FILED
ELEVENTH CIRCUIT
JUDICIAL COUNCIL
AUG. 05 2026
CIRCUIT EXECUTIVE

Before the

# Judicial Council of the Eleventh Circuit

## RESOLUTION

Before: WILLIAM PRYOR, JORDAN, ROSENBAUM, JILL PRYOR, NEWSOM, BRANCH, GRANT, LUCK, and BRASHER, Circuit Judges*; ALTONAGA, HOWARD, HAIKALA, MAY, GARDNER, BEAVERSTOCK, BAKER, WINSOR, and HUFFAKER, Chief District Judges.

RESOLVED, that on July 21, 2026, the Judicial Council approved the following revisions to the Pattern Jury Instructions, Criminal Cases:

### OFFENSE INSTRUCTIONS - REVISIONS

| | |
|---|---|
| O82 | Sexual Exploitation of Children: Producing/Transmitting Visual Depiction of Sexually Explicit Conduct, 18 U.S.C. § 2251(a) |
| O82.1 | Sexual Exploitation of Children: Advertising Visual Depiction of Sexually Explicit Conduct, 18 U.S.C. § 2251(d) |
| O83.1 | Sexual Exploitation of Minors: Transporting or Shipping Visual Depiction Involving Sexual Exploitation of Minors, 18 U.S.C. § 2252(a)(1) |
| O83.2A | Sexual Exploitation of Minors: Receiving or Distributing Visual Depiction Involving Sexual Exploitation of Minors, 18 U.S.C. § 2252(a)(2) [Previously O83.2] |
| O83.3A | Child Pornography: Mailing, Transporting, or Shipping (Visual Depiction of Actual Minor as Defined in 18 U.S.C. § 2256(8)(A), (C)), 18 U.S.C. § 2252A(a)(1) |
| O83.3B | Child Pornography: Mailing, Transporting, or Shipping (Computer or Digital Image that Appears Indistinguishable from Actual Minor but may not be of an Actual Person as Defined in 18 U.S.C. § 2256(8)(B)), 18 U.S.C. § 2252A(a)(1) |

* Circuit Judge Barbara Lagoa took no part in this decision.

O83.4A Child Pornography: Receiving or Distributing (Visual Depiction of Actual Minor as Defined in 18 U.S.C. § 2256(8)(A), (C)), 18 U.S.C. § 2252A(a)(2)(A))

O83.4B Child Pornography: Receiving or Distributing (Computer or Digital Image that Appears Indistinguishable from Actual Minor but may not be of an Actual Person as Defined in 18 U.S.C. § 2256(8)(B)), 18 U.S.C. § 2252A(a)(2)(A)

OFFENSE INSTRUCTIONS - NEW

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O83.2C Sexual Exploitation of Minors: Selling or Possessing with Intent to Sell Visual Depiction Involving Sexual Exploitation of Minors, 18 U.S.C. § 2252(a)(3)(B)

O83.2D Sexual Exploitation of Minors: Possessing or Accessing with Intent to View Visual Depiction Involving Sexual Exploitation of Minors, 18 U.S.C. § 2252(a)(4)(B)

O83.5A Child Pornography: Possessing or Accessing with Intent to View (Visual Depiction of Actual Minor as Defined in 18 U.S.C. § 2256(8)(A), (C)), 18 U.S.C. § 2252A(a)(5)(B)

O83.5B Child Pornography: Possessing or Accessing with Intent to View (Computer or Digital Image that Appears Indistinguishable from Actual Minor but may not be of an Actual Person as Defined in 18 U.S.C. § 2256(8)(B)), 18 U.S.C. § 2252A(a)(5)(B)

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. This resolution shall not be construed as an adjudicative approval of the content of these revisions or of any other instructions, which must await case-by-case review by the Court.

FOR THE JUDICIAL COUNCIL:

/s/ William H. Pryor Jr.
Chief Judge

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O101.1 Withdrawal as a Defense to Conspiracy - Quantity of Drugs

O101.2 Withdrawal as a Defense to Conspiracy Based on the Statute of Limitations

O102.1 Controlled Substances: Continuing Criminal Enterprise 21 U.S.C. § 848

O102.2 Controlled Substances: Continuing Criminal Enterprise - Murder 21 U.S.C. § 848(e)

O103 Possession of Controlled Substance Near Schools or Public Housing 21 U.S.C. § 860

O104 Controlled Substances: Importation 21 U.S.C. § 952(a)

O105 Possession or Transfer of Non-Tax-Paid Distilled Spirits 26 U.S.C. §§ 5604(a)(1) & 5301(d)

O106.1 Possession or Unregistered Firearm 26 U.S.C. § 5861(d)

O106.2 Possession of Firearm having Altered or Obliterated Serial Number 26 U.S.C. § 5861(h)

O106.3 Possession or Receipt of Firearm not Identified by a Serial Number 26 U.S.C. § 5861(i)

O107.1 Tax Evasion: General Charge 26 U.S.C. § 7201

O107.2 Net Worth Method

O107.3 Bank-Deposits Method

O107.4 Cash Expenditures Method

O108 Failure to File a Tax Return 26 U.S.C. § 7203

O109.1 Filing a False Tax-Related Document 26 U.S.C. § 7206(1)

O109.2 Aiding or Assisting in Preparation of False Documents Under Internal Revenue Laws 26 U.S.C. § 7206(2)

O110 False Tax Return, List, Account, or Statement 26 U.S.C. § 7207

O111 Impeding Internal Revenue Service - Omnibus Clause 26 U.S.C. § 7212(a)

O112 Evading a Currency-Transaction Reporting Requirement by Structuring Transaction 31 U.S.C. § 5324(a)(3)

O113 Knowingly Discharge Pollutant in Violation of the Clean Water Act 33 U.S.C. §§ 1311(a) & 1319(c)(2)(A)

O114 Fraudulent Receipt of V.A. Benefits 38 U.S.C. § 6102(b)

O115 Falsely Representing a Social Security Number 42 U.S.C. § 408(a)(7)(B)

**O116 Forceful Intimidation Because of Race: Occupancy of Dwelling (No Bodily Injury) 42 U.S.C. § 3631**

**O117.1 Controlled Substances: Possession on Vessel of the United States or Subject to the Jurisdiction of the United States 46 U.S.C. § 70503(a)**

**O117.2 Controlled Substances: Possession on Vessel by United States Citizen or Resident Alien 46 U.S.C. § 70503(a)**

**O118 Assaulting or Intimidating a Flight Crew of an Aircraft in United States without Dangerous Weapon 49 U.S.C. § 46504**

**O119 Attempting to Board Air Craft with Concealed Weapon or Explosive Device 49 U.S.C. § 46505(b)**

**O120 Procurement of Citizenship or Naturalization Unlawfully 18 U.S.C. § 1425**

**TRIAL INSTRUCTIONS**

**T1.1 Cautionary Instruction Similar Acts Evidence (Rule 404(b), Fed. R. Evid.)**

**T1.2 Cautionary Instruction Similar Acts Evidence - Identity (Rule 404(b), Fed. R. Evid.)**

**T2 Witness's Prior Statement or Testimony Explanatory Instruction**

**T3 Explanatory Instruction - Transcript of Tape Recorded Conversation**

**T4 Explanatory Instruction Role of the Interpreter**

**T5 Modified Allen Charge**

**T6 Forfeiture Proceedings (To be given before supplemental evidentiary proceedings or supplemental arguments of counsel)**

**P1**
**Preliminary Instructions – Criminal Cases**

Members of the Jury:

Now that you have been sworn, I need to explain some basic principles about a criminal trial and your duty as jurors. These are preliminary instructions. At the end of the trial, I will give you more detailed instructions.

Duty of jury:

It will be your duty to decide what happened so you can determine whether the defendant is guilty or not guilty of the crime charged in the indictment. At the end of the trial, I will explain the law that you must follow to reach your verdict. You must follow the law as I explain it to you even if you do not agree with the law.

What is evidence:

You must decide the case solely on the evidence presented here in the courtroom. Evidence can come in many forms. It can be testimony about what someone saw or heard or smelled. It can be an exhibit admitted into evidence. It can be someone's opinion. Some evidence proves a fact indirectly, such as a witness who saw wet grass outside and people walking into the courthouse carrying wet umbrellas. Indirect evidence, sometimes called circumstantial evidence, is simply a chain of circumstances that proves a fact. As far as the law is concerned, it makes no difference whether evidence is direct or indirect. You may

choose to believe or disbelieve either kind and should give every piece of evidence whatever weight you think it deserves.

What is not evidence:

Certain things are not evidence and must not be considered. I will list them for you now:

- Statements and arguments of the lawyers. In their opening statements and closing arguments, the lawyers will discuss the case, but their remarks are not evidence;
- Questions and objections of the lawyers. The lawyers' questions are not evidence. Only the witnesses' answers are evidence. You should not think that something is true just because a lawyer's question suggests that it is. For instance, if a lawyer asks a witness, "you saw the defendant hit his sister, didn't you?" – that question is no evidence whatsoever of what the witness saw or what the defendant did, unless the witness agrees with it.

There are rules of evidence that control what can be received into evidence. When a lawyer asks a question or offers an exhibit and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, then the question may be answered or the exhibit received. If I sustain the objection, then the question cannot be answered, and the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and not try to guess what the answer would have been.

Sometimes I may order that evidence be stricken and that you disregard or ignore the evidence. That means that when you are deciding the case, you must not consider that evidence.

Some evidence is admitted only for a limited purpose. When I instruct you that an item of evidence has been admitted for a limited purpose, you must consider it only for that limited purpose and no other.

Credibility of witnesses:

In reaching your verdict, you may have to decide what testimony to believe and what testimony not to believe. You may believe everything a witness says, or part of it, or none of it. In considering the testimony of any witness, you may take into account:

- The opportunity and ability of the witness to see or hear or know the things testified to;
- The witness's memory;
- The witness's manner while testifying;
- The witness's interest in the outcome of the case and any bias or prejudice;
- Whether other evidence contradicted the witness's testimony;
- The reasonableness of the witness's testimony in light of all the evidence; and
- Any other factors that bear on believability.

I will give you additional guidelines for determining credibility of witnesses at the end of the case.

Rules for criminal cases:

As you know, this is a criminal case. There are three basic rules about a criminal case that you must keep in mind.

First, the defendant is presumed innocent until proven guilty. The indictment against the defendant brought by the government is only an accusation, nothing more. It is not proof of guilt or anything else. The defendant therefore starts out with a clean slate.

Second, the burden of proof is on the government until the very end of the case. The defendant has no burden to prove [his/her] innocence or to present any evidence, or to testify. Since the defendant has the right to remain silent and may choose whether to testify, you cannot legally put any weight on a defendant's choice not to testify. It is not evidence.

Third, the government must prove the defendant's guilt beyond a reasonable doubt. I will give you further instructions on this point later, but bear in mind that the level of proof required is high.

Conduct of the jury:

Our law requires jurors to follow certain instructions regarding their personal conduct in order to help assure a just and fair trial. I will now give you those instructions:

> 1. Do not talk, either among yourselves or with anyone else, about anything related to the case. You may tell the people with whom you live and your employer that you are a juror and give them information about when you will be required to be in court, but you may not discuss with them or anyone else anything related to the case.

2. Do not, at any time during the trial, request, accept, agree to accept, or discuss with any person, any type of payment or benefit in return for supplying any information about the trial.

3. You must promptly tell me about any incident you know of involving an attempt by any person to improperly influence you or any member of the jury.

4. Do not visit or view the premises or place where the charged crime was allegedly committed, or any other premises or place involved in the case. And you must not use Internet maps or Google Earth or any other program or device to search for a view of any location discussed in the testimony.

5. Do not read, watch, or listen to any accounts or discussions related to the case which may be reported by newspapers, television, radio, the Internet, or any other news media.

6. Do not attempt to research any fact, issue, or law related to this case, whether by discussions with others, by library or Internet research, or by any other means or source.

In this age of instant electronic communication and research, I want to emphasize that in addition to not talking face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages, email, Internet chat, chat rooms, blogs, encrypted-communication apps, or social-networking websites and apps. You may not use any similar social-media technology, even if I have not specifically mentioned it here.

You must not provide any information about the case to anyone by any means whatsoever, and that includes posting information about the case, or what you are doing in the case, on any device or Internet site, including blogs, chat rooms, social websites, or any other means.

You also must not use Google or otherwise search for any information about the case, or the law that applies to the case, or the people involved in the case, including the defendant, the witnesses, the lawyers, or the judge. It is important that you understand why these rules exist and why they are so important:

Our law does not permit jurors to talk with anyone else about the case, or to permit anyone to talk to them about the case, because only jurors are authorized to render a verdict. Only you have been found to be fair and only you have promised to be fair – no one else is so qualified.

Our law also does not permit jurors to talk among themselves about the case until the court tells them to begin deliberations, because premature discussions can lead to a premature final decision.

Our law also does not permit you to visit a place discussed in the testimony. First, you can't be sure that the place is in the same condition as it was on the day in question. Second, even if it were in the same condition, once you go to a place discussed in the testimony to evaluate the evidence in light of what you see, you become a witness, not a juror. As a witness, you may now have a mistaken view of the scene that neither party may have a chance to correct. That is not fair.

Finally, our law requires that you not read or listen to any news accounts of the case, and that you not attempt to research any fact, issue, or law related to the case. Your decision must be based solely on the testimony and other evidence

presented in this courtroom. Also, the law often uses words and phrases in special ways, so it's important that any definitions you hear come only from me, and not from any other source. It wouldn't be fair to the parties for you to base your decision on some reporter's view or opinion, or upon other information you acquire outside the courtroom.

These rules are designed to help guarantee a fair trial, and our law accordingly sets forth serious consequences if the rules are not followed. I trust that you understand and appreciate the importance of following these rules, and in accord with your oath and promise, I know you will do so.

Taking notes:

Moving on now, if you wish, you may take notes to help you remember what witnesses said. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. Do not let note-taking distract you so that you do not hear other answers by witnesses. When you leave the courtroom, your notes should be left in the jury room. Whether or not you take notes, you should rely on your own memory of what was said. Notes are to assist your memory only. They are not entitled to any greater weight than your memory or impression about the testimony.

Separate consideration for each defendant:

Although the defendants are being tried together, you must give separate consideration to each defendant. In doing so, you must determine which evidence in the case applies to a particular defendant and disregard any evidence admitted solely against some other defendant[s]. The fact that you may find one of the defendants guilty or not guilty should not control your verdict as to any other defendant[s].

Course of the trial:

The trial will now begin. First, the government will make an opening statement, which is simply an outline to help you understand the evidence as it comes in. Next, the defendant's attorney may, but does not have to, make an opening statement. Opening statements are neither evidence nor argument.

The government will then present its witnesses, and counsel for the defendant may cross-examine them. Following the government's case, the defendant may, if [he/she] wishes, present witnesses whom the government may cross-examine. After all the evidence is in, the attorneys will present their closing arguments to summarize and interpret the evidence for you, and I will instruct you on the law. After that, you will go to the jury room to decide your verdict.

**ANNOTATIONS AND COMMENTS**

No annotations associated with this instruction.

**P2**
**Preliminary and Explanatory Instructions to Innominate (Anonymous) Jury**

Before selecting jury members, I'll tell you about something that affects how a jury is selected and how a trial is conducted.

Sometimes criminal trials attract the attention of the media and the public. The level of interest is unpredictable and not within my control. This case involves several defendants and may continue for some time. It may attract an unusual amount of attention, so there may be curiosity about the participants – the lawyers, witnesses, defendants, judge, and perhaps even the jurors.

People may ask questions to learn more about the case. Even though these questions may be well-intentioned, they may still distract you from your duties as a juror. These questions can be awkward or inconvenient for you, your family, and your friends. They can be part of unwanted and improper approaches toward you from outside the courtroom.

During your service as a juror, you must not discuss this case with anyone. And even after the case is finished, you will never be required to explain your verdict or jury service to anyone.

Your names and personal information will be known only to court personnel and will not be disclosed.

To discourage unwanted publicity, telephone calls, letters, and questions, you will be referred to only by your juror number.

**ANNOTATIONS AND COMMENTS**

The term "innominate" jury (in preference to anonymous jury) is taken from United States v. Ippolito, 10 F. Supp. 1305, 1307 n.1 (M.D. Fla. 1998), as approved in United States v. Carpa, 271 F.3d 962 (11th Cir. 2001) (reversing in part on other grounds).

The selection of an innominate jury is a "drastic measure" but is an approved technique in this Circuit when circumstances warrant. United States v. Ross, 33 F.3d 1507, 1419-1522 (11th Cir. 1994). See also, United States v. Salvatore, 110 F.3d 1131, 1143-1144 (5th Cir. 1997).

**B1**
**Face Page - Introduction**

UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____
_____ DIVISION

UNITED STATES OF AMERICA

CASE NO. <CASE NO.>

-vs-

<Defendant's Name>

COURT'S INSTRUCTIONS
TO THE JURY

Members of the Jury:

It's my duty to instruct you on the rules of law that you must use in deciding this case. After I've completed these instructions, you will go to the jury room and begin your discussions – what we call your deliberations.

You must decide whether the Government has proved the specific facts necessary to find the Defendant guilty beyond a reasonable doubt.

**ANNOTATIONS AND COMMENTS**

No annotations associated with this instruction.

## B2.1
## The Duty to Follow Instructions And the Presumption of Innocence

Your decision must be based only on the evidence presented here. You must not be influenced in any way by either sympathy for or prejudice against the Defendant or the Government.

You must follow the law as I explain it – even if you do not agree with the law – and you must follow all of my instructions as a whole. You must not single out or disregard any of the Court's instructions on the law.

The indictment or formal charge against a defendant isn't evidence of guilt. The law presumes every defendant is innocent. The Defendant does not have to prove [his] [her] innocence or produce any evidence at all. The Government must prove guilt beyond a reasonable doubt. If it fails to do so, you must find the Defendant not guilty.

**ANNOTATIONS AND COMMENTS**

*In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368 (1970) (The due process clause protects all criminal defendants "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); see also *Harvell v. Nagle*, 58 F.3d 1541, 1542 (11th Cir. 1995), *reh'g denied*, 70 F.3d 1287 (11th Cir. 1995).

## B2.2
## The Duty to Follow Instructions and the Presumption of Innocence When a Defendant Does Not Testify

Your decision must be based only on the evidence presented during the trial. You must not be influenced in any way by either sympathy for or prejudice against the Defendant or the Government.

You must follow the law as I explain it – even if you do not agree with the law – and you must follow all of my instructions as a whole. You must not single out or disregard any of the Court's instructions on the law.

The indictment or formal charge against a defendant isn't evidence of guilt. The law presumes every defendant is innocent. The Defendant does not have to prove [his] [her] innocence or produce any evidence at all. A defendant does not have to testify, and you cannot consider in any way the fact that the Defendant did not testify. The Government must prove guilt beyond a reasonable doubt. If it fails to do so, you must find the Defendant not guilty.

**ANNOTATIONS AND COMMENTS**

*United States v. Teague*, 953 F.2d 1525, 1539 (11th Cir. 1992) (Birch, J., concurring) ("defendant who does not testify is entitled to instruction that no inference may be drawn from that election"); *see also United States v. Veltman*, 6 F.3d 1483, 1493 (11th Cir. 1993) (Court was "troubled" by "absence of instruction on the presumption of innocence at the beginning of the trial…. Although the court charged the jury on the presumption before they retired to deliberate, we believe it extraordinary for a trial to progress to that stage with nary a mention of this jurisprudential bedrock.").

## B3
## Definition of "Reasonable Doubt"

The Government's burden of proof is heavy, but it doesn't have to prove a Defendant's guilt beyond all possible doubt. The Government's proof only has to exclude any "reasonable doubt" concerning the Defendant's guilt.

A "reasonable doubt" is a real doubt, based on your reason and common sense after you've carefully and impartially considered all the evidence in the case.

"Proof beyond a reasonable doubt" is proof so convincing that you would be willing to rely and act on it without hesitation in the most important of your own affairs. If you are convinced that the Defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

**ANNOTATIONS AND COMMENTS**

***United States v. Daniels***, 986 F.2d 451 (11th Cir. 1993), opinion readopted on rehearing, 5 F.3d 495 (11th Cir. 1993), ***cert. denied***, 511 U.S. 1054, 114 S. Ct. 1615, 128 L. Ed. 2d 342 (1994) approves this definition and instruction concerning reasonable doubt; ***see also United States v. Morris***, 647 F.2d 568 (5th Cir. 1981); ***Victor v. Nebraska***, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994) (discussing "reasonable doubt" definition and instruction).

## B4
## Consideration of Direct and Circumstantial Evidence; Argument of Counsel; Comments by the Court

As I said before, you must consider only the evidence that I have admitted in the case. Evidence includes the testimony of witnesses and the exhibits admitted. But, anything the lawyers say is not evidence and isn't binding on you.

You shouldn't assume from anything I've said that I have any opinion about any factual issue in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision about the facts.

Your own recollection and interpretation of the evidence is what matters.

In considering the evidence you may use reasoning and common sense to make deductions and reach conclusions. You shouldn't be concerned about whether the evidence is direct or circumstantial.

"Direct evidence" is the testimony of a person who asserts that he or she has actual knowledge of a fact, such as an eyewitness.

"Circumstantial evidence" is proof of a chain of facts and circumstances that tend to prove or disprove a fact. There's no legal difference in the weight you may give to either direct or circumstantial evidence.

**ANNOTATIONS AND COMMENTS**

*United States v. Clark*, 506 F.2d 416 (5th Cir. 1975), *cert. denied*, 421 U.S. 967, 95 S. Ct. 1957, 44 L. Ed. 2d 454 (1975) approves the substance of this instruction concerning the

lack of distinction between direct and circumstantial evidence; *see also United States v. Barnette*, 800 F.2d 1558, 1566 (11th Cir. 1986), *reh'g denied*, 807 F.2d 999 (11th Cir. 1986), *cert. denied*, 480 U.S. 935, 107 S. Ct. 1578, 94 L. Ed. 2d 769 (1987) (noting that the "test for evaluating circumstantial evidence is the same as in evaluating direct evidence") (citing *United States v. Henderson*, 693 F.2d 1028, 1030 (11th Cir. 1982)).

*United States v. Hope*, 714 F.2d 1084, 1087 (11th Cir. 1983) ("A trial judge may comment upon the evidence as long as he instructs the jury that it is the sole judge of the facts and that it is not bound by his comments and as long as the comments are not so highly prejudicial that an instruction to that effect cannot cure the error.") (citing *United States v. Buchanan*, 585 F.2d 100, 102 (5th Cir. 1978)). *See also United States v. Jenkins*, 901 F.2d 1075 (11th Cir. 1990).

*United States v. Granville*, 716 F.2d 819, 822 (11th Cir. 1983) notes that the jury was correctly instructed that the arguments of counsel should not be considered as evidence (citing *United States v. Phillips*, 664 F.2d 971, 1031 (5th Cir. 1981)); *see also United States v. Siegel*, 587 F.2d 721, 727 (5th Cir. 1979).

For an alternative description of evidence, see Preliminary Instruction, "what is evidence."

**B5**
**Credibility of Witnesses**

When I say you must consider all the evidence, I don't mean that you must accept all the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. The number of witnesses testifying concerning a particular point doesn't necessarily matter.

To decide whether you believe any witness I suggest that you ask yourself a few questions:

- Did the witness impress you as one who was telling the truth?
- Did the witness have any particular reason not to tell the truth?
- Did the witness have a personal interest in the outcome of the case?
- Did the witness seem to have a good memory?
- Did the witness have the opportunity and ability to accurately observe the things he or she testified about?
- Did the witness appear to understand the questions clearly and answer them directly?
- Did the witness's testimony differ from other testimony or other evidence?

**ANNOTATIONS AND COMMENTS**

No annotations associated with this instruction.

## B6.1
## Impeachment of Witnesses Because of Inconsistent Statements

You should also ask yourself whether there was evidence that a witness testified falsely about an important fact. And ask whether there was evidence that at some other time a witness said or did something, or didn't say or do something, that was different from the testimony the witness gave during this trial.

But keep in mind that a simple mistake doesn't mean a witness wasn't telling the truth as he or she remembers it. People naturally tend to forget some things or remember them inaccurately. So, if a witness misstated something, you must decide whether it was because of an innocent lapse in memory or an intentional deception. The significance of the misstatement may depend on whether the misstatement was about an important fact or about an unimportant detail.

**ANNOTATIONS AND COMMENTS**

*See United States v. D'Antignac*, 628 F.2d 428, 435-36 n.10 (5th Cir. 1980) (approving a previous version of this instruction used in conjunction with Basic Instruction 5 and Special Instruction 2.1 as befitted the facts of that case). *See also United States v. McDonald*, 620 F.2d 559, 565 (5th Cir. 1980); *United States v. Soloman*, 856 F.2d 1572, 1578 (11th Cir. 1988).

## B6.2
## Impeachment of Witnesses Because of Inconsistent Statements or Felony Conviction

You should also ask yourself whether there was evidence that a witness testified falsely about an important fact. And ask whether there was evidence that at some other time a witness said or did something, or didn't say or do something, that was different from the testimony the witness gave during this trial.

To decide whether you believe a witness, you may consider the fact that the witness has been convicted of a felony or a crime involving dishonesty or a false statement. But keep in mind that a simple mistake doesn't mean a witness wasn't telling the truth as he or she remembers it. People naturally tend to forget some things or remember them inaccurately. So, if a witness misstated something, you must decide whether it was because of an innocent lapse in memory or an intentional deception. The significance of the misstatement may depend on whether the misstatement was about an important fact or about an unimportant detail.

**ANNOTATIONS AND COMMENTS**

*See United States v. Solomon*, 856 F.2d 1572, 1578 (11th Cir. 1988).

## B6.3
## Impeachment of Witnesses Because of Inconsistent Statements (Defendant with No Felony Conviction Testifies)

You should also ask yourself whether there was evidence that a witness testified falsely about an important fact. And ask whether there was evidence that at some other time a witness said or did something, or didn't say or do something, that was different from the testimony the witness gave during this trial.

But keep in mind that a simple mistake doesn't mean a witness wasn't telling the truth as he or she remembers it. People naturally tend to forget some things or remember them inaccurately. So, if a witness misstated something, you must decide whether it was because of an innocent lapse in memory or an intentional deception. The significance of the misstatement may depend on whether the misstatement was about an important fact or about an unimportant detail. A defendant has a right not to testify.

But since the Defendant did testify, you should decide whether you believe the Defendant's testimony in the same way as that of any other witness.

**ANNOTATIONS AND COMMENTS**

No annotations associated with this instruction.

## B6.4
## Impeachment of Witnesses Because of Inconsistent Statements (Defendant with Felony Conviction Testifies)

You should also ask yourself whether there was evidence that a witness testified falsely about an important fact. And ask whether there was evidence that at some other time a witness said or did something, or didn't say or do something, that was different from the testimony the witness gave during this trial.

But keep in mind that a simple mistake doesn't mean a witness wasn't telling the truth as he or she remembers it. People naturally tend to forget some things or remember them inaccurately. So, if a witness misstated something, you must decide whether it was because of an innocent lapse in memory or an intentional deception. The significance of the misstatement may depend on whether the misstatement was about an important fact or about an unimportant detail.

A defendant has a right not to testify. But since the Defendant did testify, you should decide whether you believe the Defendant's testimony in the same way as that of any other witness.

[Evidence that a defendant was previously convicted of a crime is not evidence of guilt of the crime(s) in this trial. But you may use the evidence to decide whether you believe the Defendant's testimony.]

**ANNOTATIONS AND COMMENTS**

*United States v. Lippner*, 676 F.2d 456, 462 n.11 (11th Cir. 1982) (noting it is plain error not to give a limiting instruction (such as the last sentence of this instruction) when a defendant is impeached as a witness under Rule 609, Fed. R. Evid., by cross examination concerning a prior conviction) (citing *United States v. Diaz*, 585 F.2d 116 (5th Cir. 1978)). If, however, evidence of a Defendant's prior conviction is admitted for other purposes under Rule 404(b), Fed. R. Evid., the last sentence of this instruction should not be given. See, instead, Trial Instruction 3 and Special Instruction 4. Similarly, the last sentence of this instruction should not be given if evidence of a defendant's prior conviction is admitted because the existence of such a conviction is an essential element of the crime charged. See, for example, Offense Instruction 30.6, 18 USC 922(g), and the Annotations and Comments following that instruction.

## B6.5
## Impeachment of Witnesses Because of Inconsistent Statements or Felony Conviction
## (Defendant with no Felony Conviction Testifies)

You should also ask yourself whether there was evidence that a witness testified falsely about an important fact. And ask whether there was evidence that at some other time a witness said or did something, or didn't say or do something, that was different from the testimony the witness gave during this trial.

To decide whether you believe a witness, you may consider the fact that the witness has been convicted of a felony or a crime involving dishonesty or a false statement. But keep in mind that a simple mistake doesn't mean a witness wasn't telling the truth as he or she remembers it. People naturally tend to forget some things or remember them inaccurately. So, if a witness misstated something, you must decide whether it was because of an innocent lapse in memory or an intentional deception. The significance of the misstatement may depend on whether the misstatement was about an important fact or about an unimportant detail.

A defendant has a right not to testify. But since the Defendant did testify, you should decide whether you believe the Defendant's testimony in the same way as that of any other witness.

**ANNOTATIONS AND COMMENTS**

No annotations associated with this instruction.

**B6.6**
**Impeachment of Witnesses because of Inconsistent Statement or Felony Conviction**
**(Defendant with Felony Conviction Testifies)**

You should also ask yourself whether there was evidence that a witness testified falsely about an important fact. And ask whether there was evidence that at some other time a witness said or did something, or didn't say or do something, that was different from the testimony the witness gave during this trial.

To decide whether you believe a witness, you may consider the fact that the witness has been convicted of a felony or a crime involving dishonesty or a false statement. But keep in mind that a simple mistake doesn't mean a witness wasn't telling the truth as he or she remembers it. People naturally tend to forget some things or remember them inaccurately. So, if a witness misstated something, you must decide whether it was because of an innocent lapse in memory or an intentional deception. The significance of the misstatement may depend on whether the misstatement was about an important fact or about an unimportant detail.

A defendant has a right not to testify. But since the Defendant did testify, you should decide whether you believe the Defendant's testimony in the same way as that of any other witness.

[Evidence that a Defendant was previously convicted of a crime is not evidence of guilt of the crime(s) in this trial. But you may use the evidence to decide whether you believe the Defendant's testimony.]

**ANNOTATIONS AND COMMENTS**

*United States v. Lippner*, 676 F.2d 456, 462 n.11 (11th Cir. 1982) (noting it is plain error not to give a limiting instruction (such as the last sentence of this instruction) when a Defendant is impeached as a witness under Rule 609, Fed. R. Evid., by cross examination concerning a prior conviction) (citing *United States v. Diaz*, 585 F.2d 116 (5th Cir. 1978)).

If, however, evidence of a Defendant's prior conviction is admitted for other purposes under Rule 404(b), Fed. R. Evid., the last sentence of this instruction should not be given. See, instead, Trial Instruction 3 and Special Instruction 4.

Similarly, the last sentence of this instruction should not be given if evidence of a Defendant's prior conviction is admitted because the existence of such a conviction is an essential element of the crime charged. See, for example, Offense Instruction 30.6, 18 U.S.C. § 922(g), and the Annotations and Comments following that instruction.

## B6.7
## Impeachment of Witness Because of Bad Reputation for (or Opinion about) Truthfulness (May Be Used With 6.1 – 6.6)

There may also be evidence tending to show that a witness has a bad reputation for truthfulness in the community where the witness resides, or has recently resided, or that others have a bad opinion about the witness's truthfulness.

You may consider reputation and community opinion in deciding whether to believe or disbelieve a witness.

**ANNOTATIONS AND COMMENTS**

Rule 608. [Fed. R. Evid.] A Witness's Character for Truthfulness or Untruthfulness

(a) Reputation or opinion evidence. - -

> A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

See *United States v. Watson*, 669 F.2d 1374, 1381–83 (11th Cir. 1982), distinguishing between reputation witnesses and personal opinion witnesses, and finding error in the exclusion of opinion testimony.

*See also*, Special Instruction 12, Character Evidence (relating to evidence of the character of the accused offered under Rule 404(a)(1), Fed. R. Evid.), and the Annotations and Comments following that instruction.

## B7
## Expert Witness

When scientific, technical or other specialized knowledge might be helpful, a person who has special training or experience in that field is allowed to state an opinion about the matter.

But that doesn't mean you must accept the witness's opinion. As with any other witness's testimony, you must decide for yourself whether to rely upon the opinion.

**ANNOTATIONS AND COMMENTS**

*United States v. Johnson*, 575 F.2d 1347, 1361 (5th Cir. 1978), *cert. denied*, 440 U.S. 907, 99 S. Ct. 1214, 59 L. Ed. 2d 454 (1979).

## B8
## Introduction to Offense Instructions

The indictment charges ___ separate crimes, called "counts," against the Defendant. Each count has a number. You'll be given a copy of the indictment to refer to during your deliberations.

[Count [count number] charges that the Defendants knowingly and willfully conspired to [describe alleged object(s) of the conspiracy].]

[Counts [count numbers] charge that Defendants committed what are called "substantive offenses," specifically [describe alleged substantive offenses]. I will explain the law governing those substantive offenses in a moment.]

[But first note that the Defendants are not charged in Count [conspiracy count number] with committing a substantive offense – they are charged with conspiring to commit that offense.]

[I will also give you specific instructions on conspiracy.]

**ANNOTATIONS AND COMMENTS**

No annotations associated with this instruction.

## B8.1

## Conjunctively Charged Counts

Where a statute specifies multiple alternative ways in which an offense may be committed, the indictment may allege the multiple ways in the conjunctive, that is, by using the word "and." If only one of the alternatives is proved beyond a reasonable doubt, that is sufficient for conviction, so long as you agree unanimously as to that alternative.

**ANNOTATIONS AND COMMENTS**

"[I]t is well-established . . . that a disjunctive statute may be pleaded conjunctively and proved disjunctively." *United States v. Williams*, 790 F.3d 1240, 1245 n.2 (11th Cir. 2015) (quoting *United States v. Haymes*, 610 F.2d 309, 310 (5th Cir. 1980) (citing *United States v. Quiroz-Carrasco*, 565 F.2d 1328, 1331 (5th Cir. 1978)); *see also Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (adopting as binding precedent all decisions of the former Fifth Circuit issued on or before September 30, 1981).

In other words, "when a defendant is charged in an indictment conjunctively with alternative means or alternative mental states, any one of which will satisfy an element of the crime, the 'jury instruction may properly be framed in the disjunctive' without a constructive amendment taking place." *United States v. Mozie*, 752 F.3d 1271, 1284 (11th Cir. 2014) (quoting *United States v. Simpson*, 228 F.3d 1294, 1300 (11th Cir. 2000)). "The rule applies not only to alternative acts that satisfy a statutory element, but also to alternative mental states that may satisfy an element." *Id.* (citing *Haymes*, 610 F.2d at 310–11).

"This is not only a permissible practice but also a common one." *Id.* (quoting *United States v. Howard*, 742 F.3d 1334, 1343 n.3 (11th Cir. 2014)) ("Prosecutors can and frequently do . . . charge alternative elements in the conjunctive and prove one or more of them in the disjunctive, which is constitutionally permissible."); *see also Simpson*, 228 F.3d at 1300.

## B9.1A
## Knowingly; Willfully – General

The word "knowingly" means that an act was done voluntarily and intentionally and not because of a mistake or by accident.

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

**ANNOTATIONS AND COMMENTS**

The definition of willfulness in this instruction can be used in most cases where willfulness is an element. For crimes requiring a particularized knowledge of the law being violated, such as tax and currency-structuring cases, use 9.1B's definition of willfulness.

The Committee in its most recent revisions to the pattern instructions has changed the approach to how "willfully" should be charged in the substantive offenses which include it as an essential element of the offense. The previous editions of the pattern instructions included the following definition that historically has been used in most cases:

> The word "willfully," as that term has been used from time to time in these instructions, means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law.

Although this definition has been useful as a general definition that encompasses many different aspects of the legal concept of "willfulness" in a concise and straightforward manner, the Committee has concluded, along with every other Circuit Pattern Instruction Committee that has considered the issue, that the definition is not accurate in every situation. A review of the case law reveals how the courts have struggled with the meaning of "willfulness" as a *mens rea* requirement for substantive criminal offenses. *See Bryan v. United States*, 524. U.S. 184, 189-92 (1998) ("The word 'willfully' is

sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears." (citing *Spies v. United States*, 317 U.S. 492, 497 (1943))); *see also Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994); *United States v. Phillips*, 19 F.3d 1565, 1576-84 (11th Cir. 1994) (noting the difficulty in defining "willfully" and discussing the term in various contexts), *amended to correct clerical errors*, 59 F.3d 1095 (11th Cir. 1995); *United States v. Granda*, 565 F.2d 922, 924 (5th Cir. 1978) (noting, *inter alia*, that "willfully" has "defied any consistent interpretation by the courts"); *see generally United States v. Bailey*, 444 U.S. 394, 403 (1980) ("Few areas of criminal law pose more difficulty than the proper definition of the *mens rea* requirement for any particular crime.").

Based on the case law, the Committee has concluded that the criminal offenses that expressly include "willfulness" as an essential element can be divided into two broad categories. For the first category (Instruction 9.1A, which encompasses most offenses) "willfully" is defined to require that the offense be committed voluntarily and purposely with the intent to do something unlawful. However, the person need not be aware of the specific law or rule that his or her conduct may be violating. This definition is narrower than the traditional definition that has been used in our pattern charges in the past, but the Committee believes that this narrower definition is required under the law. *See, e.g. Bryan v. United States*, 524 U.S. 184 (1998) (holding that the term "willfully" in 18 U.S.C. §§ 922(a)(1)(A) and 924(a)(1)(D) requires proof that the Defendant knew that his conduct was generally unlawful, but does not require that the Defendant knew of the specific licensing requirement that he was violating).

The second category of criminal offenses that have "willfulness" as an essential element have a heightened *mens rea* requirement. For this limited class of offenses, the Government must prove more than the Defendant knew that his conduct was done with a bad purpose to disobey the law in general. The Government must prove that the Defendant had an intent to violate a known legal duty, that is with the *specific* intent to do something the law forbids. For these offenses, the Committee recommends that the definition of "willfully" in Instruction 9.1B be given to the jury. These offenses include currency structuring statutes and certain tax laws, which tend to involve "highly technical statutes that present[] the danger of ensnaring individuals engaged in apparently innocent conduct." *Bryan*, 524 U.S. at 194. *see, e.g.*, *Ratzlaf v. United States*, 510 U.S. at 149 (holding that with respect to 31 U.S.C. § 5322(a) and the monetary transaction provisions that it controls, the Government must prove that the Defendant acted willfully, *i.e.*, with specific knowledge that the structuring of currency transactions in which he was engaged was unlawful); *Cheek v. United States*, 498 U.S. 192, 199-200 (1991) (explaining that due to the complexity of tax laws, there is an exception to the general rule that "ignorance of the law or a mistake of law is no defense to criminal prosecution," and "[t]he term 'willfully' [as used in certain federal criminal tax offenses] connot[es] a 'voluntary, intentional violation of a known legal duty'" (first citing *United States v. Pomponio*, 429 U.S. 10, 12 (1976); and then citing *United States v. Bishop*, 412 U.S. 346, 360-61 (1973))). In *Cheek*, the Supreme Court found error in the trial court's instruction to the

jury that in order for the Defendant's belief that he was not violating the law to be a defense, his good-faith belief must have been objectively reasonable. 498 U.S. at 203. The Court further explained, however, that "a defendant's views about the validity of the tax statutes are irrelevant to the issue of willfulness and need not be heard by the jury, and, if they are, an instruction to disregard them would be proper." *Id*. at 206.

The Committee observes that the required mental state may be different even for different elements of the same crime. This possibility should be considered when determining what definition of *mens rea* should be charged. *See Liparota v. United States*, 471 U.S. 419, 423 n.5 (1985).

Note: If the Defendant raises a good faith defense, it may be appropriate to give Special Instruction 9 [Good Faith Defense to Willfulness (as under the Internal Revenue Code)] or Special Instruction 18 [Good Faith Reliance Upon Advice of Counsel].

## B9.1B
## Knowingly; Willfully – Intentional Violation of a Known Legal Duty

The word "knowingly" means that an act was done voluntarily and intentionally and not because of a mistake or by accident.

The word "willfully" means that the act was done voluntarily and purposely with the specific intent to violate a known legal duty. Disagreement with the law or a belief that the law is wrong does not excuse willful conduct.

**ANNOTATIONS AND COMMENTS**

For crimes requiring a particularized knowledge of the law being violated, such as tax and currency-structuring cases, use this definition of willfulness.

Note: Please refer to the Annotations and Comments following Instruction 9.1A for a detailed commentary regarding the selection of the applicable "willfully" definition. Additionally, there may be instances where a case presents one substantive offense charging a crime subject to the general willfulness *mens rea* requirement and a separate offense charging a crime subject to the more rigorous *mens rea* standard set forth above. In such a situation, the Committee recommends providing the applicable definition within the offense instruction itself.

## B9.2
## On or About a Particular Date

You'll see that the indictment charges that a crime was committed "on or about" a certain date. The Government doesn't have to prove that the offense occurred on an exact date. The Government only has to prove beyond a reasonable doubt that the crime was committed on a date reasonably close to the date alleged.

**ANNOTATIONS AND COMMENTS**

United States v. Creamer, 721 F.2d 342, 343 (11th Cir. 1983), "on or about" language upheld in case in which alibi defense was used by the defendant; the court "rejected the contention that time becomes a material element of a criminal offense merely because the defense of alibi is advanced." *See also United States v. Reed*, 887 F.2d 1398 (11th Cir. 1989), *reh'g denied*, 891 F.2d 907 (1989), *cert. denied*, 493 U.S. 1080, 110 S. Ct. 1136, 107 L. Ed. 2d 1041 (1990).

**B10.1**
**Caution: Punishment**
**(Single Defendant, Single Count)**

I caution you that the Defendant is on trial only for the specific crime charged in the indictment. You're here to determine from the evidence in this case whether the Defendant is guilty or not guilty of that specific crime.

You must never consider punishment in any way to decide whether the Defendant is guilty or not guilty. If you find the Defendant guilty, the punishment is for the Judge alone to decide later.

**ANNOTATIONS AND COMMENTS**

*See United States v. McDonald*, 935 F.2d 1212, 1222 (11th Cir. 1991).

## B10.2
## Caution: Punishment
## (Single Defendant, Multiple Counts)

Each count of the indictment charges a separate crime. You must consider each crime and the evidence relating to it separately. [If you find the Defendant guilty or not guilty of one crime, that must not affect your verdict for any other crime.]

I caution you that the Defendant is on trial only for the specific crimes charged in the indictment. You're here to determine from the evidence in this case whether the Defendant is guilty or not guilty of those specific crimes.

You must never consider punishment in any way to decide whether the Defendant is guilty or not guilty. If you find the Defendant guilty, the punishment is for the Judge alone to decide later.

**ANNOTATIONS AND COMMENTS**

There may be cases in which the last sentence of the first paragraph of this instruction is inappropriate and should be deleted. This may occur, for example, in prosecutions under 18 U.S.C. § 1962 (RICO offenses) or 21 U.S.C. § 848 (Continuing Criminal Enterprise offenses) where the indictment is structured so that a conviction of one count or counts (sometimes called "predicate offenses") is necessary to a conviction of another count or counts.

## B10.3
## Caution: Punishment
## (Multiple Defendants, Single Count)

You must consider the case of each defendant and the evidence relating to it separately and individually. If you find one Defendant guilty or not guilty, that must not affect your verdict for any other Defendant.

I caution you that each Defendant is on trial only for the specific crime alleged in the indictment. You're here to determine from the evidence in this case whether each Defendant is guilty or not guilty.

You must never consider punishment in any way to decide whether a Defendant is guilty or not guilty. If you find a Defendant guilty, the punishment is for the Judge alone to decide later.

**ANNOTATIONS AND COMMENTS**

*United States v. Gonzalez*, 940 F.2d 1413, 1428 (11th Cir. 1991) states that "cautionary instructions to the jury to consider the evidence as to each defendant separately are presumed to guard adequately against prejudice." *See also United States v. Adams*, 1 F.3d 1566 (11th Cir. 1993). *United States v. Watson*, 669 F.2d 1374, 1389 (11th Cir. 1982) allowed use of single verdict form for multiple defendants when the form listed each defendant separately and jury was instructed that each defendant "should be considered separately and individually." *See also United States v. Russo*, 796 F.2d 1443, 1450 (11th Cir. 1986).

**B10.4**
**Caution: Punishment**
**(Multiple Defendants, Multiple Counts)**

Each count of the indictment charges a separate crime against one or more of the Defendants. You must consider each crime and the evidence relating to it separately. And you must consider the case of each Defendant separately and individually. If you find a Defendant guilty or not guilty of one crime, that must not affect your verdict for [any other crime or] any other Defendant.

I caution you that each Defendant is on trial only for the specific crimes charged in the indictment. You're here to determine from the evidence in this case whether each Defendant is guilty or not guilty of those specific crimes.

You must never consider punishment in any way to decide whether a Defendant is guilty or not guilty. If you find a Defendant guilty, the punishment is for the Judge alone to decide later.

**ANNOTATIONS AND COMMENTS**

*See United States v. Morales*, 868 F.2d 1562, 1572 (11th Cir. 1989). There may be cases in which the bracketed language in the first paragraph of this instruction is inappropriate and should be deleted. This may occur, for example, in prosecutions under 18 U.S.C. § 1962 (RICO offenses) or 21 U.S.C. § 848 (Continuing Criminal Enterprise offenses) where the indictment is structured so that a conviction of one count or counts (sometimes called "predicate offenses") is necessary to a conviction of another count or counts.

## B11
## Duty to Deliberate

Your verdict, whether guilty or not guilty, must be unanimous – in other words, you must all agree. Your deliberations are secret, and you'll never have to explain your verdict to anyone.

Each of you must decide the case for yourself, but only after fully considering the evidence with the other jurors. So you must discuss the case with one another and try to reach an agreement. While you're discussing the case, don't hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But don't give up your honest beliefs just because others think differently or because you simply want to get the case over with.

Remember that, in a very real way, you're judges – judges of the facts. Your only interest is to seek the truth from the evidence in the case.

**ANNOTATIONS AND COMMENTS**

*See United States v. Brokemond*, 959 F.2d 206, 209 (11th Cir. 1992). *See also United States v. Cook*, 586 F.2d 572 (5th Cir. 1978), *reh'g denied*, 589 F.2d 1114 (1979), *cert. denied*, 442 U.S. 909, 99 S. Ct. 2821, 61 L. Ed. 2d 274 (1979); *United States v. Dunbar*, 590 F.2d 1340 (5th Cir. 1979).

## B12
## Verdict

When you get to the jury room, choose one of your members to act as foreperson. The foreperson will direct your deliberations and will speak for you in court.

A verdict form has been prepared for your convenience.

[Explain verdict]

Take the verdict form with you to the jury room. When you've all agreed on the verdict, your foreperson must fill in the form, sign it, date it, and carry it. Then you'll return it to the courtroom.

If you wish to communicate with me at any time, please write down your message or question and give it to the marshal. The marshal will bring it to me and I'll respond as promptly as possible – either in writing or by talking to you in the courtroom. But I caution you not to tell me how many jurors have voted one way or the other at that time.

**ANNOTATIONS AND COMMENTS**

*United States v. Norton*, 867 F.2d 1354, 1365-66 (11th Cir. 1989), *cert. denied*, 491 U.S. 907, 109 S. Ct. 3192, 105 L. Ed. 2d 701 (1989) and 493 U.S. 871, 110 S. Ct. 200, 107 L. Ed. 2d 154 (1989) notes that the Court should not inquire about, or disclose, numerical division of the jury during deliberations but states that "[r]eversal may not be necessary even where the trial judge undertakes the inquiry and thereafter follows it with an *Allen* charge, absent a showing that either incident or a combination of the two was inherently coercive." See *United States v. Brokemond*, 959 F.2d 206, 209 (11th Cir. 1992). *See also United States v. Cook*, 586 F.2d 572 (5th Cir. 1978), *reh'g denied*, 589 F.2d 1114 (1979), *cert. denied*, 442 U.S. 909, 99 S. Ct. 2821, 61 L. Ed. 2d 274 (1979).

## S1.1
## Testimony of Accomplice, Informer, or Witness with Immunity

You must consider some witnesses' testimony with more caution than others.

For example, paid informants, witnesses who have been promised immunity from prosecution, or witnesses who hope to gain more favorable treatment in their own cases, may have a reason to make a false statement in order to strike a good bargain with the Government.

So while a witness of that kind may be entirely truthful when testifying, you should consider that testimony with more caution than the testimony of other witnesses.

**ANNOTATIONS AND COMMENTS**

*See United States v. Shearer*, 794 F.2d 1545, 1551 (11th Cir. 1986). *See also United States v. Solomon*, 856 F.2d 1572 (11th Cir. 1988), cert. denied, 489 U.S. 1070, 109 S. Ct. 1352, 103 L. Ed. 2d 820 (1989) (holding that, as a general rule, a cautionary instruction regarding the credibility of accomplices should be given).

## S1.2
## Testimony of Accomplice or Codefendant with Plea Agreement

You must consider some witnesses' testimony with more caution than others.

In this case, the Government has made a plea agreement with a Codefendant in exchange for [his] [her] testimony. Such "plea bargaining," as it's called, provides for the possibility of a lesser sentence than the Codefendant would normally face. Plea bargaining is lawful and proper, and the rules of this court expressly provide for it.

But a witness who hopes to gain more favorable treatment may have a reason to make a false statement in order to strike a good bargain with the Government.

So while a witness of that kind may be entirely truthful when testifying, you should consider that testimony with more caution than the testimony of other witnesses.

And the fact that a witness has pleaded guilty to an offense isn't evidence of the guilt of any other person.

**ANNOTATIONS AND COMMENTS**

*United States v. Solomon*, 856 F.2d 1572, 1578-79 (11th Cir. 1988), cert. *denied*, 489 U.S. 1070, 109 S. Ct. 1352, 103 L. Ed. 2d 820 (1989).

## S1.3
## Testimony of Accomplice, Witness Using Addictive Drugs, or Witness With Immunity

You must consider some witnesses' testimony with more caution than others.

For example, a witness may testify about events that occurred during a time when the witness was using addictive drugs, and so the witness may have an impaired memory of those events. And a witness who has been promised immunity from prosecution or witnesses who hope to gain more favorable treatment in [his] [or] [her] own case may have a reason to make a false statement in order to strike a good bargain with the Government.

So while a witness of that kind may be entirely truthful when testifying, you should consider that testimony with more caution than the testimony of other witnesses.

**ANNOTATIONS AND COMMENTS**

*See United States v. Fajardo*, 787 F.2d 1523, 1527 (11th Cir. 1986). *See also United States v. Solomon*, 856 F.2d 1572 (11th Cir. 1988), *cert. denied*, 489 U.S. 1070, 109 S. Ct. 1352, 103 L. Ed. 2d 820 (1989) (holding that, as a general rule, a cautionary instruction regarding the credibility of accomplices should be given).

## S2.1
## Confession or Statement of a Single Defendant

If the Government offers evidence that a Defendant made a statement or admission to someone after being arrested or detained, you must consider that evidence with caution and great care.

You must decide for yourself (1) whether the Defendant made the statement, and (2) if so, how much weight to give to it. To make these decisions, you must consider all the evidence about the statement – including the circumstances under which it was made.

**ANNOTATIONS AND COMMENTS**

*See United States v. Clemons*, 32 F.3d 1504, 1510 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1801, 131 L. Ed. 2d 728 (1995).

## S2.2
## Confession or Statement of Multiple Defendants

If the Government offers evidence that a Defendant made a statement or admission to someone after being arrested or detained, you must consider that evidence with caution and great care.

You must decide for yourself (1) whether the Defendant made the statement, and (2) if so, how much weight to give to it. To make these decisions, you must consider all the evidence about the statement – including the circumstances under which it was made.

Any such statement is not evidence about any other Defendant.

**ANNOTATIONS AND COMMENTS**

No annotations associated with this instruction.

## S3
## Identification Testimony

The Government must prove beyond a reasonable doubt that the Defendant was the person who committed the crime.

