11th Cir. 1999), the Eleventh Circuit held that under § 1951 the affect on commerce need not be adverse. The effect on commerce can involve activities that occur outside of the United States. *See*, *e.g.*, *Kaplan*, 171 F.3d at 1355-58 (use of interstate communication facilities and claimed travel to carry out extortion scheme's object, which was the movement of substantial funds from Panama to Florida, constituted sufficient affect under § 1951).

The commerce nexus for an attempt or conspiracy under § 1951 can be shown by evidence of a potential impact on commerce or by evidence of an actual, de minimis impact on commerce. *Kaplan*, 171 F.3d at 1354 (citations omitted). In the case of a substantive offense, the impact on commerce need not be substantial; it can be minimal. *See id.; see also United States v. Le*, 256 F.3d 1229 (11th Cir. 2001); *U.S. v. Verbitskaya*, 405 F.3d 1324 (11th Cir. 2005) (jurisdictional element can be met simply by showing this crime had a minimal effect on commerce); *U.S. v. White*, No. 07-11793, 2007 U.S. App. LEXIS 27819 (11th Cir. Nov. 29, 2007) (jurisdictional element can be met simply by showing this crime had a minimal effect on commerce); *U.S. v. Mathis*, 186 F. App'x 971 (11th Cir. 2006); *U.S. v. Stamps*, 201 Fed. Appx. 759 (11th Cir. 2006).

In *U.S. v. Taylor*, 480 F.3d 1025 (11th Cir. 2007), the Eleventh Circuit held that the jurisdictional element is met even when the object of a planned robbery (i.e. drugs in a sting operation) or its victims are fictional.

O82
Sexual Exploitation of Children
Producing Child Pornography
18 U.S.C. § 2251(a)

It's a Federal crime for any person [to employ, use, persuade, induce, entice, or coerce a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of the conduct] [to have a minor assist any other person to engage in sexually explicit conduct for the purpose of producing a visual depiction of the conduct] [to transport any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that the minor engage in sexually explicit conduct for the purpose of producing any visual depiction of the conduct], if [the person knows or has reason to know that the visual depiction will be transported in interstate or foreign commerce or mailed] [the visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer] [the visual depiction has been transported in interstate or foreign commerce, or mailed].

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) an actual minor, that is, a real person who was less than 18 years old, was depicted;

(2) the Defendant [employed] [used] [persuaded] [induced] [enticed] [coerced] the minor to engage in sexually explicit conduct for the

purpose of producing a [visual depiction, e.g., video tape] of the conduct;

OR

the Defendant had the minor assist any other person to engage in sexually explicit conduct for the purpose of producing a [visual depiction, e.g., video tape] of the conduct;

OR

the Defendant transported the minor [in interstate commerce] [in foreign commerce] [in any Territory or Possession of the United States], with the intent that such minor engage in sexually explicit conduct for the purpose of producing a [visual depiction, e.g., video tape] of the conduct; and

(3) either (a) the Defendant knew or had reason to know that the [visual depiction, e.g., video tape] would be mailed or transported in interstate or foreign commerce; (b) the [visual depiction, e.g., video tape] was produced using materials that had been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer; or (c) the [visual depiction, e.g., video tape] was mailed or actually transported in interstate or foreign commerce.

While the Government must prove that a purpose of the sexually explicit conduct was to produce a visual depiction, it need not be Defendant's only or dominant purpose.

The term "interstate or foreign commerce" means the movement of a person or property from one state to another state or from one state to another country. The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States. [It is not

necessary for the Government to prove that the Defendant knew that the [visual depiction] [materials used to produce the visual depiction] had moved in interstate or foreign commerce.]

The term "minor" means any person who is less than 18 years old.

The term "producing" means producing, directing, manufacturing, issuing, publishing, or advertising.

[The term "computer" means an electronic, magnetic, optical, electrochemical, or other high-speed data-processing device performing logical, arithmetic, or storage functions, and includes any data-storage facility or communications facility directly related to or operating in conjunction with that device, but the term does not include an automated typewriter or typesetter, a portable hand-held calculator, or similar devices that are limited in function to only word-processing or mathematical calculations.]

The term "visual depiction" includes undeveloped film and videotape, and data stored on a computer disk or by any other electronic means that can be converted into a visual image.