If a witness identifies a Defendant as the person who committed the crime, you must decide whether the witness is telling the truth. But even if you believe the witness is telling the truth, you must still decide how accurate the identification is. I suggest that you ask yourself questions:

1. Did the witness have an adequate opportunity to observe the person at the time the crime was committed?

2. How much time did the witness have to observe the person?

3. How close was the witness?

4. Did anything affect the witness's ability to see?

5. Did the witness know or see the person at an earlier time?

You may also consider the circumstances of the identification of the Defendant, such as the way the Defendant was presented to the witness for identification and the length of time between the crime and the identification of the Defendant.

After examining all the evidence, if you have a reasonable doubt that the Defendant was the person who committed the crime, you must find the Defendant not guilty.

**ANNOTATIONS AND COMMENTS**

*See United States v. Martinez*, 763 F.2d 1297, 1304 (11th Cir. 1985).

**S4.1**
**Similar Acts Evidence**
**(Rule 404(b), Fed. R. Evid.)**

During the trial, you heard evidence of acts allegedly done by the Defendant on other occasions that may be similar to acts with which the Defendant is currently charged. This evidence is admitted and may be considered by you for the limited purpose of assisting you in determining whether [the Defendant had the state of mind or intent necessary to commit the crime charged in the indictment] [the Defendant had a motive or the opportunity to commit the acts charged in the indictment] [the Defendant acted according to a plan or in preparation to commit a crime] [the Defendant committed the acts charged in the indictment by accident or mistake].

You may not consider this evidence for any other purpose.

The Defendant is currently on trial only for the crime[s] charged in the indictment. You may not convict a person simply because you believe that person may have committed an act in the past that is not charged in the indictment.

**ANNOTATIONS AND COMMENTS**

Rule 404. [Fed. R. Evid.] Character Evidence; Crimes or Other Acts

* * * * *

(2) Other Crimes, Wrongs, or Acts.

a) ***Prohibited Uses.*** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

b) ***Permitted Uses.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

c) ***Notice in a Criminal Case.*** In a criminal case, the prosecutor must:

> (A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;
> (B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and
> (C) do so in writing before trial — or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

*United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (en banc) discusses at length the tests to be applied in admitting or excluding evidence under Rule 404(b); and, more specifically, the different standards that apply depending upon the purpose of the evidence, i.e., to show intent versus identity, for example. *See id*. at 911 n.15.

Both the Supreme Court and the Eleventh Circuit have expressly endorsed the *Beechum* test. *Huddleston v. United States*, 485 U.S. 681 (1988); *United States v. Miller*, 959 F.2d 1535 (11th Cir. 1992) (en banc).

**S4.2**
**Similar Acts Evidence - Identity**
**(Rule 404(b), Fed. R. Evid.)**

During the trial, you heard evidence of acts allegedly done by the Defendant on other occasions that may be similar to acts with which the Defendant is currently charged. If you find the Defendant committed the allegedly similar acts, you may use this evidence to help you decide whether the similarity between those acts and the one[s] charged in this case suggests the same person committed all of them.

You may not consider this evidence for any other purpose.

The Defendant is currently on trial only for the crime[s] charged in the indictment. You may not convict a person simply because you believe that person may have committed an act in the past that is not charged in the indictment.

**ANNOTATIONS AND COMMENTS**

Rule 404. [Fed. R. Evid.] Character Evidence; Crimes or Other Acts

* * * * *

(2) Other Crimes, Wrongs, or Acts.

a) ***Prohibited Uses.*** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

b) ***Permitted Uses.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

c) ***Notice in a Criminal Case.*** In a criminal case, the prosecutor must:

> (A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;
>
> (B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and
>
> (C) do so in writing before trial — or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

*United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (en banc) discusses at length the tests to be applied in admitting or excluding evidence under Rule 404(b); and, more specifically, the different standards that apply depending upon the purpose of the evidence, i.e., to show intent versus identity, for example. *See id*. at 911 n.15. Regarding evidence used to prove identity, *Beechum* notes:

> The physical similarity must be such that it marks the offenses as the handiwork of the accused. In other words, the evidence must demonstrate a modus operandi. *United States v. Goodwin*, 492 F.2d 1141, 1154 (5th Cir. 1974). Thus, (a) much greater degree of similarity between the charged crime and the uncharged crime is required when the evidence of the other crime is introduced to prove identity than when it is introduced to prove a state of mind. *United States v. Myers*, 550 F.2d 1036, 1045 (5th Cir. 1977).

*Id*.; *see also United States v. Phaknikone*, 605 F.3d 1099, 1108 (11th Cir. 2010).

Both the Supreme Court and the Eleventh Circuit have expressly endorsed the *Beechum* test. *Huddleston v. United States*, 485 U.S. 681 (1988); *United States v. Miller*, 959 F.2d 1535 (11th Cir. 1992) (en banc).

## S5
## Note-taking

You've been permitted to take notes during the trial. Most of you – perhaps all of you – have taken advantage of that opportunity.

You must use your notes only as a memory aid during deliberations. You must not give your notes priority over your independent recollection of the evidence. And you must not allow yourself to be unduly influenced by the notes of other jurors.

I emphasize that notes are not entitled to any greater weight than your memories or impressions about the testimony.

**ANNOTATIONS AND COMMENTS**

No annotations associated with this instruction.

## S6
## Possession

The law recognizes several kinds of possession. A person may have actual possession or constructive possession. And, if a person has actual or constructive possession, he/she may have sole possession or joint possession.

"Actual possession" of a thing occurs if a person knowingly has direct physical control of it. "Constructive possession" of a thing occurs if a person doesn't have actual possession of it but has both the power and the intention to take control over it later.

"Sole possession" of a thing occurs if a person is the only one to possess it.

"Joint possession" of a thing occurs if two or more people share possession of it. The term "possession" includes actual, constructive, sole, and joint possession.

**ANNOTATIONS AND COMMENTS**

*See United States v. Hastamorir*, 881 F.2d 1551 (11th Cir. 1989).

**S7**
**Aiding and Abetting; Agency**
**18 U.S.C. § 2**

It's possible to prove the Defendant guilty of a crime even without evidence that the Defendant personally performed every act charged.

Ordinarily, any act a person can do may be done by directing another person, or "agent." Or it may be done by acting with or under the direction of others.

A Defendant "aids and abets" a person if the Defendant intentionally joins with the person to commit a crime.

A Defendant is criminally responsible for the acts of another person if the Defendant aids and abets the other person. A Defendant is also responsible if the Defendant willfully directs or authorizes the acts of an agent, employee, or other associate.

But finding that a Defendant is criminally responsible for the acts of another person requires proof that the Defendant intentionally associated with or participated in the crime – not just proof that the Defendant was simply present at the scene of a crime or knew about it.

In other words, you must find beyond a reasonable doubt that the Defendant was a willful participant and not merely a knowing spectator.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2 provides:

(a) whoever commits an offense against the United States or, aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

*See United States v. Broadwell*, 870 F.2d 594, 607 (11th Cir. 1989), *cert. denied*, 493 U.S. 840, 110 S. Ct. 125, 107 L. Ed. 2d 85 (1989). See also *United States v. Walker*, 621 F.2d 163 (5th Cir. 1980), *cert. denied*, 450 U.S. 1000, 101 S. Ct. 1707, 68 L. Ed. 2d 202 (1981).

## S8
## Deliberate Ignorance as Proof of Knowledge

If a Defendant's knowledge of a fact is an essential part of a crime, it's enough that the Defendant was aware of a high probability that the fact existed – unless the Defendant actually believed the fact didn't exist.

"Deliberate avoidance of positive knowledge" – which is the equivalent of knowledge – occurs, for example, if a defendant possesses a package and believes it contains a controlled substance but deliberately avoids learning that it contains the controlled substance so he or she can deny knowledge of the package's contents.

So you may find that a defendant knew about the possession of a controlled substance if you determine beyond a reasonable doubt that the defendant (1) actually knew about the controlled substance, or (2) had every reason to know but deliberately closed [his] [her] eyes.

But I must emphasize that negligence, carelessness, or foolishness isn't enough to prove that the Defendant knew about the possession of the controlled substance.

**ANNOTATIONS AND COMMENTS**

*United States v. Stone*, 9 F.3d 934, 937 (11th Cir. 1993), cert. denied, 513 U.S. 833, 115 S. Ct. 111, 130 L. Ed. 2d 58 (1994), "deliberate ignorance" instruction appropriate only when evidence in the record shows that the Defendant purposely contrived to avoid learning the truth.

*United States v. Aleman*, 728 F.2d 492, 494 (11th Cir. 1984), this instruction should be given only if there are facts that suggest the Defendant consciously avoided knowledge, not when the Defendant has actual knowledge; *see also United States v. Rivera*, 944 F.2d 1563, 1570-72 (11th Cir. 1991) (describing circumstances in which deliberate ignorance instruction is appropriate) and *United States v. Perez-Tosta*, 36 F.3d 1552 (11th Cir. 1994) (approving a similar instruction).

See also Basic Instruction 9.1.

## S9
## Good-Faith Defense to Willfulness
## (as under the Internal Revenue Code)

Good-Faith is a complete defense [to the charge(s) in the indictment] since good-faith on the part of the Defendant is inconsistent with willfulness, and willfulness is an essential part of the charge(s). If the Defendant acted in good faith, sincerely believing [himself] [herself] to be exempt by the law [from the withholding of income taxes], then the Defendant did not intentionally violate a known legal duty – that is, the Defendant did not act "willfully." The burden of proof is not on the Defendant to prove good-faith intent because the Defendant does not need to prove anything. The Government must establish beyond a reasonable doubt that the Defendant acted willfully as charged.

Intent and motive must not be confused. "Motive" is what prompts a person to act. It is why the person acts.

"Intent" refers to the state of mind with which the act is done.

If you find beyond a reasonable doubt that the Defendant specifically intended to do something that is against the law and voluntarily committed the acts that make up the crime, then the element of "willfulness" is satisfied, even if the Defendant believed that violating the law was [religiously, politically, or morally] required or that ultimate good would result.

**ANNOTATIONS AND COMMENTS**

This instruction has been updated and now more closely resembles the language of other good faith defenses.

*See United States v. Anderson*, 872 F.2d 1508, 1517-18 (11th Cir. 1989), *cert. denied*, 493 U.S. 1004 (1989). However, in *United States v. Paradies*, 98 F.3d 1266 (11th Cir. 1996), *cert. denied*, 521 U.S. 1106 and 522 U.S. 1014 (1997), the Eleventh Circuit noted that although the jury instructions given in the case were legally sufficient as a whole, a portion of the former Special Instruction 9 "might potentially be deemed confusing." Id. at 1285. The updated instruction eliminates the confusion. It may be given when appropriate as a supplement to Basic Instruction 9.1B.

## S10.1
## Lesser-Included Offense (Single)

In some cases, a defendant is charged with breaking a law that actually covers two separate crimes.

A "lesser-included offense" is a crime that isn't as serious as the other crime a defendant is charged with.

If you find the Defendant not guilty of the crime charged in Count number _____, you must determine whether the Defendant is guilty of the lesser-included offense.

Proof of the lesser-included offense requires proof beyond a reasonable doubt of the facts necessary to prove the crime charged in Count number _____, except _____ [list elements not required for the lesser-included offense].

**ANNOTATIONS AND COMMENTS**

*See United States v. Alvarez*, 755 F.2d 830 (11th Cir. 1985).

## S10.2
## Lesser-Included Offense (Multiple)

In some cases, a defendant is charged with breaking a law that actually covers two or more separate crimes.

A "lesser-included offense" is a crime that isn't as serious as other crimes a defendant is charged with.

If you find the Defendant not guilty of the crime charged in Count _____, you must determine whether the Defendant is guilty of the first lesser-included offense.

Proof of the first lesser-included offense requires proof beyond a reasonable doubt of the facts necessary to prove the crime charged in Count _____, except [list elements not required for the first lesser-included offense].

If you find the Defendant not guilty of the offense charged in Count _____ and not guilty of the first lesser-included offense, you must determine whether the Defendant is guilty of the second lesser-included offense.

Proof of the second lesser-included offense requires proof beyond a reasonable doubt of the facts necessary to prove the crime charged in Count _____, except [list elements not required for the second lesser-included offense].

**ANNOTATIONS AND COMMENTS**

*See United States v. Alvarez*, 755 F.2d 830 (11th Cir. 1985), *cert. denied*, 474 U.S. 905, 106 S. Ct. 274, 88 L. Ed. 2d 235 (1985) and *cert. denied*, 482 U.S. 908, 107 S. Ct. 2489, 96 L. Ed. 2d 380 (1987).

The Committee recognizes - - and cautions - - that sentence enhancing factors subject to the principle of *Apprendi* are not necessarily "elements" creating separate offenses for purposes of analysis in a variety of contexts. *See United States v. Sanchez*, 269 F.3d 1250, 1277 n.51 (11th Cir. 2001) *en banc, cert. denied*, 535 U.S. 942, 122 S. Ct. 1327, 152 L. Ed. 2d 234 (2002). Even so, the lesser included offense model is an appropriate and convenient procedural mechanism for purposes of submitting sentence enhancers to a jury when required by the principle of *Apprendi*.

The following is one form of verdict that may be used in cases in which the offense charged in the indictment embraces a lesser included offense or offenses in the traditional sense, or involves sentencing enhancers subject to *Apprendi*. Alternatively, especially in drug cases involving multiple Defendants and/or multiple forms of controlled substances, it may be preferable to use a form of special verdict for each Defendant (preceded by appropriate instructions concerning the reasons for, and the use of, such verdict forms). *See infra*, Offense Instructions 85 and 87.

Verdict

1. We, the Jury, find the Defendant [name of Defendant] _____ of the offense charged in Count [_____] of the indictment.

[Note: Proceed to the remainder of the verdict form only if you find the Defendant not guilty of the offense as charged.]

2. We, the Jury, having found the Defendant [name of Defendant] not guilty of the offense as charged in Count [_____] of the indictment, now find the Defendant _____ of the [first] lesser included offense in Count [_____] of [give generic description of lesser included offense, i.e., conspiring to distribute less than 50 grams but not less than 5 grams of cocaine base].

[Note: Proceed to the remainder of the verdict form only if you find the Defendant not guilty of the first lesser included offense.]

3. We, the Jury, having found the Defendant [name of Defendant] not guilty of the first lesser included offense within Count [_____] now find the Defendant _____ of the second lesser included offense in Count [_____] of [give generic description of second lesser included offense, i.e., conspiring to distribute less than 5 grams of cocaine base].

So Say We All.

Date: _____ _____

Foreperson

**S11**
**Attempt(s)**

In some cases, it's a crime to attempt to commit an offense – even if the attempt fails. In this case the Defendant is charged in Count _____ with attempting to commit [substantive offense].

The Defendant can be found guilty of [substantive offense] only if all the following facts are proved beyond a reasonable doubt: [list elements of substantive offense].

The Defendant can be found guilty of an *attempt* to commit that offense only if both of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly intended to commit the crime of _____; and

Second: The Defendant's intent was strongly corroborated by [his] [her] taking a substantial step toward committing the crime.

A "substantial step" is an important action leading up to committing of an offense – not just an inconsequential act. It must be more than simply preparing. It must be an act that would normally result in committing the offense.

**ANNOTATIONS AND COMMENTS**

Instruction taken from *United States v. McDowell*, 250 F.3d 1354, 1365 (11th Cir. 2001).

## S12
## Character Evidence

Evidence of a defendant's character traits may create a reasonable doubt.

You should consider testimony that a defendant is an honest and law-abiding citizen along with all the other evidence to decide whether the Government has proved beyond a reasonable doubt that the Defendant committed the offense.

**ANNOTATIONS AND COMMENTS**

Rule 404. [Fed. R. Evid.] Character Evidence; Crimes or Other Acts

(a) Character Evidence.

(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

*See United States v. Broadwell*, 870 F.2d 594, 609 (11th Cir. 1989), *cert. denied*, 493 U.S. 840, 110 S. Ct. 125, 107 L. Ed. 2d 85 (1989).

*United States v. Darland*, 626 F.2d 1235 (5th Cir. 1980) held that it can be plain error to refuse this instruction when the Defendant offers evidence of good character; and, further, the admission of such evidence may not be conditioned on the Defendant testifying as a witness. Character evidence may be excluded, however, when the proffered witness has an inadequate basis for expressing an opinion as to the Defendant's character. *United States v. Gil*, 204 F.3d 1347 (11th Cir. 2000). A distinction must be drawn between evidence of a pertinent trait of the Defendant's character, offered under Fed. R. Evid. 404(a)(2), and evidence of the character of a witness for truthfulness (including the Defendant as a witness) offered under Fed. R. Evid. 608(a). This instruction should be given when the evidence has been admitted under Rule 404. Basic Instruction 6.7 should be given when evidence has been admitted under Rule 608.

In either case - - whether character evidence is admitted under Rule 404 or Rule 608 - - Rule 405(a) provides that "it may be proved by testimony about the person's reputation or by testimony in the form of an opinion."

## S13.1
## Entrapment

"Entrapment" occurs when law-enforcement officers or others under their direction persuade a defendant to commit a crime that the defendant had no previous intent to commit.

The Defendant has claimed to be a victim of entrapment regarding the charged offense.

The law forbids convicting an entrapped defendant.

But there is no entrapment when a defendant is willing to break the law and the Government merely provides what appears to be a favorable opportunity for the defendant to commit a crime.

For example, it's not entrapment for a Government agent to pretend to be someone else and offer – directly or through another person – to engage in an unlawful transaction.

So a defendant isn't a victim of entrapment if you find beyond a reasonable doubt that the government only offered the defendant an opportunity to commit a crime the defendant was already willing to commit.

But if there is a reasonable doubt about whether the Defendant was willing to commit the crime without the persuasion of a Government officer or a person under the Government's direction, then you must find the Defendant not guilty.

**ANNOTATIONS AND COMMENTS**

*See United States v. Davis*, 799 F.2d 1490, 1493-94 (11th Cir. 1986). *See also United States v. King*, 73 F.3d 1564, 1569-71 (11th Cir. 1996), *cert. denied*, 519 U.S. 886, 117 S. Ct. 220, 136 L. Ed. 2d 153 (1996).

However, in *Jacobson v. United States*, 503 U.S. 540, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992), the Supreme Court held that the necessary predisposition of the Defendant must have existed before the Defendant was approached by Government agents or cooperating informants, and in *United States v. Brown*, 43 F.3d 618, 628 n.8 (11th Cir. 1995), cert. denied, 516 U.S. 917, 116 S. Ct. 309, 133 L. Ed. 2d 212 (1995), the Court of Appeals upheld the sufficiency and correctness of the former instruction but implied that clarification might be appropriate in the light of *Jacobson*. The present reformulation of the instruction on entrapment makes that clarification.

## S13.2
## Entrapment: Evaluating Conduct Of Government Agents

"Entrapment" occurs when law-enforcement officers or others under their direction persuade a defendant to commit a crime the defendant had no previous intent to commit.

The Defendant has claimed to be a victim of entrapment regarding the charged offense.

The law forbids convicting an entrapped defendant.

But there is no entrapment when a Defendant is willing to break the law and the Government merely provides what appears to be a favorable opportunity for the Defendant to commit a crime.

For example, it's not entrapment for a Government agent to pretend to be someone else and offer – directly or through another person – to engage in an unlawful transaction.

You must not evaluate the conduct of Government officers or others under their direction to decide whether you approve of the conduct or think it was moral.

So a defendant isn't a victim of entrapment if you find beyond a reasonable doubt that the Government only offered the defendant an opportunity to commit a crime the Defendant was already willing to commit.

But if there is a reasonable doubt about whether the Defendant was willing to commit the crime without the persuasion of a Government officer or a person under the Government's direction, then you must find the Defendant not guilty.

**ANNOTATIONS AND COMMENTS**

*See United States v. Davis*, 799 F.2d 1490, 1493-94 (11th Cir. 1986). See also *United States v. King*, 73 F.3d 1564, 1569-71 (11th Cir. 1996), *cert. denied*, 519 U.S. 886, 117 S. Ct. 220, 136 L. Ed. 2d 153 (1996).

However, in *Jacobson v. United States*, 503 U.S. 540, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992), the Supreme Court held that the necessary predisposition of the Defendant must have existed before the Defendant was approached by Government agents or cooperating informants, and in *United States v. Brown*, 43 F.3d 618, 628 n.8 (11th Cir. 1995), cert. denied, 516 U.S. 917, 116 S. Ct. 309, 133 L. Ed. 2d 212 (1995), the Court of Appeals upheld the sufficiency and correctness of the former instruction but implied that clarification might be appropriate in the light of *Jacobson*. The present reformulation of the instruction on entrapment makes that clarification.

## S14
## Alibi

Evidence has been introduced to establish an alibi – that the Defendant was not present at the time or place of the charged crime.

If you have a reasonable doubt about whether the Defendant was present at the time and place of the charged crime, you must find the Defendant not guilty.

**ANNOTATIONS AND COMMENTS**

*United States v. Rhodes*, 569 F.2d 384 (5th Cir. 1978), *cert. denied*, 439 U.S. 844, 99 S. Ct. 138, 58 L. Ed. 2d 143 (1978) approved instruction in substantially same form.

## S15
## Insanity

There is an issue about the Defendant's sanity when the charged offense occurred. If you find beyond a reasonable doubt that the Defendant committed the offense, you must consider whether the Defendant was "not guilty only by reason of insanity."

A defendant is "insane" only if the defendant is unable – because of severe mental disease or defect – to appreciate the nature and quality or wrongfulness of an act. But mental disease or defect doesn't otherwise constitute a defense.

On the issue of insanity, it is the Defendant who must prove his insanity by clear and convincing evidence. Clear and convincing evidence is evidence sufficient to persuade you that the Defendant's claim is highly probable. It is a higher standard of proof than a preponderance of the evidence but less exacting than proof beyond a reasonable doubt.

A "preponderance of the evidence" is enough evidence to persuade you that the Defendant's claim is more likely true than not true.

If the Defendant proves insanity by clear and convincing evidence, then you must find the Defendant "not guilty only by reason of insanity."

So there are three possible verdicts:

· guilty;

· not guilty; and

· not guilty only by reason of insanity.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 17 provides:

> (a) Affirmative defense – It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.
>
> (b) Burden of proof – The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

See Also 18 U.S.C. § 4242:

> § 4242. Determination of the existence of insanity at the time of the offense.
>
> * * * * * *
>
> (b) Special verdict – If the issue of insanity is raised by notice as provided in Rule 12.2 of the Federal Rules of Criminal Procedure on motion of the defendant or of the attorney for the Government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a non jury trial, the court shall find the defendant –
>
> (1) guilty;
>
> (2) not guilty; or
>
> (3) not guilty only by reason of insanity.

*See* *United States v. Owens*, 854 F.2d 432 (11th Cir. 1988) (describing the circumstances in which the insanity instruction should be given). In *Owens*, the Eleventh Circuit defined the clear and convincing standard set forth above. *Id.* at n.8.

## S16
## Duress and Coercion (Justification or Necessity)

The Defendant claims that if he committed the acts charged in the indictment, he did so only because he was forced to commit the crime. If you conclude that the Government has proved beyond a reasonable doubt that the Defendant committed the crime as charged, you must then consider whether the Defendant should nevertheless be found "not guilty" because his actions were justified by duress or coercion.

To excuse a criminal act, the Defendant must prove by a preponderance of the evidence:

First: That there was an unlawful and present, immediate, and impending threat of death or serious bodily harm to the Defendant or another;

Second: That the Defendant's own negligent or reckless conduct did not create a situation where the Defendant would be forced to engage in a crime;

Third: That the Defendant had no reasonable legal alternative to violating the law; and

Fourth: That avoiding the threatened harm caused the criminal action.

A "preponderance of the evidence" is enough evidence to persuade you that the Defendant's claim is more likely true than not true.

If you find that the Defendant has proven each of these elements by a preponderance of the evidence, you must find the Defendant not guilty.

## ANNOTATIONS AND COMMENTS

The substantive elements of this instruction are taken from *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000), *cert. denied*, 530 U.S. 1264, 120 S. Ct. 2724 (2000). The Court of Appeals reiterated the requirements of the defense in *United States v. Harmon*, 213 Fed. Appx. 914, 916 (11th Cir. 2007) (unpublished) (citing *Deleveaux*, 205 F.3d at 1297). The instruction also is based in part on Modern Federal Jury Instructions – Criminal § 8.06 (2008), which was revised following the Supreme Court's decision in *Dixon v. United States*, 548 U.S. 1, 126 S. Ct. 2437 (2006).

Dixon resolved a split among the circuits regarding which party bears the burden of persuasion for a duress defense. In *Dixon*, the defendant was charged with receiving a firearm while under indictment in violation of 18 U.S.C. § 922(n) and with making false statements in connection with the acquisition of a firearm in violation of § 922(a)(6). The Supreme Court held that (1) the jury instructions given "did not run afoul of the Due Process Clause when they placed the burden on petitioner to establish the existence of duress by a preponderance of the evidence," and (2) under modern law, in the context of the firearms offenses at issue, duress is an affirmative defense that does not require the government to bear the burden of disproving the defendant's defense beyond a reasonable doubt. *See Dixon*, 548 U.S. at 6-8, 15-17, 126 S. Ct. at 2442, 2447-48. Accordingly, the above instruction clearly reflects that the Government bears the burden of proving beyond a reasonable doubt each element of the offense, and if the jury finds that the Government has met its burden, then a defendant who seeks to use the justification defense must prove the affirmative defense by a preponderance of the evidence.

In *Deleveaux* the Court of Appeals cautioned that this defense is available in only "extraordinary circumstances" (205 F.3d at 1297), and the holding was expressly limited to prosecutions under 18 U.S.C. § 922(g)(1) - - felon in possession of a firearm. See Offense Instruction 34.6, *infra*. In *Harmon*, the Court of Appeals noted that "[t]he imminency prong 'requires nothing less than an immediate emergency.'" 213 Fed. Appx. at 916 (citing *United States v. Bell*, 214 F.3d 1299, 1300 (11th Cir. 2000)); *see also United States v. Rice*, 214 F.3d 1295 (11th Cir. 2000) (affirming the defendant's conviction on the ground that the facts proffered were insufficient to establish a justification defense, as the defendant did not face an immediate emergency).

The defense of duress or necessity "does not negate a defendant's criminal state of mind when the applicable offense requires a defendant to have acted knowingly or willfully; instead, it allows the defendant to 'avoid liability… because coercive conditions or necessity negates a conclusion of guilt even though the necessary *mens rea* was present." *Dixon*, 548 U.S., 1, 7, 126 S. Ct. at 2442 (citing *United States v. Bailey*, 444 U.S. 394, 402 100 S. Ct. 624, 631 (1980)). Further, the *Dixon* Court noted that "there may be crimes [such as common-law crimes requiring 'malice'] where the nature of the *mens rea* would require the Government to disprove the existence of duress beyond a reasonable

doubt. *Id*. at 2442 n.4. *Bailey* discusses the common law distinction between coercion/duress and necessity/justification, observing: "While the defense of duress covered the situation where the coercion had its source in the actions of other human beings, the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils." *Bailey*, 444 U.S. at 409, 100 S. Ct. at 634. However, the Supreme Court noted that, [m]odern cases have tended to blur the distinction…" *Id*.

## S17
## Good-Faith Defense

"Good faith" is a complete defense to a charge that requires intent to defraud. A defendant isn't required to prove good faith. The Government must prove intent to defraud beyond a reasonable doubt.

An honestly held opinion or an honestly formed belief cannot be fraudulent intent – even if the opinion or belief is mistaken. Similarly, evidence of a mistake in judgment, an error in management, or carelessness can't establish fraudulent intent.

But an honest belief that a business venture would ultimately succeed doesn't constitute good faith if the Defendant intended to deceive others by making representations the Defendant knew to be false or fraudulent.

**ANNOTATIONS AND COMMENTS**

*United States v. Goss*, 650 F.2d 1336 (5th Cir. 1981), failure to give this instruction as a theory-of-defense charge, when requested to do so, is error if there is any evidentiary foundation to support the Defendant's claim. Note, however, that there must be some evidentiary basis for the request. If the usual instructions are given defining willfulness and intent to defraud, that will ordinarily suffice in the absence of evidence of good faith. *United States v. Boswell*, 565 F.2d 1338 (5th Cir. 1978), *reh'g denied*, 568 F.2d 1367 (11th Cir. 1978), *cert. denied*, 439 U.S. 819, 99 S. Ct. 81, 58 L. Ed. 2d 110 (1978); *United States v. England*, 480 F.2d 1266 (5th Cir. 1973), *cert. denied*, 414 U.S. 1041, 94 S. Ct. 543, 38 L. Ed. 2d 332 (1973); *United States v. Williams*, 728 F.2d 1402 (11th Cir. 1984).

## S18
## Good-Faith Reliance upon Advice of Counsel

Good-faith is a complete defense to the charge in the indictment because the Government must prove beyond a reasonable doubt that the Defendant acted with [intent to defraud] [bad purpose to disobey or disregard the law] [a specific intent to violate a known legal duty]. Evidence that the Defendant in good-faith followed the advice of counsel would be inconsistent with such an unlawful intent.

Unlawful intent has not been proved if the Defendant, before acting:

- made a full and complete good-faith report of all material facts to an attorney he or she considered competent;
- received the attorney's advice as to the specific course of conduct that was followed; and
- reasonably relied upon that advice in good-faith.

**ANNOTATIONS AND COMMENTS**

"Good-faith" is a defense whenever the defendant's good-faith is inconsistent with a finding that the defendant acted with the mental state required by the definition of the offense charged. Good-faith exculpates when it necessarily negates the required mental state for the offense. Of course, whether good-faith would negate the mental state element depends on how that element is defined with respect to the offense charged and the evidence presented at trial in support of the defendant's good-faith defense. Because good-faith relates to an element of the offense, the defendant does not have the burden of persuasion, although the defendant may have the burden of production.

Perhaps because of *Cheek v. United States*, 498 U.S. 192 (1991), where the Supreme Court held that the defendant could not be convicted if the jury found that he honestly believed the tax laws did not make his conduct criminal, even if that belief was unreasonable, this defense is often thought of in connection with tax offenses.

The defense has also been used commonly in the context of fraud type offenses, such as mail fraud, securities fraud, bankruptcy fraud, bank fraud and the like, as well as false statement crimes.

This instruction should be used, where appropriate, only in cases where "intent" is an element. It is not to be used where it is required only that the defendant acted "knowingly."

*See United States v. Eisenstein*, 731 F.2d 1540, 1544 (11th Cir. 1984).

*See also United States v. Condon*, 132 F.3d 653 (11th Cir. 1998) (describing the circumstances in which a good-faith reliance upon advice of counsel instruction is appropriate).

*See also United States v. Petrie*, 302 F.3d 1280 (11th Cir. 2002) (the instruction may be applied to the charges of conspiracy to launder money if there is an evidentiary predicate for the defense).

## S19
## Evidence of Flight

Intentional flight or concealment by a person during or immediately after a crime has been committed, or after a person 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 that, 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 to determine. And if you determine that the Defendant's conduct constituted flight or concealment, whether or not that conduct showed a consciousness of guilt on the Defendant's part is also exclusively for you to determine.

If you find that there was flight or concealment, you should also consider there may be reasons for this conduct that 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 that 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).

**O1.1**
**Forcibly Assaulting a Federal Officer:**
**without Use of a Deadly Weapon**
**18 USC § 111(a)(1) – Felony Offense**

It's a Federal crime to forcibly assault a Federal officer [causing physical contact] [intending to commit another felony] while the officer is performing official duties.

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

(1) the Defendant "forcibly assaulted" the person described in the indictment;

(2) the person assaulted was a Federal officer performing an official duty; and

(3) the Defendant's acts [resulted in physical contact with the person assaulted] [involved the intent to commit another felony].

A "forcible assault" is an intentional threat or attempt to cause serious bodily injury when the ability to do so is apparent and immediate. It includes any intentional display of force that would cause a reasonable person to expect immediate and serious bodily harm or death.

The Government must prove beyond a reasonable doubt that the victim was a Federal officer performing an official duty and that the Defendant forcibly assaulted the officer. Whether the Defendant knew at the time that the victim was a Federal officer carrying out an official duty does not matter.

[But you can't find that a forcible assault occurred if you believe that the Defendant acted only on a reasonable good-faith belief that self-defense was necessary to protect against an assault by a private citizen, and you have a reasonable doubt that the Defendant knew that the victim was a Federal officer.]

[A [name of agent type, e.g., Special Agent or I.R.S. Agent] of the [name of agency], is a Federal officer and has the official duty to [describe function at issue in case].]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 111(a)(1) provides:

> Whoever forcibly assaults, resists, opposes, impedes, intimidates or interferes with any [Federal officer or employee] designated in Section 1114 of this title while engaged in or on account of the performance of his official duties . . . and where such acts involve physical contact with the victim of that assault or the intent to commit another felony [shall be guilty of an offense against the United States].

Maximum Penalty: Eight (8) years imprisonment and applicable fine.

Before 18 U.S.C. § 111 was amended in 2008, it provided for three categories of forcible assault: (1) simple or misdemeanor assault, "where the acts in violation of [subsection (a)] constitute only simple assault;" (2) "all other cases," where the acts specified in subsection (a) constitute felony assault; and (3) where the acts specified in subsection (a) involved use of a deadly or dangerous weapon, or inflicted bodily injury. *See United States v. Siler*, 734 F.3d 1290 (11th Cir. 2013) (citing *United States v. Martinez*, 486 F.3d 1239 (11th Cir. 2007)). The statute was amended in 2008 to narrow the second category of forcible assault to require "physical contact with the victim or the intent to commit another felony." 18 U.S.C. § 111(a). If the evidence does not support that there was physical contact or the intent to commit another crime, it may be necessary to instruct on the lesser included offense of simple assault. *See* Special Instruction 10.

Although knowledge of the official capacity of the victim is unnecessary for conviction, a Defendant may not be found guilty if the Defendant acts from the mistaken belief that he or she is threatened with an intentional tort by a private citizen. *United States v. Young*, 464 F.2d 160 (5th Cir. 1972); *United States v. Danehy*, 680 F.2d 1311 (11th Cir. 1982). In connection with a claim of self-defense, see *United States v. Alvarez*, 755 F.2d 830 (11th

Cir. 1985), concerning an instruction about the relevance of the Defendant's state of mind and the alternative methods the Government has to negate such a claim.

## O1.2
## Forcibly Assaulting a Federal Officer: with Use of a Deadly Weapon or Inflicting Bodily Injury
## 18 USC § 111(b)

It's a Federal crime to forcibly assault a Federal officer [using a deadly or dangerous weapon] [inflicting bodily injury] while the officer is performing official duties.

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

(1) the Defendant "forcibly assaulted" the person described in the indictment;

(2) the person assaulted was a Federal officer performing an official duty; and

(3) the Defendant [used a deadly or dangerous weapon] [inflicted bodily injury]

A "forcible assault" is an intentional threat or attempt to cause serious bodily injury when the ability to do so is apparent and immediate. It includes any intentional display of force that would cause a reasonable person to expect immediate and serious bodily harm or death.

The Government must prove beyond a reasonable doubt that the victim was a Federal officer performing an official duty and the Defendant forcibly assaulted the officer. Whether the Defendant knew at the time that the victim was a Federal officer carrying out an official duty does not matter.

[But you can't find that a forcible assault occurred if you believe that the Defendant acted only on a reasonable good-faith belief that self-defense was necessary to protect against an assault by a private citizen, and you have a reasonable doubt that the Defendant knew that the victim was a Federal officer.]

[A [name of agent type, e.g., Special Agent, I.R.S. Agent] of the [name of agency] is a Federal officer and has the official duty to [describe function at issue in case].]

[A "deadly or dangerous weapon" means any object that can cause death or present a danger of serious bodily injury. A weapon intended to cause death or present a danger of serious bodily injury but that fails to do so by reason of a defective component, still qualifies as a "deadly or dangerous weapon."

To show that such a weapon was "used," the Government must prove that the Defendant possessed the weapon and intentionally displayed it during the forcible assault.]

[Though a forcible assault requires an intentional threat or attempt to inflict serious bodily injury, the threat or attempt doesn't have to be carried out and the victim doesn't have to be injured.]

[In this case, the indictment alleges that bodily injury actually occurred, so that is the last element that the Government must prove.

A "bodily injury" is any injury to the body, no matter how temporary. It includes any cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; or impairment of the function of a bodily member, organ, or mental faculty.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 111(b) provides:

> Whoever, in the commission of any acts described in subsection (a) uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury [shall be punished as provided by law].

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

In *United States v. Siler*, 734 F.3d 1290 (11th Cir. 2013), the Eleventh Circuit held that 18 U.S.C. § 111(b) does not require proof of physical contact or the intent to commit another felony. The twenty-year maximum penalty applies whenever a person commits any act listed in 18 U.S.C. § 111(a), including simple assault, while using a deadly or dangerous weapon.

If the evidence does not support that a deadly or dangerous weapon was used, or that bodily injury was inflicted, it may be necessary to instruct on the lesser included offense of assaulting a Federal officer without use of deadly weapon or infliction of bodily injury, or simple assault. *See* Special Instruction 10.

Although knowledge of the official capacity of the victim is unnecessary for conviction, a Defendant may not be found guilty if the Defendant acts from the mistaken belief that he or she is threatened with an intentional tort by a private citizen. *United States v. Young*, 464 F.2d 160 (5th Cir. 1972); *United States v. Danehy*, 680 F.2d 1311 (11th Cir. 1982). In connection with a claim of self-defense, see *United States v. Alvarez*, 755 F.2d 830 (11th Cir. 1985), concerning an instruction about the relevance of the Defendant's state of mind and the alternative methods the Government has to negate such a claim.

The definition of "bodily injury" in the last paragraph of the instruction is from *United States v. Myers*, 972 F.2d 1566, 1572 (11th Cir. 1992), *cert. denied*, 507 U.S. 1017, (1993), defining the term under 18 U.S.C. § 242.

**O2**
**Concealment of Property Belonging**
**to the Estate of a Bankruptcy Debtor**
**18 U.S.C. § 152(1)**

In a case governed by the Federal bankruptcy laws, it's a Federal crime to fraudulently conceal any property belonging to the estate of a bankruptcy debtor from creditors or from an officer of the court who has a duty to take control of the property.

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

(1) on or about the date charged, a bankruptcy case docketed as case number _____ was pending in the United States Bankruptcy Court for the _____ District of _____, and _____ [doing business as _____] was the Debtor;

(2) the property or an interest in the property described in the indictment was a part of the Debtor's bankruptcy estate; and

(3) the Defendant knowingly and fraudulently concealed the property from creditors or from the [Bankruptcy Administrator] [United States Trustee] who had responsibility for the control or custody of the property.

A "Debtor" is a person or corporation that's the subject of a federal bankruptcy case.

When a debtor files a petition for bankruptcy, the bankruptcy estate is created. Among other things, the estate includes all the property owned by the

debtor and the debtor's claims on or rights to other property, no matter where the property is or who possesses it when the bankruptcy case begins.

If another person or entity also owns an interest in a property, the debtor's interest in it is still part of the bankruptcy estate.

The bankruptcy estate also includes any proceeds, products, rents, or profits of or from property of the estate except earnings from services performed by an individual debtor after the bankruptcy case begins.

Note: In Chapter 11 bankruptcy cases filed after October 17, 2005, and all cases filed under Chapter 12 and Chapter 13, use the following alternative definition of "bankruptcy estate."

[The bankruptcy estate also includes any proceeds, products, rents, or profits of or from property of the estate. It also includes earnings from services performed by an individual debtor after the commencement of the bankruptcy case.]

The [Bankruptcy Administrator] [United States Trustee] for the Bankruptcy Court for the _____ District of _____ is an officer of the court and was at all relevant times responsible for the control or custody of all property constituting the bankruptcy estate in case number _____.

The heart of this charge is the knowing and fraudulent concealment of property belonging to the debtor's estate. "Conceal" has its ordinary sense of "to hide" or "to prevent recognition" of something.

To "fraudulently conceal" property means to knowingly withhold information about property or to knowingly prevent its discovery while intending to deceive or cheat a creditor or custodian, usually for personal financial gain or to cause financial loss to someone else.

A "creditor" is a person or company that has a claim or right to payment from the debtor that arose before or when a bankruptcy court issued an order for relief concerning the debtor.

The term "custodian" means a person authorized by a bankruptcy court to administer the property of the debtor. It includes a bankruptcy administrator or trustee.

Fraudulently concealing property may include:

- transferring property to a third party or entity;
- destroying the property;
- withholding information about the property's existence or location; or
- knowingly doing anything else to hinder, delay, or defraud any creditor [or the] [Bankruptcy Administrator] [United States Trustee].

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 152(1) provides that whoever:

> (1) knowingly and fraudulently conceals… in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and applicable fine.

Some of the definitions in this instruction are from 11 U.S.C. §§ 101 and 541.

The Eleventh Circuit determined that in the term "property of the estate" has a broader definition in Chapter 13 bankruptcy cases, and includes "earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed or converted…" *In re Waldron*, 536 F.3d 1239, 1241 (11th Cir. 2008) (quoting 11 U.S.C. § 1306(a)(2). Chapter 11, as amended by BAPCPA), has a similar provision for individual Chapter 11 debtors, 11 U.S.C. § 1115(a)(2), as does Chapter 12, 11 U.S.C. § 1207(a)(2).

**O3**
**Presenting or Using a False**
**Claim in a Bankruptcy Proceeding**
**18 U.S.C. § 152(4)**

It's a Federal crime to knowingly and fraudulently [present] [use] a false claim in any bankruptcy proceeding.

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

(1) on or about the date charged, a bankruptcy case docketed as Case Number _____ was pending in the United States Bankruptcy Court for the _____ District of _____, and _____ [doing business as _____] was the Debtor;

(2) the Defendant [in a personal capacity] [as or through an agent, proxy, or attorney] [presented] [used] a claim against the estate of the Debtor in that bankruptcy proceeding;

(3) a material fact in the claim so [presented] [used] was false; and

(4) the Defendant knowingly and fraudulently [presented] [used] the claim.

A claim is "false" if it is untrue when [made] [presented] and the person [making] [presenting] it knows it is untrue.

A "material fact" is an important fact -- not some unimportant or trivial detail.

A claim is "fraudulent" if it is intended to deceive or to cheat, usually for personal financial gain or to cause someone else financial loss.

## ANNOTATIONS AND COMMENTS

18 U.S.C. § 152(4) provides that whoever:

> (4) knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity or as or through an agent, proxy, or attorney [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and applicable fine.

*See* 11 U.S.C. § 101(5) for a definition of "claim" if one is needed.

There are no decisions in the Eleventh Circuit as to whether materiality is an element of this offense. However, because the statute expressly incorporates the term "fraudulently" in conjunction with the term "false claim," the Committee believes that materiality is an essential element of the offense that must be submitted to the jury under the Supreme Court decisions in *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310 (1995); *United States v. Wells*, 519 U.S. 482, 117 S. Ct. 921 (1997); and *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827 (1999). The Court concluded in *Wells* that materiality was not an element of the offense of making a "false statement" in violation of 18 U.S.C. § 1014, but held in *Neder* that use of the words "fraud" or "fraudulently" in 18 U.S.C. §§ 1341, 1343 and 1344, as terms of art, incorporated the common law requirement that proof of fraud necessitates proof of misrepresentation or concealment of a material fact. And *Gaudin* held that when materiality is an essential element of an offense, it must be submitted to the jury.

**O4**
**Embezzlement of a Bankruptcy Estate**
**18 U.S.C. § 153**

It's a Federal crime for the trustee or custodian of a bankruptcy estate to knowingly and fraudulently embezzle or appropriate any property belonging to the bankruptcy estate.

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

(1) on or about the date charged a bankruptcy case docketed as Case Number _____ was pending in the United States Bankruptcy Court for _____ District of _____, and _____ [doing business as] was the Debtor;

(2) the property or interest described in the indictment was part of the bankruptcy estate of the Debtor;

(3) the Defendant had access to the property as a trustee or custodian of the bankruptcy estate; and

(4) the Defendant knowingly and fraudulently embezzled, spent, transferred, or appropriated to the Defendant's own use property belonging to the bankruptcy estate.

A "Debtor" is a person or corporation that's the subject of a Federal bankruptcy case.

When a debtor files a voluntary petition for bankruptcy, the bankruptcy estate is created. Among other things, it includes all the property owned by the Debtor and the Debtor's claims on or rights to other property, no matter where the property is or who possessed it when the bankruptcy case began.

The Bankruptcy Court for the _____ has the authority and power to appoint a custodian or trustee to administer the bankruptcy estate of a Debtor. The custodian or trustee is responsible for the control of all the property belonging to the bankruptcy estate.

The heart of the charge in the indictment is the knowing and fraudulent embezzlement or appropriation of property belonging to the Debtor's estate.

"Fraudulent" means to knowingly deceive or mislead someone, usually for personal gain.

To "embezzle" or "appropriate" means to wrongfully take someone's property and spend it, transfer it, convert it to personal use, or convert it to someone else's use.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 153 provides:

> (a) Offense. A person described in subsection (b) [a trustee or other custodian] who knowingly and fraudulently appropriates to the person's own use, embezzles, spends, or transfers any property… belonging to the estate of a debtor [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and applicable fine.

**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.

**O6.1**
**Bribery of a Bank Officer**
**18 U.S.C. § 215(a)(1)**

It's a Federal crime for anyone to corruptly [give] [offer] [promise] anything of value to any person with the intent to [influence] [reward] an [officer] [director] [employee] [agent] [attorney] of a financial institution in connection with any [business] [transaction] of the institution.

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

(1) the Defendant [gave] [offered] [promised] something of value to the person named in the indictment;

(2) the Defendant did so knowingly and corruptly with the intent to [influence] [reward] an [officer] [director] [employee] [agent] [attorney] of a financial institution in connection with any [business] [transaction] of that institution; and

(3) the money or property [given] [offered] [promised] had a value greater than $1,000.

[Institution's name] is legally a "financial institution."

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

**ANNOTATIONS AND COMMENTS**

Title 18 U.S.C. § 215(a)(1) provides:

§ 215. Receipt of commissions or gifts for procuring loans

(a) Whoever - -

(1) corruptly gives, offers, or promises anything of value to any person, with intent to influence or reward an officer, director, employee, agent, or attorney of a financial institution in connection with any business or transaction of such institution [shall be guilty of an offense against the United States].

The term "financial institution" is defined in 18 U.S.C. § 20.

Maximum penalty: Thirty (30) 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.

18 U.S.C. § 215(a) provides that if the value of the bribe does not exceed $1,000, the Defendant is subject to imprisonment for not more than one year, i.e., a misdemeanor offense. *See* Special Instruction 10, Lesser Included Offense.

The forfeiture provisions of 18 U.S.C. § 982 apply (18 U.S.C. § 982(a)(2)(A)) if the indictment has given notice under Federal Rule of Criminal Procedure 32.2 that the Government will seek forfeiture as part of the sentence. The principle of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), does not apply to forfeiture proceedings following conviction, and the burden of proof on a forfeiture count is preponderance of the evidence. *United States v. Cabeza*, 258 F.3d 1256 (11th Circuit 2001).

*See* Trial Instruction 6 for use in submitting forfeiture issues to the jury.

## O6.2
## Receipt of a Bribe or Reward by a Bank Officer
## 18 U.S.C. § 215(a)(2)

It's a federal crime for an [officer] [director] [employee] [agent] [attorney] of a financial institution, for the benefit of any person, corruptly to [solicit or demand] [accept or agree to accept] anything of value from any person, intending to be [influenced] [rewarded] in connection with any business or transaction of the institution.

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

(1) the Defendant, as an [officer] [director] [employee] [agent] [attorney] of a financial institution [solicited or demanded] [accepted or agreed to accept] something of value from the person named in the indictment for [his or her own benefit] [the benefit of another person];

(2) the Defendant did so knowingly and corruptly, intending to be [influenced] [rewarded] in connection with any business or transaction of the financial institution; and

(3) the money or other property so [solicited or demanded] [accepted or agreed to accept] had a value greater than $1,000.

[Institution's name] is legally a "financial institution."

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

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 215(a)(2) provides:

§ 215. Receipt of commissions or gifts for procuring loans

(a) Whoever - -

(2) as an officer, director, employee, agent, or attorney of a financial institution, corruptly solicits or demands for the benefit of any person, or corruptly accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business or transaction of such institution [shall be guilty of an offense against the United States].

The term "financial institution" is defined in 18 U.S.C. § 20.

Maximum Penalty: Thirty (30) 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.

18 U.S.C. § 215(a) provides that if the value of the bribe does not exceed $1,000, the Defendant is subject to imprisonment for not more than one year, i.e., a misdemeanor offense. *See* Special Instruction 10, Lesser Included Offense.

The forfeiture provisions of 18 U.S.C. § 982 apply (18 U.S.C. § 982(a)(2)(A)) if the indictment has given notice under Federal Rule of Criminal Procedure 32.2 that the Government will seek forfeiture as part of the sentence. The principle of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000) does not apply to forfeiture proceedings following conviction, and the burden of proof on a forfeiture count is preponderance of the evidence. *United States v. Cabeza*, 258 F.3d 1256 (11th Circuit 2001).

*See* Trial Instruction 6 for use in submitting forfeiture issues to the jury.

**O7**
**Failure to Pay Child Support**
**18 U.S.C. § 228(a)(3)**

It's a Federal crime to willfully fail to pay a child-support obligation for a child who resides in another State if that obligation [has been unpaid for more than two years] [is more than $10,000].

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

(1) the Defendant failed to pay a support obligation;

(2) the support obligation was for a child who resides in another State;

(3) the Defendant willfully failed to pay the support obligation; and

(4) the support obligation [has been unpaid for more than two years] [is more than $10,000].

A "support obligation" is any amount set by a court order, or an order of an administrative process under state law, requiring a person to pay for the support of a child and the parent whom the child lives with.

The requirement that the Defendant act willfully in failing to pay the support obligation means that [he] [she] must have had a legal duty to pay the support obligation, that [he] [she] knew of this duty, and that [he] [she] voluntarily and intentionally violated that duty. It also means that the Defendant must have known that this child resided in another state.

[The existence of a support obligation that was in effect during the time charged in the indictment creates a rebuttable presumption that the Defendant had the ability to pay the support. That presumption may be assumed true unless contrary evidence rebuts it.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 228(a)(3) provides:

> (a) Any person who - -
>
> (3) willfully fails to pay a support obligation with respect to a child who resides in another state, if such obligation has remained unpaid for a period longer than 2 years, or is greater than $10,000 [shall be guilty of an offense against the United States].

Maximum Penalty: Two (2) years imprisonment and applicable fine. Section 228(d) mandates restitution in an amount equal to the unpaid support obligation as it exists at the time of sentencing.

In *United States v. Fields*, 500 F.3d 1327 (11th Cir. 2007), the court held that the "willful" element requires the government to prove that the defendant knew the child resided in another state.

The rebuttable presumption is created by the statute, 18 U.S.C. § 228(b). However, in *United States v. Grigsby*, 85 F. Supp. 2d 100 (D.R.I. 2000), the court held the presumption to be unconstitutional in violation of the Due Process Clause of the Fifth Amendment. No other court has addressed this issue to date.

**O8**
**Deprivation of Civil Rights (Without Bodily Injury, Kidnapping, Sexual Assault, or Death)**
**18 U.S.C. § 242**

It's a Federal crime for anyone acting under color of state law to willfully deprive someone else of his or her rights secured by the Constitution or laws of the United States.

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

(1) the Defendant deprived the victim of the right [of] [to] [describe right infringed, e.g., deprivation of liberty without due process of law];

(2) the Defendant acted or claimed to act under color of state law; and

(3) the Defendant willfully exceeded and misused or abused the Defendant's authority under state law.

An act "under color of state law" includes any act done by an official under a state law or regulation. It also covers acts done by an official under the ordinances and regulations of any county or municipality of the state. It even includes acts performed under a state or local custom.

To act "under color of state law" means to exceed or abuse lawful authority while claiming or pretending to perform an official duty. An unlawful act under color of state law occurs when a person has power only because that person is an official, and that person does acts that are a misuse or abuse of that power.

[The Defendant may be found guilty even though the Defendant isn't an official or employee of the State, or of any county, or other governmental unit, if the Government has proved beyond a reasonable doubt that the essential facts constituting the offense charged have been established and that the Defendant willfully participated with the State or its agents in the misuse or abuse of lawful authority.]

["Liberty" includes freedom from unlawful attack upon one's person and the principle that no person may be physically assaulted, intimidated, or otherwise abused intentionally and without justification by a person acting under the color of the laws of any state.]

[To be deprived of liberty "without due process of law" means to be deprived of liberty without legal authority.

To determine whether the alleged victim was deprived of liberty without due process of law, you must first determine from the evidence whether the Defendant did any of the acts charged.

If so, then you must determine whether the Defendant acted within the bounds of the Defendant's lawful authority.]

[If you find that the Defendant acted within the limits of lawful authority under state law, the Defendant did not deprive the alleged victim of any liberty without due process of law.]

[But if you find that the Defendant exceeded the limits of lawful authority under state law, you may find that the Defendant deprived the alleged victim of liberty without due process of law and then decide whether the Defendant acted willfully.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 242 provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State… to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States [shall be guilty of an offense against the United States].

Maximum Penalty: One (1) year imprisonment and applicable fine.

18 U.S.C. § 242 was amended in 1988 to increase the maximum penalty in a variety of situations, such as when bodily injury results or dangerous weapons are used, Under the principle of *Apprendi*, this charge must be modified if one of the many situations calling for an increased punishment is charged and, in that event, the Lesser Included Offense Special Instruction may also be used.

The Eleventh Circuit has approved the following definition of "bodily injury" under § 242: "the term 'bodily injury' means – (A) a cut, abrasion, bruise, burn or disfigurement; (B) physical pain; (C) illness; (D) impairment of a function of a bodily member, organ or mental faculty; or (E) any other injury to the body, no matter how temporary." *United States v. Myers*, 972 F.2d 1566, 1572 (11th Cir. 1992), *cert. denied*, 507 U.S. 1017, 113 S. Ct. 1813, 123 L. Ed. 2d 445 (1993).

A private citizen who aids and abets a state officer may be guilty under § 242 if the private citizen willfully acts with state officers who are active participants. *United States v. Farmer*, 923 F.2d 1557, 1564 (11th Cir. 1991).

If the determination of whether the Defendant acted within or without the limits of lawful authority is dependent upon the presence of "probable cause," an instruction defining probable cause, tailored to the case, must be included in the charge. For an example of a "probable cause" instruction, *see* Federal Claims Instruction 2.2, Pattern Jury Instructions (Civil Cases).

The civil action requirement that the alleged constitutional infringement be "clearly established" under substantially similar circumstances in order to overcome qualified immunity is equally applicable in criminal prosecutions in the sense that the unlawfulness of the conduct must be apparent in the light of pre-existing case law so as to give "fair warning" to the accused offender. *United States v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219 (1997). *See also Marsh v. Butler County*, 268 F.3d 1014, 1031 n.9 (11th Cir. 2001).

The committee believes that the general definition of "willfully" in Basic Instruction 9.1A would usually apply to this crime.

**O9**
**Damage to Religious Property**
**18 U.S.C. § 247(a)(1) and (d)(2)**

Under certain circumstances, it's a Federal crime for anyone to [deface] [damage] [destroy] any religious real property because of the religious character of that property.

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

(1) the Defendant intentionally [defaced] [damaged] [destroyed] the real property described in the indictment;

(2) the Defendant did so knowingly and because of the property's religious character;

(3) the crime was in or affected interstate or foreign commerce;

(4) the person named in the indictment suffered bodily injury as a direct or proximate result of the Defendant's acts; and

(5) the Defendant used [fire] [an explosive] in committing the crime.

"Religious property" is any church, synagogue, mosque, religious cemetery, or other religious property.

The required effect on [interstate] [foreign] commerce can arise in many ways, such as when the Defendant traveled into the state where the conduct occurred from [another state] [a foreign country]; or when materials to repair the damage traveled from one state into another state; or [insert other relevant conduct that affects commerce].

[A "bodily injury" means any injury to the body, no matter how temporary. It includes any cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; or impairment of the function of a bodily member, organ, or mental faculty.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 247 provides:

> (a) Whoever in any of the circumstances referred to in subsection (b) of this section - -
>
> > (1) intentionally defaces, damages, or destroys any religious real property, because of the religious character of that property, or attempts to do so [shall be guilty of an offense against the United States].
>
> * * * * *
>
> (b) The circumstances referred to in subsection (a) are that the offense is in or affects interstate or foreign commerce.
>
> * * * * *
>
> (d) The punishment for a violation of subsection (a) of this section shall be - -
>
> > (2) if bodily injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this section, and the violation is by means of fire or an explosive a fine under this title or imprisonment for not more than 40 years, or both;

Maximum Penalty: One (1) year imprisonment and applicable fine unless bodily injury results (or the offense is otherwise aggravated as specified in subsection (d)(1), (2), and (3) of the statute).

This instruction covers three separate offenses embodied in § 247: (1) damage to property; (2) damage to property with bodily injury; (3) damage to property with bodily injury resulting from use of fire or explosives. In an appropriate case, therefore, it may be necessary to use Special Instruction 10, Lesser Included Offenses, and to modify that instruction if both of the lesser crimes are submitted to the jury.

**O10.1**
**Freedom of Access to Reproductive Health Services: Intimidation or Injury of a Person**
**18 U.S.C. § 248(a)(1)**

It's a Federal crime for anyone to use [force] [a threat of force] [a physical obstruction] to intentionally [injure] [intimidate] [interfere with] a person [obtaining] [providing] reproductive-health 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 used [force] [a threat of force] [a physical obstruction] to intentionally [injure] [intimidate] [interfere with] the person named in the indictment; [and]

(2) the Defendant did so knowingly and because the person was or had been [providing] [obtaining] reproductive-health services; [and]

[(3) the Defendant's acts resulted in [death] [bodily injury].]

[To "force" a person means to exert or apply physical compulsion or restraint against the person.]

[To "interfere with" means to restrict a person's freedom of movement.]

[To "intimidate" a person means to place the person in reasonable fear of bodily harm either to that person or to someone else.]

[To "physically obstruct" means to block the entry to or exit from a facility that provides reproductive-health services.]

"Reproductive-health services" are medical, surgical, counseling, or referral services relating to the human reproductive system – including services relating to pregnancy or the termination of a pregnancy – provided in a hospital, clinic, physician's office, or other facility.

[A "bodily injury" means any injury to the body, no matter how temporary. It includes any cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; or impairment of the function of a bodily member, organ, or mental faculty.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 248(a)(1) provides:

> Whoever - -
>
> > (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services [shall be guilty of an offense against the United States].

Maximum Penalty: Ten (10) years imprisonment, and applicable fine, if bodily injury results. Three (3) years imprisonment, and applicable fine, for repeat offense. One (1) year imprisonment, and applicable fine, for first offense without bodily injury. Six (6) months, and applicable fine, "for an offense involving exclusively a nonviolent physical obstruction."

Lesser Included Offense (Special Instruction 10) may apply. Also, if the indictment or information charges only an exclusively nonviolent physical obstruction, the Defendant is not entitled of right to a jury trial. *United States v. Unterberger*, 97 F.3d 1413 (11th Cir. 1996).

# O10.2
# Freedom of Access to Reproductive-Health Services: Damage to a Facility 18 U.S.C. § 248(a)(3)

It's a Federal crime for anyone to intentionally [damage] [destroy] a facility because the facility provides reproductive-health 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 intentionally [damaged] [destroyed] the facility described in the indictment; and

(2) the Defendant did so knowingly and because the facility was being used to provide reproductive-health services.

A "facility" is a hospital, clinic, physician's office, or other facility that provides reproductive-health services. It includes the building or structure in which the facility is located.

"Reproductive-health services" are medical, surgical, counseling, or referral services relating to the human reproductive system – including services relating to pregnancy or the termination of a pregnancy – provided in a hospital, clinic, physician's office, or other facility.

## ANNOTATIONS AND COMMENTS

18 U.S.C. § 248(a)(3) provides:

Whoever - -

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship [shall be guilty of an offense against the United States].

Maximum Penalty: Ten (10) years imprisonment, and applicable fine, if bodily injury results. Three (3) years imprisonment, and applicable fine, for repeat offense.

Lesser Included Offense (Special Instruction 10) may apply.

**O11.1**
**Conspiracy to Defraud the Government**
**with Respect to Claims**
**18 U.S.C. § 286**

It's a separate Federal crime for anyone to conspire or agree with someone else to defraud the Government by obtaining or helping to obtain the payment or allowance of any false or fraudulent claim.

A "conspiracy" is an agreement by two or more persons to commit an unlawful act. In other words, it is a kind of partnership for criminal purposes. Every member of the conspiracy becomes the agent or partner of every other member.

The Government does not have to prove that all the people named in the indictment were members of the plan, or that those who were members made any kind of formal agreement. The heart of a conspiracy is the making of the unlawful plan itself, so the Government does not have to prove that the conspirators succeeded in carrying out the plan.

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

(1) two or more people in some way agreed to try to accomplish a shared and unlawful plan;

(2) the Defendant knew the unlawful purpose of the plan and willfully joined in it; and

(3) the plan was to defraud the Government by obtaining the payment or allowance of a claim based on a false or fraudulent material fact.

A "material fact" is an important fact – not some unimportant or trivial detail – that has a natural tendency to influence or is capable of influencing a decision of a department or agency in reaching a required decision.

A person may be a conspirator even without knowing all the details of the unlawful plan or the names and identities of all the other alleged conspirators.

If the Defendant played only a minor part in the plan but had a general understanding of the unlawful purpose of the plan – and willfully joined in the plan on at least one occasion – that's sufficient for you to find the Defendant guilty.

But simply being present at the scene of an event or merely associating with certain people and discussing common goals and interests doesn't establish proof of a conspiracy. Also, a person who doesn't know about a conspiracy but happens to act in a way that advances some purpose of one doesn't automatically become a conspirator.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 286 provides:

> Whoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim, shall be [guilty of an offense against the United States].

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

Section 286 does not require the Government to prove an overt act. *United States v. Lanier*, 920 F.2d 887, 892 (11th Cir. 1991).

Because the statute expressly incorporates the term "fraudulent" in conjunction with the term "false," the Committee believes that materiality is an essential element of the offense that must be submitted to the jury under the more recent Supreme Court decisions in *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310 (1995); *United States v. Wells*, 519 U.S. 482, 117 S. Ct. 921 (1997); and *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827 (1999). The Court concluded in *Wells* that materiality was not an element of the offense of making a "false statement" in violation of 18 U.S.C. § 1014, but held in *Neder* that use of the words "fraud" or "fraudulently" as terms of art in 18 U.S.C. §§ 1341, 1343 and 1344 incorporated the common law requirement that proof of fraud necessitates proof of misrepresentation or concealment of a material fact. And *Gaudin* held that when materiality is an essential element of an offense, it must be submitted to the jury.

The committee believes that the general definition of "willfully" in Basic Instruction 9.1A would usually apply to this crime.

**O11.2**
**False Claims Against the Government**
**18 U.S.C. § 287**

It's a Federal crime to knowingly make a false claim against any department or agency of the United States.

[The General Services Administration is a department or agency of the United States.]

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 presented a false claim against the United States to an agency of the United States;

(2) the claim was based on a false or fraudulent material fact; and

(3) the Defendant acted intentionally and knew that the claim was false and fraudulent.

A claim is "false" or "fraudulent" if it is untrue when [made][presented] and the person [making] [presenting] it knows it is untrue. But the Government doesn't have to show that the Governmental department or agency was in fact deceived or misled.

It's not a crime to make a false claim unless the falsity or fraudulent aspect relates to a material fact. A misrepresentation is "material" if it contains a "material fact" that is false. A "material fact" is an important fact – not some

unimportant or trivial detail – that has a natural tendency to influence or is capable of influencing a department or agency in reaching a required decision.

[The defendant does not have to directly submit the claim to an employee or agency of the United States. It is sufficient if the defendant submits the claim to a third party knowing that the third party will submit the claim or seek reimbursement from the United States [or a department or agency thereof].]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 287 provides:

> Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and applicable fine.

Note that Section 287, unlike other false claims or false statement provisions such as 18 U.S.C. § 1001, does not expressly state that "materiality" is an essential element of the offense.

Before 1997, the Fourth and Eighth Circuits held that materiality is an element of a violation under 18 U.S.C. § 287. *United States v. Pruitt*, 702 F.2d 152, 155 (8th Cir. 1983); *United States v. Snider*, 502 F.2d 645, 652 n.12 (4th Cir. 1974), while the Second, Fifth, Ninth, and Tenth Circuits held that materiality is not an element under 18 U.S.C. § 287. *United States v. Upton*, 91 F.3d 677 (5th Cir. 1996); *United States v. Taylor*, 66 F.3d 254, 255 (9th Cir. 1995); *United States v. Parsons*, 967 F.2d 452, 455 (10th Cir. 1992); *United States v. Elkin*, 731 F.2d 1005, 1009 (2nd Cir. 1984), *cert. denied*, 469 U.S. 822, 105 S. Ct. 97, 83 L. Ed. 2d 43 (1984).

The Eleventh Circuit had explicitly avoided deciding whether materiality is an element under 18 U.S.C. § 287. *United States v. White*, 27 F.3d 1531, 1535 (11th Cir. 1994).

However, because the statute expressly incorporates the term "fraudulent" in conjunction with the term "false," the Committee believes that materiality is an essential element of

the offense that must be submitted to the jury under the more recent Supreme Court decisions in *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310 (1995); *United States v. Wells*, 519 U.S. 482, 117 S. Ct. 921 (1997); and *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827 (1999). The Court concluded in *Wells* that materiality was not an element of the offense of making a "false statement" in violation of 18 U.S.C. § 1014, but held in *Neder* that use of the words "fraud" or "fraudulently" as terms of art in 18 U.S.C. §§ 1341, 1343 and 1344 incorporated the common law requirement that proof of fraud necessitates proof of misrepresentation or concealment of a material fact. And *Gaudin* held that when materiality is an essential element of an offense, it must be submitted to the jury.

With respect to the additional language provided in this instruction for claims submitted to third parties, the Committee relies on the following authorities. *United States v. Precision Med. Labs, Inc.*, 593 F.2d 434, 442-43 (2nd Cir. 1978); *United States v. Catena*, 500 F.2d 1319 (3rd Cir. 1974), cert. denied, 419 U.S. 1047 (1974). *See generally* 18 U.S.C. § 2(b). *See also United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (interpreting R.S. § 5438, forerunner of 18 U.S.C. § 287); *United States v. Beasley*, 550 F.2d 261 (5th Cir. 1977), *cert. denied*, 434 U.S. 938 (1977).

**O12**
**Presenting False Declaration or Certification**
**18 U.S.C. § 289**

It's a Federal crime for anyone to knowingly and willfully make a false declaration or certification to the Department of Veterans Affairs.

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 presented a false or fraudulent declaration or certificate to the Department of Veterans Affairs;

(2) the declaration or certificate related to a material fact; and

(3) the Defendant acted willfully, knowing that the declaration was false or fraudulent.

A "false" or "fraudulent" declaration or certificate is a declaration or certificate that the person [presenting] [using] it knows is untrue. But the Government does not have to show that the Department of Veterans Affairs was in fact deceived or misled.

A "material fact" in a declaration or certificate is an important fact – not some unimportant or trivial detail – that has a natural tendency to influence or is capable of influencing the Department of Veterans Affairs in reaching a required decision.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 289 provides:

> Whoever knowingly and willfully makes, or presents any false, fictitious or fraudulent affidavit, declaration, certificate, voucher, endorsement, or paper or writing purporting to be such, concerning any claim for pension or payment thereof, or pertaining to any other matter within the jurisdiction of the Secretary of Veterans Affairs [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment, and applicable fine.

Note that Section 289, like Section 287 but unlike other false claims or false statements provisions such as 18 U.S.C. § 1001, does not expressly state that "materiality" is an essential element of the offense. There are no decisions on the point under Section 289, but there seems to be no reason to distinguish cases decided under Section 287.

Before 1997, the Fourth and Eighth Circuits had held that materiality is an element of a violation under 18 U.S.C. § 287. *United States v. Pruitt*, 702 F.2d 152, 155 (8th Cir. 1983); *United States v. Snider*, 502 F.2d 645, 652 n.12 (4th Cir. 1974), while the Second, Fifth, Ninth, and Tenth Circuits had held that materiality is not an element under 18 U.S.C. § 287. United States v. Upton, 91 F.3d 677 (5th Cir. 1996); *United States v. Taylor*, 66 F.3d 254, 255 (9th Cir. 1995); *United States v. Parsons*, 967 F.2d 452, 455 (10th Cir. 1992); *United States v. Elkin*, 731 F.2d 1005, 1009 (2nd Cir. 1984), *cert. denied*, 469 U.S. 822, 105 S. Ct. 97, 83 L. Ed. 2d 43 (1984).

The Eleventh Circuit had explicitly avoided deciding whether materiality is an element under 18 U.S.C. § 287.

However, because the statute expressly incorporates the term "fraudulent" in conjunction with the term "false," the Committee believes that materiality is an essential element of the offense that must be submitted to the jury under the more recent Supreme Court decisions in *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310 (1995); *United States v. Wells*, 519 U.S. 482, 117 S. Ct. 921 (1997); and *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827 (1999). The Court concluded in *Wells* that materiality was not an element of the offense of making a "false statement" in violation of 18 U.S.C. § 1014, but held in *Neder* that use of the words "fraud" or "fraudulently" as terms of art in 18 U.S.C. §§ 1341, 1343 and 1344 incorporated the common law requirement that proof of fraud necessitates proof of misrepresentation or concealment of a material fact. And *Gaudin* held that when materiality is an essential element of an offense, it must be submitted to the jury.

The committee believes that the general definition of "willfully" in Basic Instruction 9.1A would usually apply to this crime.

**O13.1**
**General Conspiracy Charge**
**18 U.S.C. § 371**

It's a separate Federal crime for anyone to conspire or agree with someone else to do something that would be another Federal crime if it was actually carried out.

A "conspiracy" is an agreement by two or more people to commit an unlawful act. In other words, it is a kind of "partnership" for criminal purposes. Every member of a conspiracy becomes the agent or partner of every other member.

The Government does not have to prove that all the people named in the indictment were members of the plan, or that those who were members made any kind of formal agreement.

The Government does not have to prove that the members planned together all the details of the plan or the "overt acts" that the indictment charges would be carried out in an effort to commit the intended crime.

The heart of a conspiracy is the making of the unlawful plan itself followed by the commission of any overt act. The Government does not have to prove that the conspirators succeeded in carrying out the plan.

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

(1) two or more persons in some way agreed to try to accomplish a shared and unlawful plan;

(2) the Defendant knew the unlawful purpose of the plan and willfully joined in it;

(3) during the conspiracy, one of the conspirators knowingly engaged in at least one overt act as described in the indictment; and

(4) the overt act was committed at or about the time alleged and with the purpose of carrying out or accomplishing some object of the conspiracy.

An "overt act" is any transaction or event, even one that may be entirely innocent when viewed alone, that a conspirator commits to accomplish some object of the conspiracy

A person may be a conspirator without knowing all the details of the unlawful plan or the names and identities of all the other alleged conspirators.

If the Defendant played only a minor part in the plan but had a general understanding of the unlawful purpose of the plan and willfully joined in the plan on at least one occasion, that's sufficient for you to find the Defendant guilty.

But simply being present at the scene of an event or merely associating with certain people and discussing common goals and interests doesn't establish proof of a conspiracy. A person who doesn't know about a conspiracy but happens to act in a way that advances some purpose of one doesn't automatically become a conspirator.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 371 provides:

> If two or more persons conspire… to commit any offense against the United States… and one or more of such persons do any act to effect the object of the conspiracy, each [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and applicable fine.

*See United States v. Horton*, 646 F.2d 181, 186 (5th Cir. 1981).

The Committee believes that the general definition of "willfully" in Basic Instruction 9.1A would usually apply to this crime.

The general conspiracy statute, 18 U.S.C. § 371, expressly makes an overt act an element of the offense. A conspiracy charged under other conspiracy statutes may not include an overt act as an element. *See, e.g.*, 18 U.S.C. §§ 286, 1349, 1956(h), 1962(d); and 21 U.S.C. §§ 846, 963. To the extent that district courts are relying on this instruction as guidance for drafting an instruction for a different conspiracy offense, the Committee cautions that the United States Supreme Court has held in several circumstances that proof of an overt act is not required when a conspiracy statute does not expressly contain an overt act requirement. *See Whitfield v. United States*, 543 U.S. 209, 214 (2005) (finding no overt act requirement in 18 U.S.C. § 1956(h)); *Salinas v. United States,* 522 U.S. 52, 63 (1997) (same as to 18 U.S.C. § 1962(d)); *United States v. Shabani* 513 U.S. 10, 11 (1994) (same as to 21 U.S.C. § 846). Reference to instructions related to those statutes may provide useful guidance. *See* O74.5, O75.2, O100.

**O13.2**
**Multiple Objects of a Conspiracy –**
**for use with General Conspiracy Charge 13.1**
**18 U.S.C. § 371**

In this case, regarding the alleged conspiracy, the indictment charges that the Defendants conspired to commit [first crime] and to commit [second crime]. In other words, the Defendants are charged with conspiring to commit two separate substantive crimes.

The Government does not have to prove that the Defendant willfully conspired to commit both crimes. It is sufficient if the Government proves beyond a reasonable doubt that the Defendant willfully conspired to commit one of those crimes. But to return a verdict of guilty, you must all agree on which of the two crimes the Defendant conspired to commit.

**ANNOTATIONS AND COMMENTS**

*United States v. Ballard*, 663 F.2d 534, 544 (5th Cir. Unit B, 1981), requires this instruction in order to assure a unanimous verdict when a single conspiracy embraces multiple alleged objects.

**O13.3**
**Multiple Conspiracies –**
**for use with General Conspiracy Charge 13.1**
**18 U.S.C. § 371**

Proof of several separate conspiracies isn't proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies proved is the single overall conspiracy.

You must decide whether the single overall conspiracy charged existed between two or more conspirators. If not, then you must find the Defendants not guilty of that charge.

But if you decide that a single overall conspiracy did exist, then you must decide who the conspirators were. And if you decide that a particular Defendant was a member of some other conspiracy – not the one charged – then you must find that Defendant not guilty.

So to find a Defendant guilty, you must all agree that the Defendant was a member of the conspiracy charged – not a member of some other separate conspiracy.

**ANNOTATIONS AND COMMENTS**

*See United States v. Diecidue*, 603 F.2d 535, 548-49 (5th Cir. 1979).

**O13.4**
**Withdrawal from a Conspiracy –**
**for use with General Conspiracy Charge 13.1**
**18 U.S.C. § 371**

A conspiracy isn't a crime unless (1) there is an agreement, and (2) a conspirator performs an overt act.

So, if a Defendant joins a conspiracy but later has a change of mind and withdraws from the conspiracy before any conspirator has committed an "overt act," the Defendant isn't guilty of conspiracy.

But to find that a Defendant withdrew from a conspiracy, you must find that the Defendant took action to disavow or defeat the purpose of the conspiracy before any member of the conspiracy committed any overt act.

**ANNOTATIONS AND COMMENTS**

*See United States v. Jimenez*, 622 F.2d 753 (5th Cir. 1980).

*United States v. Marolla*, 766 F.2d 457 (11th Cir. 1985), withdrawal, to constitute a defense, must come before the completion or consummation of the offense through the commission of an overt act.

This instruction is sometimes used when the charged conspiracy is not pursuant to 18 U.S.C. § 371 (general conspiracy charge). The holding of *Marolla* prevents a defendant from raising withdrawal under a conspiracy statute that does not require proof of an overt act (such as 21 U.S.C § 846, 955c, and 963) except in two instances. First, when the defendant raises withdrawal as a defense to Pinkerton liability, in which case withdrawal is a defense to subsequent criminal conduct of the defendant's co-conspirators. *See United States v. Alvarez*, 755 F.2d 830 (11th Cir. 1985); *United States v. Marolla*, 766 F.2d 457 (11th Cir. 1985). Second, when the defendant claims to have withdrawn from the conspiracy outside the limitations period, in which case withdrawal, in conjunction with the operation of the statute of limitations, is a complete defense to the conspiracy charge. *United States v. Harriston*, 329 F.3d 779 (11th Cir. 2003); *United States v. Arias*, 431 F.3d 1327 (11th Cir. 2005).

Withdrawal is an affirmative defense. The defendant must prove "that he undertook affirmative steps, inconsistent with the objects of the conspiracy, to disavow or to defeat the conspiratorial objectives, and either communicated those acts in a manner reasonably calculated to reach his co-conspirators or disclosed the illegal scheme to law enforcement authorities." *United States v. Firestone*, 816 F.2d 583, 589 (11th Cir.), *cert. denied*, 484 U.S. 948, 108 S. Ct. 338, 98 L. Ed. 2d 365 (1987). Neither arrest nor incarceration during the time frame of the conspiracy automatically triggers withdrawal from a conspiracy. *United States v. Gonzalez*, 940 F.2d 1413, 1427 (11th Cir. 1991).

**O13.5**
**Pinkerton Instruction**
**[*Pinkerton v. U.S.*, 328 U.S. 640 (1946)]**

During a conspiracy, if a conspirator commits a crime to advance the conspiracy toward its goals, then in some cases a coconspirator may be guilty of the crime even though the coconspirator did not participate directly in the crime.

So regarding counts _____, and Defendants _____, if you have first found [either] [any] of those Defendants guilty of the crime of conspiracy as charged in Count _____, you may also find that Defendant guilty of any of the crimes charged in Counts _____ even though the Defendant did not personally participate in the crime. To do so, you must find beyond a reasonable doubt:

(1) during the conspiracy a conspirator committed the additional crime charged to further the conspiracy's purpose;

(2) the Defendant was a knowing and willful member of the conspiracy when the crime was committed; and

(3) it was reasonably foreseeable that a coconspirator would commit the crime as a consequence of the conspiracy.

**ANNOTATIONS AND COMMENTS**

This charge is an adaptation of the one set forth in *United States v. Alvarez*, 755 F.2d 830, 848 n.22 (11th Cir. 1985).

The committee believes that the general definition of "willfully" in Basic Instruction 9.1A would usually apply to this crime.

## O13.6
## Conspiracy to Defraud the United States
## 18 U.S.C. § 371 (Second Clause)

It's a Federal crime for anyone to conspire or agree with someone else to defraud the United States or any of its agencies.

To "defraud" the United States means to cheat the Government out of property or money or to interfere with any of its lawful governmental functions by deceit, craft, or trickery.

A "conspiracy" is an agreement by two or more persons to commit an unlawful act. In other words, it is a kind of partnership for criminal purposes. Every member of the conspiracy becomes the agent or partner of every other member.

The Government does not have to prove that all the people named in the indictment were members of the plan, or that those who were members made any kind of formal agreement. The heart of a conspiracy is the making of the unlawful plan itself, so the Government does not have to prove that the conspirators succeeded in carrying out the plan.

The Government does not have to prove that the members planned together all the details of the plan or the "overt acts" that the indictment charges would be carried out in an effort to commit the intended crime.

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

(1) Two or more people in some way agreed to try to accomplish a shared and unlawful plan;

(2) the Defendant knew the unlawful purpose of the plan and willfully joined in it;

(3) during the conspiracy, one of the conspirators knowingly engaged in at least one overt act described in the indictment; and

(4) the overt act was knowingly committed at or about the time alleged and with the purpose of carrying out or accomplishing some object of the conspiracy.

An "overt act" is any transaction or event, even one which may be entirely innocent when viewed alone, that a conspirator commits to accomplish some object of the conspiracy.

A person may be a conspirator even without knowing all the details of the unlawful plan or the names and identities of all the other alleged conspirators.

If the Defendant played only a minor part in the plan but had a general understanding of the unlawful purpose of the plan – and willfully joined in the plan on at least one occasion – that's sufficient for you to find the Defendant guilty.

But simply being present at the scene of an event or merely associating with certain people and discussing common goals and interests doesn't establish proof of a conspiracy. Also a person who doesn't know about a conspiracy but happens to

act in a way that advances some purpose of one doesn't automatically become a conspirator.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 371 provides:

> If two or more persons conspire… to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each [shall be guilty of an offense against the United States].

The definition of "to defraud the United States" comes from *Hammerschmidt v. United States*, 265 U.S. 182 (1924), and *United States v. Porter*, 591 F.2d 1048 (5th Cir. 1979): "To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful government functions by deceit, craft or trickery, or at least by means dishonest."

Maximum Penalty: Five (5) years imprisonment and applicable fine.

The committee believes that the general definition of "willfully" in Basic Instruction 9.1A would usually apply to this crime.

# O14
# Counterfeiting
# 18 U.S.C. § 471

It's a Federal crime to counterfeit any United States Federal Reserve Notes.

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

(1) the Defendant made counterfeit Federal Reserve Notes; and

(2) the Defendant did so with intent to defraud.

To act with "intent to defraud" means to act with the specific intent to deceive or cheat, usually for personal financial gain or to cause financial loss to someone else. The Government does not have to prove that anyone was in fact defrauded.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 471 provides:

> Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States [shall be guilty of an offense against the United States].

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

*See* Trial Instruction 6 for use in submitting forfeiture issues to the Jury.

In cases where there is an issue as to whether the forged instrument is "counterfeit," the court should consider defining "counterfeit." The Eleventh Circuit has apparently not in a published opinion defined "counterfeit" for purposes of 18 U.S.C. § 471. In an unpublished opinion, however, the Circuit stated: "The test for determining whether a replica item of currency is counterfeit is 'whether the fraudulent obligation bears such a likeness or resemblance to any of the genuine obligations or securities issued under the authority of the United States as is calculated to deceive an honest, sensible and

unsuspecting person of ordinary observation and care dealing with a person supposed to be upright and honest." *United States v. Collett*, 135 Fed. Appx. 402, 404 (11th Cir. 2005) (per curiam) (quoting *United States v. Parr*, 716 F.2d 796, 807 (11th Cir. 1983)).

# O15.1
# Possession of Counterfeit Notes
# 18 U.S.C. § 472

It's a Federal crime to possess counterfeit United States Federal Reserve Notes with the intent to defraud.

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

(1) the Defendant possessed counterfeit Federal Reserve Notes;

(2) the Defendant knew that the notes were counterfeit; and

(3) the Defendant possessed the notes with intent to defraud.

To act with "intent to defraud" means to act with the specific intent to deceive or cheat, usually for personal financial gain or to cause financial loss to someone else. The Government does not have to prove that anyone was in fact defrauded.

## ANNOTATIONS AND COMMENTS

18 U.S.C. § 472 provides:

> Whoever, with intent to defraud… keeps in possession or conceals any falsely made [or] counterfeited… obligation… of the United States [shall be guilty of an offense against the United States.]

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

*See* Trial Instruction 6 for use in submitting forfeiture issues to the jury.

## O15.2
## Counterfeit Notes: Passing or Uttering
## 18 U.S.C. § 472

It's a Federal crime to pass or utter, with intent to defraud, any counterfeit United States Federal Reserve Note.

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

(1) the Defendant passed or tried to pass a counterfeit Federal Reserve Note;

(2) the Defendant knew that the note was counterfeit; and

(3) the Defendant acted with the intent to defraud.

To "pass" (or "utter") a counterfeit note means to try to spend it or otherwise place it in circulation.

To act with "intent to defraud" means to act with the specific intent to deceive or cheat, usually for personal financial gain or to cause financial loss to someone else. The Government does not have to prove that anyone was in fact defrauded.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 472 provides:

> Whoever, with intent to defraud, passes [or] utters… any falsely made [or] counterfeited… obligation… of the United States [shall be guilty of an offense against the United States.]

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

The "pass" element can be satisfied at any stage after the manufacturing of a counterfeit bill by the willful delivery of the bill to someone for the purpose of placing the bill in circulation, provided the person delivering the bill had the intent to defraud someone who might thereafter accept the bill as true and genuine. *See United States v. Wilkerson*, 469 F.2d 963 (5th Cir. 1972).

*See* Trial Instruction 6 for use in submitting forfeiture issues to the Jury.

**O16**
**Counterfeit Notes: Dealing**
**18 U.S.C. § 473**

It's a Federal crime to buy, sell, exchange, transfer, receive, or deliver a counterfeit Federal Reserve Note with the intent to pass or use the note as true and genuine.

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

(1) the Defendant bought, sold, exchanged, transferred, received or delivered [a] counterfeit Federal Reserve Note[s] as charged;

(2) the Defendant knew that the note[s] [was] [were] counterfeit; and

(3) the Defendant intended that the note[s] be passed or used as genuine.

To "pass" or "use" a counterfeit note as "true and genuine" includes any attempt to spend it or otherwise place it in circulation.

The indictment alleges that the Defendant bought, sold, exchanged, transferred, received, and delivered a counterfeit Federal Reserve Note. The Government does not have to prove all those acts but must prove beyond a reasonable doubt that the Defendant bought or sold or exchanged or transferred or received or delivered a counterfeit note. To find the Defendant guilty, you must all agree on which one of those things the Defendant did.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 473 provides:

> Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be [guilty of an offense against the United States].

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

The "pass" element can be satisfied at any stage after the manufacturing of a counterfeit bill by the willful delivery of the bill to someone for the purpose of placing the bill in circulation, provided the person delivering the bill had the intent to defraud someone who might thereafter accept the bill as true and genuine. *See United States v. Wilkerson*, 469 F.2d 963 (5th Cir. 1972).

*See* Trial Instruction 6 for use in submitting forfeiture issues to the jury.

**O17**
**Counterfeit Notes: Possession of Notes**
**Made after the Similitude of Genuine Notes**
**18 U.S.C. § 474(a)**
**(Fifth Paragraph)**

It's a Federal crime to possess a counterfeit made United States Federal Reserve Note made to look like a genuine note with the intent to sell or otherwise use it.

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

(1) the Defendant possessed fake Federal Reserve Notes made to look like genuine notes;

(2) the Defendant knew that the notes were fake; and

(3) the Defendant possessed the notes with the intent to sell or otherwise use them.

A Federal Reserve Note is "fake" for purposes of this statute when it looks so much like a genuine note that it is calculated to deceive an honest unsuspecting person who uses ordinary observation and care.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 474(a) (fifth paragraph) provides:

> Whoever has in his possession or custody… any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same [shall be guilty of an offense against the United States].

Maximum Penalty: Twenty-five (25) years imprisonment for a Class B felony (18 U.S.C. § 3581) and applicable fine.

The definition of "after the similitude" is taken from *United States v. Parr*, 716 F.2d 796, 807 (11th Cir. 1983).

*See* Trial Instruction 6 for use in submitting forfeiture issues to the Jury.

**O18.1**
**Forgery:**
**Endorsement of Government Check**
**18 U.S.C. § 510(a)(1)**
**Having a Face Value of More Than $1,000**

It's a Federal crime for anyone to forge the endorsement of the payee on a United States Treasury check.

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

(1) the Defendant forged the payee's endorsement on a United States Treasury check having a face value of more than $1,000; and

(2) the Defendant forged the endorsement with the intent to defraud by getting (or enabling someone else to get) money directly or indirectly from the United States.

The "payee" of a check is the person to whom the check is payable.

To "forge" means to write a payee's endorsement or signature on a Treasury check without the payee's permission or authority.

To act with "intent to defraud" means to act with the specific intent to deceive or cheat, usually for personal financial gain or to cause financial loss to someone else.

The crime is complete when someone intentionally forges a payee's signature with the intent to defraud. The Government does not have to prove that the United States was in fact defrauded or that anyone actually obtained any money from the United States.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 510(a)(1) provides:

> (a) Whoever, with intent to defraud - -
>
> (1) falsely makes or forges any endorsement or signature on a Treasury check or bond or security of the United States [having a face value of more than $1,000] [shall be guilty of an offense against the United States].

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

If the evidence justifies an instruction on the lesser included offense under § 510(c), *see* Special Instruction 10, Lesser Included Offense.

*See also* 18 U.S.C. § 495.

**O18.2**
**Forgery:**
**Uttering a Forged Endorsement**
**18 U.S.C. § 510(a)(2)**
**Having a Face Value of More Than $1,000**

It's a Federal crime for anyone to pass or try to pass any United States Treasury check with a forged endorsement.

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

(1) the Defendant passed or tried to pass a genuine United States Treasury check having a face value of more than $1,000 as alleged in the indictment;

(2) the Defendant knew that the payee's endorsement on the check was a forgery; and

(3) the Defendant acted with intent to defraud the United States.

The "payee" of a check is the person to whom the check is payable.

"Forgery" means a signature or endorsement made without the true payee's permission or authority.

To "pass" (or "utter") a check includes any attempt to cash the check or otherwise place it in circulation while stating or implying, directly or indirectly, that the check and the endorsement are genuine.

To act with "intent to defraud" means to act with the specific intent to deceive or cheat, usually for personal financial gain or to cause financial loss to someone else.

The crime is completed when someone who knows that the signature or endorsement on a check is a forgery and intentionally tries to pass or otherwise circulate the check as genuine with the intent to defraud.

The Government does not have to prove that the Defendant in fact did the forgery or that anyone actually obtained money from the United States.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 510(a)(2) provides:

> (a) Whoever, with intent to defraud - -
>
> (2) passes, utters, or publishes, or attempts to pass, utter, or publish, any Treasury check or bond or security of the United States [having a face value of more than $1,000] bearing a falsely made or forged endorsement or signature [shall be guilty of an offense against the United States].

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

If the evidence justifies an instruction on the lesser included offense, *see* Special Instruction 10, Lesser Included Offense.

*See also* 18 U.S.C. § 495.

## O18.3
## Counterfeit or Forged Securities
## 18 U.S.C. § 513(a)

It's a Federal crime to possess any counterfeit or forged securities of an organization with the intent to defraud.

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

(1) the Defendant made, passed or attempted to pass, or possessed a counterfeit or forged security;

(2) the counterfeit or forged security was of an organization; and

(3) the Defendant possessed the counterfeit or forged security with intent to deceive another person, organization, or government.

The term "counterfeit" means a document that has been falsely made or manufactured so as to appear to be a genuine security. To be counterfeit, the fraudulent security does not have to appear to be a genuine security of an organization that in fact exists, but rather, it must look so much like a genuine security that it is calculated to deceive an honest, unsuspecting person who uses ordinary observation and care.

The term "forged" means a document that purports to be genuine but has been fraudulently altered, completed, signed, or endorsed.

An "organization" is a nongovernmental legal entity. It includes, but is not limited to, a corporation, company, association, firm, partnership, joint-stock

company, foundation, institution, society, union, or any other association of persons that operates in or the activities of which affect interstate or foreign commerce.

The term "security" includes: a note, stock certificate, treasury-stock certificate, bond, treasury bond, debenture, certificate of deposit, interest coupon, bill, check, draft, warrant, debit instrument, money order, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest in or participation in any profit-sharing agreement, collateral-trust certificate, certificate of interest in tangible or intangible property, instrument evidencing ownership of goods, wares, merchandise, and blank forms for any of the items meeting this definition.

To act with "intent to deceive" means to act with the specific intent to deceive or cheat, usually for personal financial gain or to cause financial loss to someone else. The Government does not have to prove that anyone was in fact deceived.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 513(a) provides:

> Whoever makes, utters or possesses a counterfeited security of… an organization with intent to deceive another person, organization, or government [shall be guilty of an offense against the United States].

18 U.S.C. § 513(c) provides numerous helpful definitions to terms used in § 513(a).

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

*See United States v. Prosperi*, 201 F.3d 1335 (11th Cir. 2000) (holding that § 513(a) does not require counterfeits to bear a similitude to genuine securities).

This charge applies to securities of organizations, but can be modified to apply to securities of a state or political subdivision thereof.

**O19**
**Criminal Street Gangs**
**18 U.S.C. § 521**

**Note:** Section 521 creates a maximum sentence enhancement of up to ten years imprisonment under certain circumstances for any member of a "criminal street gang" who commits a federal felony crime of violence or a federal felony controlled-substance offense. The Committee believes, therefore, any indictment containing allegations sufficient to invoke Section 521 requires submission of those issues to the jury. In such a case the following additional elements of proof would apply:

(1) the Defendant committed the crime charged in Count _____ while participating in a criminal street gang;

(2) the Defendant knew that the members of the criminal street gang committed a continuing series of [felony crimes of violence with an element of physical force, or attempted physical force against another person] [controlled-substances crimes that are punishable by at least five years imprisonment];

(3) the Defendant committed the crime charged in Count _____ with the intent to promote or advance the criminal street gang's felonious activities or to maintain or raise [his] [her] position in the gang; and

(4) within the five years before the crime charged was committed, the Defendant was convicted of [a felony crime of violence with an element of physical force, or attempted physical force against another] [a controlled-substances crime punishable by at least five years imprisonment] .

A "criminal street gang" is a group or organization that: (1) is ongoing; (2) has as one of its primary purposes the commission of one or more [federal felony crimes of violence with an element of physical force or attempted physical force against another person] [federal controlled-substances felonies]; (3) consists of at least five members; (4) engages or has engaged within the past five years in a continuing series of [federal felony crimes of violence that include an element of physical force or attempted physical force against another person] [federal controlled-substances felonies]; and (5) through its activities affects interstate or foreign commerce.

A "continuing series" of crimes means proof of at least three qualifying crimes that were connected together as a series of related or ongoing activities – not isolated and disconnected acts.

**ANNOTATIONS AND COMMENTS**

No annotations associated with this instruction.

**O20**
**Smuggling**
**18 U.S.C. § 545**
**(First Paragraph)**

It's a Federal crime to willfully smuggle merchandise into the United States in violation of the customs laws and regulations.

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

(1) the Defendant smuggled merchandise into the United States without declaring it for invoicing as required by customs laws and regulations;

(2) the Defendant knew that the merchandise should have been invoiced; and

(3) the Defendant acted willfully with intent to defraud the United States.

To "smuggle" means to bring something into the United States secretly or fraudulently.

"Merchandise [that] should have been invoiced" means any goods or articles that must be declared to customs officials upon entry into the United States, even if the goods or articles are not subject to the payment of a tax or duty.

[Describe the merchandise involved in the case] is merchandise that must be declared to customs officials upon entry into the United States.

To act with "intent to defraud" means to act with the specific intent to deceive or cheat, usually for personal financial gain or to cause financial loss to

someone else. The Government does not have to prove that anyone was in fact defrauded.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 545 (first paragraph) provides:

> Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces… into the United States any merchandise which should have been invoiced [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and applicable fine.

*See* Trial Instruction 6 for use in submitting forfeiture issues to the Jury.

The committee believes that the general definition of "willfully" in Basic Instruction 9.1A would usually apply to this crime.

**O21**
**Theft of Government Money or Property**
**18 U.S.C. § 641 (First Paragraph)**

It's a Federal crime to [embezzle] [steal] [convert] any money or property belonging to the United States and worth more than $1,000.

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

(1) the money or property described in the indictment belonged to the United States;

(2) the Defendant [embezzled] [stole] [knowingly converted] the money or property to his own use or to someone else's use;

(3) the Defendant knowingly and willfully intended to deprive the owner of the use or benefit of the money or property; and

(4) the money or property had a value greater than $1,000.

The word "value" means the greater of (1) the face, par, or market value, or (2) the price, whether wholesale or retail.

It doesn't matter whether the Defendant knew that the United States owned the property. But it must be proved beyond a reasonable doubt that the United States did in fact own the money or property, that the Defendant knowingly [embezzled] [stole] [converted] it, and that the value was greater than $1,000.

[To "embezzle" means to wrongfully or intentionally take someone else's money or property after lawfully taking possession or control of it.]

[To "steal" or "convert" means to wrongfully or intentionally take the money or property belonging to someone else with the intent to deprive the owner of its use or benefit permanently or temporarily.]

A "taking" doesn't have to be any particular type of movement or carrying away. But any appreciable and intentional change in the property's location is a taking, even if the property isn't removed from the owner's premises.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 641 (first paragraph) provides:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another . . . any . . . money, or thing of value of the United States [having a value in excess of the sum of $1,000 shall be guilty of an offense against the United States].

The government does not lose its property interest in an erroneously issued tax refund check payable to the defendant even where the defendant who received the check has done nothing to induce the issuance of the check. *United States v. McRee*, 7 F.3d 976, 982 (11th Cir. 1993) *(en banc)*. Additionally, because it does not "matter whether the Defendant knew that the United States owned the property," the third element refers to the "owner" rather than the "United States."

When an outright grant is paid over to the end recipient, utilized, commingled, or otherwise loses its identity, the money in the grant ceases to be federal. *United States v. Smith*, 596 F.2d 662, 664 (5th Cir. 1979). But federal grant money remains federal money even after being deposited in the grantee's bank account and even if commingled with non-federal funds so long as the government exercises supervision and control over the funds and their ultimate use. *Hayle v. United States*, 815 F.2d 879 (2d Cir. 1987), cited with approval in *United States v. Hope*, 901 F.2d 1013, 1019 (11th Cir. 1990). Identifiable funds advanced by a HUD grantee to a subgrantee in anticipation of immediate federal reimbursement for purposes governed by and subject to federal statutes and regulations can be considered federal funds when those funds are diverted by the subgrantee prior to their delivery to the end recipient. *Hope*,901 F.2d at 1019–20.

Elements of an embezzlement offense under this statute are:

> (1) that the money or property . . . belonged to the United States or an agency thereof and had a value in excess of [$1,000]; (2) that the property

> lawfully came into the possession or care of the defendant[; (3) that] the defendant fraudulently appropriated the money or property to his own use or the use of others; and [(4)] that the defendant did so knowingly and willfully with the intent either temporarily or permanently to deprive the owner of the use of the money or property so taken.

*United States v. Burton*, 871 F.2d 1566, 1570 (11th Cir. 1989).

If the evidence justifies an instruction on the lesser included offense (theft of property having a value of $1,000 or less), see Special Instruction 10, Lesser Included Offense.

The Committee believes that the general definition of "willfully" in Basic Instruction 9.1A would usually apply to this crime.

**O22**
**Theft or Embezzlement by Bank Employee**
**18 U.S.C. § 656**

It's a Federal crime for a bank employee to [embezzle] [misapply] the bank's funds.

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 officer or employee of the bank described in the indictment;

(2) the bank was an insured bank;

(3) the Defendant knowingly and willfully [embezzled] [misapplied] funds or credits belonging to the bank or entrusted to its care;

(4) the Defendant intended to injure or defraud the bank; and

(5) the [embezzled] [misapplied] funds or credits had a value greater than $1,000.

An "insured bank" means any bank whose deposits are insured by the Federal Deposit Insurance Corporation.

[To "embezzle" means to wrongfully or willfully take someone else's money or property after lawfully taking possession or control of it.

To "take" money or property means to knowingly and willfully deprive the owner of its use or benefit by converting it to one's own use with the intent to defraud the bank.

A "taking" doesn't have to be any particular type of movement or carrying away. But any appreciable and intentional change in location of the property is a taking, even if the property isn't removed from the owner's premises.]

[To "misapply" a bank's money or property means to willfully convert or take a bank's money or property by a bank employee for [his] [her] own use and benefit, or the use and benefit of another, with intent to defraud the bank, whether or not the money or property has been entrusted to the employee's care.]

To act with "intent to defraud" means to act with the specific intent to deceive or cheat, usually for personal financial gain or to cause financial loss to someone else.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 656 provides:

> Whoever, being an officer, director, agent or employee of… any… national bank or insured bank… embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits [having a value in excess of $1,000] of such bank… or… entrusted to the custody or care of such bank [shall be guilty of an offense against the United States].

Maximum Penalty: Thirty (30) years imprisonment and applicable fine.

If the evidence justifies an instruction on the lesser included offense (embezzlement or misapplication of funds having a value of $1,000 or less), see Special Instruction 10, Lesser Included Offense.

The committee believes that the general definition of "willfully" in Basic Instruction 9.1A would usually apply to this crime.

*See* Trial Instruction 6 for use in submitting forfeiture issues to the Jury.

**O23.1**
**Theft from an Interstate Shipment**
**18 U.S.C. § 659 (First Paragraph)**

It's a Federal crime to [embezzle] [steal] from a [railroad car] [motor truck] any property that is part of an interstate shipment of freight if the property's value is more than $1,000.

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 [embezzled] [stole] from a [railroad car] [motor truck] the property described in the indictment;

(2) the property was moving as or was part of an interstate shipment of freight or express; and

(3) the property then had a value greater than $1,000.

"Value" means the greater of (1) the face, par, or market value, or (2) the price, whether wholesale or retail.

[To "embezzle" means to wrongfully take someone else's property after lawfully taking possession or control of it.]

[To "steal" or "unlawfully take" means to wrongfully take goods or property belonging to someone else with the intent to deprive the owner of the use or benefit permanently or temporarily and to convert it to one's own use or the use of another.]

An "interstate shipment" means the movement or transportation of property from one state into another.

An interstate shipment begins when property is identified and prepared for shipping and placed in the carrier's possession, and continues until the shipment is delivered at its destination.

A waybill or other shipping document is prima facie evidence of the shipment's places of origin and destination.

"Prima facie evidence" is evidence that's sufficient for proof unless it's outweighed by other evidence. So an authenticated waybill, bill of lading, invoice, or other shipping document is enough to show that a shipment was interstate unless other evidence leads you to a different conclusion.

The interstate nature of the shipment is an essential part of the offense, but it's not necessary to prove that the Defendant knew that the property was part of an interstate shipment when the alleged [embezzlement] [theft] occurred; only that the Defendant intended to [embezzle] [steal] them.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 659 (first Paragraph) provides:

> Whoever embezzles, steals, or unlawfully takes [or] carries away… from any … railroad car… motor truck, or other vehicle… with intent to convert to his own use any goods or chattels [having a value in excess of $1,000, and] moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property [shall be guilty of an offense against the United States].

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

If the evidence justifies an instruction on the lesser included offense (embezzlement or theft of goods having a value of $1,000 or less), *see* Special Instruction 10, Lesser Included Offense.

## O23.2
## Buying or Receiving Goods Stolen from an Interstate Shipment
## 18 U.S.C. § 659 (Second Paragraph)

It's a Federal crime to knowingly buy or receive goods stolen from a [railroad car] [motor truck] carrying an interstate shipment of freight if the property's value is more than $1,000.

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

(1) someone knowingly [embezzled] [stole] from a [railroad car] [motor truck] the property described in the indictment while it was moving as or part of, an interstate shipment of freight or express;

(2) the Defendant bought, received or possessed the property knowing that it was stolen; and

(3) the property then had a value greater than $1,000.

"Value" means the greater of (1) the face, par, or market value, or (2) the price, whether wholesale or retail.

An "interstate shipment" means the movement or transportation of property from one state into another.

An interstate shipment begins when property is identified and prepared for shipping and placed in the carrier's possession, and continues until the shipment is delivered at its destination.

A waybill or other shipping document is prima facie evidence of the shipment's places of origin and destination.

"Prima facie evidence" is evidence that's sufficient for proof unless it's outweighed by other evidence. So an authenticated waybill, bill of lading, invoice, or other shipping document is enough to show that a shipment was interstate unless other evidence leads you to a different conclusion.

The interstate nature of the shipment is an essential part of the offense, but it's not necessary to prove that the Defendant knew that the property was part of an interstate shipment when the alleged [embezzlement] [theft] occurred; only that the Defendant intended to [embezzle] [steal] it.

But the Government must prove that the Defendant knew the property was stolen property when [he] [she] bought, received or possessed it.

To "embezzle" means to wrongfully take someone else's property after lawfully taking possession or control of it.

To "steal" or "unlawfully take" means to wrongfully take property belonging to someone else with the intent to deprive the owner of the property's use or benefit permanently or temporarily and to convert it to one's own use or the use of another.

The Government must prove beyond a reasonable doubt that the Defendant bought or received or possessed the stolen property, not that the Defendant did all

three. But to find the Defendant guilty, you must all agree on which of those things the Defendant did.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 659 (second paragraph) provides:

> Whoever buys or receives or has in his possession any such [goods having a value in excess of $1,000 embezzled or stolen from an interstate shipment of freight], knowing the same to have been embezzled or stolen [shall be guilty of an offense against the United States].

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

If the evidence justifies an instruction on the lesser included offense (receipt of stolen goods having a value of $1,000 or less), *see* Special Instruction 10, Lesser Included Offense.

**O24.1**
**Theft Concerning Programs**
**Receiving Federal Funds**
**18 U.S.C. § 666(a)(1)(A)**

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] that receives more than $10,000 in federal assistance in any one year period, to [embezzle] [steal] [obtain by fraud] [knowingly convert without authority] [intentionally misapply] property that is valued at $5,000 or more, and is [owned by] [under the care, custody, or control of] such [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) the Defendant [embezzled] [stole] [obtained by fraud] [knowingly converted to the use of any person other than the rightful owner without authority] [intentionally misapplied] property that was [owned by] [under the care, custody, or control of] [same name entity as above]; and

(4) the property had a value of $5,000 or more.

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.

[To "embezzle" means to wrongfully or intentionally take someone else's money or property after lawfully taking possession or control of it.]