The term "sexually explicit conduct" means actual or simulated:

- sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
- bestiality;

- masturbation;
- sadistic or masochistic abuse; or
- lascivious exhibition of the genitals or pubic area of any person.

"Lascivious exhibition" means indecent exposure of the genitals or pubic area, usually to incite lust. Not every exposure is a lascivious exhibition.

To decide whether a visual depiction is a lascivious exhibition, you must consider the context and setting in which the genitalia or pubic area is being displayed. Factors you may consider include:

- the overall content of the material;
- whether the focal point of the visual depiction is on the minor's genitalia or pubic area;
- whether the setting of the depiction appears to be sexually inviting or suggestive – for example, in a location or in a pose associated with sexual activity;
- whether the minor appears to be displayed in an unnatural pose or in inappropriate attire;
- whether the minor is partially clothed or nude;
- whether the depiction appears to convey sexual coyness or an apparent willingness to engage in sexual activity; and
- whether the depiction appears to have been designed to elicit a sexual response in the viewer.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 2251(a) provides:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

Maximum Penalty: Thirty (30) years and applicable fine. Minimum sentence is fifteen (15) years. For those who have previously been convicted of specified sex crimes, the maximum is fifty (50) years and the minimum is twenty-five (25) years. 18 U.S.C. § 2251(e). For registered sex offenders, the sentence is enhanced by ten (10) years. 18 U.S.C. § 2260A.

Note that 1998 amendment to § 2252 added subsection (c) allowing certain affirmative defenses.

Definition of the relevant terms is taken from 18 U.S.C. § 2256.

18 U.S.C. § 2260A provides for an enhanced sentence for persons required to register as sex offenders. 18 U.S.C. § 2251(e) provides for an enhanced sentence for those individuals who have previously been convicted of certain specified sex crimes. 18 U.S.C. § § 3559 provides for mandatory life imprisonment for repeated sex offenses against children.

Neither knowledge of the age of the minor nor knowledge of the interstate nexus is a required element of the crime. *United States v. Deverso*, 518 F.3d 1250, 1257 (11th Cir. 2008); *United States v. Smith*, 459 U.S. 1276, 1289 (11th Cir. 2006). In *Deverso*, the Eleventh Circuit found that the trial court did not err in declining to give a "mistake of age defense" jury instruction. *Deverso*, 518 F.3d at 1257.

In *United States v. Smith*, 459 F.3d 1276, 1296 n.17 (11th Cir. 2006), the Eleventh Circuit noted that the district court instructed the jury that answering the question whether conduct was "lascivious exhibition" involved consideration of "whether the setting of the depiction is such as to make it appear to be sexually inviting or suggestive, for example in a location or in a pose associated with sexual activity… and whether the depiction has been designed to elicit a sexual response in the viewer."

The Eleventh Circuit quoted the dictionary definition of "lascivious" as "exciting sexual desires; salacious." *United States v. Williams*, 444 F.3d 1286, 1299 (11th Cir. 2006), *rev'd on other grounds*, 553 U.S. 285, 128 S. Ct. 1830 (2008). The court also noted: "What exactly constitutes a forbidden "lascivious exhibition of the genitals or pubic area" and how that differs from an innocuous photograph of a naked child (e.g., a family photograph of a child taking a bath, or an artistic masterpiece portraying a naked child model) is not concrete… While the pictures needn't always be "dirty" or even nude depictions to qualify, screening materials through the eyes of a neutral fact finder limits the potential universe of objectionable images." *Id*. The court further noted that most lower courts have embraced the six-factor "lascivious exhibition" test articulated in *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986):

> (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
>
> (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
>
> (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
>
> (4) whether the child is fully or partially clothed, or nude;
>
> (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
>
> (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

The *Dost* court also observed that "a visual depiction need not involve all of these factors to be a 'lascivious exhibition of the genitals or pubic area.' The determination will have to be made based on the overall content of the visual depiction, taking into account the age of the minor." *Id*.

The Eleventh Circuit has held that producing a visual depiction need only be *a* purpose of the sexually explicit conduct; it need not be the sole or dominant purpose. *United States v. Miller*, 819 F.3d 1314 (11th Cir. 2016); *United States v. Lebowitz*, 676 F.3d 1000 (11th Cir. 2012).