[To "steal" or "convert" means to wrongfully or intentionally take the money or property belonging to someone else with the intent to deprive the owner of its use or benefit permanently or temporarily.]

[To "obtain by fraud" means to act knowingly and with intent to deceive or cheat, usually for the purpose of causing financial loss to someone else or bringing about a financial gain to oneself or another.]

[To "intentionally misapply" money or property means to intentionally convert such money or property for one's own use and benefit, or for the use and benefit of another, knowing that one had no right to do so.]

The word "value" means the face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

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.

In determining whether the Defendant is guilty of this offense, do not consider bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. §666(a)(1)(A) 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 - -
> >
> > > (A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that - -
> > >
> > > > (i) is valued at $5,000 or more, and
> > > >
> > > > (ii) is owned by, or is under the care, custody, or control of such organization, government, or agency [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.

Agent.

"To qualify as an agent of an entity, an individual need only be authorized to act on behalf of that entity." *United States v. Keen*, 676 F.3d 981, 990 (11th Cir. 2012). There is no "additional qualifying requirement that the person be authorized to act *specifically with respect to the entity's funds*." *Id.; see also United States v. Fernandez*, 722 F.3d 1, 11 (1st Cir. 2013); *United States v. Vitillo*, 490 F.3d 314, 323 (3d Cir. 2007); *United States v. Hudson*, 491 F.3d 590, 595 (6th Cir. 2007); *United States v. Spano*, 401 F.3d 837, 839-41 (7th Cir. 2005).

Benefits.

The term "benefits" is not limited to monies received in the form of payments or disbursements. *See United States v. Townsend*, 630 F.3d 1003, 1010–12 (11th Cir. 2011)

(holding that accepting bribes in exchange for either tangible or intangible benefits is a violation of §666).

Benefits and Federal Assistance.

"The scope of §666, however, is not limitless; the statute clearly indicates that only those contractual relationships constituting some form of 'Federal assistance' fall within the scope of the statute. Thus, organizations engaged in purely commercial transactions with the federal government are not subject to §666." *United States v. Copeland*, 143 F.3d 1439, 1441 (11th Cir. 1998) (citations omitted). As explained by the Supreme Court:

> Any receipt of federal funds can, at some level of generality, be characterized as a benefit. The statute does not employ this broad, almost limitless use of the term. Doing so would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance. To determine whether an organization participating in a federal assistance program receives "benefits," an examination must be undertaken of the program's structure, operation, and purpose. The inquiry should examine the conditions under which the organization receives the federal payments. The answer could depend, as it does here, on whether the recipient's own operations are one of the reasons for maintaining the program.

*Fischer v. United States*, 529 U.S. 667, 681 (2000) (holding that a health care provider participating in the Medicare program received "benefits" within the meaning of the statute); *see Copeland*, 143 F.3d at 1441 (finding that "[n]othing in the record indicates that Lockheed receives any form of federal assistance or is in anyway engaged in something other than purely commercial transactions with the government.").

Conflict of Interest as Relevant to Proof of a Violation.

The Eleventh Circuit addressed the meaning of "intentionally misapplied" in *United States v. Jimenez*, 705 F.3d 1305 (11th Cir. 2013):

> To be clear, we do not mean to say that violating a conflict of interest policy can never form the basis of a §666 conviction. We hold instead that evidence of an undisclosed conflict of interest is insufficient, standing alone, to sustain a conviction for "intentionally misapplying" funds within the meaning of §666.

Id. at 1310-11.

Intangible Property.

The Eleventh Circuit has expressly held that §666(a)(1)(B) covers bribery in connection with transactions involving either tangible or intangible property. *See U.S. v. Townsend*, 630 F.3d 1003, 1010–12 (11th Cir. 2011) (holding that accepting bribes in exchange for freedom from jail and greater freedom while on pretrial release falls within the plain meaning of the statute). Although the Sixth Circuit has held that 18 U.S.C. §666(a)(1)(A) also covers both tangible and intangible stolen property, *United States v. Sanderson*, 966 F.2d 184, 188–89 (6th Cir. 1992), the Eleventh Circuit has not yet determined whether theft of intangible property falls within the scope of §666(a)(1)(A). To decide whether a transaction involving intangibles has a value of $5,000 or more, courts should look to traditional valuation methods. *See Townsend*, 630 F.3d at 1011–12 (finding that the market approach is a valid method for determining the value of an intangible obtained through bribery, and setting the monetary value at "what a willing bribe-giver gives and what a willing bribe-taker takes in exchange for the intangible").

One-Year Period.

The definition in the instruction is derived from 18 U.S.C. § 666(d)(5). A violation of §666 can occur if the agency receives the requisite federal benefits in any one-year period within a year before or after the alleged offense takes place. 18 U.S.C. §666(d)(5). However, if the government proposes an instruction directing the jury to consider a more limited time period to determine whether the agency received the requisite federal benefits, it is bound to make a showing to satisfy the elements of the offense as instructed. *See United States v. Murillo*, 443 F. App'x 472, 474 (11th Cir. 2011) (per curiam).

Bona Fide Wages.

The last paragraph in the instruction concerning wages is taken from 18 U.S.C. §666(c). Whether wages are bona fide and earned in the usual course of business is a question of fact for the jury to decide. *See United States v. Schmitz*, 634 F.3d 1247, 1264 n.13 (11th Cir. 2011) ("a salary is not bona fide or earned in the usual course of business under §666(c) if the employee is not entitled to the money." (quoting *United States v. Williams*, 507 F.3d 905, 908 (5th Cir. 2007))).

State, Local or Indian Tribal Government.

The definitions in the instruction are derived from 18 U.S.C. §§666(d)(2) through 666(d)(4). 18 U.S.C. §666 criminalizes behavior affecting funds owned by or under the care, custody or control of State, local or Indian tribal governments, or an agency, thereof, not the Federal government or any agency thereof. *See* S. Rep. No. 225 at 369–

71, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510–3511 (18 U.S.C. §666 was "designed to create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies that are disbursed to private organizations or state and local governments pursuant to a Federal program").

Steal or Embezzle.

The definitions of "steal" and "embezzle," as used in this instruction, are consistent with the definitions of those terms in Offense Instruction 21 regarding Theft of Government Money or Property under 18 U.S.C. §641.

**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 affected 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 the one-year 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 years imprisonment and applicable fine.

In *United States v. McNair*, 605 F.3d 1152, 1188 (11th Cir. 2010), the Eleventh Circuit held that neither § 666(a)(1)(B) nor (a)(2) requires "that the government allege or prove an intent that a specific payment was solicited, received, or given in exchange for a specific official act, termed a *quid pro quo*." Other circuits have held the same. *See, e.g.*, *United States v. Abbey*, 560 F.3d 513, 520 (6th Cir. 2009) (stating that "the text says nothing of a quid pro quo requirement to sustain a conviction" and "while a *quid pro quo* of money for a specific [legislative] act is sufficient to violate [§ 666(a)(1)(B) or (a)(2)], it is not necessary") (internal quotation marks omitted); *United States v. Gee*, 432 F.3d 713, 714-15 (7th Cir. 2005) (holding that "[a] *quid pro quo* of money for a specific legislative act" is not necessary under § 666(a)(1)(B) and that an exchange of money for the official's "influence" was enough").

However, defendants have argued that the Supreme Court's reasoning in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), which concerned an 18 U.S.C. § 201 bribery prosecution, should apply to a § 666 bribery prosecution. Section 201, in relevant part, addresses bribes given or received to influence an "official act" or "in return for" an "official act." In *McDonnell*, the Supreme Court held that district courts should clearly define the type of conduct that constitutes official acts in § 201 prosecutions.

The Eleventh Circuit has not addressed whether *McDonnell* applies to § 666, but other circuits have held that it does not. *See, e.g.*, *United States v. Suhl*, 885 F.3d 1106, 1112 (8th Cir. 2018) ("Suhl asks us to apply *McDonnell* to both honest-services and federal-funds bribery. *McDonnell* interpreted the term 'official act' in § 201, and the parties agree that § 201 also defines the elements of honest-services bribery. Section 666, however, does not include the term 'official act.'"); *United States v. Boyland*, 862 F.3d 279, 291 (2d Cir. 2017) ("We do not see that the *McDonnell* standard applied to these counts [under § 666]."); *United States v. Porter*, 886 F.3d 562, 565 (6th Cir. 2018) ("Porter's reliance on *McDonnell* is misplaced. In *McDonnell*, the Supreme Court limited the interpretation of the term 'official act' as it appears in § 201, an entirely different statute than the one at issue here.").

In *United States v. Fischer*, 168 F.3d 1273, 1277 n.8 (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.

**O24.3**
**Bribery of Agent of Entity**
**Receiving Benefits Under a**
**Federal Assistance Program**
**18 U.S.C. § 666(a)(2)**

It's a Federal crime for anyone to corruptly [give] [offer] [agree to give] anything of value to 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, with the intent to reward or influence that agent 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)that [name of agent claimed by the government to be rewarded or influenced by the Defendant] was an agent of [name of entity claimed by the government to be the affected entity];

(2)that [same name of affected 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)that during the one-year period, the Defendant [gave] [offered] [agreed to give] something of value to [agent of entity] with the intent to influence or reward [the agent] in connection with any business, transaction, or series of transactions of [entity's name], involving something of value of $5,000 or more; and

(4)that in so doing, 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)(2) provides:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists - -
>
> > (2)corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, 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 years imprisonment and applicable fine.

In *United States v. McNair*, 605 F.3d 1152, 1188 (11th Cir. 2010), the Eleventh Circuit held that neither § 666(a)(1)(B) nor (a)(2) requires "that the government allege or prove an intent that a specific payment was solicited, received, or given in exchange for a specific official act, termed a *quid pro quo*." Other circuits have held the same. *See, e.g.*, *United States v. Abbey*, 560 F.3d 513, 520 (6th Cir. 2009) (stating that "the text says nothing of a quid pro quo requirement to sustain a conviction" and "while a *quid pro quo* of money for a specific [legislative] act is sufficient to violate [§ 666(a)(1)(B) or (a)(2)], it is not necessary") (internal quotation marks omitted); *United States v. Gee*, 432 F.3d 713, 714-15 (7th Cir. 2005) (holding that "[a] *quid pro quo* of money for a specific legislative act" is not necessary under § 666(a)(1)(B) and that an exchange of money for the official's "influence" was enough").

However, defendants have argued that the Supreme Court's reasoning in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), which concerned an 18 U.S.C. § 201 bribery prosecution, should apply to a § 666 bribery prosecution. Section 201, in relevant part,

addresses bribes given or received to influence an "official act" or "in return for" an "official act." In *McDonnell*, the Supreme Court held that district courts should clearly define the type of conduct that constitutes official acts in § 201 prosecutions.

The Eleventh Circuit has not addressed in a reported decision whether *McDonnell* applies to § 666, but other circuits have held that it does not. *See, e.g.*, *United States v. Suhl*, 885 F.3d 1106, 1112 (8th Cir. 2018) ("Suhl asks us to apply *McDonnell* to both honest-services and federal-funds bribery. *McDonnell* interpreted the term 'official act' in § 201, and the parties agree that § 201 also defines the elements of honest-services bribery. Section 666, however, does not include the term 'official act.'"); *United States v. Boyland*, 862 F.3d 279, 291 (2d Cir. 2017) ("We do not see that the *McDonnell* standard applied to these counts [under § 666]."); *United States v. Porter*, 886 F.3d 562, 565 (6th Cir. 2018) ("Porter's reliance on *McDonnell* is misplaced. In *McDonnell*, the Supreme Court limited the interpretation of the term 'official act' as it appears in § 201, an entirely different statute than the one at issue here.").

In *United States v. Fischer*, 168 F.3d 1273, 1277 n.8 (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.

# O25
# Escape
# 18 U.S.C. § 751(a)

It's a Federal crime to escape from the lawful custody of a Federal officer.

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 escaped from custody; and

(2) at the time, the Defendant was in a Federal officer's custody after a lawful arrest or under judicial process issued by a Federal judicial officer.

"Custody" means the detaining or holding of an individual by a lawful process or authority.

To "escape" means fleeing or otherwise leaving another's custody or failing to return to custody while knowing that a detention is lawful.

## ANNOTATIONS AND COMMENTS

18 U.S.C. § 751(a) provides:

> Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate judge, or from the custody of an officer or employee of the United States pursuant to lawful arrest [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and $250,000 fine.

In *United States v. Bailey*, 444 U.S. 394, 408, 100 S. Ct. 624, 633, 62 L. Ed. 2d 575 (1980), the Supreme Court rejected the notion that § 751(a) requires proof of "an intent to avoid confinement." The Court held that the prosecution meets its burden by showing

that the escapee knew his actions would result in leaving physical confinement without permission.

Regarding escape from an INS Detention Facility, *see United States v. Rodriguez-Fernandez*, 234 F.3d 498 (11th Cir. 2000).

The first element, pertaining to custody or confinement, normally can be established by demonstrating that a subject was (1) in the custody of the Attorney General or her authorized representative; (2) confined in an institution by direction of the Attorney General; (3) in custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate; or (4) in the custody of an officer or employee of the United States pursuant to a lawful arrest. *Id.* at 500, n.6.

The Fourth, Eighth, Ninth and Tenth Circuits hold that custody may be minimal or even constructive. *See United States v. Cluck*, 542 F.2d 728, 731 (8th Cir. 1976); *United States v. Depew*, 977 F.2d 1412, 1414 (10th Cir. 1992); *United States v. Hollen*, 393 F.2d 479 (4th Cir. 1968).

If the indictment alleges an attempt, *see* Special Instruction 11.

# O26
# Instigating or Assisting an Escape
# 18 U.S.C. § 752(a)

It's a Federal crime for anyone to instigate an escape or help someone else escape the lawful custody of a Federal officer.

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

(1) [person named in the indictment] was in the custody of [the Attorney General][a Federal officer under judicial process]; and

(2) the Defendant knowingly instigated or helped with that person's escape or attempt to escape from custody.

"Custody" means the detaining or holding of an individual by a lawful process or authority.

To "escape" means fleeing or otherwise leaving another's custody or failing to return to custody while knowing that a detention is lawful.

## ANNOTATIONS AND COMMENTS

18 U.S.C. § 752(a) provides:

> Whoever rescues or attempts to rescue or instigates, aids or assists the escape, or attempt to escape, of any person arrested upon a warrant or other process issued under any law of the United States, or committed to the custody of the Attorney General or to any institution or facility by his direction [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and $250,000 fine.

It may be necessary in some cases to define the boundary line between aiding an escape (under this section) and harboring a fugitive (in violation of 18 U.S.C. § 1072). If an escapee reaches safety so that the escape itself is accomplished, any aid given to the

fugitive after that point would constitute harboring, not aiding the escape. *See United States v. DeStefano*, 59 F.3d 1 (1st Cir. 1995), in which the Court of Appeals approved the following instruction: "The crime of aiding or assisting an escape cannot occur after the escapee reaches temporary safety. After that, aid or assistance to a fugitive is no longer aiding or assisting his escape..."

**O27**
**Making Threats By Mail Or Telephone**
**18 U.S.C. § 844(e)**

It's a Federal crime to use an instrument of commerce, including the [mail] [telephone], to willfully communicate any threat to [kill, injure, or intimidate any individual] [unlawfully damage or destroy any building, vehicle, or other real or personal property] by means of [fire] [an explosive].

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

(1) the Defendant made, or caused to be made, a threat to [kill, injure, or intimidate any individual] [unlawfully damage or destroy a building, vehicle, or other real or personal property] by means of [fire] [an explosive];

(2) the Defendant used, or caused to be used, an instrument of commerce, such as [the mail] [a telephone] to communicate the threat; and

(3) the Defendant acted knowingly and willfully.

A "threat" means an expression of intent to [kill, injure, or intimidate an individual] [unlawfully damage or destroy a building, vehicle, or other real or personal property] by means of [fire] [an explosive], and made with the intent that others understand it as a serious threat. The Government doesn't have to prove that the Defendant intended to carry out the threat.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 844(e) provides:

> Whoever, through the use of the mail, telephone, telegraph, or other instrument of interstate or foreign commerce, or in or affecting interstate or foreign commerce, willfully makes any threat, or maliciously conveys false information knowing the same to be false, concerning an attempt or alleged attempt being made, or to be made, to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property by means of fire or an explosive [shall be guilty of an offense against the United States].

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

The term "explosive" is defined in 18 U.S.C. § 844(j) if the circumstances of the case require inclusion of a definition of the term in the instructions.

The committee believes that the general definition of "willfully" in Basic Instruction 9.1A would usually apply to this crime.

**O28**
**Federal Arson Statute**
**18 U.S.C. § 844(i)**

It's a Federal crime to [attempt to] maliciously damage or destroy by fire or explosive any building, vehicle, or any other real or personal property used in interstate or foreign commerce or affecting interstate or foreign commerce.

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

(1) the Defendant [damaged] [destroyed] [attempted to damage or destroy] the [building] [vehicle] [other real or personal property] described in the indictment by means of [a fire] [an explosive];

(2) the Defendant acted intentionally or with deliberate disregard of the likelihood that damage or injury would result from [his] [her] acts; and

(3) the [building] [vehicle] [other real or personal property] that the Defendant [damaged] [destroyed] [attempted to damage or destroy] was used [in interstate or foreign commerce] [in activity affecting foreign or interstate commerce].

"Interstate or foreign commerce" is trade and other business activity between people and entities located in different states or between people and entities located in the United States and outside of the United States. The Government must prove that the property was actually used for a function that involved or affected interstate or foreign commerce.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 844(i) provides:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned…

Penalty ranges from 5 years imprisonment to the death penalty and includes an applicable fine. *See* 18 U.S.C. § 844(i).

*United States v. Gullett*, 75 F.3d 941, 948 (4th Cir. 1996), "maliciously," as contained in § 844(i), is comparable to the common law definition of malice and "is satisfied if the defendant acted intentionally or with willful disregard of the likelihood that damage or injury would result from his or her acts." This instruction has avoided the use of "willful" because of possible confusion with Basic Instruction 9.1A.

*Jones v. United States*, 529 U.S. 848, 859, 120 S. Ct. 1904, 1912, 146 L. Ed. 2d 902 (2000), holding that "building" in § 844(i) "covers only property currently used in commerce or in an activity affecting commerce," and does not cover an owner-occupied dwelling.

For a discussion of the interstate commerce requirement of § 844(i) in light of *Jones, see United States v. Odom*, 252 F.3d 1289 (11th Cir. 2001).

Explosive is defined in 18 U.S.C. § 844(j).

If the indictment alleges an attempt, *see* Special Instruction 11.

**O29**
**Threats Against the President**
**18 U.S.C. § 871**

It's a Federal crime to knowingly and willfully make a threat to [kill] [kidnap] [inflict bodily harm upon] the President of the United States.

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

(1) the Defendant [mailed] [wrote] [said] the words alleged to be the threat against the President;

(2) the Defendant understood and meant the words as a true threat; and

(3) the Defendant knowingly and willfully [mailed] [wrote] [said] the words.

The Government doesn't have to prove that the Defendant intended to carry out the threat.

A "threat" is a statement expressing an intention to [kill] [kidnap] [inflict bodily harm upon] the President.

A "true threat" is a serious threat – not idle talk, a careless remark, or something said jokingly – that is made under circumstances that would lead a reasonable person to believe that the Defendant intended to [kill] [kidnap] [inflict bodily harm upon] the President.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 871(a) provides:

> Whoever knowingly and willfully deposits for conveyance in the mail . . . any letter . . . or document containing any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States . . . or knowingly and willfully otherwise makes any such threat against the President [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and $250,000 fine.

This instruction is unaltered by the Supreme Court's decision in *Elonis v. United States*, 575 U.S. __, 135 S. Ct. 2001 (2015), because in addition to the objective standard contained in the definition of "true threat," this instruction requires that the defendant's subjective mental state be considered.

Although certain prior Eleventh Circuit cases that defined "true threat" have now been overruled in light of *Elonis* for the failure to consider the defendant's subjective mental state, the objective person standard remains useful in the determination of whether the defendant's statement actually constitutes a "true threat," as that term has been defined in prior case law. *See e.g., United States v. Martinez*, 736 F.3d 981, 984-86 (11th Cir. 2013), *overruled on other grounds*, __ F.3d __, 2015 WL 5155225 (11th Cir. Sept. 3, 2015) (discussing *Watts v. United States*, 394 U.S. 705 (1969) as the origin of the "true threats" doctrine).

The committee believes that the general definition of "willfully" in Basic Instruction 9.1A would usually apply to this crime.

**O30.1**
**Interstate Transmission of a Demand for Ransom**
**for Return of a Kidnapped Person**
**18 U.S.C. § 875(a)**

It's a Federal crime to knowingly send in interstate or foreign commerce a demand or request for a reward or ransom for the release of any kidnapped person.

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 sent in [interstate] [foreign] commerce a demand or request for a ransom or reward for the kidnapped person's release; and

(2) the Defendant did so with the intent to extort money or some other thing of value.

[To send something in "interstate commerce" means to transmit it from a place in one state to a place in another state.]

[To send something in "foreign commerce" means to transmit it from a place in the United States to anyplace outside the United States.]

To act with "intent to extort" means to act with the purpose of getting money or something of value from someone who consents because of the wrongful use of actual or threatened force or violence.

A "thing of value" is anything that has value to the Defendant, whether it is tangible or not.

A kidnapped person is someone who is forcibly and unlawfully held, kept, or imprisoned against his or her will.

The heart of the crime is the sending of a message in interstate or foreign commerce to extort something of value in return for the release of a kidnapped victim. The Government doesn't have to prove that the Defendant participated in the kidnapping or succeeded in obtaining money or any other thing of value.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 875(a) provides that:

> Whoever transmits in interstate or foreign commerce any communication containing any demand or request for a ransom or reward for the release of any kidnapped person, [shall be guilty of an offense against the United States].

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

Although this subsection of § 875 does not specifically require an intent to extort, it has been held that such intent is implicitly an element. "Congress intended not only that there be a criminal intent element of the crime charged in the statute [18 U.S.C. § 875(a)] but also that this intent element be specifically the intent to extort." *United States v. Heller*, 579 F.2d 990, 995 (6th Cir. 1978).

Under *United States v. Nilsen*, 967 F.2d 539, 543 (11th Cir. 1992), "thing of value" is a clearly defined term that includes both tangibles and intangibles.

The federal kidnapping statute is 18 U.S.C. § 1201.

**O30.2**
**Interstate Transmission of an Extortionate Threat**
**to Kidnap or Injure**
**18 U.S.C. § 875(b)**

It's a Federal crime to knowingly send in [interstate] [foreign] commerce an extortionate communication.

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 sent a message in [interstate] [foreign] commerce containing a true threat to [kidnap any person] [injure the person of another]; and

(2) the Defendant did so with the intent to extort money or something else of value to the Defendant.

The Government doesn't have to prove that the Defendant intended to carry out the threat or succeeded in obtaining the money or any other thing of value.

[To transmit something in "interstate commerce" means to send it from a place in one state to a place in another state.]

[To transmit something in "foreign commerce" means to send it from a place in the United States to anyplace outside the United States.]

A "true threat" is a serious threat – not idle talk, a careless remark, or something said jokingly – that is made under circumstances that would place a

reasonable person in fear of [being [kidnapped] [injured]] [another person being [kidnapped] [injured]].

To act with "intent to extort" means to act with the purpose of obtaining money or something of value from someone who consents because of the true threat.

A "thing of value" is anything that has value to the Defendant, whether it's tangible or not.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 875(b) provides that:

> Whoever, with intent to extort from any person . . . any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another [shall be guilty of an offense against the United States].

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

This instruction is unaltered by the Supreme Court's decision in *Elonis v. United States*, 575 U.S. __, 135 S. Ct. 2001 (2015), because in addition to the objective standard contained in the definition of "true threat," this instruction requires that the defendant's subjective mental state be considered.

Although certain prior Eleventh Circuit cases that defined "true threat" have now been overruled in light of *Elonis* for the failure to consider the defendant's subjective mental state, the objective person standard remains useful in the determination of whether the defendant's statement actually constitutes a "true threat," as that term has been defined in prior case law. *See e.g., United States v. Martinez*, 736 F.3d 981, 984-86 (11th Cir. 2013), *overruled on other grounds*, __ F.3d __, 2015 WL 5155225 (11th Cir. Sept. 3, 2015) (discussing *Watts v. United States*, 394 U.S. 705 (1969) as the origin of the "true threats" doctrine).

In *United States v. Evans*, 478 F.3d 1332 (11th Cir. 2007), the Court of Appeals considered and rejected the argument that the "threat to injure" language contained in 18 U.S.C. § 876(c) (which deals with mailing threatening communications) included only future threats. The Eleventh Circuit joined the Second, Third, and Fifth Circuits in holding that a future threat is not necessary and that the statute also applied to immediate threats of harm.

Under *United States v. Nilsen*, 967 F.2d 539, 543 (11th Cir. 1992), "thing of value" is a clearly defined term that includes both tangibles and intangibles.

## O30.3
## Interstate Transmission of Threat to Kidnap or Injure
## 18 U.S.C. § 875(c)

It's a Federal crime to knowingly send in [interstate] [foreign] commerce a true threat to [kidnap] [injure] any person.

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

(1) the Defendant knowingly sent a message in [interstate] [foreign] commerce containing a true threat to [kidnap any person] [injure the person of another]; and

(2) the Defendant sent the message with the intent to communicate a true threat or with the knowledge that it would be viewed as a true threat.

The Government doesn't have to prove that the Defendant intended to carry out the threat.

[To transmit something in "interstate commerce" means to send it from a place in one state to a place in another state.]

[To transmit something in "foreign commerce" means to send it from a place in the United States to anyplace outside the United States.]

A "true threat" is a serious threat – not idle talk, a careless remark, or something said jokingly – that is made under circumstances that would place a reasonable person in fear of [being [kidnapped] [injured]] [another person being [kidnapped] [injured]].

## ANNOTATIONS AND COMMENTS

18 U.S.C. § 875(c) provides that:

> Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and applicable fine.

This instruction is based on *Elonis v. United States*, 575 U.S. __, 135 S. Ct. 2001 (2015). In *Elonis*, the Supreme Court rejected a district court's instruction that failed to consider the defendant's subjective mental state. The Supreme Court held that an objective standard requiring that "liability turn on whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks—reduces culpability on the all-important element of the crime to negligence." *Id.* at 2011 (citation omitted). The Court specifically held that the mental state requirement of § 875(c) "is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." *Id.* at 2012. The Court declined, however, to determine whether a finding of recklessness on the part of the defendant would be sufficient. *Id.* at 2012-13.

The Court noted that the defendant's conviction could not be "premised solely" on a reasonable person standard and that it was an error for the Government to "prove *only* that a reasonable person would regard [the defendant's] communications as threats." 135 S. Ct. at 2011-12 (emphasis added). The Court's opinion did not foreclose the possibility that both an objective and a subjective standard be used in determining whether the defendant knowingly sent a threat. *Id.* at 2012 ("Federal criminal liability generally does not turn *solely* on the results of an act *without considering* the defendant's mental state." (emphasis added)). Thus, although the Supreme Court has made clear that the defendant's subjective mental state must be taken into account, the objective person standard remains useful in the determination of whether the defendant's statement actually constitutes a "true threat," as that term has been defined in prior case law. *See e.g., United States v. Martinez*, 736 F.3d 981, 984-86 (11th Cir. 2013), *overruled on other grounds*, __ F.3d __, 2015 WL 5155225 (11th Cir. Sept. 3, 2015) (discussing *Watts v. United States*, 394 U.S. 705 (1969) as the origin of the "true threats" doctrine).

In *United States v. Evans*, 478 F.3d 1332 (11th Cir. 2007), the Court of Appeals considered and rejected the argument that the "threat to injure" language contained in 18 U.S.C. § 876(c) (which deals with mailing threatening communications) included only future threats. The Eleventh Circuit joined the Second, Third, and Fifth Circuits in holding that a future threat is not necessary and that the statute also applied to immediate threats of harm.

This subsection, as distinguished from § 875(a) (implicitly), and § 875(b) and § 875(d) (explicitly), does not require an intent to extort.

## O30.4
## Interstate Transmission of an Extortionate Communication
## 18 U.S.C. § 875(d)

It's a Federal crime to knowingly send in [interstate] [foreign] commerce an extortionate communication.

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 sent a message in [interstate] [foreign] commerce containing a true threat to [damage the [reputation] [property] of another] [accuse another of a crime]; and

(2) the Defendant did so with the intent to extort money or something else of value to the Defendant.

The Government doesn't have to prove that the Defendant intended to carry out the threat or succeeded in obtaining the money or any other thing of value.

[To transmit something in "interstate commerce" means to send it from a place in one state to a place in another state.]

[To transmit something in "foreign commerce" means to send it from a place in the United States to anyplace outside the United States.]

A "true threat" is a serious threat – not idle talk, a careless remark, or something said jokingly – that is made under circumstances that would place a reasonable person in fear of [damage to their [property] [reputation]] [damage to

another person's [property] [reputation]] [being accused of a crime] [another person being accused of a crime].

To act with "intent to extort" means to act with the purpose of obtaining money or something of value from someone who consents because of the true threat.

A "thing of value" is anything that has value to the Defendant, whether it's tangible or not.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 875(d) provides that:

> Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime [shall be guilty of an offense against the United States].

Maximum Penalty: Two (2) years imprisonment and applicable fine.

This instruction is unaltered by the Supreme Court's decision in *Elonis v. United States*, 575 U.S. __, 135 S. Ct. 2001 (2015), because in addition to the objective standard contained in the definition of "true threat," this instruction requires that the defendant's subjective mental state be considered.

Although certain prior Eleventh Circuit cases that defined "true threat" have now been overruled in light of *Elonis* for the failure to consider the defendant's subjective mental state, the objective person standard remains useful in the determination of whether the defendant's statement actually constitutes a "true threat," as that term has been defined in prior case law. *See e.g., United States v. Martinez*, 736 F.3d 981, 984-86 (11th Cir. 2013), *overruled on other grounds*, __

F.3d __, 2015 WL 5155225 (11th Cir. Sept. 3, 2015) (discussing *Watts v. United States*, 394 U.S. 705 (1969) as the origin of the "true threats" doctrine).

In *United States v. Evans*, 478 F.3d 1332 (11th Cir. 2007), the Court of Appeals considered and rejected the argument that the "threat to injure" language contained in 18 U.S.C. § 876(c) (which deals with mailing threatening communications) included only future threats. The Eleventh Circuit joined the Second, Third, and Fifth Circuits in holding that a future threat is not necessary and that the statute also applied to immediate threats of harm.

Under *United States v. Nilsen*, 967 F.2d 539, 543 (11th Cir. 1992), "thing of value" is a clearly defined term that includes both tangibles and intangibles.

# O31.1
# Mailing Threatening Communications
# 18 U.S.C. § 876 (First Paragraph)

It's a Federal crime to knowingly use the United States mail to send someone a demand or request for a reward or ransom in return for the release of a kidnapped person.

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 sent or caused to be sent through the United States Mail a demand or request for a ransom or reward for the release of a kidnapped person; and

(2) the Defendant did so with the intent to extort money or some other thing of value.

To act with "intent to extort" means to act with the purpose of obtaining money or something of value from someone who consents because of fear or because of the wrongful use of actual or threatened force or violence.

A "thing of value" is anything that has value to the Defendant, whether it's tangible or not.

The heart of the crime is intentionally sending something through the United States mail in order to extort something of value for the release of a kidnapping victim. The Government doesn't have to prove that the Defendant participated in a kidnapping or succeeded in obtaining the money or any other thing of value.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 876(a) provides:

> Whoever knowingly deposits in any post office or authorized depository for mail matter, to be sent or delivered by the Postal Service or knowingly causes to be delivered by the Postal Service according to the direction thereon, any communication, with or without a name or designating mark subscribed thereto, addressed to any other person, and containing any demand or request for ransom or reward for the release of any kidnapped person [shall be guilty of an offense against the United States].

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

Under *United States v. Nilsen*, 967 F.2d 539, 543 (11th Cir. 1992), "thing of value" is a clearly defined term that includes both tangible and intangibles.

The federal kidnapping statute is 18 U.S.C. § 1201.

**O31.2**
**Mailing Threatening Communications**
**18 U.S.C. § 876 (b)**

It's a Federal crime to knowingly use the United States mail to send an extortionate communication.

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 used the United States Mail to send a message containing a true threat to [kidnap any person] [injure the person of another]; and

(2) the Defendant did so with the intent to extort money or something else of value to the Defendant.

The Government doesn't have to prove that the Defendant intended to carry out the threat or succeeded in obtaining the money or any other thing of value.

A "true threat" is a serious threat – not idle talk, a careless remark, or something said jokingly – that is made under circumstances that would place a reasonable person in fear of [being [kidnapped] [injured]] [another person being [kidnapped] [injured]].

To act with "intent to extort" means to act with the purpose of obtaining money or something of value from someone who consents because of the true threat.

A "thing of value" is anything that has value to the Defendant, whether it's tangible or not.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 876(b) provides:

> Whoever, with intent to extort from any person any money or other thing of value, [knowingly deposits in any post office or authorized depository for mail matter, to be sent or delivered by the Postal Service or knowingly causes to be delivered by the Postal Service according to the direction thereon], any communication containing any threat to kidnap any person or any threat to injure the person of the addressee or of another [shall be guilty of an offense against the United States].

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

This instruction is unaltered by the Supreme Court's decision in *Elonis v. United States*, 575 U.S. __, 135 S. Ct. 2001 (2015), because in addition to the objective standard contained in the definition of "true threat," this instruction requires that the defendant's subjective mental state be considered.

Although certain prior Eleventh Circuit cases that defined "true threat" have now been overruled in light of *Elonis* for the failure to consider the defendant's subjective mental state, the objective person standard remains useful in the determination of whether the defendant's statement actually constitutes a "true threat," as that term has been defined in prior case law. *See e.g., United States v. Martinez*, 736 F.3d 981, 984-86 (11th Cir. 2013), *overruled on other grounds*, __ F.3d __, 2015 WL 5155225 (11th Cir. Sept. 3, 2015) (discussing *Watts v. United States*, 394 U.S. 705 (1969) as the origin of the "true threats" doctrine).

Present intent to actually do injury is not required. *United States v. DeShazo*, 565 F.2d 893 (5th Cir. 1978); *see also United States v. McMorrow*, 434 F.3d 1116 (8th Cir. 2006) (noting the "intent to carry through on a threat is not an element of [a crime under 18 U.S.C. § 876(b)]").

The defendant in *United States v. Bly*, 510 F.3d 453 (4th Cir. 2007), sent threatening letters to various employees of the University of Virginia in violation

of § 876(b). The indictment charged that he sent the letters "knowingly, and with intent to extort from the University of Virginia a sum of money or other thing of value." In an issue of first impression, the Fourth Circuit rejected the defendant's argument that "any person" provided for in statute was limited to "living and breathing persons." The university, therefore, was a "person" for purposes of the statute.

Under *United States v. Nilsen*, 967 F.2d 539, 543 (11th Cir. 1992) "thing of value" is a clearly defined term that includes both tangibles and intangibles.

## O31.3
## Mailing Threatening Communications
## 18 U.S.C. § 876(c)

It's a Federal crime to knowingly use the United States mail to send a true threat to [kidnap] [injure] any person.

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

(1) the Defendant knowingly used the United States mail to send a true threat to [kidnap any person] [injure the person of another]; and

(2) the Defendant sent the message with the intent to communicate a true threat or with the knowledge that it would be viewed as a true threat.

The Government doesn't have to prove that the Defendant intended to carry out the threat.

A "true threat" is a serious threat – not idle talk, a careless remark, or something said jokingly – that is made under circumstances that would place a reasonable person in fear of [being [kidnapped] [injured]] [another person being [kidnapped] [injured]].

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 876(c) provides:

> Whoever knowingly [deposits in any post office or authorized depository for mail matter, to be sent or delivered by the Postal Service or knowingly causes to be delivered by the Postal Service according to the direction thereon], any communication with or

> without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to kidnap any person or any threat to injure the person of the addressee or of another [shall be guilty of an offense against the United States].

Maximum Penalty: Up to ten (10) years imprisonment (if the addressee is a United States judge or federal officer/official) and applicable fine.

This instruction is based on *Elonis v. United States*, 575 U.S. __, 135 S. Ct. 2001 (2015).

In *Elonis*, the Supreme Court rejected a district court's instruction under 18 U.S.C § 875(c) (which deals with the transmission of threatening communications in interstate or foreign commerce) that failed to consider the defendant's subjective mental state. The Supreme Court held that an objective standard requiring that "liability turn on whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks—reduces culpability on the all-important element of the crime to negligence." *Id.* at 2011 (citation omitted). The Court specifically held that the mental state requirement of § 875(c) "is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." *Id.* at 2012. The Court declined, however, to determine whether a finding of recklessness on the part of the defendant would be sufficient. *Id.* at 2012-13.

The Court noted that the defendant's conviction could not be "premised solely" on a reasonable person standard and that it was an error for the Government to "prove *only* that a reasonable person would regard [the defendant's] communications as threats." 135 S. Ct. at 2011-12 (emphasis added). The Court's opinion did not foreclose the possibility that both an objective and a subjective standard be used in determining whether the defendant knowingly sent a threat. *Id.* at 2012 ("Federal criminal liability generally does not turn *solely* on the results of an act *without considering* the defendant's mental state." (emphasis added)). Thus, although the Supreme Court has made clear that the defendant's subjective mental state must be taken into account, the objective person standard remains useful in the determination of whether the defendant's statement actually constitutes a "true threat," as that term has been defined in prior case law. *See e.g., United States v. Martinez*, 736 F.3d 981, 984-86 (11th Cir. 2013), *overruled on other grounds*, __ F.3d __, 2015 WL 5155225 (11th Cir. Sept. 3, 2015) (discussing *Watts v. United States*, 394 U.S. 705 (1969) as the origin of the "true threats" doctrine).

In *United States v. Evans*, 478 F.3d 1332 (11th Cir. 2007), the Court of Appeals considered and rejected the argument that the "threat to injure" language contained in § 876(c) included only future threats. The Eleventh Circuit joined the Second, Third, and Fifth Circuits in holding that a future threat is not necessary and that the statute also applied to immediate threats of harm.

This subsection, like its counterpart § 875(c), does not require an intent to extort.

**O31.4**
**Mailing Threatening Communications**
**18 U.S.C. § 876(d)**

It's a Federal crime to knowingly use the United States mail to send an extortionate communication.

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 used the United States mail to send a message containing a true threat to [damage the [reputation] [property] of another] [accuse another of a crime]; and

(2) the Defendant did so with the intent to extort money or something else of value to the Defendant.

The Government doesn't have to prove that the Defendant intended to carry out the threat or succeeded in obtaining the money or any other thing of value.

A "true threat" is a serious threat – not idle talk, a careless remark, or something said jokingly – that is made under circumstances that would place a reasonable person in fear of [damage to their [property] [reputation]] [damage to another person's [property] [reputation]] [being accused of a crime] [another person being accused of a crime].

To act with "intent to extort" means to act with the purpose of obtaining money or something of value from someone who consents because of the true threat.

A "thing of value" is anything that has value to the Defendant, whether it's tangible or not.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 876(d) provides that:

> Whoever, with intent to extort from any person any money or other thing of value, knowingly [deposits in any post office or authorized depository for mail matter, to be sent or delivered by the Postal Service or knowingly causes to be delivered by the Postal Service according to the direction thereon], any communication, with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to injure the property or reputation of the addressee or of another, or the reputation of a deceased person, or any threat to accuse the addressee or any other person of a crime [shall be guilty of an offense against the United States].

Maximum Penalty: Up to ten (10) years imprisonment (if the addressee is a United States judge or federal officer/official) and applicable fine.

This instruction is unaltered by the Supreme Court's decision in *Elonis v. United States*, 575 U.S. __, 135 S. Ct. 2001 (2015), because in addition to the objective standard contained in the definition of "true threat," this instruction requires that the defendant's subjective mental state be considered.

Although certain prior Eleventh Circuit cases that defined "true threat" have now been overruled in light of *Elonis* for the failure to consider the defendant's subjective mental state, the objective person standard remains useful in the determination of whether the defendant's statement actually constitutes a "true threat," as that term has been defined in prior case law. *See e.g., United States v. Martinez*, 736 F.3d 981, 984-86 (11th Cir. 2013), *overruled on other grounds*, __ F.3d __, 2015 WL 5155225 (11th Cir. Sept. 3, 2015) (discussing *Watts v. United States*, 394 U.S. 705 (1969) as the origin of the "true threats" doctrine).

In *United States v. Evans*, 478 F.3d 1332 (11th Cir. 2007), the Court of Appeals considered and rejected the argument that the "threat to injure" language contained in 18 U.S.C. § 876(c) (which deals with mailing threatening communications)

included only future threats. The Eleventh Circuit joined the Second, Third, and Fifth Circuits in holding that a future threat is not necessary and that the statute also applied to immediate threats of harm.

Under *United States v. Nilsen*, 967 F.2d 539, 543 (11th Cir. 1992), "thing of value" is a clearly defined term that includes both tangibles and intangibles.

**O32**
**False Impersonation of a Citizen**
**18 U.S.C. § 911**

It's a Federal crime for anyone to falsely and willfully impersonate a citizen of the United States.

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 alien at the time alleged in the indictment;

(2) the Defendant falsely claimed to be a citizen of the United States; and

(3) the Defendant knowingly and willfully made the false claim.

An "alien" is a person who isn't a citizen of the United States.

A "citizen of the United States" is someone born in the United States or granted citizenship through "naturalization." A person born outside the United States is a citizen if both parents were United States citizens and one of them had a residence in the United States before the birth.

[The United States Citizenship and Immigration Services, in the Department of Homeland Security, is responsible for controlling the entry of aliens into the United States. Officers of that agency are authorized to administer oaths, and to take and consider evidence about an alien's right or privilege to enter, reenter, pass through, or remain in the United States.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 911 provides:

> Whoever falsely and willfully represents himself to be a citizen of the United States [shall be guilty of an offense against the United States].

Maximum Penalty: Three (3) years imprisonment and applicable fine.

The Eleventh Circuit has not discussed it, but other circuits have made it clear that "fraudulent purpose" is not an element of the crime. It must only be proved that "the misrepresentation was voluntarily and deliberately made." *See Chow Bing Kew v. United States*, 248 F.2d 466, 469 (9th Cir.) *cert. denied*, 355 U.S. 889, 78 S. Ct. 259, 2 L. Ed. 2d 188 (1957); *United States v. Franklin*, 188 F.2d 182, 186 (7th Cir. 1951) ("A fraudulent purpose in making a false claim of citizenship is not essential to offense [*sic*] under statute and consequently the indictment need not contain an allegation, nor need there be proof as to defendant's fraudulent purpose in making such claim.") The logic of this view is based, in part, on the fact that a prior version of 18 U.S.C. § 746(a) (the predecessor to § 911) required a showing of fraudulent purpose, but that requirement was expressly omitted from § 911.

The committee believes that the general definition of "willfully" in Basic Instruction 9.1A would usually apply to this crime.

# O33
# False Impersonation of an Officer of the United States
# 18 U.S.C. § 912

It's a Federal crime to falsely impersonate an officer of the United States.

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

(1) the Defendant pretended to be an officer or employee acting under the authority of the United States;

(2) the Defendant [acted as such] [demanded or obtained money or other thing of value]; and

(3) the Defendant did so knowingly with intent to deceive or defraud another.

For purposes of this crime, to act "with intent to deceive or defraud" means to act with the specific intent to try to get a person to do something he would not otherwise have done.

## ANNOTATIONS AND COMMENTS

18 U.S.C. § 912 provides:

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency, or officer thereof, and [1] acts as such, or [2] in such pretended character demands or obtains any money… or thing of value [shall be guilty of an offense against the United States].

Maximum Penalty: Three (3) years imprisonment and applicable fine.

*United States v. Gayle*, 967 F.2d 483, 486-87 (11th Cir. 1992) (en banc), held that intent to defraud is an essential element of this offense, relying on the amended statutory language which omitted "with intent to defraud" in deference to the Supreme Court's holding in *United States v. Lepowitch*, 318 U.S. 702, 63 S. Ct. 914, 87 L. Ed. 1091 (1943): "the words 'intent to defraud' in the context of this statute, do not require more

than the defendants have, by artifice or deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct." 318 U.S. at 704. The Eleventh Circuit joined the Third, Eighth, and D.C. Circuits in determining that intent to defraud remained an element of the offense, even though it did not have to be alleged in the indictment. Note, however, that the Second, Fourth, Seventh, and Ninth Circuits have held that "intent to defraud" is no longer an element of this offense.

In *United States v. Tin Yat Chin*, 476 F.3d 144 (2nd Cir. 2007), the Second Circuit observed that § 912 "only applies to persons impersonating a present government employee," and not a former employee).

## O34.1
## Dealing in Firearms without a License
## 18 U.S.C. § 922(a)(1)(A)

It's a Federal crime to be in the business of dealing in firearms without a Federal license.

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

(1) the Defendant engaged in the business of dealing in firearms;

(2) the Defendant didn't have a Federal license; and

(3) the Defendant acted willfully.

A "firearm" is any weapon designed to, or readily convertible to, expel a projectile by the action of an explosive. [The term includes the frame or receiver of any such weapon and any firearm muffler or silencer. "Firearm frame or receiver" means that part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel.]

A person is "engaged in the business of dealing in firearms" if the person regularly purchases and resells firearms with the principal objective of livelihood and profit. "Livelihood" includes both making a living and supplementing one's income. Some things that are *not* the "business of dealing in firearms" are

occasionally selling, exchanging, or purchasing firearms for one's own personal collection or selling all or part of one's own personal collection.

A "dealer" is any person "engaged in the business of dealing in firearms," at wholesale or retail, even if that's not the person's primary business or job.

In determining whether a Defendant had the principal objective of livelihood and profit, you may consider all of the circumstances surrounding the transactions, including: the quantity and the frequency of sales; the location of the sales; conditions under which the sales occurred; Defendant's behavior before, during, and after the sales; the price charged; and the characteristics of the firearms sold. The Government need not show that the Defendant actually made a profit, so long as the Defendant's principal objective was livelihood and profit.

The Government must prove that the Defendant knew that [his] [her] conduct was unlawful, but it doesn't have to prove that the Defendant actually knew [he][she] was required to obtain a Federal license to engage in the business of dealing in firearms.

[Proof of a profit motive isn't required if the Defendant deals regularly in firearms for criminal or terroristic purposes.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 922(a)(1)(A) provides:

(a) It shall be unlawful - -

(1) for any person - -

(A) except a… licensed dealer, to engage in the business of… dealing in firearms.

Maximum Penalty: Five (5) years imprisonment and applicable fine.

The definition of "firearm" is based on 18 U.S.C. § 921(a)(3). The definition of "firearm frame or receiver" is based on 27 C.F.R. § 478.11. The definition of "dealing" is based on "dealer," as defined at 18 U.S.C. § 921(a)(11). The definition of " engaged in the business" is based on 18 U.S.C. § 921(a)(21)(C). The definition of "principal objective of livelihood and profit" is based on 18 U.S.C. § 921(a)(22). The Gun Control Act of 1968, 18 U.S.C. § 921 *et seq.*, which governs, among other things, the sale of firearms, was amended in 1986. The language of Section 921(a)(11) and Section 922(a)(1)(A) were not affected by the 1986 Amendment. The pre-1986 version of Section 921 did not define "engaged in the business" or "principal objective of livelihood and profit."

The term "willfully" in Section 924(a)(1)(D), which establishes the penalty for a violation of Section 922(a)(1)(A), requires only proof that the defendant knew that his conduct was unlawful, and not that the defendant also knew of the specific federal licensing requirement. *Bryan v. United States*, 524 U.S. 184 (1998). The general definition of "willfully" in Basic Instruction 9.1A will usually apply.

Engaged in the business

Before the 1986 Amendment, the term "engaged in the business" was judicially interpreted. *See, e.g.*, *United States v. Burgos*, 720 F.2d 1520, 1527 n.8 (11th Cir. 1983) (possession of large supply of firearms and willingness to sell and ship them held sufficient); *United States v. Berry*, 644 F.2d 1034, 1037 (5th Cir. 1981) (considering "whether [a defendant] has guns on hand or is ready and able to procure them for the purpose of selling them from time to time to such persons as might be accepted as customers"). The 1986 Amendment defined "engaged in the business" and "principal objective of livelihood and profit," as those terms apply to a "dealer" in firearms. *United States v. Schumann*, 861 F.2d 1234, 1237-38 (11th Cir. 1988) (discussing narrowing effect of 1986 Amendment in context of determining whether it applied retroactively).

The 1986 Amendment focuses on "repetitive purchase and resale," and specifically excludes "occasional sales, exchanges or purchases of firearms for the enhancement of a personal collection or for a hobby," or "[sales of] all or part of his personal collection of firearms." 18 U.S.C. § 921(a)(21)(C). The 1986 Amendment also requires "the principal objective of livelihood and profit," which does not include "other intents, such as improving or liquidating a personal firearms collection." 18 U.S.C. §§ 921(a)(21)(C), 921(a)(22).

In determining whether a defendant has "engaged in the business" of dealing in firearms, courts have utilized a "totality of the circumstances" test. Under that test, a "defendant engages in the business of dealing in firearms when his 'principal motive is economic' and he 'pursues this objective through the repetitive purchase and resale of firearms.'" *United States v. Tyson*, 653 F.3d 192, 200-01 (3d Cir. 2011).

The Eleventh Circuit has held that a court may look at the "totality of the circumstances" "[i]n determining whether one is engaged in the business of dealing in firearms, [and] the finder of fact must examine the intent of the actor and all circumstances surrounding the acts alleged to constitute engaging in business." *United States v. Bailey*, 123 F.3d 1381, 1392 (11th Cir. 1997). "[I]n determining the character and intent of firearms transaction, the jury must examine all circumstances surrounding the transactions, without the aid of a 'bright-line rule.' [Such] relevant circumstances include: 'the quantity and the frequency of sales;' the 'location of the sales;' 'conditions under which the sales occurred;' 'defendant's behavior before, during, and after the sales;' 'the price charged;' 'the characteristics of the firearms sold;' and 'the intent of the seller at the time of the sales.'" *Tyson*, 653 F.3d at 201 (internal citations omitted).

In *United States v. Gray*, the Sixth Circuit held that evidence was sufficient to support a conviction under Section 922(a)(1)(A) where the government demonstrated: "(1) that the defendant frequented flea markets and gun shows where he displayed and sold guns; (2) that the defendant offered to sell guns to confidential informants on multiple occasions and actually sold them three different guns on two different occasions; (3) and that the defendant bought and sold guns for profit." 470 F. App'x 468, 473 (6th Cir. 2012). *See also United States v. Dettra*, 238 F.3d 424 (6th Cir. 2000) (holding that where defendant "recorded the cost of each firearm he acquired, enabling him to later determine the amount needed to sell the item in a profitable manner . . . , [he used] printed business cards and [accepted] credit [card] payment[s]," the jury could reasonably "infer that he was conducting his firearms activity as a profitable trade or business, and not merely as a hobby.").

In *United States v. Allah*, 130 F.3d 33, 42 (2d Cir. 1997), the Second Circuit also used a "totality" approach and found that the elements of "engaging in the business" and "principal objective of livelihood and profit" were satisfied when there was no "evidence that defendants were selling guns for the various nonpecuniary reasons specified in the statute." The defendants' conversations "plainly indicated that the weapons they offered to sell were coming, or could be [readily] ordered, from outside sources." *Id.* at 35.

<u>Livelihood</u>

While the Eleventh Circuit has not interpreted the "principal objective of livelihood and profit" clause in the statute, other circuits have held that Section 922 does not require the

government to prove that the unlicensed dealing in firearms is a defendant's only source of income or livelihood, nor does it have to prove that the defendant actually made a profit. *See Gray*, 470 F. App'x at 472 (finding "principal objective of livelihood and profit" to mean "that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents"); *United States v. Beecham*, 993 F.2d 1539 (4th Cir. 1993) (evidence supported dealing in firearms was a regular business to which defendant devoted time and effort and from which he intended to obtain a profit; firearm-related activity was more than a hobby); *but see United States v. Nadirashvili*, 655 F.3d 114 (2d Cir. 2011) (citing *United States v. Carter*, 801 F.2d 78, 81-81 (2d Cir. 1986), a pre-amendment case, for the requirement that "the government need only prove that the defendant has guns on hand or is ready and able to procure them for the purpose of selling them from [time] to time to such persons as might be accepted as customers").

**O34.2**
**Transfer of Firearm to Nonresident**
**18 U.S.C. § 922(a)(5)**

Under certain circumstances, it's a Federal crime for anyone who isn't a licensed dealer to sell or transfer a firearm to someone who lives in another state.

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

(1) the Defendant willfully transferred, sold, or delivered a firearm to another person;

(2) at the time, neither the Defendant nor the person who received the firearm was a licensed firearms dealer, importer, manufacturer, or collector; and

(3) the Defendant knew or had reasonable cause to believe that the person who received the firearm resided in another state.

A "firearm" is any weapon designed to or readily convertible to expel a projectile by the action of an explosive. The term includes the frame or receiver of any such weapon or any firearm muffler or silencer.

To "transfer" a firearm means to deliver it to someone else.

To have "reasonable cause to believe" that someone resides in another state means to know facts that would lead a reasonable person to conclude that the other person resides in another state.

The heart of this crime is to willfully transfer a firearm to a resident of another state.

[It's not a crime to lend or rent a firearm to someone for legal sporting purposes.

It's not a crime to transfer or deliver a firearm to a nonresident when carrying out a bequest or intestate succession as long as the person who receives the firearm may do so under that person's state law.]

[A "bequest" is property given to someone else in a will.

"Intestate succession" is the method defined by state law to distribute the estate of someone who dies without a will.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 922(a)(5) provides:

(a) It shall be unlawful - -

* * * * *

> (5) for any person [other than a licensed dealer] to transfer, sell… or deliver any firearm to any person [other than a licensed dealer] who the transferor knows or has reasonable cause to believe does not reside in … the State in which the transferor resides [unless] the transfer [is] made to carry out a bequest… [or constitutes a] loan or rental… for temporary use for lawful sporting purposes.

Maximum Penalty: Five (5) years imprisonment and applicable fine.

The term "willfully" in § 924(a)(1)(A) which imposes the penalty for a violation of *inter alia*, this subsection, requires proof only that the accused knew that the accused's conduct was unlawful, and not that the accused also knew of the federal licensing requirement. *Bryan v. United States*, 524 U.S. 184, 118 S. Ct. 1939, 141 L. Ed. 2d 197 (1998).

The committee believes that the general definition of "willfully" in Basic Instruction 9.1A would usually apply to this crime.

## O34.3
## False Statement to a Firearms Dealer
## 18 U.S.C. § 922(a)(6)

It's a Federal crime to make a false statement to a licensed firearms dealer while buying a firearm.

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

(1) the Defendant bought or tried to buy a firearm from a federally licensed firearms dealer;

(2) the Defendant [knowingly made a false or fictitious statement, orally or in writing] [knowingly furnished false identification] that was [intended to deceive] [likely to deceive] the dealer; and

(3) the subject matter of the false [statement] [identification] was material to the lawfulness of the sale.

A "firearm" is any weapon designed to or readily convertible to expel a projectile by the action of an explosive. The term includes the frame or receiver of any such weapon or any firearm muffler or silencer.

A [statement] [identification] is "false" if it is untrue when [made] [used] and the person [making] [using] it knows it is untrue.

A false [statement] [identification] is "likely to deceive" if under the circumstances a reasonable person of ordinary prudence would probably be deceived.

Whether the allegedly false [statement] [identification] is "material" is a question of law for the court to decide. If you find the [statement] [identification] in this case is false, then it was material to the sale.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 922(a)(6) provides:

> (a) It shall be unlawful - -
>
> * * * * *
>
> (6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, … manufacturer, … dealer, or … collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition…

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

*United States v. Klais*, 68 F.3d 1282 (11th Cir. 1995), held that under § 922(a)(6) materiality is a question of law, distinguishing the Supreme Court's decision in *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995) (holding that in context of 18 U.S.C. § 1001, materiality is a question for the jury).

Willfulness is not an essential element of this offense. *See* 18 U.S.C. § 924(a)(2).

## O34.4
## Failure of Firearms Dealer to Keep Proper Record of Sale
## 18 U.S.C. § 922(b)(5)

It's a Federal crime for a federally licensed firearms dealer to sell [a firearm] [armor-piercing ammunition] to anyone without keeping a record about the purchaser.

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 federally licensed firearms dealer when the alleged offense occurred;

(2) the Defendant sold or delivered [a firearm] [armor-piercing ammunition] to [buyer's name]; and

(3) the Defendant knowingly and willfully failed to record the name, age, and address of [buyer's name] as required by law.

[A "firearm" is any weapon designed to or readily convertible to expel a projectile by the action of an explosive. The term includes the frame or receiver of any such weapon or any firearm muffler or silencer.]

["Armor-piercing ammunition" is a projectile or projectile core that may be used in a handgun and is constructed almost entirely from any one or a combination of tungsten alloys, steel, iron, brass, bronze, beryllium copper, or depleted uranium. The term includes any full-jacketed projectile larger than .22 caliber that is designed and intended for use in a handgun and has a jacket weight greater than 25 percent of the projectile's total weight.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 922(b)(5) provides:

> (b) It shall be unlawful for any licensed… dealer… to sell or deliver - -
>
> * * * * *
>
> (5) any firearm or armor-piercing ammunition to any person unless the licensee notes in his records, required to be kept pursuant to section 923 of this chapter, the name, age, and place of residence of such person…

Maximum Penalty: Five (5) years imprisonment and applicable fine.

18 U.S.C. § 924(a)(1)(D) makes willfulness an element of this offense. However, in *Bryan v. United States*, 524 U.S. 184, 118 S. Ct. 1939, 141 L. Ed. 2d 197 (1998), the Court held that "willfulness" should be given its usual meaning of general knowledge of the unlawfulness of the conduct, but did not require proof that the Defendant had specific knowledge of the criminal statute being violated by his conduct. The committee believes, therefore, that the general definition of "willfully" in Basic Instruction 9.1A would usually apply to this crime.

## O34.5
## Sale of a Firearm to a Convicted Felon
## 18 U.S.C. § 922(d)(1)

It's a Federal crime to knowingly sell a firearm to a convicted felon.

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

(1) the Defendant sold the firearm described in the indictment at or about the time alleged;

(2) the firearm's buyer had been convicted of a felony – a crime punishable by imprisonment for more than a year; and

(3) the Defendant knew or had reasonable cause to believe that the buyer had been convicted of a felony.

A "firearm" is any weapon designed to or readily convertible to expel a projectile by the action of an explosive. The term includes the frame or receiver of any such weapon or any firearm muffler or silencer.

"Reasonable cause to believe" that someone is a convicted felon means knowing facts that would cause a reasonable person to conclude that the other person is a convicted felon.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 922(d)(1) provides:

> (d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person - -

(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year.

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

Willfulness is not an essential element of this offense. See 18 U.S.C. § 924(a)(2).

*See United States v. Peters*, 403 F.3d 1263 (11th Cir. 2005).

## O34.6
## Possession of a Firearm or Ammunition by a Convicted Felon
## 18 U.S.C. § 922(g)(1)

It's a Federal crime for anyone who has been convicted of a felony offense to possess a firearm or ammunition in or affecting interstate or foreign 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 possessed a firearm or ammunition in or affecting interstate or foreign commerce;
>
> (2) before possessing the firearm or ammunition, the Defendant had been convicted of a felony – a crime punishable by imprisonment for more than one year; and
>
> (3) at the time the Defendant possessed the firearm or ammunition, the Defendant knew [he][she] had previously been convicted of a felony.

A "firearm" is any weapon designed to or readily convertible to expel a projectile by the action of an explosive. The term includes the frame or receiver of any such weapon or any firearm muffler or silencer.

"Ammunition" means ammunition or cartridge cases, primers, bullets, or propellant powder designed for use in any firearm.

The term "interstate or foreign commerce" includes the movement of a firearm or ammunition from one state to another or between the United States and any foreign country. It's not necessary for the Government to prove that the Defendant knew the firearm or ammunition had moved from one state to another, only that the firearm or ammunition did, in fact, move from one state to another.

## ANNOTATIONS AND COMMENTS

18 U.S.C. § 922(g)(1) provides:

> (g) It shall be unlawful for any person - -
>
> (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year… to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Maximum Penalty: Ten (10) years' imprisonment and applicable fine. However, under the Armed Career Criminal Act, if a Defendant violates § 922(g) and has three previous convictions for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined and imprisoned for not less than fifteen (15) years. *See* 18 U.S.C. § 924(e)(1). For what may be included as a "violent felony," *see Begay v. United States*, 553 U.S. 137, 128 S. Ct. 1581, 170 L. Ed. 2d 490 (2008) (driving under the influence is not a "violent felony"); *James v. United States*, 550 U.S. 192, 127 S. Ct. 1586, 167 L. Ed. 2d 532 (2007) (attempted burglary is a "violent felony").

When a Defendant offers to stipulate to his or her status as a previously convicted felon, and the Government declines the stipulation, the issue should be evaluated under the balancing test of Fed. R. Evid. 403. While there is no per se rule requiring the Government to accept such a stipulation, it can be an abuse of discretion to admit evidence of the nature of a stipulated conviction where the nature of the crime (as distinguished from the fact of the conviction itself) has potential prejudice outweighing any probative value. *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

Willfulness is not an essential element of this offense. *See* 18 U.S.C. § 924(a)(2); *see also United States v. Palma*, 511 F.3d 1311, 1315 (11th Cir. 2008) ("We have consistently held that § 922(g) is a strict liability offense that 'does not require the prosecution to prove that the criminal acts were done with specific criminal intent.'").

The government is not required to prove that the unlawfully possessed firearm was operable. *United States v. Adams*, 137 F.3d 1298 (11th Cir. 1998).

What constitutes a prior state court "conviction" is determined, under 18 U.S.C. § 921(a)(20), according to state law; and, under Florida law, a "conviction" requires an adjudication of guilt by a jury verdict or a plea of guilty. A plea of *nolo contendere* followed by a withholding of adjudication by the Court is not a "conviction" for purposes of § 922(g)(1). *United States v. Willis*, 106 F.3d 966 (11th Cir. 1997). In *Small v. United States*, 544 U.S. 385, 125 S. Ct. 1752, 161 L. Ed. 2d 651 (2005), the Supreme Court held

that § 922(g)(1)'s phrase "convicted in any court" encompasses only domestic, not foreign, convictions.

In *United States v. Scott*, 263 F.3d 1270 (11th Cir. 2001), the Court held that as long as the weapon at issue had a minimal nexus to interstate commerce, application of § 922(g) was constitutional. The interstate nexus was demonstrated by the fact that the firearm the Defendant possessed was manufactured in California and had moved in interstate commerce to Georgia, where the Defendant was found in possession of the weapon.

With regard to a "justification" defense under § 922(g), *see United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000), the Court held that in order to establish a justification defense, the Defendant must prove by a preponderance of the evidence that: (1) the Defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury, (2) the Defendant did not negligently or recklessly place himself in a situation where the Defendant would be forced to engage in criminal conduct, (3) the Defendant had no reasonable legal alternative to violating the law, and (4) there was a direct causal relationship between the criminal action and the avoidance. *Id*. at 1297. *See* Special Instruction 16, Justification or Necessity. A justification defense may be available only in "extremely limited" and "extraordinary circumstances." *Palma*, 511 F.3d at 1316 n.3.

In a prosecution under 18 U. S. C. § 922(g), "the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Rehaif v. United States*, 139 S. Ct. 2191, 2200, 204 L. Ed. 2d 594 (2019).

## O34.7
## False Entry in a Record by a Firearms Dealer
## 18 U.S.C. § 922(m)

It's a Federal crime for a licensed firearms dealer to make a false entry in any record that federal law requires the dealer to keep.

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 federally licensed firearms dealer when the alleged offense occurred;

(2) the Defendant made a false entry in a firearm record that [he] [she] was required to keep under federal law; and

(3) the Defendant knew that the entry was false.

Federal law requires a licensed firearms dealer to maintain a [record's name] record.

An entry in a record is "false" if it is untrue when made and the person making it knows it is untrue.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 922(m) provides:

> It shall be unlawful for any licensed… dealer… knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder.

Maximum Penalty: One (1) year imprisonment and applicable fine.

Willfulness is not an essential element of this offense. *See* 18 U.S.C. § 924(a)(3)(B).

## O34.8
## Possession of a Machine Gun
## 18 U.S.C. § 922(o)(1)

It's a Federal crime to possess a machine gun.

A "machine gun" is any weapon that shoots, is designed to shoot, or can be readily restored to shoot multiple shots automatically, without manual reloading, by a single function of the trigger.

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

(1) the Defendant possessed a "machine gun"; and

(2) the Defendant knew it was a machine gun or was aware of the firearm's essential characteristics that made it a "machine gun" as defined.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 922(o)(1) provides:

> … [I]t shall be unlawful for any person to transfer or possess a machine gun.

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

Willfulness is not an essential element of this offense. *See* 18 U.S.C. § 924(a)(2).

Note: The definition of "machine gun" in 26 U.S.C. § 5845(b) also encompasses the "frame or receiver" and "parts" which may be used in converting or assembling a machine gun, and the expanded definition may be required when included in the charged offense.

# O35.1
# False Statement in Required Information Kept by a Firearms Dealer
# 18 U.S.C. § 924(a)(1)(A)

It's a Federal crime to make a false statement in a record that Federal law requires a licensed firearms dealer to keep.

Federal law requires a licensed firearms dealer to maintain [record's name].

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

(1) the Defendant made a false statement or representation in the [record's name];

(2) to a federally licensed firearms dealer; and

(3) the Defendant knew that the statement or representation was false.

An entry in a record is "false" if it was untrue when made and the person making it knew it was untrue.

## ANNOTATIONS AND COMMENTS

18 U.S.C. § 924(a)(1)(A) provides:

> (a)(1) … [W]hoever:
>
> (A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter [shall be guilty of an offense against the United States.]

Maximum Penalty: Five (5) years imprisonment and applicable fine.

Willfulness is not an essential element of this offense. 18 U.S.C. § 924(a)(1)

In *United States v. Nelson*, 221 F.3d 1206 (11th Cir. 2000), the Court held that § 924(a)(1)(A) applies to "straw purchases" where the buyer of the firearm intends at the point of sale to later transfer the weapon to another person. Such a buyer cannot truthfully certify on ATF 4473 that he or she is the "actual buyer" of the firearm.

**Offense Instruction 35.2**
**Using or Carrying a Firearm During a**
**Violent Crime or Drug-Trafficking Crime**
**18 U.S.C. § 924(c)(1)(A)**

It's a separate Federal crime to [use] [carry] a firearm during and in relation to a [violent crime] [drug-trafficking crime].

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

(1) that the Defendant committed the [violent crime] [drug-trafficking crime] charged in Count ____ of the indictment; and

(2) that during and in relation to that crime the Defendant knowingly [used] [carried] a firearm, as charged in the indictment.

A "firearm" is any weapon designed to or readily convertible to expel a projectile by the action of an explosive. The term includes the frame or receiver of any such weapon or any firearm muffler or silencer.

[To "use" a firearm means more than a mere possession and more than proximity and accessibility to the firearm. It requires active employment of the firearm by brandishing or displaying it in some fashion.]

[To "brandish" a firearm means to show all or part of the firearm to another person, or otherwise make another person aware of the firearm, in order to intimidate that person. The firearm need not be directly visible to the other person.]

[To "carry" a firearm is to have the firearm on one's person *or* to transport the firearm, such as in a vehicle, from one place to another, while committing the [violent crime] [drug-trafficking crime].]

To [use] [carry] a firearm "in relation to" a crime means that the firearm had some purpose or effect with respect to the crime, and was not there by accident or coincidence. The firearm must have facilitated, or had the potential of facilitating, the crime.

If you find the defendant guilty of [using] [carrying] a firearm during and in relation to a [violent crime] [drug-trafficking crime], you will answer an additional question about the firearm: whether the firearm was [a short-barreled rifle] [a short-barreled shotgun] [a semiautomatic assault weapon] [a machinegun] [was equipped with a firearm silencer or firearm muffler] [a destructive device]. The Government has the burden of proof on this question, and the standard again is proof beyond a reasonable doubt.

[A "rifle" is a firearm intended to be fired from a person's shoulder which, when the trigger is pulled, expels only one projectile through a grooved barrel. A "short-barreled rifle" is a rifle with one or more barrels that are less than sixteen inches long, or any weapon made from a rifle and which is less than twenty-six inches long overall.]

[A "shotgun" is a firearm intended to be fired from a person's shoulder which, when the trigger is pulled, expels one projectile or a number of pellets contained in one shell, through a smooth barrel. A "short-barreled shotgun" is a shotgun with one or more barrels that are less than eighteen inches long, or any weapon made from a shotgun and which is less than twenty-six inches long overall.]

[A "semiautomatic weapon" is a weapon that uses the action of an explosive to expel a projectile and automatically reload another, which requires the trigger to be pulled again to expel the next projectile. A "semiautomatic assault weapon" is [type of firearm or applicable characteristics from 18 U.S.C. § 921(a)(30)]].

[A "machinegun" is a weapon that shoots, is designed to shoot, or can be readily restored to shoot, multiple shots automatically, without manual reloading, using one sustained pull of the trigger or by a single pulling of the trigger. The term also includes any part or combination of parts used to assemble, or convert another weapon into, a machinegun.]

[A "firearm silencer" or "firearm muffler" is any device that can be attached to a firearm to silence, muffle, or lessen the sound of a firearm if discharged. The terms also include any combination of parts designed for use in assembling or fabricating a firearm silencer or firearm muffler.]

[A "destructive device" is any weapon designed to, or readily convertible to, expel a projectile by the action of an explosive or other propellant, and which has a barrel with an interior width of more than one-half inch in diameter.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 924(c)(1) provides:

> (c)(1)(A)… [A]ny person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime - -
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.
>
> (B) If the firearm possessed by a person convicted of a violation of this subsection - -
>
> (i) is a short-barreled rifle, short-barreled shotgun, or a semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or
>
> (ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

Maximum Penalty: As stated in the statute above and applicable fine. Sentence must be consecutive.

The definition of "brandish" is based on 18 U.S.C. § 924(c)(4). The definition of "short-barreled rifle" is based on 18 U.S.C. §§ 921(a)(7)-(8). The definition of "short-barreled shotgun" is based on 18 U.S.C. §§ 921(a)(5)-(6). The definition of "machinegun" is based on 18 U.S.C. § 921(a)(23) and 26 U.S.C. § 5845(b). The definition of "destructive device" is based on 18 U.S.C. § 921(a)(4).

The definition of "semiautomatic assault weapon" is based on 18 U.S.C. § 921(a)(28), and should be completed by including language from 18 U.S.C. § 921(a)(30) (West 2004). On September 13, 2004, 18 U.S.C. § 921(a)(30) was repealed upon expiration of the Federal Assault Weapons Ban. The Committee believes that the language of Section 921(a)(30) is still helpful to define the term "semiautomatic assault weapon" for violations of 18 U.S.C. § 924(c)(1).

In *Bailey v. United States*, 516 U.S. 137 (1995), the Court held that "uses" within the meaning of § 924(c)(1) means more than mere possession and more than proximity and accessibility; it requires, instead, active employment of the weapon as by brandishing or displaying it in some fashion.

In 1998, in direct response to *Bailey*, Congress amended the statute in several respects, including the insertion of the phrase "or who, in furtherance of any such crime, possesses a firearm . . . ." The stated purpose and effect of this amendment was to overcome the *Bailey* court's constrictive interpretation of the scope of the statute and to extend its reach to any drug trafficking or violent crime in which the Defendant merely possesses a firearm "in furtherance of any such crime." Thus, there are three possible charges under this statute: (1) "used" during and in relation to; (2) "carried" during and in relation to; or (3) "possessed" in furtherance of the offense.

In *Watson v. United States*, 552 U.S. 74 (2007), the Supreme Court held that, for purposes of § 924(c)(1)(A), the term "uses" would turn on the language as it was normally spoken. *Compare Smith v. United States*, 508 U.S. 223, (1993) (A person "who trades his firearm for drugs 'uses' the firearm during and in relation to a drug trafficking offence within the meaning of § 924(c)(1)."), *with Watson*, 552 U.S. 74 (a person does not "use" a firearm under the statute when he receives it in trade for drugs).

In *Dean v. United States*, 556 U.S. 568 (2009), the Supreme Court held that § 924(c)(1)(A)(iii), which provides for an enhanced penalty "if the firearm is discharged," does not require separate proof of intent. In other words, the enhancement will apply even if the firearm is discharged by accident. *See id.*

For purposes of § 924(c)(1)(B)(ii), a firearm may be "equipped with a firearm silencer or firearm muffler," where a silencer is located in close proximity to the firearm and the silencer is specially designed to be used with that firearm. The enhancement may apply

even if the silencer is not attached to the firearm. *See United States v. Charles,* 469 F.3d 402 (5th Cir. 2006), *cert. denied,* 549 U.S. 1273 (2007); *United States v. Rodriguez*, 841 F. Supp. 79 (E.D.N.Y. 1994), *aff'd*, 53 F.3d 545 (2d Cir.), *cert. denied*, 516 U.S. 893 (1995). In *Alleyne v. United States*, 133 S. Ct. 2151 (2013), the United States Supreme Court held that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies to facts that increase the mandatory minimum punishment for a crime, and that any fact (other than the fact of a prior conviction) that increases a mandatory minimum sentence "is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." 133 S. Ct. at 2155. The Court in *Alleyne* overruled *Harris v. United States*, 536 U.S. 545 (2002), which held that *Apprendi* did not preclude the use of facts found by a judge at sentencing to increase a defendant's mandatory minimum sentence. Accordingly, a jury is required to be instructed that any fact charged in the indictment that enhances a defendant's sentence must be found by the jury beyond a reasonable doubt and the verdict form should be amended to show these required findings. The enhancements under 924(c) that trigger mandatory minimum sentences beyond the five-year base sentence for a first offense are: brandishing (7 years); discharging (10 years); short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon (10 years); and machinegun, destructive device, or firearm equipped with a silencer or muffler (30 years).

Whether a crime is a crime of violence is a question of law, not of fact. *United States v. Amparo*, 68 F.3d 1222 (9th Cir. 1995); *United States v. Moore*, 38 F.3d 977 (8th Cir. 1994); *United States v. Weston*, 960 F.2d 212 (1st Cir. 1992); *United States v. Adkins*, 937 F.2d 947 (4th Cir. 1991). *But see, United States v. Jones*, 993 F.2d 58 (5th Cir. 1993). *Cf. Begay v. United States*, 553 U.S. 137 (2008) ("In determining whether [a] crime is a violent felony [for purposes of § 924(e)], we consider the offense generically, that is to say, we examine it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion."); *James v. United States*, 550 U.S. 192 (2007) (stating that in determining if a crime qualifies as a violent felony for purposes of § 924(e), "we look only to the fact of conviction and the statutory definition of the prior offense, and do not generally consider the particular facts disclosed by the record of conviction").

*Special Verdict*

1. We, the Jury, find the Defendant [name of Defendant] _____ of the offense charged in Count [___] of the indictment.

[Note: If you find the Defendant not guilty as charged in Count [___], you need not consider the paragraphs below.]

2. We, the Jury, having found the Defendant guilty of the offense charged in Count [___], further find with respect to that Count that the firearm was _____ [brandished] [discharged].

3. We, the Jury, having found the Defendant guilty of the offense charged in Count [___], further find with respect to that Count the firearm [used] [carried] _____ was a [short-barreled rifle] [short-barreled shotgun] [semiautomatic assault weapon] [machinegun] [destructive devise] [equipped with a firearm silencer or firearm muffler].

So Say We All.

Date: _____ _____

Foreperson

## O35.3
## Possessing a Firearm in Furtherance of a Violent Crime or Drug-Trafficking Crime
## 18 U.S.C. § 924(c)(1)(A)

It's a separate Federal crime to possess a firearm in furtherance of a [violent crime] [drug-trafficking crime].

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

(1) that the Defendant committed the [violent crime] [drug-trafficking crime] charged in Count _____ of the indictment; and

(2) that the Defendant knowingly possessed a firearm in furtherance of that crime, as charged in the indictment.

A "firearm" is any weapon designed to or readily convertible to expel a projectile by the action of an explosive. The term includes the frame or receiver of any such weapon or any firearm muffler or silencer.

To "possess" a firearm is to have direct physical control of the firearm or to have knowledge of the firearm's presence and the ability and intent to later exercise control over the firearm.

Possessing a firearm "in furtherance of" a crime means that the firearm helped, promoted, or advanced the crime in some way.

If you find the defendant guilty of possessing a firearm in furtherance of a [violent crime] [drug-trafficking crime], you will answer an additional question about the firearm: whether the firearm was [a short-barreled rifle] [a short-barreled shotgun] [a semiautomatic assault weapon] [a machinegun] [was equipped with a firearm silencer or firearm muffler] [a destructive device]. The Government has the burden of proof on this question, and the standard again is proof beyond a reasonable doubt.

[A "rifle" is a firearm intended to be fired from a person's shoulder which, when the trigger is pulled, expels only one projectile through a grooved barrel. A "short-barreled rifle" is a rifle with one or more barrels that are less than sixteen inches long, or any weapon made from a rifle and which is less than twenty-six inches long overall.]

[A "shotgun" is a firearm intended to be fired from a person's shoulder which, when the trigger is pulled, expels one projectile or a number of pellets contained in one shell, through a smooth barrel. A "short-barreled shotgun" is a shotgun with one or more barrels that are less than eighteen inches long, or any weapon made from a shotgun and which is less than twenty-six inches long overall.]

[A "semiautomatic weapon" is a weapon that uses the action of an explosive to expel a projectile and automatically reload another, which requires the trigger to

be pulled again to expel the next projectile. A "semiautomatic assault weapon" is [type of firearm or applicable characteristics from 18 U.S.C. § 921(a)(30)]].

[A machinegun is a weapon that shoots, is designed to shoot, or can be readily restored to shoot, multiple shots automatically, without manual reloading, using one sustained pull of the trigger or by a single pulling of the trigger. The term also includes any part or combination of parts used to assemble, or convert another weapon into, a machinegun.]

[A "firearm silencer" or "firearm muffler" is any device that can be attached to a firearm to silence, muffle, or lessen the sound of a firearm if discharged. The term also includes any combination of parts designed for use in assembling or fabricating a firearm silencer or firearm muffler.]

[A "destructive device" is any weapon designed to or readily convertible to expel a projectile by the action of an explosive or other propellant, and which has a barrel with an interior width of more than one-half inch in diameter.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 924(c)(1) provides:

> (c)(1)(A)… [A]ny person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime - -

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection - -

(i) is a short-barreled rifle, short-barreled shotgun, or a semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

Maximum Penalty: As stated in the statute above and applicable fine. Sentence must be consecutive.

The definition of "short-barreled rifle" is based on 18 U.S.C. §§ 921(a)(7)-(8). The definition of "short-barreled shotgun" is based on 18 U.S.C. §§ 921(a)(5)-(6). The definition of "machinegun" is based on 18 U.S.C. § 921(a)(23) and 26 U.S.C. § 5845(b). The definition of "destructive device" is based on 18 U.S.C. § 921(a)(4).

The definition of "semiautomatic assault weapon" is based on 18 U.S.C. § 921(a)(28), and should be completed by including language from 18 U.S.C. § 921(a)(30) (West 2004). On September 13, 2004, 18 U.S.C. § 921(a)(30) was repealed upon expiration of the Federal Assault Weapons Ban. The Committee believes that the language of Section 921(a)(30) is still helpful to define the term "semiautomatic assault weapon" for violations of 18 U.S.C. § 924(c)(1).

In *Bailey v. United States*, 516 U.S. 137 (1995), the Court held that "uses" within the meaning of § 924(c)(1) means more than mere possession and more than proximity and accessibility; it requires, instead, active employment of the weapon as by brandishing or displaying it in some fashion.

In 1998, in direct response to *Bailey*, Congress amended the statute in several respects, including the insertion of the phrase "or who, in furtherance of any such crime, possesses a firearm . . . ." The stated purpose and effect of this amendment was to overcome the *Bailey* court's constrictive interpretation of the scope of the statute and to extend its reach to any drug trafficking or violent crime in which the Defendant merely possesses a firearm "in furtherance of any such crime." Thus, there are three possible charges under this statute: (1) "used" during and in relation to; (2) "carried" during and in relation to; or (3) "possessed" in furtherance of; the offense.

Possession of a firearm may be either actual or constructive. "Constructive possession of a firearm is shown where a defendant (1) was aware or knew of the firearm's presence and (2) had the ability and intent to later exercise dominion and control over that firearm." *United States v. Perez*, 661 F.3d 568, 576 (11th Cir. 2011) (citing *United States v. Beckles*, 565 F.3d 832, 841 (11th Cir. 2009) (where defendant was charged with violating 18 U.S.C. §§ 924(c), 922(g), government must prove defendant's knowing possession of firearm as key element of both offenses).

To establish that a firearm was possessed "in furtherance of" the crime, the government must show that the firearm helped, furthered, promoted or advanced the crime. *United States v. Timmons*, 283 F.3d 1246 (11th Cir. 2002). There must be "some nexus" between the firearm and the crime, which can be shown by, for example, ". . . accessibility of the firearm, the type of the weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to the drugs or drug profits, and the time and circumstances under which the firearm is found." *Id.* at 1253 (quoting *United States v. Ceballos-Torres*, 218 F.3d 409, 414-15 (5th Cir. 2000)).

In *Dean v. United States*, 556 U.S. 568 (2009), the Supreme Court held that § 924(c)(1)(A)(iii), which provides for an enhanced penalty "if the firearm is discharged," does not require separate proof of intent. In other words, the enhancement will apply even if the firearm is discharged by accident. *See id.*

For purposes of § 924(c)(1)(B)(ii), a firearm may be "equipped with a firearm silencer or firearm muffler," where a silencer is located in close proximity to the firearm and the silencer is specially designed to be used with that firearm. The enhancement may apply even if the silencer is not attached to the firearm. *See United States v. Charles,* 469 F.3d402 (5th Cir. 2006), *cert. denied,* 549 U.S. 1273 (2007); *United States v. Rodriguez*, 841F. Supp. 79 (E.D.N.Y. 1994), *aff'd*, 53 F.3d 545 (2d Cir.), *cert. denied*, 516 U.S. 893 (1995).

In *Alleyne v. United States*, 133 S. Ct. 2151 (2013), the United States Supreme Court held

that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies to facts that increase the mandatory minimum punishment for a crime, and that any fact (other than the fact of a prior conviction) that increases a mandatory minimum sentence "is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." 133 S. Ct. at 2155. The Court in *Alleyne* overruled *Harris v. United States*, 536 U.S. 545 (2002), which held that *Apprendi* did not preclude the use of facts found by a judge at sentencing to increase a defendant's mandatory minimum sentence. Accordingly, a jury is required to be instructed that any fact charged in the indictment that enhances a defendant's sentence must be found by the jury beyond a reasonable doubt and the verdict form should be amended to show these required findings. The enhancements under 924(c) that trigger mandatory minimum sentences beyond the five-year base sentence for a first offense are: brandishing (7 years); discharging (10 years); short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon (10 years); and machinegun, destructive device, or firearm equipped with a silencer or muffler (30 years).

Whether a crime is a crime of violence is a question of law, not of fact. *United States v. Amparo*, 68 F.3d 1222 (9th Cir. 1995); *United States v. Moore*, 38 F.3d 977 (8th Cir. 1994); *United States v. Weston*, 960 F.2d 212 (1st Cir. 1992); *United States v. Adkins*, 937 F.2d 947 (4th Cir. 1991). *But see, United States v. Jones*, 993 F.2d 58 (5th Cir. 1993). *Cf. Begay v. United States*, 553 U.S. 137 (2008) ("In determining whether [a] crime is a violent felony [for purposes of § 924(e)], we consider the offense generically, that is to say, we examine it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion."); *James v. United States*, 550 U.S. 192 (2007) (stating that in determining if a crime qualifies as a violent felony for purposes of § 924(e), "we look only to the fact of conviction and the statutory definition of the prior offense, and do not generally consider the particular facts disclosed by the record of conviction").

*Special Verdict*

1. We, the Jury, find the Defendant [name of Defendant] _____ of the offense charged in Count [___] of the indictment.

[Note: If you find the Defendant not guilty as charged in Count [___], you need not consider the paragraphs below.]

2. We, the Jury, having found the Defendant guilty of the offense charged in Count [___], further find with respect to that Count the firearm [possessed] _____ was a [short-barreled rifle] [short-barreled shotgun]

[semiautomatic assault weapon] [machinegun] [destructive devise] [equipped with a firearm silencer or firearm muffler].

So Say We All.

Date: _____ _____

Foreperson

## O35.4
## Using or Carrying and Possessing a Firearm in Furtherance of a Violent Crime or Drug-Trafficking Crime
## 18 U.S.C. § 924(c)(1)(A)

It's a separate Federal crime to [use] [carry] a firearm during and in relation to a [violent crime] [drug-trafficking crime], or to possess a firearm in furtherance of a [violent crime] [drug-trafficking crime].

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

(1) that the Defendant committed the [violent crime] [drug-trafficking crime]charged in Count ____ of the indictment; and

(2) that during and in relation to that [violent crime] [drug- trafficking crime], the Defendant knowingly [used] [carried] a firearm, as charged in the indictment;

or

that the Defendant knowingly possessed a firearm in furtherance of that [violent crime] [drug-trafficking crime], as charged in the indictment.

A "firearm" is any weapon designed to or readily convertible to expel a projectile by the action of an explosive. The term includes the frame or receiver of any such weapon or any firearm muffler or silencer.

[To "use" a firearm means more than a mere possession and more than proximity and accessibility to the firearm. It requires active employment of the firearm by brandishing or displaying it in some fashion.]

[To "brandish" a firearm means to show all or part of the firearm to another person, or otherwise make another person aware of the firearm, in order to intimidate that person. The firearm need not be directly visible to the other person.]

[To "carry" a firearm is to have the firearm on one's person or to transport the firearm, such as in a vehicle, from one place to another, while committing the [violent crime] [drug-trafficking crime].]

To [use] [carry] a firearm "in relation to" a crime means that that the firearm had some purpose or effect with respect to the crime, and was not there by accident or coincidence. The firearm must have facilitated, or had the potential of facilitating, the crime.

To "possess" a firearm is to have direct physical control of the firearm or to have knowledge of the firearm's presence and the ability and intent to later exercise control over the firearm.

Possessing a firearm "in furtherance of" a crime means that the firearm helped, promoted, or advanced the crime in some way.

If you find the defendant guilty of [using] [carrying] or possessing a firearm as charged in this count, you will answer an additional question about the firearm: whether the firearm was [a short-barreled rifle] [a short-barreled shotgun] [a semiautomatic assault weapon] [a machinegun] [was equipped with a firearm silencer or firearm muffler] [a destructive device]. The Government has the

burden of proof on this question, and the standard again is proof beyond a reasonable doubt.

[A "rifle" is a firearm intended to be fired from a person's shoulder which, when the trigger is pulled, expels only one projectile through a grooved barrel. A "short-barreled rifle" is a rifle with one or more barrels that are less than sixteen inches long, or any weapon made from a rifle and which is less than twenty-six inches long overall.]

[A "shotgun" is a firearm intended to be fired from a person's shoulder which, when the trigger is pulled, expels one projectile or a number of pellets contained in one shell, through a smooth barrel. A "short-barreled shotgun" is a shotgun with one or more barrels that are less than eighteen inches long, or any weapon made from a shotgun and which is less than twenty-six inches long overall.]

[A "semiautomatic weapon" is a weapon that uses the action of an explosive to expel a projectile and automatically reload another, which requires the trigger to be pulled again to expel the next projectile. A "semiautomatic assault weapon" is [type of firearm or applicable characteristics from 18 U.S.C. § 921(a)(30)]]. [A machinegun is a weapon that shoots, is designed to shoot, or can be readily restored to shoot, multiple shots automatically, without manual reloading, using one sustained pull of the trigger or by a single pulling of the trigger. The term also

includes any part or combination of parts used to assemble, or convert another weapon into, a machinegun.]

[A "firearm silencer" or "firearm muffler" is any device that can be attached to a firearm to silence, muffle, or lessen the sound of a firearm if discharged. The term also includes any combination of parts designed for use in assembling or fabricating a firearm silencer or firearm muffler.]

[A "destructive device" is any weapon designed to or readily convertible to expel a projectile by the action of an explosive or other propellant, and which has a barrel with an interior width of more than one-half inch in diameter.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 924(c)(1) provides:

> (c)(1)(A)… [A]ny person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime - -
>
> > (i) be sentenced to a term of imprisonment of not less than 5 years;
> >
> > (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
> >
> > (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.
> >
> > (B) If the firearm possessed by a person convicted of a violation of this subsection - -

> (i) is a short-barreled rifle, short-barreled shotgun, or a semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or
>
> (ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

Maximum Penalty: As stated in the statute above and applicable fine. Sentence must be consecutive.

The definition of "brandish" is based on 18 U.S.C. § 924(c)(4). The definition of "short-barreled rifle" is based on 18 U.S.C. §§ 921(a)(7)-(8). The definition of "short-barreled shotgun" is based on 18 U.S.C. §§ 921(a)(5)-(6). The definition of "machinegun" is based on 18 U.S.C. § 921(a)(23) and 26 U.S.C. § 5845(b). The definition of "destructive device" is based on 18 U.S.C. § 921(a)(4).

The definition of "semiautomatic assault weapon" is based on 18 U.S.C. § 921(a)(28), and should be completed by including language from 18 U.S.C. § 921(a)(30) (West 2004). On September 13, 2004, 18 U.S.C. § 921(a)(30) was repealed upon expiration of the Federal Assault Weapons Ban. The Committee believes that the language of Section 921(a)(30) is still helpful to define the term "semiautomatic assault weapon" for violations of 18 U.S.C. § 924(c)(1).

In *Bailey v. United States*, 516 U.S. 137 (1995), the Court held that "uses" within the meaning of § 924(c)(1) means more than mere possession and more than proximity and accessibility; it requires, instead, active employment of the weapon as by brandishing or displaying it in some fashion.

In 1998, in direct response to *Bailey*, Congress amended the statute in several respects, including the insertion of the phrase "or who, in furtherance of any such crime, possesses a firearm . . . ." The stated purpose and effect of this amendment was to overcome the *Bailey* court's constrictive interpretation of the scope of the statute and to extend its reach to any drug trafficking or violent crime in which the Defendant merely possesses a firearm "in furtherance of any such crime." Thus, there are three possible charges under this statute: (1) "used" during and in relation to; (2) "carried" during and in relation to; or (3) "possessed" in furtherance of the offense.

This instruction was prepared to cover situations when any combination of the three are charged in the same count. *See United States v. Timmons*, 283 F.3d 1246 (11th Cir.2002).

In *Watson v. United States*, 552 U.S. 74 (2007), the Supreme Court held that, for purposes of § 924(c)(1)(A), the term "uses" would turn on the language as it was normally spoken. *Compare Smith v. United States*, 508 U.S. 223 (1993) (A person "who trades his firearm for drugs 'uses' the firearm during and in relation to a drug trafficking offence within the meaning of § 924(c)(1)."), *with Watson*, 552 U.S. 74 (a person does not "use" a firearm under the statute when he receives it in trade for drugs).

Possession of a firearm may be either actual or constructive. "Constructive possession of a firearm is shown where a defendant (1) was aware or knew of the firearm's presence and (2) had the ability and intent to later exercise dominion and control over that firearm." *United States v. Perez*, 661 F.3d 568, 576 (11th Cir. 2011) (citing United States v. Beckles, 565 F.3d 832, 841 (11th Cir. 2009) (where defendant was charged with violating 18 U.S.C. §§ 924(c), 922(g), government must prove defendant's knowing possession of firearm as key element of both offenses).

To establish that a firearm was possessed "in furtherance of" the crime, the government must show that the firearm helped, furthered, promoted or advanced the crime. *United States v. Timmons*, 283 F.3d 1246 (11th Cir. 2002). There must be "some nexus" between the firearm and the crime, which can be shown by, for example, ". . . accessibility of the firearm, the type of the weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to the drugs or drug profits, and the time and circumstances under which the firearm is found." Id. at 1253 (quoting *United States v. Ceballos-Torres*, 218 F.3d 409, 414-15 (5th Cir. 2000)).

In *Dean v. United States*, 556 U.S. 568 (2009), the Supreme Court held that § 924(c)(1)(A)(iii), which provides for an enhanced penalty "if the firearm is discharged," does not require separate proof of intent. In other words, the enhancement will apply even if the firearm is discharged by accident. See id.

For purposes of § 924(c)(1)(B)(ii), a firearm may be "equipped with a firearm silencer or firearm muffler," where a silencer is located in close proximity to the firearm and the silencer is specially designed to be used with that firearm. The enhancement may apply even if the silencer is not attached to the firearm. *See United States v. Charles*, 469 F.3d 402 (5th Cir. 2006), *cert. denied*, 549 U.S. 1273 (2007); *United States v. Rodriguez*, 841 F. Supp. 79 (E.D.N.Y. 1994), *aff'd*, 53 F.3d 545 (2d Cir.), *cert. denied*, 516 U.S. 893 (1995).

In *Alleyne v. United States*, 133 S. Ct. 2151 (2013), the United States Supreme Court held that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies to facts that increase the mandatory minimum punishment for a crime, and that any fact (other than the fact of a prior conviction) that increases a mandatory minimum sentence "is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." 133 S. Ct. at 2155.

The Court in *Alleyne overruled Harris v. United States*, 536 U.S. 545 (2002), which held that *Apprendi* did not preclude the use of facts found by a judge at sentencing to increase a defendant's mandatory minimum sentence. Accordingly, a jury is required to be instructed that any fact charged in the indictment that enhances a defendant's sentence must be found by the jury beyond a reasonable doubt and the verdict form should be amended to show these required findings. The enhancements under 924(c) that trigger mandatory minimum sentences beyond the five-year base sentence for a first offense are: brandishing (7 years); discharging (10 years); short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon (10 years); and machinegun, destructive device, or firearm equipped with a silencer or muffler (30 years).

Whether a crime is a crime of violence is a question of law, not of fact. *United States v. Amparo*, 68 F.3d 1222 (9th Cir. 1995); *United States v. Moore*, 38 F.3d 977 (8th Cir. 1994); *United States v. Weston*, 960 F.2d 212 (1st Cir. 1992); *United States v. Adkins*, 937 F.2d 947 (4th Cir. 1991). *But see, United States v. Jones*, 993 F.2d 58 (5th Cir. 1993). *Cf. Begay v. United States*, 553 U.S. 137 (2008) ("In determining whether [a] crime is a violent felony [for purposes of § 924(e)], we consider the offense generically, that is to say, we examine it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion."); *James v. United States*, 550 U.S. 192 (2007) (stating that in determining if a crime qualifies as a violent felony for purposes of § 924(e), "we look only to the fact of conviction and the statutory definition of the prior offense, and do not generally consider the particular facts disclosed by the record of conviction").

*Special Verdict*

1. We, the Jury, find the Defendant [name of Defendant] _____ of the offense charged in Count [___] of the indictment.

[Note: If you find the Defendant not guilty as charged in Count [___], you need not consider the paragraphs below]

2. We, the Jury, having found the Defendant guilty of the offense charged in Count [___], further find with respect to that Count that the firearm was _____ [brandished] [discharged].

3. We, the Jury, having found the Defendant guilty of the offense charged in Count [___], further find with respect to that Count the firearm [used] [carried] [possessed] _____ was a [short-barreled rifle] [short-barreled shotgun] [semiautomatic assault weapon] [machinegun] [destructive devise] [equipped with a firearm silencer or firearm muffler].

So Say We All.

Date: _____ _____

Foreperson

## O35.5
## Aiding and Abetting: Possessing a Firearm
## 18 U.S.C. § 924(c)

A Defendant who aids and abets the crime of possessing a firearm in furtherance of a [violent crime] [drug-trafficking crime] can be found guilty even if the Defendant did not personally possess the firearm. But to be found guilty on this basis, the Defendant must have actively participated in the [violent crime] [drug-trafficking crime] with advance knowledge that another participant would possess a firearm in furtherance of the [violent crime] [drug-trafficking crime].

Advance knowledge means knowledge at a time when the Defendant chose to begin or continue the Defendant's participation in the [violent crime] [drug-trafficking crime]. The Defendant chose to continue the Defendant's participation if the Defendant learned of the firearm and continued to participate. But the Defendant did not choose to continue to participate if the Defendant learned of the firearm too late for the Defendant to be reasonably able to walk away

**ANNOTATIONS AND COMMENTS**

In *Rosemond v. United States*, 134 S. Ct. 1240 (2014), the Supreme Court held that an unarmed accomplice cannot aid and abet a violation of 18 U.S.C. § 924(c) without some advance knowledge that a confederate will commit the offense with a firearm. That means knowledge at a time the accomplice can do something about it, for example walk away. If a defendant continues to participate in a crime after the firearm is used or displayed, a jury may determine that he had such knowledge. Therefore, in § 924(c) cases, it is recommended that this instruction be given together with Instruction 7.

In *Rosemond*, the Supreme Court said, "We hold that the Government makes its case by proving that the defendant *actively participated* in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission." 134 S. Ct. at 1243 (emphasis added). The instruction tracks this language. In most cases, this will present no issue; in most cases the defendant's alleged role in the drug-trafficking or violent crime will be as an active participant. Suppose, though, that the defendant only aided or abetted the underlying crime, perhaps by loaning a car knowing it would be used in an armed bank robbery. Perhaps, in the Supreme Court's view, loaning a car is "active" participation. But in a case with facts of that kind, the district court may wish to modify the standard instruction.

There are three possible charges under § 924(c): (1) used during and in violation to; (2) "carried" during and in relationship to; or (3) "possessed" in furtherance of the offense. Moreover, enhancements under § 924(c) that trigger mandatory minimum sentences beyond the five year base sentence for a first offense are: brandishing (7 years); discharging (10 years); short-barreled rifle or short-barreled shotgun (10 years); and machine gun destructive device, or firearm equipped with silencer or muffler (30 years). A jury finding is necessary to support any enhancement. *See Alleyne v. United States*, 133 S. Ct. 2151 (2013).

In instances where the indictment charges violation of the statute in multiple ways or where enhancements may be applicable, a special verdict form is recommended.

## O35.6
## Aiding and Abetting: Using or Carrying a Firearm
## 18 U.S.C. § 924(c)

A Defendant who aids and abets the crime of [using] [carrying] a firearm during and in relation to a [violent crime] [drug- trafficking crime] can be found guilty even if the Defendant did not personally [use] [carry] the firearm. But to be found guilty on this basis, the Defendant must have actively participated in the [violent crime] [drug-trafficking crime] with advance knowledge that another participant would [use] [carry] a firearm during and in relation to the [violent crime] [drug-trafficking crime].

Advance knowledge means knowledge at a time when the Defendant chose to begin or continue the Defendant's participation in the [violent crime] [drug-trafficking crime]. The Defendant chose to continue the Defendant's participation if the Defendant learned of the firearm and continued to participate. But the Defendant did not choose to continue to participate if the Defendant learned of the firearm too late for the Defendant to be reasonably able to walk away.

**ANNOTATIONS AND COMMENTS**

In *Rosemond v. United States*, 134 S. Ct. 1240 (2014), the Supreme Court held that an unarmed accomplice cannot aid and abet a violation of 18 U.S.C. § 924(c) without some advance knowledge that a confederate will commit the offense with a firearm. That means knowledge at a time the accomplice can do something about it, for example, walk away. If a defendant continues to participate in a crime after the firearm is used or displayed, a jury may determine that he had such knowledge. Therefore, in § 924(c) cases, it is recommended that this instruction be given together with Instruction 7.

In *Rosemond*, the Supreme Court said, "We hold that the Government makes its case by proving that the defendant *actively participated* in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission." 134 S. Ct. at 1243 (emphasis added). The instruction tracks this language. In most cases, this will present no issue; in most cases the defendant's alleged role in the drug-trafficking or violent crime will be as an active participant. Suppose, though, that the defendant only aided or abetted the underlying crime, perhaps by loaning a car knowing it would be used in an armed bank robbery. Perhaps, in the Supreme Court's view, loaning a car is "active" participation. But in a case with facts of that kind, the district court may wish to modify the standard instruction.

There are three possible charges under § 924(c): (1) used during and in violation to; (2) "carried" during and in relationship to; or (3) "possessed" in furtherance of the offense. Moreover, enhancements under § 924(c) that trigger mandatory minimum sentences beyond the five year base sentence for a first offense are: brandishing (7 years); discharging (10 years); short-barreled rifle or short-barreled shotgun (10 years); and machine gun, destructive device, or firearm equipped with silencer or muffler (30 years). A jury finding is necessary to support any enhancement. *See Alleyne v. United States*, 133 S. Ct. 2151 (2013).

## O35.7
## Aiding and Abetting: Using or Carrying and Possessing a Firearm
## 18 U.S.C. § 924(c)

A Defendant who aids and abets the crime of [using] [carrying] a firearm during and in relation to, or possessing a firearm in furtherance of, a [violent crime] [drug-trafficking crime] can be found guilty even if the Defendant did not personally [use] [carry] or possess the firearm. But to be found guilty on this basis, the Defendant must have actively participated in the [violent crime] [drug-trafficking crime] with advance knowledge that another participant would [use] [carry] a firearm during and in relation to, or possess a firearm in furtherance of, the [violent crime] [drug-trafficking crime].

Advance knowledge means knowledge at a time when the Defendant chose to begin or continue the Defendant's participation in the [violent crime] [drug-trafficking crime]. The Defendant chose to continue the Defendant's participation if the Defendant learned of the firearm and continued to participate. But the Defendant did not choose to continue to participate if the Defendant learned of the firearm too late for the Defendant to be reasonably able to walk away.

**ANNOTATIONS AND COMMENTS**

In *Rosemond v. United States*, 134 S. Ct. 1240 (2014), the Supreme Court held that an unarmed accomplice cannot aid and abet a violation of 18 U.S.C. § 924(c) without some advance knowledge that a confederate will commit the offense with a firearm. That means knowledge at a time the accomplice can do something about it, for example walk away. If a defendant continues to participate in a crime after the firearm is used or displayed, a jury may determine that he had such knowledge. Therefore, in

§ 924(c) cases, it is recommended that this instruction be given together with Instruction 7.

In *Rosemond*, the Supreme Court said, "We hold that the Government makes its case by proving that the defendant *actively participated* in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission." 134 S. Ct. at 1243 (emphasis added). The instruction tracks this language. In most cases, this will present no issue; in most cases the defendant's alleged role in the drug-trafficking or violent crime will be as an active participant. Suppose, though, that the defendant only aided or abetted the underlying crime, perhaps by loaning a car knowing it would be used in an armed bank robbery. Perhaps, in the Supreme Court's view, loaning a car is "active" participation. But in a case with facts of that kind, the district court may wish to modify the standard instruction.

There are three possible charges under § 924(c): (1) used during and in violation to; (2) "carried" during and in relationship to; or (3) "possessed" in furtherance of the offense. Moreover, enhancements under § 924(c) that trigger mandatory minimum sentences beyond the five year base sentence for a first offense are: brandishing (7 years); discharging (10 years); short-barreled rifle or short-barreled shotgun (10 years); and machine gun destructive device, or firearm equipped with silencer or muffler (30 years). A jury finding is necessary to support any enhancement. *See Alleyne v. United States*, 133 S. Ct. 2151 (2013).

In instances where the indictment charges violation of the statute in multiple ways or where enhancements may be applicable, a special verdict form is recommended.

**Offense Instruction 35.8**
**Brandishing**
**18 U.S.C. § 924(c)**

If you find the Defendant guilty of using or carrying a firearm during or in relation to a [crime of violence/drug trafficking crime], you must also determine if the Defendant brandished a firearm during and in relation to a [crime of violence/drug trafficking crime].

[The Defendant is guilty of aiding and abetting the brandishing of a firearm if he had advance knowledge that another participant in the crime would display or make the presence of a firearm known for purposes of intimidation. The Defendant need not have had advance knowledge that a participant would actually brandish the firearm. This requirement is satisfied if the Defendant knew that a participant intended to brandish a firearm to intimidate if the need arose.]

**ANNOTATIONS AND COMMENTS**

Enhancements under § 924(c) that trigger mandatory minimum sentences beyond the five year base sentence for a first offense are: brandishing (7 years); discharging (10 years); short-barreled rifle or short-barreled shotgun (10 years); and machine gun destructive device, or firearm equipped with silencer or muffler (30 years). A jury finding is necessary to support any enhancement. *See Alleyne v. United States*, 133 S. Ct. 2151 (2013).

"The defendant must have intended to brandish the firearm, because the brandishing must have been done for a specific purpose." *United States v. Dean*, 556 U.S. 568, 572-73 (2009) (comparing intent requirement for brandishing a firearm and discharging a firearm and explained that, unlike discharging, Congress included an intent requirement for brandishing).

In *Rosemond v. United States*, 134 S. Ct. 1240 (2014), the Supreme Court held that an unarmed accomplice cannot aid and abet a violation of 18 U.S.C. § 924(c) without some

advance knowledge that a confederate will commit the offense with a firearm. That means knowledge at a time the accomplice can do something about it, for example walk away. The Court emphasized that "[a]iding and abetting law prevents [the] outcome [of evading . . . penalties by leaving use of the gun to someone else], so long as the player knew the heightened stakes when he decided to stay in the game." 134 S. Ct. at 1250. "An active participant in a drug transaction has the intent needed to aid and abet a § 924(c) violation when he knows that one of his confederates will carry a gun. . . . He thus becomes responsible, in the typical way of aiders and abettors, for the conduct of others. He may not have brought the gun to the drug deal himself, but because he took part in that deal knowing a confederate would do so, he intended the commission of a § 924(c) offense— *i.e.*, an armed drug sale." *Id. at* 1249.

In instances where the indictment charges violation of the statute in multiple ways or where enhancements may be applicable, a special verdict form is recommended.

**O35.9**
**Discharge of Firearm**
**18 U.S.C. § 924(c)**

If you find the Defendant guilty of using or carrying a firearm during and in relation to a [crime of violence/drug trafficking crime], you must then determine whether the firearm was discharged, even accidentally. [To aid and abet the possession or carrying of a firearm that was discharged, the Defendant need not have advance knowledge that the discharge would occur.]

**ANNOTATIONS AND COMMENTS**

Enhancements under § 924(c) that trigger mandatory minimum sentences beyond the five year base sentence for a first offense are: brandishing (7 years); discharging (10 years); short-barreled rifle or short-barreled shotgun (10 years); and machine gun destructive device, or firearm equipped with silencer or muffler (30 years). A jury finding is necessary to support any enhancement. *See Alleyne v. United States*, 133 S. Ct. 2151 (2013).

*See United States v. Dean*, 556 U.S. 568 (2009) (holding accidental discharge of firearm in connection with crime of violence or drug trafficking crime gives rise to 10-year mandatory minimum under 18 U.S.C. § 924). The Supreme Court explained that, unlike discharging, Congress included an intent requirement for brandishing.

In *Rosemond v. United States*, 134 S. Ct. 1240 (2014), the Supreme Court held that an unarmed accomplice cannot aid and abet a violation of 18 U.S.C. § 924(c) without some advance knowledge that a confederate will commit the offense with a firearm. That means knowledge at a time the accomplice can do something about it, for example walk away. The Court emphasized that "[a]iding and abetting law prevents [the] outcome [of evading . . . penalties by leaving use of the gun to someone else], so long as the player knew the heightened stakes when he decided to stay in the game." 134 S. Ct. at 1250. "An active participant in a drug transaction has the intent needed to aid and abet a § 924(c) violation when he knows that one of his confederates will carry a gun. . . . He thus becomes responsible, in the typical way of aiders and abettors, for the conduct of others. He may not have brought the gun to the drug deal himself, but because he took part in that deal knowing a confederate would do so, he intended the commission of a § 924(c) offense— *i.e.*, an armed drug sale." *Id.* at 1249.

In instances where the indictment charges violation of the statute in multiple ways or where enhancements may be applicable, a special verdict form is recommended.

## O35.10
## Weapons Listed in
## 18 U.S.C. § 924(c)(1)(B)

If you find the Defendant guilty, you must then determine whether the firearm that was [possessed/used or carried] was [a short-barreled rifle/a short-barreled shotgun/a semiautomatic assault weapon/a machine gun/a destructive device/equipped with a firearm silencer or firearm muffler]. [To aid and abet the possession or carrying of such a firearm, the Defendant need not have advance knowledge of the type of firearm.]

**ANNOTATIONS AND COMMENTS**

Enhancements under § 924(c) that trigger mandatory minimum sentences beyond the five year base sentence for a first offense are: brandishing (7 years); discharging (10 years); short-barreled rifle or short-barreled shotgun (10 years); and machine gun, destructive device, or firearm equipped with silencer or muffler (30 years). A jury finding is necessary to support any enhancement. *See Alleyne v. United States*, 133 S. Ct. 2151 (2013).

In instances where the indictment charges violation of the statute in multiple ways or where enhancements may be applicable, a special verdict form is recommended.

**O36**
**False Statement to a Federal Agency**
**18 U.S.C. § 1001**

It's a Federal crime to willfully make a false or fraudulent statement to a department or agency of the United States.

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

(1) the Defendant [made the statement] [made or used the document], as charged;

(2) the [statement] [document] was false;

(3) the falsity concerned a material matter;

(4) the Defendant acted willfully, knowing that the [statement] [document] was false; and

(5) the [false statement] [false document] was made or used for a matter within the jurisdiction of a department or agency of the United States.

A [statement] [document] is "false" when [made] [used] if it is untrue when made and the person [making] [using] it knows it is untrue. The Government doesn't have to show that the Governmental agency or department was, in fact, deceived or misled.

[When Government agents are conducting an investigation, a false "no" in response to a question is a false statement.]

[United States Citizenship and Immigration Services, Department of Homeland Security, is an agency of the United States. Filing documents with that agency to produce a change in an alien's immigration status is a matter within that agency's jurisdiction.]

The [making of a false statement] [use of a false document] is not a crime unless the falsity relates to a "material" fact.

A "material fact" is an important fact – not some unimportant or trivial detail – that has a natural tendency to influence or is capable of influencing a decision of a department or agency in reaching a required decision.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1001(a) provides:

> … [W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully - - (1) falsifies… a material fact; (2) makes any materially false, fictitious or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious or fraudulent statement or entry [shall be guilty of an offense against the United States.]

Maximum Penalty: Five (5) years imprisonment and applicable fine.

The enumeration of the elements of the offense is taken from *United States v. Calhoon*, 97 F.3d 518, 523 (11th Cir. 1996).

In *Arthur Pew Const. Co. v. Lipscomb*, 965 F.2d 1559, 1576 (11th Cir. 1992), the court held that misrepresentation for purposes of § 1001 must be deliberate, knowing, and willful, or at least have been made with a reckless disregard of the truth and a conscious purpose to avoid telling the truth.

In *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995), the Supreme Court held that the materiality of a false statement under this section is a jury

question, and that failure to submit the question of materiality to the jury constitutes reversible error. *See United States v. Klais*, 68 F.3d 1282, 1283 (11th Cir. 1995) (recognizing holding). The Eleventh Circuit has held that for a conviction to be sustained under § 1001, "it is imperative that the writing or document be 'false.'" *United States v. Blankenship*, 382 F.3d 1110, 1132 (11th Cir. 2004). Where the writing or document at issue is a contract, the Court of Appeals further held that there are only two ways in which a contract can possibly be considered false: (1) where a person forges or alters it, or (2) where it contains "factual misrepresentations." *Id*.

The materiality definition is adopted from *Gaudin*, 115 S. Ct. at 2313, and *United States v. Lichenstein*, 610 F.2d 1272 (5th Cir. 1980). *See United States v. Grizzle*, 933 F.2d 943, 948 (11th Cir. 1991); *United States v. Herring*, 916 F.2d 1543, 1547 (11th Cir. 1990); *United States v. Gafyczk*, 847 F.2d 685, 691 (11th Cir. 1988).

The "exculpatory no" doctrine as an exception to the scope of the offense (*see United States v. Payne*, 750 F.2d 844, 861 (11th Cir. 1985)) was repudiated by the Supreme Court in *Brogan v. United States*, 522 U.S. 398, 118 S. Ct. 805, 139 L. Ed. 2d 830 (1998).

The committee believes that the general definition of "willfully" in Basic Instruction 9.1A would usually apply to this crime.

**O37**
**False Entry in Bank Records**
**18 U.S.C. § 1005 (Third Paragraph)**

It's a Federal crime for anyone to make a false entry in any book or record of a federally insured bank.

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

(1) That the Defendant made or caused to be made a false entry in a book or record of an insured bank;

(2) That the entry was "material;" and

(3) That the Defendant knowingly and willfully made the entry, or caused the entry to be made knowing it was false and with the intent to defraud or deceive, as charged.

An "insured bank" is any bank whose deposits are insured by the Federal Deposit Insurance Corporation.

An entry in a book or record is "false" if it is untrue when made and the person making it knows it is untrue.

An entry in a book or record is "material" if it has the capacity or natural tendency to influence the operations of the bank. It is not a trivial detail.

To act "with intent to defraud" is to act with the specific intent to deceive or cheat, usually for personal financial gain or to cause financial loss to someone else.

The heart of the crime is willfully making a material false entry with intent to defraud. The Government doesn't have to prove that anyone was actually deceived or defrauded.

## ANNOTATIONS AND COMMENTS

18 U.S.C. § 1005 (third paragraph) provides:

> Whoever makes any false entry in any book, report, or statement of [an insured bank] with intent to injure or defraud such bank… or to deceive any officer of such bank… or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank… or the Board of Governors of the Federal Reserve System [shall be guilty of an offense against the United States].

Maximum Penalty: Thirty (30) years imprisonment and $1,000,000 fine.

*United States v. Rapp*, 871 F.2d 957, 963 (11th Cir. 1989), statute requires knowing and willful making of a false entry with knowledge of its falsity and with intent to deceive or defraud a bank. As the Tenth Circuit has explained, the defendant himself need not make the false entries in bank records; "it suffices that he set in motion management actions that necessarily caused [bank personnel] to make false entries." *United States v. Weidner*, 437 F.3d 1023, 1037 (10th Cir. 2006).

The committee believes that the general definition of "willfully" in Basic Instruction 9.1A would usually apply to this crime.

There are no decisions in the Eleventh Circuit as to whether materiality is an element of this offense. However, because the statute expressly requires that the false entry be made "with intent to defraud," the Committee believes that materiality is an essential element of the offense that must be submitted to the jury under the Supreme Court decisions in *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310 (1995); *United States v. Wells*, 519 U.S. 482, 117 S. Ct. 921 (1997); and *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827 (1999). The Court concluded in *Wells* that materiality was not an element of the offense of making a "false statement" in violation of 18 U.S.C. § 1014, but held in *Neder* that use of the words "fraud" or "fraudulently" as terms of art in 18 U.S.C. §§ 1341, 1343, and 1344 incorporated the common law requirement that proof of fraud necessitates proof of misrepresentation or concealment of a material fact. And, *Gaudin* held that when materiality is an essential element of an offense, it must be submitted to the jury.

See Trial Instruction 6 for use in submitting forfeiture issues to the jury.

**O38**
**False Statements in Department of Housing and Urban Development and Federal Housing Administration Transactions**
**18 U.S.C. § 1010**

It's a Federal crime to [make a false statement] [forge or counterfeit any document] [pass as genuine any forged or counterfeited document] [willfully overvalue any asset or income] to [obtain a loan with the intent that the loan be offered to or accepted by the Department of Housing and Urban Development for insurance] [obtain an extension or renewal of any loan or mortgage insured by the Department of Housing and Urban Development].

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

(1) the Defendant [made a false statement] [forged or counterfeited a document] [passed as genuine a forged or counterfeited document]; and

(2) [the Defendant knowingly acted [to obtain a loan with the intent that the loan be offered to or accepted by] [to obtain an extension or renewal of any loan or mortgage insured by] the Department of Housing and Urban Development].

– or –
(if the alleged wrongdoing is overstating the value of an asset or income)

[(1) The Defendant willfully overvalued an asset or income; and

(2) the Defendant did so [to obtain a loan with the intent that the loan be offered to or accepted by] [to obtain an extension or renewal of any loan or mortgage insured by] the Department of Housing and Urban Development].]

A [statement] [document] is "false" it if is untrue when made and the person making it knows it is untrue.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1010 provides:

> Whoever, for the purpose of obtaining any loan or advance of credit… with the intent that such loan or advance of credit shall be offered to or accepted by the Department of Housing and Urban Development for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Department, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Department, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income… [shall be guilty of an offense against the United States].

Maximum Penalty: Two (2) years imprisonment and applicable fine.

*United States v. DeCastro*, 113 F.3d 176 (11th Cir. 1997), materiality is not an element of the offense under 18 U.S.C. § 1010. Although *DeCastro* was decided before *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), the decision is in harmony with *Neder* because § 1010 does not require proof of fraud or fraudulent intent. Accord, *United States v. Wells*, 419 U.S. 482, 117 S. Ct. 921, 137 L. Ed. 2d 107 (1997).

In cases involving overvaluation of assets, the committee believes that the general definition of "willfully" in Basic Instruction 9.1A would usually apply to this crime.

**O39**
**False Statement to a Federally Insured Institution**
**18 U.S.C. § 1014**

It's a Federal crime to knowingly make a false statement or report to a federally insured financial institution.

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

(1) the Defendant made a false statement or report;

– or –
(when the alleged wrongdoing is overstating the value of an asset or income)

[(1) the Defendant willfully overvalued land property or security;]

(2) the Defendant did so knowingly and with intent to influence an action of the institution described in the indictment regarding an application, advance, commitment, or loan, or a change or extension to any of those; and

(3) the deposits of the institution were insured by the Federal Deposit Insurance Corporation.

A statement or report is "false" if it is untrue when made and the person making it knows it is untrue.

The heart of the crime is the attempt to influence the action of the institution by [knowingly] [willfully] making a false statement or report. The Government does not have to prove that the institution was actually influenced or misled.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1014 provides:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of… any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, … [or] the Resolution Trust Corporation… upon any application, advance,… commitment, or loan, or any change or extension of any of the same [shall be guilty of an offense against the United States].

Maximum Penalty: Thirty (30) years imprisonment and applicable fine.

*United States v. Key*, 76 F.3d 350, 353 (11th Cir. 1996), a defendant need not know of the victim institution's insured status to be guilty of this offense; rather, it is sufficient that the defendant knowingly directed conduct at a bank that the government proves was insured.

*United States v. Greene*, 862 F.2d 1512, 1514 (11th Cir. 1989), section applies to representations made in connection with conventional loan or related transactions.

*United States v. Wells*, 519 U.S. 482, 117 S. Ct. 921, 137 L. Ed. 2d 107 (1997), materiality is not an element of this offense.

Section 1014 also includes "willfully overvalues" as an alternative offense. If that is charged, this instruction must be modified accordingly. The committee believes that the general definition of "willfully" in Basic Instruction 9.1A would usually apply to this crime.

**O40.1**
**False Identification Documents**
**18 U.S.C. § 1028(a)(3)**

It's a Federal crime to knowingly possess five or more false identification documents with the intent to unlawfully use or transfer them if the possession is in or affects interstate or foreign 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 possessed at least five false identification documents;

(2) the Defendant knew the documents were false, knowingly possessed them, and intended to use or transfer them unlawfully; and

(3) the Defendant's possession of the documents was in or affecting interstate or foreign commerce.

To "intend to use or transfer" false identification documents unlawfully is to intend to sell, give, lend, or otherwise transfer them with the knowledge that they were unlawfully produced.

A "false identification document" is one of a type that is commonly accepted for purposes of an individual's identification and is not issued by, or under the authority of, a governmental entity, but appears to be issued by or under the authority of [the United States Government] [a State or a political subdivision of a State].

[The term "interstate commerce" refers to any transaction or event that involves travel, trade, transportation or communication between a place in one state and a place in another state.]

[The term "foreign commerce" refers to any transaction or event that involves travel, trade, transportation or communication between a place in the United States and a place outside the United States.]

The government must prove only a minimal connection with interstate or foreign commerce to satisfy the "in or affects interstate or foreign commerce" requirement of the statute. It must also prove that the defendant had the intent to accomplish acts, which, if successful, would have affected interstate or foreign commerce in some way. But the Government does not have to prove that the Defendant had knowledge of the interstate- or foreign-commerce connection when [he] [she] committed the crime.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1028(a)(3) provides:

> (a) Whoever… - -
>
> > (3) knowingly possesses with intent to use unlawfully or transfer unlawfully five or more identification documents (other than those issued lawfully for the use of the possessor), authentication features, or false identification documents [shall be guilty of an offense against the United States].

Maximum penalty: depends on the use of the documents and can be as many as 30 (thirty) years and applicable fine.

Subsection (a)(3) in § 1028 is one of eight subsections in the statute concerning the possession, production, transfer, use and/or trafficking of false identification documents. The elements of this instruction can be modified to fit the facts of the case if the Defendant is charged with one of the seven other subsections.

*United States v. Alejandro*, 118 F.3d 1518 (11th Cir. 1997), the Eleventh Circuit aff'd the trial court's use of this instruction. In *United States v. Klopf*, 423 F.3d 1228, 1239 (11th Cir. 2005), the Eleventh Circuit again aff'd the use of this instruction, but it "clarified" the interstate or foreign commerce requirement:

"[W]e now hold that the government must prove only a minimal nexus with interstate commerce in a § 1028(a) prosecution to satisfy the "in or affects interstate or foreign commerce" requirement of § 1028(c)(3)(A). The defendant needs to have had only the intent to accomplish acts, which, if successful, would have affected interstate or foreign commerce. The government, however, is not required to prove that the defendant had knowledge of the interstate commerce nexus when he committed an act in violation of § 1028(a)."

In a 2008 decision involving § 1028(a)(1), the Eleventh Circuit held that, under *Klopf*, the requisite interstate commerce nexus was satisfied when the defendant fraudulently obtained a Florida commercial driver's license, even if he only intended to (and did) drive on roads within the state. In rejecting the defendant's argument that "if driving on public roads satisfies the minimal interstate nexus requirement, all local crimes would be federalized," the Court of Appeals held that the facts showed the defendant "clearly intended to operate a commercial vehicle, and operating a commercial vehicle illegally, even if the vehicle never leaves Florida, sufficiently affects interstate commerce to satisfy the minimal nexus requirement." *United States v. Mendez*, 528 F.3d 811, 817 (11th Cir. 2008).

If the indictment alleges one of the sentencing enhancing circumstances listed in § 2326 (telemarketing, victimizing 10 or more persons over age 55, or targeting persons over age 55), that factor should be stated as an additional element under the principle of *Apprendi* and consideration should be given to a lesser included offense instruction, Special Instruction 10.

**O40.2**
**False Identification Documents**
**18 U.S.C. § 1028(a)(4)**

It's a federal crime to knowingly possess a false identification document with the intent to use the document to defraud the United States.

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 possessed a false identification document; and

(2) the Defendant intended to use the document to defraud the United States.

An "identification document" is a document that's made or issued by or under the authority of the United States Government and contains information about a particular person. In other words, it is of a type intended or commonly accepted to identify an individual.

A "false identification document" is one made and used to identify the bearer that falsely appears to have been issued by or under the authority of [the United States Government] [a State or a political subdivision of a State].

The phrase "intended for the document to be used to defraud the United States" means a specific intent to mislead or deceive an officer or employee of the United States in carrying out his or her official duties.

The heart of the crime is the intent to mislead or deceive. The Government does not have to prove that anyone was actually misled or deceived.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1028(a)(4) provides:

> (a) Whoever, in a circumstance described in subsection (c) of this section - -
>
> * * * * *
>
> (4) knowingly possesses an identification document (other than one issued lawfully for the use of the possessor), authentication feature, or a false identification document, with the intent such document be used to defraud the United States [shall be guilty of an offense against the United States].
>
> * * * * *
>
> (c) The circumstance referred to in subsection (a) of this section is that - -
>
> (1) the identification document, authentication feature, or false identification document is or appears to be issued by or under the authority of the United States… or the document-making implement is designed or suited for making such an identification document, authentication feature, or false identification document;
>
> (2) the offense is an offense under subsection (a)(4) of this section…

Maximum Penalty: Up to thirty (30) years imprisonment (if the offense is committed to facilitate an act of domestic or international terrorism) and applicable fine.

**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 in a manner that is fraudulent or deceptive.

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 more than a causal relationship. The "transfer," "possession," or "use" of the [means of identification] [identification documents] must be at the crux of what makes [the eligible felony alleged in the indictment] a criminal offense. The "transfer," "possession," or "use" "in relation to" [the eligible felony alleged in the indictment] must be in a manner that is fraudulent or deceptive centered on identity. The fraud or deceit centered on identity can be summarized as going to "who" is involved. In other words, the means of identification specifically must be a key mover in the criminality.

[In cases where the underlying crime involves fraud or deceit, the Government must also prove that the Defendant transferred, possessed, or used the

other person's [means of identification] [identification documents] in a manner that is fraudulent or deceptive.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1028A(a)(1) provides:

> (a) Offenses. - -
>
> > (1) In general. - - Whoever, during and in relation to any felony enumerated in subsection (c), knowingly transfers, possesses, or uses, 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 drive" as a "means of identification," *see id.* § 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.

The Supreme Court has 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 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 § 1028(A(a)(1) does not require the Government to prove that the defendant obtained another person's identification documents by "stealing," *see id.* at 608, has not been overruled. In other words, the phrase "without lawful authority" prohibits methods of obtaining another person's identification beyond stealing. *See ibid.*; *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).

In *Dubin v. United States*, 599 U.S. 110, 114–15, 131–32 (2023), the Supreme Court clarified the definition of "use" "in relation to" in section 1028A. The Court explained that "[a] defendant 'uses' another person's means of identification 'in relation to' a predicate offense when th[e] use is at the crux of what makes the conduct criminal" and emphasized that "being at the crux of the criminality requires more than a causal relationship, such as 'facilitation' of the offense or being a but-for cause of its 'success.'" *Id.* at 131 (alteration added; citation omitted). The "means of identification specifically must be used in a manner that is fraudulent or deceptive." *Id.* at 132. Thus, a defendant did not "use" a Medicaid reimbursement number "in relation to" healthcare fraud when he overstated the qualifications of the employee performing psychological testing, resulting in overbilling. The "use" of the means of identification was not fraudulent or deceptive in a manner going to identity and was not at the crux of what made the healthcare fraud criminal. Instead, it was the overbilling that made the healthcare fraud criminal. *See id.* at 114–15, 131–32.

In *United States v. Gladden*, 78 F.4th 1232, 1245 (11th Cir. 2023), the defendant forged identities and used those identities to refill prescriptions in their names, even though the victims were not aware of and did not receive any products. "Because the deception centered on the identity of the individual receiving the product, [defendant] committed identity theft." *Id.* (alteration added). The Eleventh Circuit explained: "Section 1028A's reach is thus limited to situations where 'a genuine nexus' exists between the use of a means of identification and the predicate offense." *Id.* at 1244 (quoting *Dubin*, 599 U.S. at 1565). "[T]he means of identification specifically [must be] a key mover in the criminality." *Ibid.* (first alteration added; second alteration in original; quoting *Dubin*, 599 U.S. at 1568).

Additionally, the Supreme Court in Dubin, 599 U.S. at 131–32, noted that, "with fraud and deceit crimes . . . , the means of identification specifically must be used in a manner that is fraudulent and deceptive."). The last bracketed sentence has been added to this Instruction for use in cases where the underlying crime involves fraud or deceit.

**O41.1**
**Fraudulent Use of Counterfeit**
**Credit Cards or Other Access Devices**
**18 U.S.C. § 1029(a)(1)**

It's a Federal crime to [produce] [use] [traffic in] counterfeit credit cards or other access devices.

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 [produced] [used] [trafficked in] a counterfeit access device;

(2) the Defendant knew the access device was counterfeit, and acted with the intent to defraud or deceive; and

(3) the Defendant's conduct affected interstate or foreign commerce.

An "access device" is a credit card, plate, code, account number, electronic serial number, mobile identification number, personal identification number, or other means of account access that can be used alone or in conjunction with another access device, to get money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument).

A "counterfeit access device" is an access device that's counterfeit, fictitious, altered, or forged, or an identifiable component of an access device or a counterfeit access device.

[To "produce" a counterfeit access device is to design, alter, authenticate, duplicate, or assemble one.]

[To "use" includes any effort to obtain money, goods, services, or any other thing of value, or to initiate a transfer of funds with a counterfeit access device.]

[The term "trafficked in" means transferring or otherwise disposing of a counterfeit access device to another, or possessing or controlling a counterfeit device with the intent to transfer or dispose of it to another.]

To act "with intent to defraud" means to act with intent to deceive or cheat, usually for personal financial gain or to cause financial loss to someone else.

The heart of the crime is the knowing use of a counterfeit access device with intent to defraud. The Government does not have to prove that anyone was actually deceived or defrauded.

The term "interstate commerce" refers to any transaction or event that involves travel, trade, transportation or communication between a place in one state and a place in another state.

The term "foreign commerce" refers to any transaction or event that involves travel, trade, transportation or communication between a place in the United States and a place outside the United States.

The Government does not have to prove that the Defendant specifically intended to interfere with or affect interstate or foreign commerce. But the

Government must prove that the natural consequences of the acts alleged in the indictment would be to affect interstate or foreign commerce. For example, if you find beyond a reasonable doubt that [the device was used to purchase goods from another [state] [country]] [the device was used to purchase goods manufactured outside of this [state] [country]], you may find that [interstate] [foreign] commerce has been affected.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1029(a)(1) provides:

> (a) Whoever - -
>
> (1) knowingly and with intent to defraud produces, uses, or traffics in one or more counterfeit access devices [shall be guilty of an offense against the United States] if the offense affects interstate commerce or foreign commerce…

Maximum Penalty: Up to twenty (20) years imprisonment (if the offense occurs after a conviction for another offense under this section) and applicable fine.

*United States v. Sepulveda*, 115 F.3d 882 (11th Cir. 1997) (un-programmed ESN-MIN combinations constitute access devices within the meaning of § 1029).

*United States v. Dabbs*, 134 F.3d 1071 (11th Cir. 1998) (a merchant account number constitutes an access device).

*Obasohan v. United States Attorney General*, 479 F.3d 785, 789 n.7 (11th Cir. 2007) (noting that § 1029(a)(1) has no minimum loss associated with it, unlike § 1029(a)(2) which contains a $1,000 minimum loss amount).

If the indictment alleges one of the sentencing enhancing circumstances listed in § 2326 (telemarketing, victimizing 10 or more persons over age 55, or targeting persons over age 55), that factor should be stated as an additional element under the principle of *Apprendi* and consideration should be given to a lesser included offense instruction, Special Instruction 10.

**Offense Instruction 41.2**
**Fraudulent Use of Unauthorized Credit Cards or Other Access Devices**
**18 U.S.C. § 1029(a)(2)**

It's a Federal crime to [use] [traffic in] unauthorized access devices, including ordinary credit cards, to obtain a thing or things of value totaling $1,000 or more in any 12-month period.

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 [used] [trafficked in] one or more unauthorized access devices;

(2) the Defendant, during a 12-month period, obtained a thing or things of value totaling $1,000 or more as a result of such [use of] [trafficking in] unauthorized access devices;

(3) the Defendant acted with the intent to defraud or deceive; and

(4) the Defendant's conduct affected interstate or foreign commerce.

An "access device" is a credit card, plate, code, account number, electronic serial number, mobile identification number, personal identification number, or other means of account access that can be used alone or in conjunction with another access device, to get money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by a paper instrument).

An "unauthorized access device" is an access device that's lost, stolen, expired, canceled, revoked, or obtained with the intent to defraud.

[To "use" includes any effort to obtain money, goods, services, or any other thing of value, or to initiate a transfer of funds with an unauthorized access device.]

[To "traffic in" means to transfer, or otherwise dispose of an unauthorized access device to another, or to possess or control an unauthorized device with the intent to transfer or dispose of it to another person.]

To act "with intent to defraud" means to act with the intent to deceive or cheat, usually for personal financial gain or to cause financial loss to someone else.

The heart of the crime is the intent to defraud. The Government does not have to prove that anyone was actually defrauded or deceived.

The term "interstate commerce" refers to any transaction or event that involves travel, trade, transportation or communication between a place in one state and a place in another state.

The term "foreign commerce" refers to any transaction or event that involves travel, trade, transportation or communication between a place in the United States and a place outside the United States.

The Government does not have to prove that the Defendant specifically intended to interfere with or affect interstate or foreign commerce. But the Government must prove that the natural consequences of the acts alleged in the indictment would be to affect interstate or foreign commerce.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1029(a)(2) provides: (a) Whoever - -

> (2) knowingly and with intent to defraud traffics in or uses one or more unauthorized access devices during any one-year period, and by such conduct obtains anything of value aggregating $1,000 or more during that period [shall be guilty of an offense against the United States] if the offense affects interstate commerce or foreign commerce . . . .

Maximum Penalty: Ten (10) years imprisonment (if the offense does not occur after a conviction for another offense under this section), or twenty (20) years imprisonment (if the offense occurs after a conviction for another offense under this section) and applicable fine.

*United States v. Sepulveda*, 115 F.3d 882 (11th Cir. 1997) (un-programmed ESN-MIN combinations constitute access devices within the meaning of § 1029).

*United States v. Dabbs*, 134 F.3d 1071 (11th Cir. 1998) (a merchant account number constitutes an access device).

*See United States v. Klopf*, 423 F.3d 1228 (11th Cir. 2005). The Defendant in that case was a fugitive, who, without authorization, obtained credit cards from various banks in the names of four other individuals. He was charged with, and convicted of, *inter alia*, using unauthorized credit cards in violation of § 1029(a)(2). He argued on appeal that he could not be convicted under the statute because he merely "borrow[ed] the creditworthiness of unsuspecting individuals to open corporate accounts in order to utilize credit cards because he was unable to apply for credit cards under his own name because of his fugitive status." He contended that he did not possess the requisite intent to defraud because he made regular payments on the credit card accounts. The Eleventh Circuit rejected the arguments, holding that the credit cards were clearly obtained with intent to defraud and that it was "irrelevant" that the defendant made payments on the cards because, "in each application for a credit card, he intended to defraud the banks by representing to them that they were dealing with persons other than himself."

If the indictment alleges one of the sentencing enhancing circumstances listed in § 2326 (telemarketing, victimizing 10 or more persons over age 55, or targeting persons over age 55), that factor should be stated as an additional element under the principle of *Apprendi* and consideration should be given to a lesser included offense instruction, Special Instruction 10.

**O42.1**
**Computer Fraud: Injury to the United States**
**18 U.S.C. § 1030(a)(1)**

It's a Federal crime to knowingly access a computer without authorization to get secret information to be used to the injury of the United States or to give some advantage to any foreign nation.

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 accessed a computer [without authorization] [in a way that went beyond authorized use];

(2) the Defendant got [information that the United States Government protected against unauthorized disclosure for national defense or foreign relations reasons] [data about the design, manufacture, or use of atomic weapons]; and

(3) the Defendant intended to use the [information] [data] to harm the United States or to give some advantage to a foreign nation.

The term "computer" includes any high-speed data-processing device that can perform logical, arithmetic, or storage functions, including any data-storage facility or communications facility that is directly related to or operates in conjunction with the device.

[To access a computer "in a way that goes beyond authorized use" is to use the computer to get or change information that the person is not permitted to get or change.]

The Government does not have to prove that any [secret information] [restricted data] the Defendant obtained without permission was actually used to harm of the United States or to the advantage of any foreign nation. But the Government must prove that the Defendant intended to use the [secret information] [restricted data] to harm the United States or give some advantage to a foreign nation.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1030(a)(1) provides:

> (a) Whoever - -
>
> > (1) having knowingly accessed a computer without authorization or exceeding authorized access, and by means of such conduct having obtained information that has been determined by the United States Government pursuant to an Executive order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations, or any restricted data, as defined in paragraph y. of section 11 of the Atomic Energy Act of 1954, with reason to believe that such information so obtained could be used to the injury of the United States, or to the advantage of any foreign nation [shall be guilty of an offense against the United States].

Maximum Penalty: Up to twenty (20) years imprisonment (if the offense occurs after a conviction for another offense under this section) and applicable fine.

The Atomic Energy Act defines "Restricted Data" as "all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 2162 of this title." 42 U.S.C. § 2014(y).

The Senate Judiciary Committee emphasized that "obtains information" in this context includes mere observation of the data. "Actual asportation, in the sense of physically removing the data from its original location or transcribing the data, need not be proved

in order to establish a violation of this subsection." S. Rep. 99-432, at 6-7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2479, 2484.

The Seventh Circuit has observed that in this context, "[t]he difference between 'without authorization' and 'exceeding authorized access' is paper thin, but not quite invisible." *International Airport Centers, LLC v. Citrin*, 440 F.3d 418, 420 (7th Cir. 2006).

"Intent" has been deleted from § 1030(a)(1), which now requires only that the defendant act "with reason to believe" that the information could harm the United States. To date, no reported appellate opinion has defined "with reason to believe" in this context. The Committee recommends that the phrase be given its ordinary and common usage.

**O42.2**
**Computer Fraud:**
**Obtaining Financial Information**
**18 U.S.C. § 1030(a)(2)(A) and (c)(2)(B)**

It's a Federal crime to intentionally access a computer [without authorization] [in excess of authorized access] and get information from a financial record of [a financial institution] [the issuer of a credit card] [a consumer-reporting agency about a consumer].

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

(1) the Defendant intentionally accessed a computer [without authorization] [in a way or to an extent beyond the permission given]; and

(2) the Defendant got information from a [financial record of a financial institution] [financial record of the issuer of a credit card] [file of a consumer reporting agency concerning a consumer]; and

(3) the Defendant acted [for private financial gain or a commercial advantage] [to further a criminal or tortious act] [to get information worth more than $5,000].

The term "computer" includes any high-speed data-processing device that can perform logical, arithmetic, or storage functions, including any data-storage facility or communications facility that is directly related to or operates in conjunction with the device.

[To access a computer "in a way or to an extent beyond the permission given" is to use authorized access to get or change information that the person is not permitted to get or change.]

[A "financial record" is information kept by a financial institution or credit-card issuer about a customer.]

[A "financial institution" is [an institution with deposits insured by the Federal Deposit Insurance Corporation.] [a credit union with accounts insured by the National Credit Union Administration.] [a broker-dealer registered with the Securities and Exchange Commission pursuant to section 15 of the Securities Exchange Act of 1934.]

[A "consumer reporting agency" is a person or corporation that, for a fee, dues, or on a cooperative nonprofit basis, regularly assembles or evaluates consumer-credit information or other consumer information and provides reports about consumers to third parties. An agency may use any tools of interstate commerce to prepare or furnish the reports.]

A "criminal or tortious act" includes [describe the crime or tort intended to be furthered by this crime].

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1030(a)(2)(A) provides:

(a) Whoever - -

* * * * *

(2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains - -

(A) information contained in a financial record of a financial institution, or of a card issuer as defined in section 1602(n) of Title 15, or contained in a file of a consumer reporting agency on a consumer, as such terms are defined in the Fair Credit Reporting Act (15 U.S.C. 1681 et. seq.) [shall be guilty of an offense against the United States].

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

15 U.S.C. § 1681a(c) defines "consumer" to mean "an individual," and 15 U.S.C. § 1681a(f) defines "consumer reporting agency" to mean "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports." 15 U.S.C. § 1602(n) defines "card issuer" to mean "any person who issues a credit card, or the agent of such person with respect to such card."

The Senate Judiciary Committee emphasized that "obtains information" in this context includes mere observation of the data. "Actual asportation, in the sense of physically removing the data from its original location or transcribing the data, need not be proved in order to establish a violation of this subsection." S. Rep. 99-432, at 6-7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2479, 2484.

**O42.3**
**Computer Fraud:**
**Causing Damage to Computer or Program**
**18 U.S.C. § 1030(a)(5)(A) and (B)**

It's a Federal crime to knowingly transmit a harmful [program] [information] [code] [command] to a protected computer [system] without authorization.

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 transmitted [a program] [information] [a code] [a command] to a protected computer without authorization;

(2) the Defendant intended to access a protected computer without authorization and [recklessly] cause damage; and

(3) the damage resulted in [losses of more than $5,000 during a one-year period [beginning [*date*], and ending [*date*]] [modification or impairment, or potential modification or impairment, of one or more individual's medical examination, diagnosis, treatment, or care] [physical injury to any person] [a threat to public health or safety] [affecting a computer system used by or for a government entity in furtherance of the administration of justice, national defense, or national security].

The term "computer" includes any high-speed data-processing device that can perform logical, arithmetic, or storage functions, including any data-storage facility or communications facility that is directly related to or operates in conjunction with the device.

The term "protected computer" means [a computer exclusively for the use of a financial institution or the United States Government] [a computer used by or for a financial institution or the United States Government and the conduct constituting the offense affects that use by or for the financial institution or the Government] [a computer that is used in interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communications of the United States].

The term "interstate commerce" refers to any transaction or event that involves travel, trade, transportation or communication between a place in one state and a place in another state.

The term "foreign commerce" refers to any transaction or event that involves travel, trade, transportation or communication between a place in the United States and a place outside the United States.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1030(a)(5)(A) and (B) provide:

> (a) Whoever - -
>
> * * * * *
>
> > (5)(A)(i) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;

(ii) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or

(iii) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage; and

(B) by conduct described in clause (i), (ii), or (iii) of subparagraph (A), caused (or, in the case of an attempted offense, would, if completed, have caused) - -

(i) loss to 1 or more persons during any 1-year period (and, for purposes of an investigation, prosecution, or other proceeding brought by the United States only, loss resulting from a related course of conduct affecting 1 or more other protected computers) aggregating at least $5,000 in value;

(ii) the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of 1 or more individuals;

(iii) physical injury to any person;

(iv) a threat to public health or safety; or

(v) damage affecting a computer system used by or for a government entity in furtherance of the administration of justice, national defense, or national security [shall be guilty of an offense against the United States].

Maximum Penalty: Up to life in prison (if the offender knowingly or recklessly causes or attempts to cause death from conduct in violation of subsection (a)(5)(A)(i)) and applicable fine.

**O42.4**
**Computer Fraud:**
**Trafficking in Passwords**
**18 U.S.C. § 1030(a)(6)(A) or (B)**

It's a Federal crime for anyone – knowingly and with intent to defraud – to traffic in any password that will enable a person to access a computer without permission.

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

(1) the Defendant trafficked in a computer password without permission;

(2) the Defendant intended to defraud someone; and

(3) the Defendant's acts [affected interstate commerce] [involved access to a computer used by or for the United States Government].

A "computer" is any high-speed data-processing device that can perform logical, arithmetic, or storage functions, including any data-storage facility or communications facility that is directly related to or operates in conjunction with the device.

To "traffic" in a computer password is to transfer the password to someone else or to get it with the intent to transfer it to someone else, either with or without any financial interest in the transfer.

The "intent to defraud" is the specific intent to deceive or cheat someone, usually for personal financial gain or to cause financial loss to someone else.

The term "interstate commerce" refers to any transaction or event that involves travel, trade, transportation or communication between a place in one state and a place in another state.

The term "foreign commerce" refers to any transaction or event that involves travel, trade, transportation or communication between a place in the United States and a place outside the United States.

[The Government claims that the Defendant's acts affected interstate commerce because the Defendant [used interstate telephone or Internet facilities in committing the alleged offense]. If you find that the Government has proved beyond a reasonable doubt that the Defendant did the acts claimed, then you may find that interstate commerce was affected.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1030(a)(6)(A) provides:

> (a) Whoever - -
>
> * * * * *
>
> (6) knowingly and with intent to defraud traffics (as defined in section 1029) in any password or similar information through which a computer may be accessed without authorization, if - -
>
> (A) such trafficking affects interstate or foreign commerce [shall be punished as provided in subsection (c) of this section]; or

(B) such computer is used by or for the Government of the United States [shall be punished as provided in subsection (c) of this section]

[shall be guilty of an offense against the United States].

Maximum Penalty: Up to ten (10) years imprisonment (if the offense occurs after a conviction for another offense under this section) and applicable fine.

The wording of the statute leaves some uncertainty as to what "without authorization" is intended to modify. It seems logical that it is intended to describe the access to the computer, and this instruction is drafted to incorporate that construction.

**O43**
**Major Fraud against the United States**
**18 U.S.C. § 1031**

It's a Federal crime to knowingly execute a scheme or try to execute a scheme with the intent to defraud the United States or to get money or property by making false or fraudulent pretenses, representations, or promises in procuring property or services as a prime contractor or supplier under a contract connected to a prime contract with the United States worth $1,000,000 or more.

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 used or tried to use a scheme with the intent to defraud the United States or to get money or property by using materially false or fraudulent pretenses, representations, or promises;

(2) the scheme took place as a part of acquiring [property] [services] [money] as a contractor with the United States or as a subcontractor or a supplier on a contract with the United States; and

(3) the value of the contract or subcontract was $1,000,000 or more.

The value of the contract or subcontract is the value of the amount to be paid under the contract.

The false or fraudulent pretenses, representations, or promises violate the law if they occur [before the contract is created] [when the contract is created] [while the contract is being carried out].

A "scheme to defraud" includes any plan or course of action intended to deceive or cheat someone out of money or property by using false or fraudulent pretenses, representations, or promises.

A statement or representation is "false" or "fraudulent" if it is about a material fact that the speaker knows is untrue or makes with a reckless indifference to the truth, and makes with the intent to defraud. A statement or representation may be "false" or "fraudulent" when it constitutes a half truth or effectively conceals a material fact, and is made with intent to defraud.

A "material fact" is an important fact that a reasonable person would use to decide whether to do or not to do something.

The "intent to defraud" is the specific intent to deceive or cheat someone, usually for personal financial gain or to cause financial loss to someone else.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1031 provides:

> (a) Whoever knowingly executes, or attempts to execute, any scheme or artifice with the intent - -
>
> (1) to defraud the United States; or
>
> (2) to obtain money or property by means of false or fraudulent pretenses, representations, or promises, in any procurement of property or services as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States, if the value of the contract, subcontract, or any constituent part thereof, for such property or services is $1,000,000 or more [shall be guilty of an offense against the United States].

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

*See United States v. Nolan*, 223 F.3d 1311 (11th Cir. 2000).

**O44**
**Transmission of Wagering Information**
**18 U.S.C. § 1084**

It's a Federal crime for anyone engaged in betting or wagering as a business to use a wire-communication facility for an interstate transmission of a bet or betting information on any sporting event.

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 in the business of betting;

(2) as a part of the business, the Defendant knowingly used a wire-communication facility to send in interstate [or foreign] commerce bets or information to help with placing bets on a sporting event; and

(3) the defendant did so knowingly and intentionally.

The "business of betting" doesn't mean that a person's primary source of income must come from making bets or wagers, or dealing in wagering information. It doesn't matter how many bets a person has made or how much money the person bet, or whether the person made a profit on betting.

To prove the Defendant was "in the business of betting," it must be proved beyond a reasonable doubt that the Defendant regularly engaged in activities devoted to betting or wagering with the goal of making a profit. Isolated or sporadic activities are not a business.

A "wire-communication facility" includes long-distance telephone facilities.

Information conveyed or received by telephone from one state to another state [or between the United States and a foreign country], is a transmission in "interstate" [or "foreign"] commerce.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1084(a) provides:

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest [shall be guilty of an offense against the United States].

Maximum Penalty: Two (2) years imprisonment and applicable fine.

The "use" of a wire communication facility for the transmission of gambling information includes either the transmission or receipt of such information. *United States v. Sellers*, 483 F.2d 37 (5th Cir. 1973), *cert. denied*, 417 U.S. 908, 94 S. Ct. 2604, 41 L. Ed. 2d 212 (1974), overruled on other grounds by *United States v. McKeever*, 905 F.2d 829 (5th Cir. 1990). Also, the Defendant need not have personal knowledge of the interstate character of the transmission. *United States v. Miller*, 22 F.3d 1075 (11th Cir. 1994).

**O45.1**
**First Degree Murder: Premeditated Murder**
**18 U.S.C. § 1111**

It's a Federal crime to murder another human being within the [special maritime] [territorial] jurisdiction of the United States. Murder is the unlawful killing of a human being with malice aforethought.

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

(1) the victim, [victim's name], was killed;

(2) the Defendant caused the death of the victim with malice aforethought;

(3) the Defendant did so with premeditated intent; and

(4) the killing took place within the [special maritime] [territorial] jurisdiction of the United States.

To kill with "malice aforethought" is to intend to take someone else's life deliberately and intentionally, or to willfully act with callous and wanton disregard for human life. It doesn't matter whether the Defendant hated the victim or felt any ill will toward the victim at the time. But the Government must prove beyond a reasonable doubt that the Defendant intended to kill or willfully acted with callous and wanton disregard for the consequences, knowing that a serious risk of serious bodily harm or death would result.

Proof of premeditated intent is required in addition to proof of malice aforethought.

To kill with "premeditated intent" is to kill in cold blood after the accused has had time to think over the matter and formed the intent to kill. There's no exact amount of time that must pass between forming the intent to kill and the killing itself. But it must be enough time for the killer to be fully conscious of having the intent to kill.

[The Government does not have to prove that the victim was the person the Defendant intended to kill. If a person has a premeditated intent to kill one person and in attempting to kill that person kills someone else instead, the killing is premeditated.]

If you find beyond a reasonable doubt that the crime occurred at the location described in the indictment, that location is within the [special maritime] [territorial] jurisdiction of the United States.

**ANNOTATIONS AND COMMENTS**

(See Annotations and Comments following Offense Instruction 45.3, *infra*.)

In the appropriate case, the instructions for a Lesser Included Offense, for Second Degree Murder, and for Voluntary or Involuntary Manslaughter may need to be incorporated.

If there is evidence that the Defendant acted lawfully, such as in self-defense, a fifth element should be added and explained. For example: "The Defendant did not act in self-defense," with a definition or explanation of what constitutes self-defense. The absence of self-defense in such circumstances must be proven beyond a reasonable doubt by the Government. *United States v. Alvarez*, 755 F.2d 830, 842-43, 846 (11th Cir. 1985).

**O45.2**
**First Degree Murder: Felony Murder**
**18 U.S.C. § 1111**

It's a Federal crime to murder another person while [committing] [attempting to commit] the crime of [arson] [escape] [murder] [kidnapping] [treason] [espionage] [sabotage] [aggravated sexual abuse] [sexual abuse] [child abuse] [burglary] [robbery] within the [special maritime] [territorial] jurisdiction of the United States.

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

(1) the victim, [victim's name], was killed;

(2) the death of the victim occurred as a result of the Defendant's knowingly [committing] [attempting to commit] the crime specified in the indictment; and

(3) the killing took place within the [special maritime] [territorial] jurisdiction of the United States.

The crime is "felony murder" – a killing that takes place during the knowing and willful commission of some other specified felony crime.

The Government does not have to prove that the Defendant had a premeditated plan or intent to kill the victim. The Government only has to prove beyond a reasonable doubt that the Defendant knowingly [committed] [attempted to commit] the crime specified and that the victim died during and as a result of that crime.

If you find beyond a reasonable doubt that the crime occurred at the location described in the indictment, that location is within the [special maritime] [territorial] jurisdiction of the United States.

**ANNOTATIONS AND COMMENTS**

(See Annotations and Comments following Offense Instruction 45.3, *infra*.)

In the case of felony murder the malice aforethought requirement of Section 1111 is satisfied if the murder results from the perpetration of the enumerated crime. *United States v. Thomas*, 34 F.3d 44, 49 (2nd Cir.), *cert. denied*, 513 U.S. 1007, 115 S. Ct. 527, 130 L. Ed. 2d 431 (1994). The felony murder statute "reflects the English common law principle that one who caused another's death while committing or attempting to commit a felony was guilty of murder even though he did not intend to kill the deceased." *United States v. Tham*, 118 F.3d 1501, 1508 (11th Cir. 1997). It applies to the accidental, self-inflicted death of a co-conspirator. *Id*. Second-degree murder is not a lesser included offense of felony murder under Section 1111(a) because the malice aforethought elements are different. Unlike second-degree murder, malice aforethought for felony murder is satisfied only by commission of a felony enumerated in Section 1111(a). *United States v. Chanthadara*, 230 F.3d 1237, 1258 (10th Cir. 2000).

**O45.3**
**Second-Degree Murder**
**18 U.S.C. § 1111**

It's a Federal crime to murder another human being within the [special maritime] [territorial] jurisdiction of the United States. Murder is the unlawful killing of a human being with malice aforethought.

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

(1) the victim, [victim's name] was killed;

(2) the Defendant caused the death of the victim with malice aforethought; and

(3) the killing occurred within the [special maritime] [territorial] jurisdiction of the United States.

To kill with "malice aforethought" is to intend to take someone else's life deliberately and intentionally, or to willfully act with callous and wanton disregard for human life. It doesn't matter whether the Defendant hated the victim or felt any ill will toward the victim at the time. But the Government must prove beyond a reasonable doubt that the Defendant intended to kill or willfully acted with callous and wanton disregard for the consequences, knowing that a serious risk of death or serious bodily harm would result.

The difference between second-degree murder, which is the charge you are considering, and first-degree murder, is that second-degree murder does not require

premeditation. Premeditation is typically associated with killing in cold blood and requires a period of time in which the accused thinks the matter over before acting.

The crime charged here is second-degree murder. The Government only has to prove beyond a reasonable doubt that the Defendant killed the victim deliberately and intentionally, but without premeditation. In other words, that the Defendant killed the victim by acting with callous and wanton disregard for human life.

If you find beyond a reasonable doubt that the crime occurred at the location described in the indictment, that location is within the [special maritime] [territorial] jurisdiction of the United States.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1111 provides:

> (a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnaping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.
>
> Any other murder is murder in the second degree.
>
> (b) Within the special maritime and territorial jurisdiction of the United States,
>
> Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;

> Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life.

First degree murder under Section 1111 (including murder by transferred intent) requires both a finding of malice aforethought and premeditation (or felony murder). *United States v. Weise*, 89 F.3d 502, 505 (8th Cir. 1996) ("first degree murder is a killing with malice aforethought and premeditation, second degree murder is a killing with malice aforethought…"); *United States v. Shaw*, 701 F.2d 367, 392 (5th Cir. 1983), *cert. denied*, 465 U.S. 1067, 104 S. Ct. 1419, 79 L. Ed. 2d 744 (1984) ("Section 1111 retains the common law distinction between second degree murder, which requires a killing with malice aforethought, and first degree murder, which in addition to malice aforethought requires a killing with premeditation and deliberation.")

Malice aforethought is a term of art which has several definitions. *United States v. Pearson*, 159 F.3d 480, 485 (10th Cir. 1998). Under both the common law and the federal murder statute, malice aforethought encompasses three distinct mental states: (1) intent to kill; (2) intent to do serious bodily injury; and (3) extreme recklessness and wanton disregard for human life (i.e. a "depraved heart"). *Lara v. U.S. Parole Commission*, 990 F.2d 839, 841 (5th Cir. 1993); *United States v. Browner*, 889 F.2d 549, 551-52 (5th Cir. 1989); *see also United States v. Harrelson*, 766 F.2d 186, 189 n.5 (5th Cir.) *cert. denied*, 474 U.S. 908, 106 S. Ct. 277, 88 L. Ed. 2d 241 (1985) ("'Malice aforethought' means an intent, at the time of the killing, willfully to take the life of a human being, or an intent willfully to act in callous and wanton disregard of the consequences to human life…") (quoting 2 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions 215 (1977)). In *United States v. Milton*, 27 F.3d 203, 206-07 (6th Cir. 1994), and *United States v. Sheffey*, 57 F.3d 1419, 1430 (6th Cir. 1995), *cert. denied* 516 U.S. 1065, 116 S. Ct. 749, 133 L. Ed. 2d 697 (1996), the Sixth Circuit adopted essentially the same definition of malice aforethought: malice aforethought may be established by (1) "evidence of conduct which is 'reckless and wanton, and a gross deviation from a reasonable standard of care, of such nature that a jury is warranted in inferring that defendant was aware of a serious risk of death or serious bodily harm.'" *United States v. Black Elk*, 579 F.2d 49, 51 (8th Cir. 1978) (citing *United States v. Cox*, 509 F.2d 390, 392 (D.C. Cir. 1974)); (2) evidence that the defendant "intentionally commit[ted] a wrongful act without legal justification or excuse." *United States v. Celestine*, 510 F.2d 457, 459 (9th Cir. 1975); or (3) "circumstances which show 'a wanton and depraved spirit, a mind bent on evil mischief without regard to its consequences.'" *Id*. To prove that the Defendant acted with malice aforethought, "the government must show that he engaged in 'conduct which is reckless and wanton, and a gross deviation from a reasonable standard of care, of such nature that a jury is warranted in inferring that defendant was aware of a serious risk of death or serious bodily harm.'" *United States v. Tan*, 254 F.3d 1204, 1207 (10th Cir. 2001) (addressing second degree murder) (quoting *United States v. Wood*, 207 F.3d 1222, 1228 (10th Cir. 2000)). In other words, "the government must show that Defendant knew that his conduct posed a serious risk of death or harm to himself or others, but did not care."

*Id*. *See also United States v. Sheffey*, 57 F.3d 1419, 1430 (6th Cir. 1995), *cert. denied*, 516 U.S. 1065, 116 S. Ct. 749, 133 L. Ed. 2d 697 (1996); *United States v. Milton*, 27 F.3d 203, 206-07 (6th Cir. 1994), *cert. denied*, 513 U.S. 1085, 115 S. Ct. 741, 130 L. Ed. 2d 642 (1995).

In the case of a felony murder, the malice aforethought requirement of section 1111 is satisfied if the murder results from the perpetration of the enumerated crime. *See United States v. Thomas*, 34 F.3d 44, 49 (2nd Cir.), *cert. denied*, 513 U.S. 1007, 115 S. Ct. 527, 130 L. Ed. 2d 431 (1994).

**O46.1**
**Voluntary Manslaughter**
**18 U.S.C. § 1112**

It's a Federal crime to commit voluntary manslaughter, which is the unlawful and intentional killing of a human being without malice upon a sudden quarrel or heat of passion, when the crime occurs within the [special maritime] [territorial] jurisdiction of the United States.

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

(1) the victim, [victim's name], was killed;

(2) the Defendant caused the victim's death;

(3) the Defendant acted intentionally but without malice and in the heat of passion; and

(4) the killing occurred within the [special maritime] [territorial] jurisdiction of the United States.

Manslaughter is the unlawful killing of another human being without malice. It's voluntary when it happens intentionally during a sudden quarrel or in the heat of passion.

The term "heat of passion" means a passion of fear or rage in which the defendant loses his normal self-control as a result of circumstances that would provoke such passion in an ordinary person, but which did not justify the use of deadly force.

If you find beyond a reasonable doubt that the crime occurred at the location described in the indictment, that location is within the [special maritime] [territorial] jurisdiction of the United States.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1112 provides:

> (a) Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:
>
> Voluntary - - Upon a sudden quarrel or heat of passion.
>
> Involuntary - - In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.
>
> (b) Within the special maritime and territorial jurisdiction of the United States,
>
> Whoever is guilty of voluntary manslaughter [shall be guilty of an offense against the United States].
>
> Whoever is guilty of involuntary manslaughter [shall be guilty of an offense against the United States].

Maximum Penalty: Fifteen (15) years imprisonment and applicable fine for voluntary manslaughter. Eight (8) years imprisonment and applicable fine for involuntary manslaughter.

The fact that distinguishes manslaughter from murder is the absence of malice. *See* 18 U.S.C. § 112(a) 1112(a). In the case of voluntary manslaughter, the existence of a sudden quarrel or heat of passion is deemed to demonstrate the absence of malice. *United States v. Pearson*, 203 F.3d 1243, 1271 (10th Cir. 2000); *United States v. Collins*, 690 F.2d 431, 437 (5th Cir. 1982), *cert. denied*, 460 U.S. 1046, 103 S. Ct. 1447, 75 L. Ed. 2d 801 (1983). "A 'heat of passion' is a passion of fear or rage in which the defendant loses his normal self-control as a result of circumstances that would provoke such a passion in an ordinary person, but which did not justify the use of deadly force." *Lizama v. U.S. Parole Comm'n.*, 245 F.3d 503, 506 (5th Cir. 2001).

The government is not required to prove the absence of sudden provocation or heat of passion for a voluntary manslaughter conviction to stand in a murder trial. However, once evidence is presented that the defendant's capacity for self-control was impaired by an extreme provocation, "the burden is on the Government to prove beyond a reasonable doubt the *absence* of sudden quarrel or heat of passion before a conviction for murder can be sustained. *See United States v. Quintero*, 21 F.3d 885, 890 (9th Cir. 1994) (citing *Mullaney v. Wilbur*, 421 U.S. 684, 704, 95 S. Ct. 1881, 1892, 44 L. Ed. 2d 508 (1975).

**O46.2**
**Involuntary**
**Manslaughter**
**18 U.S.C. § 1112**

It's a Federal crime to commit involuntary manslaughter, which is the unlawful but unintentional killing of a human being [while committing an unlawful act that isn't a felony] [as a result of an act done in wanton and reckless disregard for human life] when the offense occurs within the [special maritime] or [territorial] jurisdiction of the United States.

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

(1) the victim, [victim's name], is dead;

(2) the Defendant caused the victim's death;

(3) the victim's death occurred as a result of the Defendant committing an unlawful act that wasn't a felony, namely [describe unlawful act], committing a lawful act in an unlawful manner, or acting with wanton and reckless disregard for human life;

(4) the Defendant knew or could have reasonably foreseen that the Defendant's conduct was or could be a threat to the lives of others; and

(5) the killing took place within the [special maritime] [territorial] jurisdiction of the United States.

Manslaughter is the unlawful killing of another human being without malice. It's involuntary if it is unintentional but happens while a person commits a crime that isn't a felony, or during a lawful act done in an unlawful manner, or during a lawful action done without taking due caution.

The Government doesn't have to prove that the Defendant intended to cause the victim's death. But the Government must prove beyond a reasonable doubt that the Defendant was more than just negligent or failed to use reasonable care. It must prove gross negligence amounting to "wanton and reckless disregard for human life," which means the Defendant acted unreasonably or maliciously and didn't care about the consequences.

If you find beyond a reasonable doubt that the crime occurred at the location described in the indictment, that location is within the [special maritime] [territorial] jurisdiction of the United States.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1112 provides:

> (a) Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:
>
> Voluntary - - Upon a sudden quarrel or heat of passion.
>
> Involuntary - - In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.
>
> (b) Within the special maritime and territorial jurisdiction of the United States,
>
> Whoever is guilty of voluntary manslaughter [shall be guilty of an offense against the United States].
>
> Whoever is guilty of involuntary manslaughter [shall be guilty of an offense against the United States].

Maximum Penalty: Fifteen (15) years imprisonment and applicable fine for voluntary manslaughter. Eight (8) years imprisonment and applicable fine for involuntary manslaughter.

"A proper instruction on an involuntary manslaughter charge requires the jury to find that the defendant (1) act with gross negligence, meaning a wanton or reckless disregard for human life, and (2) have knowledge that his or her conduct was a threat to the life of another or knowledge of such circumstances as could reasonably have enabled the defendant to foresee the peril to which his or her act might subject another." *United States v. Fesler*, 781 F.2d 384, 393 (5th Cir.), *cert. denied* 476 U.S. 1118, 106 S. Ct. 1977, 90 L. Ed. 2d 661 (1986); *see also, United States v. Paul*, 37 F.3d 496, 499 (9th Cir. 1994) ("involuntary manslaughter is an unintentional killing that 'evinces a wanton or reckless disregard for human life but not of the extreme nature that will support a finding of malice'" sufficient to justify a conviction for second degree murder). The intent element of involuntary manslaughter is not satisfied by a showing of simple negligence. *United States v. Gaskell*, 985 F.2d 1056, 1064 (11th Cir. 1993).

These elements are based upon *United States v. Sasnett*, 925 F.2d 392 (11th Cir. 1991), and *United States v. Schmidt*, 626 F.2d 616 (8th Cir. 1980), *cert. denied* 449 U.S. 904, 101 S. Ct. 278, 66 L. Ed. 2d (1981), but there may be some confusion regarding the third element in the *Sasnett* opinion. The third element set out here is intended to encompass the statutory distinction between lawful and unlawful acts, but should be tailored to fit the specific case. *See also United States v. Browner*, 889 F.2d 549 (5th Cir. 1989).

**O47**
**Attempted Murder**
**18 U.S.C. § 1113**

It's a Federal crime to try to murder another human being within the [special maritime] [territorial] jurisdiction of the United States.

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

(1) the Defendant did something that was a substantial step toward killing the victim, [victim's name];

(2) when the Defendant took that step, [he] [she] intended to kill the victim; and

(3) the attempted killing occurred within the [special maritime] [territorial] jurisdiction of the United States.

A "substantial step" means some important action leading toward committing a crime. It is more than an unimportant or inconsequential act. The act must be more than preparation. It must be an act that would ordinarily and likely result in an attempt to commit a crime, unless interrupted or frustrated by some condition or event.

If the Government has presented evidence of several acts taken by the Defendant, each of which may qualify as a "substantial step," you must all agree upon one act that you find was a substantial step toward committing the crime.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1113 provides:

> Except as provided in section 113 of this title, whoever, within the special maritime and territorial jurisdiction of the United States, attempts to commit murder or manslaughter, shall, for an attempt to commit murder be imprisoned not more than twenty years or fined under this title, or both, and for an attempt to commit manslaughter be imprisoned not more than seven years or fined under this title, or both.

Attempted murder requires proof of a specific intent to kill the victim. Recklessness and wanton conduct, grossly deviating from a reasonable standard of care such that the Defendant was aware of the serious risk of death, will not suffice as proof of an intent to kill. *Braxton v. United States*, 500 U.S. 344, 351 n.1, 111 S. Ct. 1854, 1859 n.1, 114 L. Ed. 2d 385 (1991) ("Although a murder may be committed without an intent to kill, an attempt to commit murder requires a specific intent to kill."); *United States v. Kwong*, 14 F.3d 189, 194-95 (2nd Cir. 1994).

Whether a Defendant's conduct amounts to a "substantial step" depends in large part on the facts of each case. *United States v. Neal*, 78 F.3d 901, 906 (4th Cir. 1996). "'A substantial step is an appreciable fragment of a crime and an action of such substantiality that, unless frustrated, the crime would have occurred.'" *United States v. Smith*, 264 F.3d 1012, 1016 (10th Cir. 2001) (quoting *United States v. DeSantiago-Flores*, 107 F.3d 1472, 1478-79 (10th Cir. 1997)).

# O48
# Killing or Attempting to Kill a Federal Officer or Employee
# 18 U.S.C. § 1114

Note: If a Defendant is charged with murder, manslaughter, or attempted murder of an officer or employee of the United States in violation of 18 U.S.C. § 1114, the appropriate murder, manslaughter, or attempted murder instruction should be used, but modified to additionally require the jury to find that the victim was a federal officer or employee. The jurisdictional element set out in those instructions isn't necessary here.

## ANNOTATIONS AND COMMENTS

18 U.S.C. § 1114 provides:

> Whoever kills or attempts to kill any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance, shall be punished - -
>
> (1) in the case of murder, as provided under section 1111;
>
> (2) in the case of manslaughter, as provided under section 1112; or
>
> (3) in the case of attempted murder or manslaughter, as provided in section 1113.

*See United States v. Alvarez*, 755 F.2d 830 (11th Cir. 1985).

**49**

**Kidnapping [Resulting in Death]**

**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 [if that kidnapping resulted in death].

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];

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

2. the victim was willfully transported in interstate or foreign 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; [and

3. the kidnapping resulted in the death of 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.

The term "interstate or foreign commerce" means the movement of a person or property from one state to another state, from one state to another country, or from another country into one or more states.

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

A "means, facility, or instrumentality of interstate commerce" includes the Internet, telephones (including cell phones), pagers, automobiles, airplanes, ships, boats, and trains.

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

[The Government doesn't need to prove that the Defendant *intended* or *knew* that the victim's death would result from the kidnapping. The Government needs to prove only that the kidnapping resulted in the victim's death. In this context, "resulted" means that the kidnapping was a but-for cause of the death.]

**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 [and willfully transports such person in interstate or foreign commerce] [shall be guilty of an offense against the United States].

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. 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.").

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." *Ibid.*; *see also 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).

Like automobiles, airplanes, ships, boats, and trains, the Internet, telephones, cell phones, and pagers are instrumentalities of interstate or foreign commerce even when they're used entirely intrastate. *United States v. Faris*, 583 F.3d 756, 759 (11th Cir. 2009) (per curiam) ("Even if none of [the defendant's] communications were routed over state lines, the internet and telephone he used to contact the undercover officer were still 'instrumentalities of interstate commerce.'"); *United States v. Evans*, 476 F.3d 1176, 1180 (11th Cir. 2007) (holding that "[t]elephones and cellular telephones are instrumentalities of interstate commerce" even when they're used to make calls not routed through an interstate system); *United States v. Ballinger*, 395 F.3d 1218, 1226 (11th Cir. 2005) (Marcus, J.) ("Instrumentalities of interstate commerce . . . are the people and things themselves moving in commerce, including automobiles, airplanes, boats, and shipments of goods. Instrumentalities of commerce include, as well, pagers, telephones, and mobile phones." (cleaned up & collecting cases)); *id.* at 1225–26 (explaining that the channels of interstate commerce—through which the instrumentalities move—include "railroads, navigable waters, and airspace, as well as telecommunications networks and national securities markets" (collecting cases)); *United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004) ("The internet is an instrumentality of interstate commerce."). Any fact charged in the indictment that enhances a defendant's sentence must be found by the jury beyond a reasonable doubt, and the verdict form should be amended to show these required findings. The fact that a kidnapping "resulted in death" within the meaning of 18 U.S.C. § 1201(a) increases the minimum sentence under the statute from "any term of years" to life in prison. It also raises the maximum sentence from life imprisonment to death. That the kidnapping "resulted in death" is therefore an element of the offense that must be found by a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("[A]cts that increase the prescribed range of penalties to which a criminal defendant is exposed" "must be established by proof beyond a reasonable doubt."); *Alleyne v. United States*, 570 U.S. 99, 103 (2013) ("[A]ny fact that increases the mandatory minimum [sentence] is an 'element' that must be submitted to the jury."). If the parties *dispute* whether a kidnapping "resulted in death," the Court should consider giving a lesser included offense instruction.

Although the "resulting in death" element must be found by a jury beyond a reasonable doubt, the Government does not need to prove beyond a reasonable doubt that the defendant *intended* or *knew* that the kidnapping would result in death. The Government need only prove that the kidnapping was a but-for *cause* of the death. *Burrage v. United States*, 571 U.S. 204, 210–11 (2014) ("Because the Controlled Substances Act does not define the phrase 'results from,' . . . we give it its ordinary

meaning. . . . [T]his requires proof that the harm would not have occurred in the absence of—that is, but for—the defendant's conduct." (cleaned up)); *accord United States v. Rodriguez-Santos*, 56 F.4th 206, 215 (1st Cir. 2022) (holding that the "resulting in death" element of § 1201(a)(1) requires but-for causation); *United States v. Simpson*, 44 F.4th 1093, 1099 (8th Cir. 2022) ("The government also must prove that the kidnapping caused the victim's death, but not that the principal intended or knew that death would result."), *reh'g denied*, 2022 WL 4295416 (8th Cir. Sept. 19, 2022), *and cert. denied*, 143 S. Ct. 813 (2023).

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).

**O50.1**
**Mail Fraud**
**18 U.S.C. § 1341**

It's a Federal crime to [use the United States mail] [transmit something by private or commercial interstate carrier] in carrying out a scheme to defraud someone.

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 defraud someone by using false or fraudulent pretenses, representations, or promises;

(2) the false or fraudulent pretenses, representations, or promises were about a material fact;

(3) the Defendant intended to defraud someone; 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] something meant to help carry out the scheme to defraud.

[A "private or commercial interstate carrier" includes any business that transmits, carries, or delivers items from one state to another. It doesn't matter whether the message or item actually moves from one state to another as long as the message or item is delivered to the carrier.]

A "scheme to defraud" means any plan or course of action intended to deceive or cheat someone out of money or property using false or fraudulent pretenses, representations, or promises.

A statement or representation is "false" or "fraudulent" if it is about a material fact, it is made with intent to defraud, and the speaker either knows it is untrue or makes it with reckless indifference to the truth. It may be false or fraudulent if it is made with the intent to defraud and is a half-truth or effectively conceals a material fact.

A "material fact" is an important fact that a reasonable person would use to decide whether to do or not do something. A fact is "material" if it has the capacity or natural tendency to influence a person's decision. It doesn't matter whether the decision-maker actually relied on the statement or knew or should have known that the statement was false.

To act with "intent to defraud" means to act knowingly and with the specific intent use false or fraudulent pretenses, representations, or promises to cause loss or injury. Proving intent to deceive alone, without the intent to cause loss or injury, is not sufficient to prove intent to defraud.

The Government does not have to prove all the details about the precise nature and purpose of the scheme or that the material [mailed] [deposited with an interstate carrier] was itself false or fraudulent. It also does not have to prove that

the use of [the mail] [the interstate carrier] was intended as the specific or exclusive means carrying out the fraud, or that the Defendant did the actual [mailing] [depositing]. It doesn't even have to prove that anyone was actually defrauded.

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

Each separate use of [the mail] [an interstate carrier] as 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. (If the violation affects a financial institution, or is in relation to or in connection with a presidentially declared major disaster or emergency, thirty (30) years' imprisonment and $1 million fine).

If the offense involved telemarketing, 18 U.S.C. § 2326 requires enhanced imprisonment penalties:

> A person who is convicted of an offense under section 1028, 1029, 1341, 1342, 1343, or 1344, or a conspiracy to commit such an offense, in connection with the conduct of telemarketing - -

(1) shall be imprisoned for a term of up to 5 years in addition to any term of imprisonment imposed under any of those sections, respectively; and

(2) in the case of an offense under any of those sections that - -

(A) victimized ten or more persons over the age of 55; or

(B) targeted persons over the age of 55,

shall be imprisoned for a term of up to 10 years in addition to any term of imprisonment imposed under any of those sections, respectively.

An additional element is required under the *Apprendi* doctrine when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. § 1341 or § 2326. If the alleged offense involved telemarketing, or involved telemarketing and victimized 10 or more persons over age 55 or targeted persons over age 55, or the scheme affected a financial institution, or is in relation to or in connection with a presidentially declared major disaster or emergency, the Court should consider including a fourth element for that part of the offense and giving a lesser included offense instruction for just the Section 1341 offense. Alternatively, an instruction (to be used with a special interrogatory on the verdict form) can address those statutory variations of the scheme:

> If you find beyond a reasonable doubt that the Defendant is guilty of using the mail in carrying out a scheme to defraud, then you must also determine whether the Government has proven beyond a reasonable doubt that [the scheme was in connection with the conduct of telemarketing and (a) victimized ten or more persons over the age of 55, or (b) targeted persons over the age of 55] [the scheme affected a financial institution] [the scheme was in relation to, or in connection with, a presidentially declared major disaster or emergency].

The instruction makes clear that deception alone does not constitute a scheme to defraud; a defendant must intend to cause injury or loss. *See United States v. Takhalov*, 827 F.3d 1307, 1315 (11th Cir. 2016), altered in part on denial of rehearing by *United States v. Takhalov*, 838 F.3d 1168 (11th Cir. 2016) ("A jury cannot convict a defendant of wire fraud, then, based on misrepresentations amounting only to a deceit." (internal quotation marks and citation omitted)).

The 1994 amendment to Section 1341 now also applies it to the use of "any private or commercial interstate carrier." Where such private carriers are involved, the statute requires the government to prove only that the carrier engages in interstate deliveries and not that state lines were crossed. *See United States v. Marek*, 238 F.3d 310, 318 (5th Cir.) *cert. denied* 534 U.S. 813, 122 S. Ct. 37, 151 L. Ed. 2d 11 (2001).

Mail fraud requires a showing of "(1) knowing participation in a scheme to defraud and (2) a mailing in furtherance of the scheme." *United States v. Photogrammetric Data Svcs., Inc.*, 259 F.3d 229, 253 (4th Cir. 2001). The mailing, however, need only "be incident to an essential part of the scheme or a step in the plot," and does not have to be an essential element of the scheme to be part of the execution of the fraud. *Schmuck v. United States*, 489 U.S. 705, 710-11, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989).

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, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The definition of materiality used here comes from that decision and the Eleventh Circuit's decision in the case upon remand. *United States v. Neder*, 197 F.3d 1122, 1128-29 (11th Cir. 1999), *cert. denied*, 530 U.S. 1261, 120 S. Ct. 2727, 147 L. Ed. 2d 982 (2000).

In mail fraud cases involving property rights, "the Government must establish that the defendant intended to defraud a victim of money or property of some value." *United States v. Cooper*, 132 F.3d 1400, 1405 (11th Cir. 1998). State and municipal licenses in general are not "property" for the purposes of Title 18, United States Code, Section 1341. *Cleveland v. United States*, 531 U.S. 12, 15, 121 S. Ct. 365, 369, 148 L. Ed. 2d 221 (2000).

In the Eleventh Circuit, there has been considerable activity with respect to whether the measure of the alleged fraudulent conduct should be an objective "intended to deceive a reasonable person" standard, or whether conduct intended to deceive "someone," including the ignorant and gullible, is sufficient.

In *United States v. Svete*, 556 F.3d 1157 (11th Cir. 2009), the Eleventh Circuit, in an en banc decision, held that:

> Proof that a defendant created a scheme to deceive reasonable people is sufficient evidence that the defendant intended to deceive, but a defendant who intends to deceive the ignorant or gullible by preying on their infirmities is no less guilty. Either way, the defendant has criminal intent.

556 F.3d 1157, 1165 (11th Cir. 2009).

**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

(3) 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 use false or fraudulent pretenses, representations, or promises to cause loss of honest services. Proving intent to deceive alone, without the intent to cause loss of honest services, is not sufficient to prove intent to defraud. [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.

The instruction makes clear that deception alone does not constitute a scheme to defraud; a defendant must intend to cause loss of honest services. *See United States v. Takhalov*, 827 F.3d 1307, 1315 (11th Cir. 2016), altered in part on denial of rehearing by

*United States v. Takhalov*, 838 F.3d 1168 (11th Cir. 2016) ("A jury cannot convict a defendant of wire fraud, then, based on misrepresentations amounting only to a deceit." (internal quotation marks and citation omitted)).

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.

**O50.3**
**Mail Fraud:**
**Depriving Another of an Intangible**
**Right of Honest Services**
**18 U.S.C. §§ [1341] and 1346**
**Private 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 of the following facts are proved beyond a reasonable doubt:

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

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

(3) the Defendant foresaw or reasonably should have foreseen that the Defendant's employer might suffer economic harm as a result of the scheme; 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 an employer by participating in a bribery or kickback scheme.

An employee who works for a private employer has a legal duty to provide honest services to the employer.

The Government must prove that the Defendant intended to breach that duty by receipt of a bribe or kickback, and foresaw, or should have foreseen, that the employer might suffer economic harm as a result of the breach.

A bribe or a kickback is any money or compensation of any kind which is provided, directly or indirectly, to an employee for the purpose of improperly obtaining or rewarding favorable treatment from the employee in connection with [his] [her] employment.

To act with "intent to defraud" means to act knowingly and with the specific intent to use false or fraudulent pretenses, representations, or promises to cause loss of honest services. Proving intent to deceive alone, without the intent to cause loss of honest services, is not sufficient to prove intent to defraud.

[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 States 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.

The instruction makes clear that deception alone does not constitute a scheme to defraud; a defendant must intend to cause loss of honest services. *See United States v. Takhalov*, 827 F.3d 1307, 1315 (11th Cir. 2016), altered in part on denial of rehearing by *United States v. Takhalov*, 838 F.3d 1168 (11th Cir. 2016) ("A jury cannot convict a defendant of wire fraud, then, based on misrepresentations amounting only to a deceit." (internal quotation marks and citation omitted)).

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 "bribe or kickback" is taken, with some modification, from 41 U.S.C. §8701(2)'s definition of "kickback" in the context of Federal Government contracts. The Committee believes the modified definition is sufficient to cover both bribes and kickbacks in the private sector. The Eleventh Circuit cited to that statutory definition in *United States v. Aunspaugh*, --- F.3d ---, 2015 WL 4098254 (11th. Cir. 2015), in which the court held the prior definition of "kickback" in the pattern instruction was too broad in light of the Supreme Court's decision in *Skilling*. The court declined to decide whether a quid pro quo is required or whether a reward would be sufficient, so courts may want to eliminate the "or rewarding" language from the definition. *See id*. at *4.

Although the typical case of defrauding one of honest services is the bribery of a public official, section 1346 also extends to defrauding some private sector duties of loyalty. It seems clear that an employment relationship creates a sufficient fiduciary duty to support a conviction for honest services fraud by a private employee. *See Skilling*, 561 U.S. at 408 n.41 (identifying an employer-employee relationship as a clear example of a fiduciary relationship under pre-*McNally* case law); *United States v. Kalaycioglu*, 210 F. App'x 825, 832-33 (11th Cir. 2006); *United States v. Williams*, 441 F.3d 716, 723 (9th Cir. 2006) (noting that employer-employee relationship is sufficient for private sector honest service fraud); *deVegter*, 198 F.3d at 1327 (listing "purchasing agents, brokers, union leaders, and others with clear fiduciary duties to their employers or unions . . . . defrauding their employers or unions by accepting kickbacks or selling confidential information" as a distinct category of honest services fraud pre-*McNally* (internal quotation marks and citation omitted)).

However, the Eleventh Circuit has held that a strict duty of loyalty ordinarily is not part of private sector relationships, and thus it is not enough to prove that a private sector defendant breached the duty of loyalty alone. In *deVegter*, a private sector case involving an independent contractor rather than an employee, the Eleventh Circuit held the breach of loyalty must inherently harm the purpose of the parties' relationship: "'The prosecution must prove that the employee intended to breach a fiduciary duty, and that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach.'" *deVegter*, 198 F.3d at 1329 (quoting *United States v. Frost*, 125 F.3d 346, 368 (6th Cir. 1997)).

As discussed in the annotations accompanying public sector honest services fraud, the Eleventh Circuit appears to have held that materiality is not an element of public sector honest services fraud. *United States v. Langford*, 647 F.3d 1309, 1321 n.7 (11th Cir. 2011). Materiality likely remains an element of private sector honest services fraud.

*deVegter*'s requirement that the Government prove the private employee foresaw or reasonably should have foreseen that his employer might suffer economic harm as a result serves the same purpose as a materiality element. Other circuits discussing materiality versus foreseeable economic harm, including the Sixth Circuit case cited by the Eleventh Circuit in *de Vegter*, choose one approach or the other and make it clear they serve the same function. *See, e.g.*, *United States v. Milovanovic*, 678 F.3d 713, 726-27 (9th Cir. 2013) (en banc) (materiality); *United States v. Rybicki*, 354 F.3d 124, 145-46 (2d Cir. 2003) (en banc) (materiality); *United States v. Vinyard*, 266 F.3d 320, 327-28 (4th Cir. 2001) (reasonably foreseeable harm); *United States v. Frost*, 125 F.3d 346, 368- 69 (6th Cir. 1997) (reasonably foreseeable harm); *United States v. Gray*, 96 F.3d 769, 774-75 (5th Cir. 1996) (materiality). Therefore, the Committee has not included a redundant materiality element in the pattern charge.

**O50.4**
**Mail Fraud:**
**Depriving Another of an Intangible**
**Right of Honest Services**
**18 U.S.C. §§ [1341] and 1346**
**Independent Contractor or Other Private Sector Contractual Relationship**
**Besides Employer/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 owed a duty of honest services to the victim;

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

(3) the Defendant did so with an intent to defraud the victim of the right to the Defendant's honest services;

(4) the Defendant foresaw or reasonably should have foreseen that the victim might suffer economic harm as a result of the scheme; and

(5) 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 another person by participating in a bribery or kickback scheme.

The Defendant owes a duty of honest services to the victim if, by the nature of their relationship, the Defendant is vested with a position of dominance, authority, trust, and de facto control. The relationship imposes this duty if trust is reposed on one side and there is resulting superiority and influence on the other.

The Government must prove that the Defendant intended to breach that duty by receipt of a bribe or kickback, and foresaw, or should have foreseen, that the victim might suffer economic harm as a result of the breach.

A bribe or a kickback is any money or compensation of any kind which is provided, directly or indirectly, to a contractor for the purpose of improperly obtaining or rewarding favorable treatment from the contractor in connection with the contract.

To act with "intent to defraud" means to act knowingly and with the specific intent to use false or fraudulent pretenses, representations, or promises to cause loss of honest services. Proving intent to deceive alone, without the intent to cause loss of honest services, is not sufficient to prove intent to defraud.

[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 States 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.

The instruction makes clear that deception alone does not constitute a scheme to defraud; a defendant must intend to cause loss of honest services. *See United States v. Takhalov*, 827 F.3d 1307, 1315 (11th Cir. 2016), altered in part on denial of rehearing by *United States v. Takhalov*, 838 F.3d 1168 (11th Cir. 2016) ("A jury cannot convict a defendant of wire fraud, then, based on misrepresentations amounting only to a

deceit." (internal quotation marks and citation omitted)).

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 "bribe or kickback" is taken, with some modification, from 41 U.S.C. §8701(2)'s definition of "kickback" in the context of Federal Government contracts. The Committee believes the modified definition is sufficient to cover both bribes and kickbacks in the private sector. The Eleventh Circuit cited to that statutory definition in *United States v. Aunspaugh*, --- F.3d ---, 2015 WL 4098254 (11th. Cir. 2015), in which the court held the prior definition of "kickback" in the pattern instruction was too broad in light of the Supreme Court's decision in *Skilling*. The court declined to decide whether a quid pro quo is required or whether a reward would be sufficient, so courts may want to eliminate the "or rewarding" language from the definition. *See id*. at *4.

Although the typical case of defrauding one of honest services is the bribery of a public official, section 1346 also extends to defrauding some private sector duties of loyalty. The Eleventh Circuit has held that a strict duty of loyalty ordinarily is not part of private sector relationships, and thus it is not enough to prove that a private sector defendant breached the duty of loyalty alone. In *deVegter*, a private sector case involving an independent contractor rather than an employee, the Eleventh Circuit held the breach of loyalty must inherently harm the purpose of the parties' relationship: "'The prosecution must prove that the employee intended to breach a fiduciary duty, and that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach.'" *deVegter*, 198 F.3d at 1329 (quoting *United States v. Frost*, 125 F.3d 346, 368 (6th Cir. 1997)). The definition of the type of relationship necessary to give rise to a duty of honest services comes from *deVegter*'s definition of fiduciary duty, which is drawn from *United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991) and *United States v. Brennan*, 183 F.3d 139, 150-51 (2d Cir. 1999). *See deVegter*, 198 F.3d at 1331 & n.8.

As discussed in the annotations accompanying public sector honest services fraud, the Eleventh Circuit appears to have held that materiality is not an element of public sector honest services fraud. *United States v. Langford*, 647 F.3d 1309, 1321 n.7 (11th Cir. 2011). Materiality likely remains an element of private sector honest services fraud. *deVegter*'s requirement that the Government prove the private employee foresaw or reasonably should have foreseen that his employer might suffer economic harm as a result serves the same purpose as a materiality element. Other circuits discussing materiality versus foreseeable economic harm, including the Sixth Circuit case cited by the Eleventh Circuit in *de Vegter*, choose one approach or the other and make it clear they serve the same function. *See, e.g.*, *United States v. Milovanovic*, 678 F.3d 713, 726-

27 (9th Cir. 2013) (en banc) (materiality); *United States v. Rybicki*, 354 F.3d 124, 145-46 (2d Cir. 2003) (en banc) (materiality); *United States v. Vinyard*, 266 F.3d 320, 327-28 (4th Cir. 2001) (reasonably foreseeable harm); *United States v. Frost*, 125 F.3d 346, 368-69 (6th Cir. 1997) (reasonably foreseeable harm); *United States v. Gray*, 96 F.3d 769, 774-75 (5th Cir. 1996) (materiality). Therefore, the Committee has not included a redundant materiality element in the pattern charge.

**O51**
**Wire Fraud**
**18 U.S.C. § 1343**

It's a Federal crime to use interstate wire, radio, or television communications to carry out a scheme to defraud someone else.

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 defraud someone by using false or fraudulent pretenses, representations, or promises;

(2) the false pretenses, representations, or promises were about a material fact;

(3) the Defendant acted with the intent to defraud; and

(4) the Defendant transmitted or caused to be transmitted by [wire] [radio] [television] some communication in interstate commerce to help carry out the scheme to defraud.

A "scheme to defraud" means any plan or course of action intended to deceive or cheat someone out of money or property by using false or fraudulent pretenses, representations, or promises.

A statement or representation is "false" or "fraudulent" if it is about a material fact that the speaker knows is untrue or makes with reckless indifference to the truth, and makes with the intent to defraud. A statement or representation may be "false" or "fraudulent" when it is a half-truth, or effectively conceals a material fact, and is made with the intent to defraud.

A "material fact" is an important fact that a reasonable person would use to decide whether to do or not do something. A fact is "material" if it has the capacity or natural tendency to influence a person's decision. It doesn't matter whether the decision-maker actually relied on the statement or knew or should have known that the statement was false.

To act with "intent to defraud" means to act knowingly and with the specific intent to use false or fraudulent pretenses, representations, or promises to cause loss or injury. Proving intent to deceive alone, without the intent to cause loss or injury, is not sufficient to prove intent to defraud.

The Government does not have to prove all the details alleged in the indictment about the precise nature and purpose of the scheme. It also doesn't have to prove that the material transmitted by interstate [wire] [radio] [television] was itself false or fraudulent; or that using the [wire] [radio] [television] was intended as the specific or exclusive means of carrying out the alleged fraud; or that the Defendant personally made the transmission over the [wire] [radio] [television]. And it doesn't have to prove that the alleged scheme actually succeeded in defrauding anyone.

To "use" interstate [wire] [radio] [television] communications is to act so that something would normally be sent through wire, radio, or television communications in the normal course of business.

Each separate use of the interstate [wire] [radio] [television] communications as part of the scheme to defraud is a separate crime.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1343 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, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice [shall be guilty of an offense against the laws of the United States].

Maximum Penalty: Twenty (20) years' imprisonment and applicable fine. (If the violation affects a financial institution, or is in relation to or in connection with a presidentially declared major disaster or emergency, thirty (30) years' imprisonment and $1 million fine.)

If the offense involved telemarketing, 18 U.S.C. § 2326 requires enhanced imprisonment penalties:

> A person who is convicted of an offense under section 1028, 1029, 1341, 1342, 1343, or 1344, or a conspiracy to commit such an offense, in connection with the conduct of telemarketing - -
>
> (1) shall be imprisoned for a term of up to 5 years in addition to any term of imprisonment imposed under any of those sections, respectively; and
>
> (2) in the case of an offense under any of those sections that - -
>
> (A) victimized ten or more persons over the age of 55; or
>
> (B) targeted persons over the age of 55,
>
> shall be imprisoned for a term of up to 10 years in addition to any term of imprisonment imposed under any of those sections, respectively.

An additional element is required under the *Apprendi* doctrine when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. § 1343 or § 2326. If the alleged offense involved telemarketing, or involved telemarketing and

victimized 10 or more persons over age 55 or targeted persons over age 55, or the scheme affected a financial institution, or is in relation to or in connection with a presidentially declared major disaster or emergency, the Court should consider including a fourth element for that part of the offense and giving a lesser included offense instruction for just the Section 1341 offense. Alternatively, an instruction (to be used with a special interrogatory on the verdict form) can address those statutory variations of the scheme:

> If you find beyond a reasonable doubt that the defendant is guilty of using interstate [wire] [radio] [television] communications facilities in carrying out a scheme to defraud, then you must also determine whether the Government has proven beyond a reasonable doubt that [the scheme was in connection with the conduct of telemarketing] [the scheme was in connection with the conduct of telemarketing and (a) victimized ten or more persons over the age of 55, or (b) targeted persons over the age of 55] [the scheme affected a financial institution] [the scheme was in relation to, or in connection with, a presidentially declared major disaster or emergency].

Wire fraud requires showing (1) that the Defendant knowingly devised or participated in a scheme to defraud; (2) that the Defendant did so willfully and with an intent to defraud; and (3) that the Defendant used interstate wires for the purpose of executing the scheme. *Langford v. Rite Aid of Ala., Inc.*, 231 F.3d 1308, 1312 (11th Cir. 2000). 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, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The definition of materiality used here comes from that decision and the Eleventh Circuit's decision in the case upon remand. *United States v. Neder*, 197 F.3d 1122, 1128-20 (11th Cir. 1999), *cert. denied* 530 U.S. 1261 (2000).

The instruction makes clear that deception alone does not constitute a scheme to defraud; a defendant must intend to cause injury or loss. *See United States v. Takhalov*, 827 F.3d 1307, 1315 (11th Cir. 2016), altered in part on denial of rehearing by *United States v. Takhalov*, 838 F.3d 1168 (11th Cir. 2016) ("A jury cannot convict a defendant of wire fraud, then, based on misrepresentations amounting only to a deceit." (internal quotation marks and citation omitted)).

In wire fraud cases involving property rights, "the Government must establish that the defendant intended to defraud a victim of money or property of some value." *United States v. Cooper*, 132 F.3d 1400, 1405 (11th Cir. 1998). State and municipal licenses in general are not "property" for the purposes of this statute. *Cleveland v. United States*,

531 U.S. 12, 15, 121 S. Ct. 365, 369, 148 L. Ed. 2d 221 (2000) (addressing "property" for purposes of mail fraud statute).

The mail fraud and wire fraud statutes are "given a similar construction and are subject to the same substantive analysis." *Belt v. United States*, 868 F.3d 1208, 1211 (11th Cir. 1989).

*See also United States v. Svete*, 556 F.3d 1157, (11th Cir. 2009) and discussion *supra* Offense Instruction 50.1.

**O52**
**Bank Fraud**
**18 U.S.C. § 1344**

It's a Federal crime to carry out or attempt to carry out a scheme to defraud a financial institution, or to get money or property owned or controlled by a financial institution by using false pretenses, representations, or promises.

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 carried out or attempted to carry out a scheme [to defraud a financial institution] [to get money, assets, or other property from a financial institution] by using false or fraudulent pretenses, representations, or promises about a material fact;

(2) the false or fraudulent pretenses, representations, or promises were material;

(3) the Defendant intended to defraud [the financial institution] [someone]; and

(4) the financial institution was federally [insured] [chartered].

A "scheme to defraud" includes any plan or course of action intended to deceive or cheat someone out of money or property by using false or fraudulent pretenses, representations, or promises relating to a material fact.

A statement or representation is "false" or "fraudulent" if it is about a material fact that the speaker knows is untrue or makes with reckless indifference as to the truth and makes with intent to defraud. A statement or representation may

be "false" or "fraudulent" when it's a half truth or effectively conceals a material fact and is made with the intent to defraud.

A "material fact" is an important fact that a reasonable person would use to decide whether to do or not do something. A fact is "material" if it has the capacity or natural tendency to influence a person's decision. It doesn't matter whether the decision-maker actually relied on the statement or knew or should have known that the statement was false.

To act with "intent to defraud" means to act knowingly and with the specific intent to use false or fraudulent pretenses, representations, or promises to cause loss or injury. Proving intent to deceive alone, without the intent to cause loss or injury, is not sufficient to prove intent to defraud.

The Government doesn't have to prove all the details alleged in the indictment about the precise nature and purpose of the scheme. It also doesn't have to prove that the alleged scheme actually succeeded in defrauding anyone. What must be proved beyond a reasonable doubt is that the Defendant knowingly attempted or carried out a scheme substantially similar to the one alleged in the indictment.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1344 provides:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice - -

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than (30) years or both.

*See* 18 U.S.C. § 20 for an enumeration of the financial institutions covered by § 1344.

An additional element is required under the *Apprendi* doctrine when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. § 2326. *See* Pattern Instruction 50.1.

Proof that the financial institution is federally chartered or insured is an essential element of the crime, as well as necessary to establish federal jurisdiction. *United States v. Scott*, 159 F.3d 916, 921 (5th Cir. 1998). Materiality is an essential element of the crime of bank fraud. *Neder v. United States*, 527 U.S. 1, 25 (1999).

There are two separate offenses possible under Section 1344: (1) defrauding a financial institution; or (2) obtaining money or funds from the financial institution by means of material false or fraudulent pretenses, representations, or promises. *United States v. Dennis*, 237 F.3d 1295, 1303 (11th Cir. 2001) (discussing elements of bank fraud under section 1344); *United States v. Mueller*, 74 F.3d 1152, 1159 (11th Cir. 1996). In the case of defrauding a financial institution, the Government must establish "that the defendant (1) intentionally participated in a scheme or artifice to defraud another of money or property; and (2) that the victim of the scheme or artifice was an insured financial institution." *United States v. Goldsmith*, 109 F.3d 714, 715 (11th Cir. 1997). Under the alternative theory, the Government must prove "(1) that a scheme existed in order to obtain money, funds, or credit in the custody of the federally insured institution; (2) that the defendant participated in the scheme by means of false pretenses, representations or promises, which were material; and (3) that the defendant acted knowingly." *Id*. As the Supreme Court explained in *Loughrin v. United States*, 134 S. Ct. 2384 (2014), to prove a violation under Section 1344(s), the Government need not prove that the defendant intended to defraud a bank.

The instruction makes clear that deception alone does not constitute a scheme to defraud; a defendant must intend to cause injury or loss. *See United States v. Takhalov*, 827 F.3d 1307, 1315 (11th Cir. 2016), altered in part on denial of rehearing by *United States v. Takhalov*, 838 F.3d 1168 (11th Cir. 2016) ("A jury cannot convict a defendant of wire fraud, then, based on misrepresentations amounting only to a deceit." (internal

quotation marks and citation omitted)).

While materiality is an element of the bank fraud offense under *Neder, see also United States v. Williams*, 390 F.3d 1319, 1324 (11th Cir. 2004) (same), the Supreme Court has held (pre-*Neder*) that materiality is *not* an element of the offense in a prosecution under 18 U.S.C. § 1014, a similar statute which prohibits making a false statement to a federally insured bank or designated financial institution. *United States v. Wells*, 519 U.S. 482 (1997).

**O53**
**Health Care Fraud**
**18 U.S.C. § 1347**

It's a Federal crime to knowingly and willfully execute, or attempt to execute, a scheme or artifice to defraud a health-care benefit program, or to get any of the money or property owned by, or under the custody or control of, a health-care benefit program by means of false or fraudulent pretenses, representations, or promises.

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

(1) the Defendant knowingly executed, or attempted to execute, a scheme or artifice to defraud a health-care benefit program, [or to obtain money or property owned by, or under the custody or control of, a health-care benefit program] by using false or fraudulent pretenses, representations, or promises;

(2) the health care benefit program affected interstate commerce;

(3) the false or fraudulent pretenses, representations, or promises related to a material fact;

(4) the Defendant acted willfully and intended to defraud; and

(5) the Defendant did so in connection with the delivery of or payment for health-care benefits, items, or services.

"Health-care benefit program" means any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity that is providing a medical benefit, item, or service for which payment may be made under the plan or contract.

A health care program affects interstate commerce if the health care program had any impact on the movement of any money, goods, services, or persons from one state to another [or between another country and the United States]. The Government need only prove that the health care program itself either engaged in interstate commerce or that its activity affected interstate commerce to any degree. The Government need not prove that [the] [a] Defendant engaged in interstate commerce or that the acts of [the] [a] Defendant affected interstate commerce.

A "scheme to defraud" includes any plan or course of action intended to deceive or cheat someone out of money or property by using false or fraudulent pretenses, representations, or promises relating to a material fact.

A statement or representation is "false" or "fraudulent" if it is about a material fact that the speaker knows is untrue or makes with reckless indifference as to the truth and makes with intent to defraud. A statement or representation may be "false" or "fraudulent" when it's a half truth or effectively conceals a material fact and is made with the intent to defraud.

A "material fact" is an important fact that a reasonable person would use to decide whether to do or not do something. A fact is "material" if it has the capacity or natural tendency to influence a person's decision. It doesn't matter whether the decision-maker actually relied on the statement or knew or should have known that the statement was false.

To act with "intent to defraud" means to do something with the specific intent to use false or fraudulent pretenses, representations, or promises to cause loss or injury. Proving intent to deceive alone, without the intent to cause loss or injury, is not sufficient to prove intent to defraud.

The Government doesn't have to prove all the details alleged in the indictment about the precise nature and purpose of the scheme. The Government also doesn't have to prove that the alleged scheme actually succeeded in defrauding anyone. What must be proved beyond a reasonable doubt is that the Defendant knowingly attempted or carried out a scheme substantially similar to the one alleged in the indictment.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1347 provides:

> Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice - -
>
> (1) to defraud any health-care benefit program; or
>
> (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health-care benefit program,
>
> in connection with the delivery of or payment for health-care benefits, items, or services, [shall be guilty of an offense against the United States].

Maximum Penalty: Ten (10) years' imprisonment and applicable fine. (If the violation results in serious bodily injury or death, twenty (20) years' or life imprisonment, respectively, and applicable fine.)

The Eleventh Circuit has stated that: "To prove health-care fraud under 18 U.S.C. §1347, the government must prove 'knowing and willful execution of or attempt to execute a scheme to defraud a health-care benefit program in connection with delivery of or payment for health-care." *United States v. Marti*, 294 F. App'x 439, 444 (11th Cir. 2008) (quoting *United States v. Mitchell*, 165 F. App'x 821, 824 (11th Cir. 2006). Thus, this instruction includes "willfully" to track the statute and circuit case law. The Committee believes the general definition of "willfully" in Basic Instruction 9.1A would usually apply to this crime.

The instruction makes clear that deception alone does not constitute a scheme to defraud; a defendant must intend to cause injury or loss. *See United States v. Takhalov*, 827 F.3d 1307, 1315 (11th Cir. 2016), altered in part on denial of rehearing by *United States v. Takhalov*, 838 F.3d 1168 (11th Cir. 2016) ("A jury cannot convict a defendant of wire fraud, then, based on misrepresentations amounting only to a deceit." (internal quotation marks and citation omitted)).

Affecting commerce is included as an element of this offense under the rationale of *United States v. Reddy*, 534 F. App'x 866, 877 (11th Cir. 2013). Other circuits have interpreted "affecting commerce" under § 24 as requiring an interstate commerce effect. *United States v. Klein*, 543 F.3d 206, 211 (5th Cir. 2008); *United States v. Lucien*, 2003 WL 22336124 (2d Cir. Oct. 14, 2003); *United States v. Whited*, 311 F.3d 259 (3d Cir. 2002). The cases draw this inference from the Hobbs Act context, which also uses the words "affect commerce." The Eleventh Circuit has reached the same result where "affecting commerce" is used in other contexts. *See United States v. Guerra*, 164 F.3d 1358 (11th Cir. 1999) (Hobbs Act).

The Eleventh Circuit has explained that the language "affecting commerce" when used in a statute has a specialized meaning. *United States v. Ballinger*, 395 F.3d 1218, 1231-32 (11th Cir. 2005). "The words 'affecting commerce,' as the Supreme Court has repeatedly explained, are 'words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power.'" *Id.* at 1232. For example, while the Hobbs Act by its terms prohibits any act that "in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion . . . ," "[t]he government needs only to establish a minimal effect on interstate commerce to support a violation." *United States v. Rodriguez*, 218 F.3d 1243, 1244 (11th Cir. 2000) (citing 18 U.S.C. § 1951(a); *Stirone v. United States*, 361 U.S. 212, 215 (1960)).

Materiality is included as an element of this offense under the rationale of *Neder v. United States*, 527 U.S. 1, 25 (1999).

**O53.2**
**Health Care Fraud**
**18 U.S.C. § 1518(a)**
**Obstruction of Criminal Investigations of Health Care Offenses**

It is a Federal crime to obstruct a criminal investigation of an offense involving health care. The Defendant can be found guilty of this offense only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant willfully [prevented] [obstructed] [misled] [or] [delayed] [or willfully attempted to] [prevent] [obstruct] [mislead] [or] [delay] the communication of [information] [or] [records] to a criminal investigator; and

(2) the [information] [or] [records] related to a violation of a Federal health care offense.

"Criminal investigator" means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations for prosecutions for violations of health care offenses. Special Agents of the [Federal Bureau of Investigation] [Health and Human Services Office of Inspector General] [Food & Drug Administration Office of Criminal Investigation] [Internal Revenue Service Criminal Investigation] [other federal agency] are "criminal investigators" as used in this section.

"Federal health care offense" means a violation of, or a criminal conspiracy to violate:

[18 U.S.C. § 287, prohibiting false, fictitious, or fraudulent claims, if the violation relates to a health care benefit program]

[18 U.S.C. § 371, prohibiting a conspiracy to commit an offense or defraud the United States, if the conspiracy relates to a health care benefit program]

[18 U.S.C. § 664, prohibiting theft or embezzlement from an employee benefit plan, if the violation relates to a health care benefit program]

[18 U.S.C. § 666, prohibiting theft or bribery concerning programs receiving Federal funds, if the violation relates to a health care benefit program]

[18 U.S.C. § 669, prohibiting theft or embezzlement in connection with health care]

[18 U.S.C. § 1001, prohibiting false statements or entries in any matter within the jurisdiction of the federal government, if the violation relates to a health care benefit program]

[18 U.S.C. § 1027, prohibiting false statements and concealment of facts in relation to documents required by the Employee Retirement Income Security Act of 1974 ("ERISA"), if the violation relates to a health care benefit program]

[18 U.S.C. § 1035, prohibiting false statements related to health care matters, if the violation relates to a health care benefit program]

[18 U.S.C. § 1341, prohibiting mail fraud, if the violation relates to a health care benefit program]

[18 U.S.C. § 1343, prohibiting wire fraud, if the violation relates to a health care benefit program]

[18 U.S.C. § 1347, prohibiting health care fraud]

[18 U.S.C. § 1349, prohibiting attempt or conspiracy to commit fraud, if the violation or conspiracy relates to a health care benefit program]

[18 U.S.C. § 1518, prohibiting obstruction of criminal investigations of health care offenses]

[18 U.S.C. § 1954, prohibiting offering, accepting, or soliciting money or things of value to influence an employee benefit plan, if the violation relates to a health care benefit program]

[21 U.S.C. § 331, prohibiting misbranded or adulterated foods, drugs, devices, tobacco products, or cosmetics, if the violation relates to a health care benefit program]

[29 U.S.C. § 1111, prohibiting convicted persons from holding certain positions for employee benefit plans, if the violation relates to a health care benefit program]

[29 U.S.C. 1131, prohibiting violations of ERISA, if the violation relates to a health care benefit program]

[29 U.S.C. § 1141, prohibiting coercive interference with ERISA participants or beneficiaries, if the violation relates to a health care benefit program]

[42 U.S.C. § 1320a-7b, prohibiting false statements and representations, illegal remunerations, and illegal patient admittance and retention practices involving federal health care programs].

"Health care benefit program" means any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity that is providing a medical benefit, item, or service for which payment may be made under the plan or contract.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1518(a) provides: "Whoever willfully prevents, obstructs, misleads, delays or attempts to prevent, obstruct, mislead, or delay the communication of information or records relating to a violation of a Federal health care offense to a criminal investigator shall be [guilty of an offense]."

Maximum Penalty: Five (5) years' imprisonment and applicable fine.

"Criminal investigator" is defined at 18 U.S.C. § 1518(b), which states: "As used in this section the term 'criminal investigator' means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations for prosecutions for violations of health care offenses."

"Federal health care offense" is defined in 18 U.S.C. § 24(a), which states:

> As used in this title, the term "Federal health care offense" means a violation of, or a criminal conspiracy to violate-
>
> (1) section 669, 1035, 1347, or 1518 of this title or section 1128B of the Social Security Act (42 U.S.C. 1320a-7b); or
>
> (2) section 287, 371, 664, 666, 1001, 1027, 1341, 1343, 1349, or 1954 of this title section 301 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 331), or section 501 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1131 ), or section 411, 518, or 511 of the Employee Retirement Income Security Act of 1974, if the violation or conspiracy relates to a health care benefit program.

For ease of reference, the statutes referenced in Section 24(a) have been placed in numerical order and sections 411 and 511 of the Employee Retirement Income Security Act of 1974 are referred to by their

U.S. Code Sections, that is, 29 U.S.C. §§ 1111 and 1141, respectively. Note that Section 24(a)'s reference to section 518 of the Employee Retirement Income Security Act of 1974 is a typographical error. Section 518 (29 U.S.C. § 1148) is not a criminal offense; it relates to regulatory deadlines during times of war.

18 U.S.C. § 24(b) further defines "health care benefit program."

> As used in this title, the term "health care benefit program" means any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract.

**O54**
**Conspiracy to Commit [Mail] Fraud**
**18 U.S.C. § 1349**

It's a Federal crime to knowingly and willfully conspire or agree with someone to do something that, if actually carried out, would result in the crime of mail fraud.

A "conspiracy" is an agreement by two or more persons to commit an unlawful act. In other words, it is a kind of partnership for criminal purposes. Every member of the conspiracy becomes the agent or partner of every other member.

The Government does not have to prove that all the people named in the indictment were members of the plan, or that those who were members made any kind of formal agreement. The heart of a conspiracy is the making of the unlawful plan itself, so the Government does not have to prove that the conspirators succeeded in carrying out the plan.

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

(1) two or more persons, in some way or manner, agreed to try to accomplish a common and unlawful plan to commit mail fraud, as charged in the indictment; and

(2) the Defendant knew the unlawful purpose of the plan and willfully joined in it;

A person may be a conspirator even without knowing all the details of the unlawful plan or the names and identities all of the other alleged conspirators.

If the Defendant played only a minor part in the plan but had a general understanding of the unlawful purpose of the plan – and willfully joined in the plan on at least one occasion – that's sufficient for you to find the Defendant guilty.

But simply being present at the scene of an event or merely associating with certain people and discussing common goals and interests doesn't establish proof of a conspiracy. Also, a person who doesn't know about a conspiracy but happens to act in a way that advances some purpose of one doesn't automatically become a conspirator.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1349 provides:

> Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Maximum penalty: As stated above.

Section 1349 applies to all fraud offenses in Chapter 63, i.e., Sections 1341 through 1348, So, a conspiracy could be charged with any of those substantive offenses as the underlying count. This instruction is thus intended to be modified to fit the specific underlying fraud alleged in the indictment, and it is in the same general form as the controlled substances conspiracy instruction for 21 U.S.C. § 846 and the money laundering conspiracy instruction for 18 U.S.C. 1956(h). No overt act is required by Section 1349, and Congress' omission of that requirement (which is specifically included in 18 U.S.C. § 371) has been held by both the Supreme Court and the Eleventh Circuit to mean that it has dispensed with such a requirement. *Cf. United States v. Shabani*, 513 U.S. 10, 12, 115 S. Ct. 382, 130 L. Ed. 2d 225 (1994); *United States v. Pistone*, 177 F.3d 957, 959-60 (11th Cir. 1999).

For a case involving conspiracy to defraud the United States arising under 18 U.S.C. § 371, *see United States v. Mendez*, 528 F.3d 811 (11th Cir. 2008).

**O55**
**Mailing Obscene Material**
**18 U.S.C. § 1461**

It's a Federal crime to use the United States mail to transmit obscene material.

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 sent or caused to be sent certain material using the United States mail;

(2) when the material was mailed, the Defendant knew the general nature of the material's content; and

(3) the material was legally obscene.

The Government doesn't have to prove that the Defendant knew the material was legally obscene. It only has to prove that the Defendant knew the general sexual nature of the material.

So if you find beyond a reasonable doubt that the Defendant sent the material in the mail and knew what it was, in other words, knew about the material's general sexual nature, and if you find that the material was legally obscene, as I'll shortly define that word for you, then you may find that the Defendant knew the material was obscene.

Freedom of expression is a constitutional right that is fundamental to our system, and we all enjoy it. It has contributed much to the development and well-

being of our free society. In exercising this right, sex may be portrayed and the subject of sex may be discussed freely and publicly. Material may not be condemned merely because it contains passages or sequences that describe or depict sexual activity. But the constitutional right to free expression doesn't extend to legally "obscene" material.

To prove beyond a reasonable doubt that material is "obscene," the Government must prove three things:

(1) that the material predominantly appeals to prurient interest;

(2) that it depicts or describes sexual conduct in a patently offensive way; and

(3) that it lacks serious literary, artistic, political, or scientific value.

First, you must view the material as a whole, keeping in mind the intended and probable audience, and decide whether the material's predominant theme or purpose is an appeal to the prurient interest of an average person of the community as a whole [or the prurient interest of members of a deviant sexual group, as the case may be].

An appeal to "prurient" interest is an appeal to a morbid, degrading, and unhealthy interest in sex, not just an ordinary interest.

Viewing the material as a whole for the "predominant theme or purpose of the material" means looking for the main or principal focus of the whole work

based on its total effect, not on the focus of incidental themes or isolated passages or sequences.

To decide whether the material appeals to a morbid, degrading, or unhealthy interest in sex of the "average person of the community as a whole," you must consider the contemporary community standards that would be applied by an average person with an ordinary attitude toward and interest in sex.

Contemporary community standards are set by the community as a whole; in other words, what society at large or people in general currently find acceptable or unacceptable.

So obscenity is not a matter of individual or personal taste or how the material strikes an individual juror – whether something is obscene or not depends on what the average person of the community as a whole would think of it.

[In addition to considering the viewpoint of a normal person, you can determine whether the material has prurient appeal by considering the sexual interest of a clearly defined deviant group, such as sadomasochists. You must find beyond a reasonable doubt that the material appeals to the prurient interest of such a group.]

Second, you must decide whether the material depicts or describes, in a patently offensive way, sexual conduct such as ultimate sexual acts or masturbation, excretory functions, or lewd exhibition of the genitals. But you must

not judge the material by your own standards. You must judge the material by contemporary community standards and decide whether the material is more than the generally accepted limits of public tolerance and is clearly offensive.

I emphasize that whether material appeals to a prurient interest or whether it is patently offensive must be judged by contemporary community standards, not by how the material affects you personally. You must consider the material in the same way that an average person in the community, with a normal attitude toward and interest in sex would consider it.

Contemporary community standards are those accepted by the community as a whole; in other words, what society at large or people in general will accept. It does not include what some groups in the community believe the community should accept or refuse to accept.

Third, you must decide whether the material lacks serious literary, artistic, political or scientific value. An item may portray explicit sexual conduct and still have serious value in one or more of these areas. You must decide whether the material in this case has such value. The ideas represented in a work do not need majority approval to be worthy of protection. So for this decision, you should <u>not</u> use contemporary community standards. Instead, you must objectively decide whether a reasonable person considering the material as a whole would find it has or does not have serious literary, artistic, political, or scientific value.

The Government must prove all three things before you can decide the material is obscene. If any one of those things is not proved, then the material is not obscene within the meaning of the law.

To use the mail is to act so that something will normally be sent through the mail in the normal course of business or reasonably foresee that the mail will be used.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1461 provides:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance…
>
> Is declared to be nonmailable matter and shall not be conveyed in the mails [and]…
>
> Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared… to be nonmailable [shall be guilty of an offense against the United States].

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

A Defendant charged under 18 U.S.C. § 1461 has the requisite *scienter* if the Defendant knows of the nature and character of the allegedly obscene material. *Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974). *See United States v. Johnson*, 855 F.2d 299, 306 (6th Cir. 1988); *United States v. Friedman*, 528 F.2d 784 (10th Cir. 1976) *vacated by*, 430 U.S. 925, 97 S. Ct. 1541, 51 L. Ed. 2d 769 (1977); *United States v. Grassi*, 602 F.2d 1192, 1195 n.3 (5th Cir. 1979); *United States v. Groner*, 494 F.2d 499 (5th Cir.), *cert. denied*, 419 U.S. 1010, 95 S. Ct. 331, 42 L. Ed. 2d 285 (1975). It is not necessary to prove that the Defendant knew the material was obscene under legal standards. *United States v. Schmeltzer*, 20 F.3d 610, 612 (5th Cir. 1994), *cert. denied*, 513 U.S. 1041, 115 S. Ct. 634, 130 L. Ed. 2d 540 (1994); *United States v. Hill*, 500 F.2d 733, 740 (5th Cir. 1974), *cert. denied*, 420 U.S. 952, 95 S. Ct. 1336, 43 L. Ed. 2d 430 (1975). The only questions as to intent are whether the Defendant knowingly used (or caused to be used) the mail for the transmission or delivery of the material, and whether the Defendant was aware of the nature of the material sent through the mail. *See*

*United States v. Shumway*, 911 F.2d 1528 (11th Cir. 1990); *Spillman v. United States*, 413 F.2d 527 (9th Cir. 1969). A specific intent to mail something known to be obscene is not required. *Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974).

The "statute's intent is to punish for the use of the mails, not the mere possession of obscene materials". Therefore, the prohibition in Section 1461 against knowingly using the mail for obscene materials applies to "persons who order obscene materials for personal use, and thus cause the mail to be used for delivery of those materials." *United States v. Carmack*, 910 F.2d 748 (11th Cir. 1990).

The three-part test used in this instruction for determining whether a matter is legally obscene is set forth in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). *See United States v. Bagnell*, 679 F.2d 826, 835-37 (11th Cir. 1982) (applying *Miller* test for obscenity), *cert. denied*, 460 U.S. 1047, 103 S. Ct. 1449, 75 L. Ed. 2d 803 (1983). Although the first two prongs of the *Miller* test are to be judged by the community standards, the third prong is to be objective - - a "reasonable person" standard. *See Pope v. Illinois*, 481 U.S. 497, 500-01, 107 S. Ct. 1918, 1921, 95 L. Ed. 2d 439 (1987).

**O56**
**Interstate Transportation of Obscene Material by Common Carrier**
**18 U.S.C. § 1462**

It's a Federal crime to use a common carrier to send obscene materials 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 used or caused to be used a common carrier to transport in interstate commerce certain materials described in the indictment;

(2) when the materials were transported, the Defendant knew the general sexual nature of the material's content; and

(3) the material was legally obscene.

A "common carrier" includes any person or corporation whose business is transporting goods and commodities for members of the public.

To send something in "interstate commerce" means to move it from one state into another state.

The Government doesn't have to prove that the Defendant knew the material was legally obscene. It only has to prove that the Defendant knew the general sexual nature of the material.

So if you find beyond a reasonable doubt that the Defendant sent the material by common carrier and knew what it was, in other words, knew about the

material's general sexual nature, and if you find that the material was legally obscene, as I'll shortly define that word for you, then you may find that the Defendant knew the material was obscene.

Freedom of expression is a constitutional right that is fundamental to our system, and we all enjoy it. It has contributed much to the development and well-being of our free society. In exercising this right, sex may be portrayed and the subject of sex may be discussed freely and publicly. Material may not be condemned merely because it contains passages or sequences that describe or depict sexual activity. But the constitutional right to free expression doesn't extend to legally obscene material.

To prove beyond a reasonable doubt that material is legally obscene, the Government must prove three things:

(1) that the material predominantly appeals to prurient interest;

(2) that it depicts or describes sexual conduct in a patently offensive way; and

(3) that it lacks serious literary, artistic, political, or scientific value.

First, you must view the material as a whole, keeping in mind the intended and probable audience, and decide whether the material's predominant theme or purpose is an appeal to the prurient interest of an average person of the community as a whole [or the prurient interest of members of a deviant sexual group, as the case may be].

An appeal to "prurient" interest is an appeal to a morbid, degrading, and unhealthy interest in sex, not just an ordinary interest.

Viewing the material as a whole for the "predominant theme or purpose of the material" means looking for the main or principal focus of the whole work based on its total effect, not on the focus of incidental themes or isolated passages or sequences.

To decide whether the material appeals to a morbid, degrading, or unhealthy interest in sex of the "average person of the community as a whole," you must consider the contemporary community standards that would be applied by an average person with an ordinary attitude toward and interest in sex.

Contemporary community standards are set by the community as a whole; in other words, what society at large or people in general currently find acceptable or unacceptable.

So obscenity is not a matter of individual or personal taste or how the material strikes an individual juror – whether something is obscene or not depends on what the average person of the community as a whole would think of it.

[In addition to considering the viewpoint of a normal person, you can determine whether the material has prurient appeal by considering the sexual interest of a clearly defined deviant group, such as sadomasochists. You must find

beyond a reasonable doubt that the material appeals to the prurient interest of such a group.]

Second, you must decide whether the material depicts or describes, in a patently offensive way, sexual conduct such as ultimate sexual acts or masturbation, excretory functions, or lewd exhibition of the genitals. But you must not judge the material by your own standards. You must judge the material by contemporary community standards and decide whether the material exceeds the generally accepted limits of public tolerance and is clearly offensive.

I emphasize that whether material appeals to a prurient interest or whether it is patently offensive must be judged by contemporary community standards, not by how the material affects you personally. You must consider the material in the same way that an average person in the community, with a normal attitude toward and interest in sex would consider it.

Contemporary community standards are those accepted by the community as a whole; in other words, what society at large or people in general will accept. It does not include what some groups in the community believe the community should accept or refuse to accept.

Third, you must decide whether the material lacks serious literary, artistic, political or scientific value. An item may portray explicit sexual conduct and still have serious value in one or more of these areas. You must decide whether the

material in this case has such value. The ideas represented in a work do not need majority approval to be worthy of protection.

So for this decision, you should not use contemporary community standards. Instead, you must objectively decide whether a reasonable person considering the material as a whole would find it has or does not have serious literary, artistic, political, or scientific value.

The Government must prove all three things before you can decide the material is obscene. If any one of those things is not proved, then the material is not obscene within the meaning of the law.

To "cause" the common carrier to be used is to do an act with knowledge that the use of the common carrier will follow in the ordinary course of business or where that use can reasonably be foreseen.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1462 provides:

> Whoever… knowingly uses any express company or other common carrier… for carriage in interstate… commerce - -
>
> > (a) any obscene… book, pamphlet, picture [or] motion-picture film [shall be guilty of an offense against the United States].

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

The *scienter* requirement for this offense is the same as for 18 U.S.C. § 1461: It is not necessary to prove that the Defendant knew the material was obscene under legal standards.

(See Annotations and Comments following Offense Instruction 55, *supra*.)

**O57**
**Interstate Transportation of Obscene Material**
**(for Purpose of Sale or Distribution)**
**18 U.S.C. § 1465**

It's a Federal crime to transport obscene materials in interstate commerce for the purpose of selling or distributing them.

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 transported the materials described in the indictment in interstate commerce;

(2) the Defendant transported the materials to sell or distribute them;

(3) when the materials were transported, the Defendant knew the general sexual nature of the material's content; and

(4) the material was legally obscene.

To move something in "interstate commerce" is to move it from one state into another state.

To transport material with "the purpose to sell or distribute" is to move the material with the intent to transfer the material to someone else, even if no money is involved.

[You may presume that the Defendant intended to sell or distribute the material if the material comprised two or more of any article of the kind described in the indictment; or a combined total of five publications or articles of the kind described in the indictment.

But that presumption may be overcome or outweighed by other evidence.]

The Government doesn't have to prove that the Defendant knew the material was legally obscene. It only has to prove that the Defendant knew the general sexual nature of the material.

So if you find beyond a reasonable doubt that the Defendant moved the material in interstate commerce and knew about the material's general sexual nature, and if you find that the material was legally obscene, as I'll shortly define that word for you, then you may find that the Defendant knew the material was obscene.

Freedom of expression is a constitutional right that is fundamental to our system, and we all enjoy it. It has contributed much to the development and well-being of our free society. In exercising this right, sex may be portrayed and the subject of sex may be discussed freely and publicly. Material may not be condemned merely because it contains passages or sequences that describe or depict sexual activity. But the constitutional right to free expression doesn't extend to legally obscene material.

To prove beyond a reasonable doubt that material is legally obscene, the Government must prove three things:

(1) that the material predominantly appeals to prurient interest;

(2) that it depicts or describes sexual conduct in a patently offensive way; and

(3) that it lacks serious literary, artistic, political, or scientific value.

First, you must view the material as a whole, keeping in mind the intended and probable audience, and decide whether the material's predominant theme or purpose is an appeal to the prurient interest of an average person of the community as a whole [or the prurient interest of members of a deviant sexual group, as the case may be].

An appeal to "prurient" interest is an appeal to a morbid, degrading, and unhealthy interest in sex, not just an ordinary interest.

Viewing the material as a whole for the "predominant theme or purpose of the material" means looking for the main or principal focus of the whole work based on its total effect, not on the focus of incidental themes or isolated passages or sequences.

To decide whether the material appeals to a morbid, degrading, or unhealthy interest in sex of the "average person of the community as a whole," you must consider the contemporary community standards that would be applied by an average person with an ordinary attitude toward and interest in sex.

Contemporary community standards are those accepted by the community as a whole; in other words, what society at large or people in general will accept. It does not include what some groups in the community believe the community should accept or refuse to accept.

But customs and standards change. So the community as a whole may decide to accept things that weren't acceptable before. What matters is what is acceptable now.

So obscenity is not a matter of individual or personal taste or how the material strikes an individual juror – whether something is obscene or not depends on what the average person of the community as a whole would think of it.

[In addition to considering the viewpoint of a normal person, you can determine whether the material has prurient appeal by considering the sexual interest of a clearly defined deviant group, such as sadomasochists. You must find beyond a reasonable doubt that the material appeals to the prurient interest of such a group.]

Second, you must decide whether the material depicts or describes, in a patently offensive way, sexual conduct such as ultimate sexual acts or masturbation, excretory functions, or lewd exhibition of the genitals. But you must not judge the material by your own standards. You must judge the material by contemporary community standards and decide whether the material exceeds the generally accepted limits of public tolerance and is clearly offensive.

I emphasize that whether material appeals to a prurient interest or whether it is patently offensive must be judged by contemporary community standards, not by how the material affects you personally. You must consider the material in the

same way that an average person in the community, with a normal attitude toward and interest in sex would consider it.

Contemporary community standards are those accepted by the community as a whole; in other words, what society at large or people in general will accept. It does not include what some groups in the community believe the community should accept or refuse to accept.

Third, you must decide whether the material lacks serious literary, artistic, political or scientific value. An item may portray explicit sexual conduct and still have serious value in one or more of these areas. You must decide whether the material in this case has such value. The ideas represented in a work do not need majority approval to be worthy of protection.

So for this decision, you should not use contemporary community standards. Instead, you must objectively decide whether a reasonable person considering the material as a whole would find it has or does not have serious literary, artistic, political, or scientific value.

The Government must prove all three things before you can decide the material is obscene. If any one of those things is not proved, then the material is not obscene within the meaning of the law.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1465 provides:

> …[W]hoever knowingly transports [in interstate commerce] for the purpose of sale or distribution of any obscene book, pamphlet, picture [or] film [shall be guilty of an offense against the United States].
>
> The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

Maximum Penalty: Five (5) years imprisonment and applicable fine.

The *scienter* requirement for this offense is the same as for 18 U.S.C. § 1461: It is not necessary to prove that the Defendant knew the material was obscene under legal standards.

(See Annotations and Comments following Offense Instruction 55, *supra*.)

**O58.1**
**Obstruction of Justice: Omnibus Clause**
**18 U.S.C. § 1503**

It's a Federal crime to try to influence, obstruct, or impede the due administration of justice [corruptly] [by threats or force] [by any threatening letter or communication].

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

(1) there was a proceeding before [this Court] [a United States Magistrate Judge of this Court] [a grand jury of this Court]; and

(2) the Defendant [by threats or force] [by a threatening letter or communication] knowingly tried to influence, obstruct, or impede the due administration of justice in that [judicial] [grand jury] proceeding.

**OR**

(2) the Defendant knowingly and corruptly tried to influence, obstruct, or impede the due administration of justice in that [judicial] [grand jury] proceeding.

To "influence, obstruct, or impede the due administration of justice" is to do something to sway or change or prevent any action likely to be taken in the [judicial] [grand jury] proceeding.

[To act "corruptly" means to act voluntarily, deliberately, and dishonestly with the specific intent to sway, change, or prevent some action likely to be taken in the [judicial] [grand jury] proceeding].

The Government does not have to prove that the [judicial] [grand jury] proceeding was in fact influenced or obstructed or impeded in any way. It only has to prove that the Defendant [corruptly] tried to influence, obstruct, or impede the due administration of justice [by threats of force] [by a threatening letter or communication], and that the natural and probable effect of the Defendant's acts would be to sway, change, or prevent some action likely to be taken in the [judicial] [grand jury] proceeding.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1503(a) provides (in the omnibus clause):

> Whoever… corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice [shall be guilty of an offense against the United States].

Maximum Penalty: In the case of a killing: Death or imprisonment for life if guilty of murder in the first degree; any term of years or for life if guilty of murder in the second degree; fifteen (15) years and/or a fine under Title 18 if guilty of voluntary manslaughter; or eight (8) years and/or a fine under Title 18 if guilty of involuntary manslaughter.

In the case of an attempted killing or if the offense was committed against a petit juror and in which a class A or B felony was charged: twenty (20) years, a fine under Title 18, or both.

In any other case: ten (10) years imprisonment and/or a fine under Title 18.

An obstruction of justice charge under the omnibus clause of § 1503 must relate to a specific judicial or grand jury proceeding - - the "nexus" requirement. *United States v. Aguilar*, 515 U.S. 593, 115 S. Ct. 2357 (1995). *See also United States v. Brenson*, 104 F.3d 1267 (11th Cir. 1997) (Hancock, District Judge, sitting by designation).

**O58.2**
**Corruptly Influencing a Juror**
**18 U.S.C. § 1503**

It's a Federal crime for anyone to corruptly try to influence, intimidate, or impede any [grand] [petit] juror in any Federal Court.

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

(1) the person described in the indictment was a [grand] [petit] juror in this Court;

(2) the Defendant tried to influence, intimidate or impede the juror in performing [his] [her] duties as a juror; [and]

(3) the Defendant acted knowingly and corruptly[.] [; and]

[(4) the petit juror served as such in this Court when it heard a [class A] [class B] felony criminal case.]

To try to "influence, obstruct, or impede" a [grand] [petit] juror is to take some action to try to sway the juror's decision or change how the jury performs or prevent the jury from performing at all. The Government does not have to prove that the Defendant succeeded in any way. The Government only has to prove that the Defendant tried to sway the juror or tried to change how the juror performed or tried to prevent the juror from performing at all.

To act "corruptly" is to act knowingly and dishonestly for a wrongful purpose with the specific intent to subvert or undermine the integrity of the court proceeding in which the juror served.

[A class A felony is any federal criminal offense punishable by life imprisonment.]

[A class B felony is any federal criminal offense punishable by up to 25 years.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1503(a) provides:

> Whoever corruptly… endeavors to influence, intimidate, or impede any grand or petit juror… in the discharge of his duty [shall be guilty of an offense against the United States].

Maximum Penalty: In the case of a killing: Death or imprisonment for life if guilty of murder in the first degree; any term of years or for life if guilty of murder in the second degree; fifteen (15) years and/or a fine under Title 18 if guilty of voluntary manslaughter; or eight (8) years and/or a fine under Title 18 if guilty of involuntary manslaughter.

In the case of an attempted killing or if the offense was committed against a petit juror and in which a class A or B felony was charged: twenty (20) years, a fine under Title 18, or both.

In any other case: ten (10) years imprisonment and/or a fine under Title 18.

The optional Fourth element is included in order to comply with *Apprendi v. New Jersey*, 530 U.S. 466 (2000) where the indictment alleges facts triggering the enhanced penalty under the statute.

Class A and class B felonies are defined in 18 U.S.C. § 3581.

**O58.3**
**Threatening a Juror**
**18 U.S.C. § 1503**

It's a Federal crime for anyone to try to influence, intimidate, or impede any [grand] [petit] juror in Federal Court using [threats or force] [any threatening letter or communication].

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

(1) the person described in the indictment was a [grand] [petit] juror in this Court;

(2) the Defendant tried to influence, intimidate, or impede the juror using [threats or force] [a threatening letter or communication]; [and]

(3) the Defendant did so knowingly[.] [; and]

[(4) the petit juror served in this Court when it heard a [class A] [class B] felony criminal case.]

To try to "influence, obstruct, or impede" a [grand] [petit] juror is to take some action to try and sway the juror's decision or change how the juror performs or prevent the juror from performing at all. The Government does not have to prove that the Defendant succeeded in any way. The Government only has to prove that the Defendant tried to sway the juror or tried to change how the juror performed or tried to prevent the juror from performing at all.

[A class A felony is any federal criminal offense punishable by life imprisonment.]

[A class B felony is any federal criminal offense punishable by up to 25 years.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1503(a) provides:

> Whoever… by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede, any grand or petit juror… in the discharge of his duty [shall be guilty of an offense against the United States].

Maximum Penalty: In the case of a killing: Death or imprisonment for life if guilty of murder in the first degree; any term of years or for life if guilty of murder in the second degree; fifteen (15) years and/or a fine under Title 18 if guilty of voluntary manslaughter; or eight (8) years and/or a fine under Title 18 if guilty of involuntary manslaughter.

In the case of an attempted killing or if the offense was committed against a petit juror and in which a class A or B felony was charged: twenty (20) years, a fine under Title 18, or both.

In any other case: ten (10) years imprisonment and/or a fine under Title 18.

The optional Fourth element is included in order to comply with *Apprendi v. New Jersey*, 530 U.S. 466 (2000) where the indictment alleges facts triggering the enhanced penalty under the statute.

Class A and class B felonies are defined in 18 U.S.C. § 3581.

**O59.1**
**Killing a Witness**
**18 U.S.C. § 1512(a)(1)(A)**

It's a Federal crime to kill or try to kill a witness to prevent the the witness from attending or testifying in any proceeding in this Court.

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

(1) the person described in the indictment was [a witness] [scheduled to be a witness] in this Court;

(2) the Defendant [killed] [tried to kill] the witness; and

(3) the Defendant acted knowingly with the intent to prevent the witness from attending or testifying at a proceeding in this Court.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1512(a)(1)(A) provides:

> Whoever kills or attempts to kill another person, with intent to - -
>
> > (A) prevent the attendance or testimony of any person in an official proceeding [shall be guilty of an offense against the United States].

Maximum Penalty: For a killing, the punishment provided in 18 U.S.C. 1111 and 1112. For an attempt to murder or the use or attempted use of physical force against any person, imprisonment for not more than thirty (30) years. For a threat of use of physical force against any person, imprisonment not more than twenty (20) years.

**O59.2**
**Tampering with a Witness**
**18 U.S.C. § 1512(b)(1)**

It's a Federal crime to [use intimidation] [use physical force] [threaten another person] with intent to [influence] [delay] [prevent] the testimony of a witness in any proceeding in this Court.

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

(1) the person described in the indictment was [a witness] [scheduled to be a witness] in this Court;

(2) the Defendant used [intimidation] [physical force] [threats] against that person; and

(3) the Defendant acted knowingly and intended to [influence] [delay] [prevent] the witness's testimony.

To "intimidate" someone is to intentionally say or do something that would cause an ordinary person to fear bodily harm. But the Government doesn't have to prove that the witness was actually frightened or that the Defendant's behavior was likely to cause terror, panic, or hysteria.

To act with intent to "influence" a witness's testimony means to try to get the witness to change or color or shade the witness's testimony in some way. But the Government doesn't have to prove that the witness's testimony was actually changed in any way.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1512(b)(1) provides:

> Whoever knowingly uses intimidation or physical force, or threatens… another person, or attempts to do so, … with intent to - -
>
> > (1) influence, delay, or prevent the testimony of any person in an official proceeding [shall be guilty of an offense against the United States].

Maximum Penalty: Twenty (20) years imprisonment, applicable fine, or both.

"Official proceeding" is defined in 18 U.S.C. § 1515(a)(1).

Pursuant to 18 U.S.C. § 1515(a)(6), the term "corruptly persuades" does not include conduct which would be misleading conduct but for a lack of a state of mind. In *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), the United States Supreme Court interpreted § 1512(b)(2) and stated that to constitute "corrupt persuasion," there must be proof that the defendant's conduct was wrongful, immoral, depraved or evil. The defendant must have also acted knowingly; that is, with awareness, understanding, or consciousness.

Additionally, the Court stated that there is a "nexus" requirement between the "persuasion" and a particular proceeding.

[While there is no pattern instruction for 18 U.S.C. § 1512(b)(3), it is important to note that the Eleventh Circuit has reiterated its holding that, unlike section 1512(b)(2), section (b)(3) does not require that a federal investigation be initiated or that an official proceeding be ongoing. *United States v. Ronda*, 455 F.3d 1273, 1288 (11th Cir. 2006). Thus, *Arthur Andersen* is irrelevant to section 1512(b)(3).]

In *United States v. Moody*, 977 F.2d 1420 (11th Cir. 1992), the Eleventh Circuit confirmed that witness tampering may also be prosecuted under section 1503.

**O60**
**False Statement in Application and Use of Passport**
**18 U.S.C. § 1542**

It's a Federal crime to knowingly and willfully make a false statement in an application for a United States passport.

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

(1) the Defendant made a false statement in an application for a United States passport;

(2) the Defendant made the statement intending to get a United States passport for [[his] [her] own use] [someone else's use];

(3) the Defendant acted knowingly and willfully[.] [and]

[(4) the Defendant did so [to facilitate an act of international terrorism] [to facilitate a drug-trafficking crime].]

A statement is false if it was untrue when made, and the person making it knows it is untrue.

[To "facilitate" an act simply means to help or further the accomplishment of that act.]

[An "act of international terrorism" means (1) a criminal act that is dangerous to human life, (2) appears to be intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by assassination or kidnapping, and (3) occurs outside the United States or transcends national boundaries in terms

of the means by which it is accomplished, the persons intended to be intimidated or coerced, or the locale in which the perpetrator operates or seeks asylum.]

[A "drug-trafficking crime" means any felony punishable under the Controlled Substances Act, 21 U.S.C. § 801 et seq.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1542 (first two paragraphs) provides:

> Whoever willfully and knowingly makes any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws; or
>
> Whoever willfully and knowingly uses or attempts to use, or furnishes to another for use any passport the issue of which was secured in any way by reason of any false statement

The optional Fourth element is included in order to comply with *Apprendi v. New Jersey*, 530 U.S. 466 (2000) where the indictment alleges facts triggering the enhanced penalty under the statute.

*See Browder v. United States*, 312 U.S. 335 (1941); *U.S. v. O'Bryant*, 775 F.2d 1528, 1535 (11th Cir. 1985) ("Section 1542 proscribes 'willfully and knowingly' making a false statement in a passport application. The crime is complete when one makes a statement one knows is untrue to procure a passport.")

**O60.1**
**Misuse of a Passport 18 U.S.C. § 1544**
**(First and Second Paragraphs)**

It's a federal crime to knowingly and willfully [use] [attempt to use] a passport issued or designed for the use of another [in violation of the conditions or restrictions contained in the passport] [in violation of the rules pursuant to the laws regulating the issuance of passports].

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

(1) the Defendant [used] [attempted to use] a passport;

(2) [the passport was issued or designed for the use of someone other than the defendant] [the use or attempted use violated the conditions or restrictions contained in the passport] [the use or attempted use violated the rules governing the issuance of passports];

(3) the Defendant acted knowingly and willfully[.] [and]

[(4) the Defendant did so [to facilitate an act of international terrorism] [to facilitate a drug-trafficking crime].]

> [To "facilitate" an act simply means to help or further the accomplishment of that act.]
>
> [An "act of international terrorism" means (1) a criminal act that is dangerous to human life, (2) appears to be intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by assassination or kidnapping, and (3) occurs outside the United States or transcends national boundaries in terms of the means by which it is accomplished, the persons intended to be intimidated or coerced, or the locale in which the perpetrator operates or seeks asylum.]

> [A "drug-trafficking crime" means any felony punishable under the Controlled Substances Act, 21 U.S.C. § 801 et seq., the Controlled Substances Import and Export Act, 21 U.S.C. 951 et seq., or chapter 705 of title 46 of the United States Code.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1544 provides:

> Whoever willfully and knowingly uses, or attempts to use, any passport issued or designed for the use of another; or
>
> Whoever willfully and knowingly uses or attempts to use any passport in violation of the conditions or restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports; or
>
> Whoever willfully and knowingly furnishes, disposes of, or delivers a passport to any person, for use by another than the person for whose use it was originally issued and designed . . . .

Maximum Penalty: Ten (10) years imprisonment, applicable fine, or both. If the offense was committed to facilitate a drug trafficking crime, twenty (20) years imprisonment, applicable fine, or both. If the offense was committed to facilitate an act of international terrorism, twenty-five (25) years imprisonment, applicable fine, or both.

The optional fourth element is included in order to comply with *Apprendi v. New Jersey*, 530 U.S. 466 (2000) where the indictment alleges facts triggering the enhanced penalty under the statute.

**O61**
**Possession or Use of False Visa**
**18 U.S.C. § 1546(a) (First Paragraph)**

It's a Federal crime to knowingly [possess] [use] a false or counterfeit visa or other document required [for entry into] [as evidence of an authorized stay or employment in] the United States.

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 [possessed] [used] [tried to use] a[n] [immigrant or nonimmigrant visa] [permit] [border-crossing card] [alien-registration receipt card] required [for entry into] [as evidence of an authorized stay or employment in] the United States, as charged; [and]

(2) The Defendant knew that the [immigrant or nonimmigrant visa] [permit] [border-crossing card] [alien-registration receipt card] [other document] [had been forged, counterfeited, altered, or falsely made] [had been procured by means of a false claim or statement][.] [; and]

[(3) intended to [help an act of international terrorism] [help commit a drug-trafficking crime].]

A "false document required to enter or stay in the United States" is an immigrant or nonimmigrant visa, permit, border-crossing card, or alien-registration receipt card – required for entry into or as evidence of an authorized stay or employment in the United States – that has been forged, counterfeited, altered, or falsely made.

To "use" a document is to show it to someone else.

[An "act of international terrorism" means a criminal act that's dangerous to human life and apparently intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of a government by assassination or kidnapping. The act must occur outside the United States or transcend national boundaries and affect the United States because of the way it's carried out, the people targeted, or the place where the perpetrator operates or seeks asylum.]

[A "drug-trafficking crime" means any felony punishable under the Controlled Substances Act, 21 U.S.C. § 801 et seq.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1546(a) (first paragraph) provides:

> Whoever knowingly… utters, uses [or] attempts to use… any [immigrant or nonimmigrant] visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement [shall be guilty of an offense against the United States].

Maximum Penalty: Twenty-Five (25) years imprisonment and applicable fine if committed to facilitate international terrorism; twenty (20) years imprisonment and applicable fine if committed to facilitate a drug trafficking crime; ten (10) years and applicable fine for first or second offense.

The optional Third element is included in order to comply with Apprendi where the indictment alleges facts triggering the enhanced penalty under the statute.

The definition of "act of international terrorism" is taken from 18 U.S.C. § 2331.

The definition of "drug trafficking crime" is taken from 18 U.S.C. § 929.

**O62**
**Involuntary Servitude and Peonage**
**18 U.S.C. §§ 1581 and 1584**

It's a Federal crime to wilfully hold another person in involuntary servitude.

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

(1) the Defendant kept [person's name] in a condition of involuntary servitude;

(2) Defendant kept that person for a substantial or significant amount of time; [and]

(3) the Defendant acted knowingly and willfully[.] [; and]

[(4) the Defendant compelled the involuntary servitude in order to satisfy a real or imagined debt.]

"Involuntary servitude" means forced or compulsory labor or service for someone else's benefit that a person unwillingly performs because of the use or threat of coercion through law or the legal process, or because of the use or threat of physical restraint or physical injury.

It makes no difference whether the person initially voluntarily agreed to perform the work or service. And it doesn't matter whether a person is paid a salary or a wage. What matters is whether the person did the work willingly at all times. If a person begins work willingly and later wants to stop but is forced to continue because another person uses or threatens to use some kind of coercion or restraint or cause physical injury, the service becomes involuntary.

So even if the person is paid, the service is involuntary if the person is forced to work against the person's will by the use of threats or coercion.

But the Government must prove that the Defendant knowingly and willfully used or threatened to use coercion and caused the person to reasonably believe that there was no way to avoid continuing to work.

Legally, servitude becomes involuntary when coercion is sufficient to completely overcome the will of an ordinary person who has the same general station in life as the victim and causes the victim to believe that there is no reasonable means of escape and no choice but to continue working for the Defendant.

To decide whether a person reasonably believed there was no way to avoid continued service, you must consider:

- the method or form of coercion threatened or used in relation to the person's particular circumstances and conditions;
- the person's physical and mental condition;
- the person's age, education, training, experience, and intelligence; and
- any reasonable means or chances the person may have had to escape.

The Government must also prove that the person was forced to work for some significant or substantial amount of time. It doesn't have to be a specific length of time, just some length that is more than trivial.

## ANNOTATIONS AND COMMENTS

18 U.S.C. §§ 1581 and 1584 provide:

> Whoever holds or returns any person to a condition of peonage [shall be guilty of an offense against the United States]. (§ 1581)
>
> Whoever knowingly and willfully holds to involuntary servitude… any other person for any term [shall be guilty of an offense against the United States]. (§ 1584)

Maximum Penalty: Twenty (20) years imprisonment, a fine under Title 18, or both (as to each section). If the offense results in death or involves kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, the penalty is enhanced to life imprisonment under both sections.

The reference to compulsion "by the use or threatened use of physical or legal coercion" incorporates the United States Supreme Court's holding in *United States v. Kozminski*, 487 U.S. 931 (1988).

The committee believes that the general definition of "willfully" in Basic Instruction 9.1A would usually apply to this crime.

If the indictment alleges one of the factors that would enhance the possible maximum punishment applicable to the offense, that factor should be stated as an additional element in the instructions under the principle of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In such case it may also be appropriate to give a lesser included offense instruction, Special Instruction 10.

**O63**
**Sex Trafficking of Children or by Force, Fraud, or Coercion**
**18 U.S.C. § 1591(a)(1)**

It's a Federal crime for anyone, in or affecting commerce, to [recruit] [entice] [harbor] [transport] [provide] [obtain] or [maintain] by any means a person, knowing or in reckless disregard of the fact that [means of force, threats of force, fraud, or coercion will be used to cause the person to engage in a commercial sex act] [the person has not attained the age of 18 years and will be caused to engage in a commercial sex act].

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 [recruited] [enticed] [harbored] [transported] [provided] [obtained] or [maintained] by any means [individual named in the indictment];

(2) that the Defendant did so knowing or in reckless disregard of the fact that [means of force, threats of force, fraud, coercion, or any combination of such means would be used to cause the person to engage in a commercial sex act] [the person had not attained the age of 18 years and would be caused to engage in a commercial sex act]; and

(3) that the Defendant's acts were in or affected [interstate] [foreign] commerce.

"Commercial sex act" means any sex act, on account of which anything of value is given to or received by any person.

In determining whether the Defendant's conduct was "in or affected interstate or foreign commerce," you may consider whether the Defendant used means or facilities of interstate commerce, such as telephones, the internet, or hotels that serviced interstate travelers, or whether his conduct substantially affected interstate commerce by virtue of the fact that he purchased items that had moved in interstate commerce.

[If the Government proves beyond a reasonable doubt that the defendant had a reasonable opportunity to observe the person recruited, enticed, harbored, transported, provided, obtained, or maintained, then the Government does not have to prove that the defendant knew that the person had not attained the age of 18 years.]

["Coercion" means:

(a) threats of serious harm to or physical restraint against any person;

(b) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(c) the abuse or threatened abuse of law or the legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.]

["Serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious,

under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1591(a) provides:

> Whoever knowingly - (1) In or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person; … knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

Maximum Penalty: Life imprisonment and applicable fine. Minimum sentence is fifteen (15) years imprisonment and applicable fine if offense involves a child under age of 14 or force, fraud, or coercion. Minimum sentence is ten (10) years imprisonment and applicable fine if offense involves a child between the ages of 15 and 17. 18 U.S.C. § 3559 provides for a mandatory life sentence for repeated sex offenses against children.

18 U.S.C. § 2260A provides for an enhanced sentence for persons required to register as sex offenders. 18 U.S.C. § 3559 provides for mandatory life imprisonment for repeated sex offenses against children.

18 U.S.C. § 1594(a) provides that whoever attempts to violate Section 1591 shall be punishable in the same manner as a completed violation of that section. 18 U.S.C. § 1594 (c) provides that whoever conspires with another to violate Section 1591 shall be fined or sentenced to a term of imprisonment of any term of years or for life.

18 U.S.C. § 1591(c) states: "In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained or maintained, the Government need not prove that the defendant knew that the person had not attained the age of 18 years."

The term "coercion" is defined at 18 U.S.C. § 1591(e)(2).

*See United States v Roberts*, 174 Fed. Appx. 475, 478-79 (11th Cir. 2006) (sufficient evidence that defendant's activities were "in or affecting interstate commerce" based upon defendant's use of a credit card to pay for his trip with the travel agency, his decision to meet the prostitutes at a hotel that served interstate travelers, and the fact that the prostitutes were supposed to move in international commerce).

*See United States v. Strevell*, 185 Fed. Appx. 841, 845 (11th Cir. 2006) (sufficient evidence that defendant's activities were "in or affecting interstate and foreign commerce" based upon defendant's use of two means of interstate commerce in attempting to obtain and entice a minor for sex: "[h]e made numerous phone calls from Philadelphia to Miami to order to arrange his sexual encounter in Costa Rica [and]… he attempted to board a plane from Miami to Costa Rica in order to meet one, if not two, 14-year-old prostitutes.").

*See United States v. Evans*, 476 F.3d 1176, 1179 (11th Cir. 2007) (the defendant's "conduct substantially affected interstate commerce" based on his "use of hotels that served interstate travelers and distribution of condoms that traveled in interstate commerce").

**O64**
**False Declaration Before a Grand Jury**
**18 U.S.C. § 1623(a)**

It's a Federal crime [to make a false statement under oath] [to use a false document] while appearing as a witness before a Federal grand jury.

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

(1) the Defendant [gave testimony] [used the described record or document] while under oath as a witness before a Grand Jury of this Court;

(2) the [testimony] [record or document] was false in one or more of the ways charged and concerned some material matter in the Grand Jury proceedings; and

(3) the Defendant knew that [the testimony was false] [record or document was false] when it was [made] [used].

[Testimony is false if the person giving it knows it is untrue when given.]

[A statement contained within a document is false if it is untrue when the document is used and the person using it knows it is untrue.]

[Making a false statement] [Using a false document] isn't a crime unless the falsity concerns a material fact.

A "material fact" is an important fact – not some unimportant or trivial detail. It must have the capacity or natural tendency to influence the Grand Jury's decision-making process or otherwise disrupt or impair the Grand Jury's functioning.

But the Government doesn't have to prove that the Grand Jury was actually misled or influenced in any way by the false [statement] [record or document].

You must consider the allegedly false [testimony] [record or document] in the context of the series of questions asked and answers given. The words used should be given their common and ordinary meaning unless the context clearly shows that both the questioner and the witness understood that a word or phrase had a different meaning.

If a particular question could be understood in two different but reasonable ways, and that the Defendant truthfully answered the question in one of those ways, then the answer wouldn't be false. Similarly, if the question was clear, but the answer could be understood in two different but reasonable ways, and at least one way would be truthful, then the answer wouldn't be false.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1623(a) provides:

> Whoever under oath… in any proceeding before [any] grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment, applicable fine, or both.

The materiality instruction is required by *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995) and *United States v. Kramer*, 73 F.3d 1067, 1074 (11th Cir. 1996).

**O65**
**Obstruction of Correspondence – Taking of Mail**
**18 U.S.C. § 1702**

It's a Federal crime for anyone to obstruct the delivery of mail by taking or removing it from the United States mail.

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 took mail [out of a post-office] [out of an authorized depository for mail matter] [from a letter or mail carrier] [that had been in the custody of any letter or mail carrier] before it was delivered to the person to whom it was addressed; and

(2) the Defendant acted knowingly and intended to obstruct delivery.

Mail is in the United States mail if it's in a post-office, in an authorized depository, with a mail carrier, or if it has been in the custody of a mail carrier.

A private mail box or receptacle is an "authorized depository for mail matter." Mail hasn't been delivered until it has been taken from the depository by the addressee or someone acting for the addressee.

To "obstruct delivery" is to take mail to prevent it from being delivered to the addressee.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1702 provides:

> Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which

has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment, applicable fine, or both.

**O66.1**
**Theft of Mail**
**18 U.S.C. § 1708**
**(First Paragraph)**

It's a Federal crime to steal mail from the United States mail.

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

(1) the [letter] [package] [mail matter] described in the indictment was [in the United States mail] [in a post-office or post-office station] [in a letter box] [in a mail receptacle] [in a mail route] [in an authorized depository for mail matter] [with a letter or mail carrier]; and

(2) the Defendant knowingly stole the mail.

Mail is in the United States mail if it's in a post-office, in an authorized depository, with a mail carrier, or if it has been placed in the custody of a mail carrier.

A private mail box or mail receptacle is an "authorized depository for mail matter." Mail hasn't been delivered until it has been taken from the depository by the addressee or someone acting for the addressee.

The word "steal" includes any act by which a person purposely takes property belonging to someone else without the owner's permission and with the intent to keep the property for that person's own use or for any person other than the true owner.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1708 (first paragraph) provides:

> Whoever steals, takes, or abstracts… from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment, applicable fine, or both.

**O66.2**
**Possession of Stolen Mail**
**18 U.S.C. § 1708**
**(Third Paragraph)**

It's a Federal crime to possess stolen mail while knowing it is stolen.

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

(1) the [letter] [mail matter] described in the indictment was stolen from [the United States mail] [a post-office or post-office station] [a letter box] [a mail receptacle] [a mail route] [an authorized depository for mail matter] [a letter or mail carrier];

(2) the Defendant possessed the [letter] [mail matter] after it was stolen; and

(3) the Defendant knew that the [letter] [mail matter] was stolen.

Mail is in the United States mail if it's in a post-office, an authorized depository, with a mail carrier, or if it has been in the custody of a mail carrier.

A private mail box or mail receptacle is an "authorized depository for mail." Mail hasn't been delivered until it has been taken from the depository by the addressee or a person acting on behalf of the addressee.

Mail matter is "stolen" when it has been purposefully taken from [the United States mail] [a post-office or post-office station] [a letter box] [a mail receptacle] [a mail route] [an authorized depository for mail matter] [a letter or mail carrier] without permission and when the person taking the mail intends to keep it for that person's own use or for any other person other than the mail's addressee.

The heart of the crime is the intentional possession of stolen mail. The Government doesn't have to prove who stole the mail. It also doesn't have to prove whether the Defendant knew that the mail was stolen before it was delivered to the addressee. The Government only has to prove that the Defendant possessed the mail and knew it was stolen.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1708 (third paragraph) provides:

> Whoever… unlawfully has in his possession, any letter… or mail, or any article or thing contained therein, which has been… stolen, taken, embezzled, or abstracted [from or out of any mail, post office or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier], knowing the same to have been stolen, taken, embezzled or abstracted [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5)years imprisonment, applicable fine, or both.

*United States v. Hall*, 632 F.2d 500 (5th Cir. 1980), the Government does not have to prove that the Defendant knew the mail matter had been stolen from the mail, only that it had been stolen.

**O67**
**Theft of Mail Matter by Postal Service Employee**
**18 U.S.C. § 1709**

It's a Federal crime for any Postal Service employee to embezzle any mail.

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 Postal Service employee at the time stated in the indictment;

(2) the Defendant was entrusted with, or came into possession of, the mail matter described in the indictment, and that matter was intended to be conveyed by the United States mail; and

(3) the Defendant knowingly embezzled the mail matter.

Mail matter is "intended to be conveyed by mail" if a reasonable person who saw the item would think it was something intended to be delivered through the mail.

[It doesn't matter if the item was a "decoy" that wasn't actually meant to go anywhere as long as a reasonable person who saw the item would think it was something intended to be delivered through the mail.]

To "embezzle" means to wrongfully take someone else's property after lawfully taking possession or control of it.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1709 provides:

Whoever, being a Postal Service officer or employee, embezzles any letter, postal card, package, bag, or mail, or any article or thing contained therein entrusted to him or which comes into his possession intended to be conveyed by mail [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5)years imprisonment, applicable fine, or both.

# O68.1
# Providing Contraband to a Federal Prisoner
# 18 U.S.C. § 1791(a)(1)

It's a Federal crime to knowingly provide a prohibited object to a Federal prisoner.

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

(1) [inmate's name] was an inmate of a Federal prison or correctional facility at the time stated in the indictment;

(2) the Defendant knowingly provided or attempted to provide a prohibited object to [inmate's name]; and

(3) providing or attempting to provide the object to [inmate's name] violated [a statute] [a rule or order issued under a statute].

To "provide" an object to a person is to knowingly deliver or transfer the object to another person directly or by indirect means.

A "prohibited object" is [describe the object as enumerated in subsection (d)(1) of the statute].

The knowing transfer, delivery, or provision of [describe the object as enumerated in subsection (d)(1) of the statute] to a Federal prisoner at the time stated in the indictment would have violated [a statute] [a rule or order issued under a statute].

**ANNOTATIONS AND COMMENTS**

(*See* Annotations and Comments following Offense Instruction 68.2, *infra*.)

Maximum Penalty: Imprisonment, a fine, or both. The length of imprisonment depends on the nature of the "prohibited conduct." Twenty (20) years imprisonment is the maximum length of time and results from a conviction of the statute if the object is a narcotic drug, methamphetamine, its salts, isomers, and salts of its isomers, lysergic acid diethylamide, or phencyclidine.

If the violation involves a controlled substance, the punishment imposed must be consecutive to any other sentence imposed by the court for an offense involving such a controlled substance. In the case of such a violation by an inmate, punishment imposed must be consecutive to the sentence being served by the inmate at the time of the violation.

The term "prison" means a Federal correctional, detention, or penal facility or any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the Attorney General. 18 U.S.C. § 1791(d)(4).

[Note: As amended Jan. 5, 2006.]

# O68.2
# Possession of Contraband by a Federal Prisoner
# 18 U.S.C. § 1791(a)(2)

It's a Federal crime for a Federal prisoner to knowingly [make] [possess] [get] certain forbidden objects.

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 inmate of a Federal prison or correctional facility at the time stated in the indictment;

(2) at the time, the Defendant knowingly [made] [possessed] [acquired] the object described in the indictment; and

(3) the object was a forbidden object.

A "forbidden object" is [describe the relevant object as enumerated in subsection (d)(1) of the statute].

## ANNOTATIONS AND COMMENTS

18 U.S.C. § 1791 provides:

> (a) Offense. - - Whoever - -
>
> (1) in violation of a statute or a rule or order issued under a statute, provides to an inmate of a prison a prohibited object, or attempts to do so; or
>
> (2) being an inmate of a prison, makes, possesses, or obtains, or attempts to make or obtain, a prohibited object [shall be guilty of an offense against the United States].
>
> * * * * *
>
> (d) Definitions. - - As used in this section - -

(1) the term "prohibited object" means - -

(A) a firearm or destructive device or a controlled substance in schedule I or II, other than marijuana or a controlled substance referred to in subparagraph (C) of this subsection;

(B) marijuana or a controlled substance in schedule III, other than a controlled substance referred to in subparagraph (C) of this subsection, ammunition, a weapon (other than a firearm or destructive device), or an object that is designed or intended to be used as a weapon or to facilitate escape from a prison;

(C) a narcotic drug, methamphetamine, its salts, isomers, and salts of its isomers, lysergic acid diethylamide, or phencyclidine;

(D) a controlled substance (other than a controlled substance referred to in subparagraph (A), (B), or (C) of this subsection) or an alcoholic beverage;

(E) any United States or foreign currency; and

(F) any other object that threatens the order, discipline, or security of a prison, or the life, health, or safety of an individual.

Maximum Penalty: Imprisonment, a fine, or both. The length of imprisonment depends on the nature of the "prohibited conduct." Twenty (20) years imprisonment is the maximum length of time and results from a conviction of the statute if the object is a narcotic drug, methamphetamine, its salts, isomers, and salts of its isomers, lysergic acid diethylamide, or phencyclidine.

If the violation involves a controlled substance, the punishment imposed must be consecutive to any other sentence imposed by the court for an offense involving such a controlled substance. In the case of such a violation by an inmate, punishment imposed must be consecutive to the sentence being served by the inmate at the time of the violation.

The term "prison" means a Federal correctional, detention, or penal facility or any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the Attorney General. 18 U.S.C. § 1791(d)(4).

[Note: As amended Jan. 5, 2006.]

In *United States v. Allen*, 190 F.3d 1208 (11th Cir. 1999), the Court held that where the indictment alleged that the "prohibited object" was "an object that is designed or intended to be used as a weapon" as proscribed by § 1791(d)(1)(B), rather than simply alleging possession of "a weapon," the requisite intent was an essential element of the offense to be submitted to the jury.

In *United States v. Gonzalez*, 244 Fed. Appx. 316 (11th Cir. 2007), the Court, in an unpublished opinion, held that a defendant may be indicted and convicted under both subsection 1791(a)(1) and subsection 1791(a)(2).

**O69**
**False Statement Regarding Federal Workers'**
**Compensation Benefits**
**18 U.S.C. § 1920**

It's a Federal crime to knowingly and willfully make a false statement in connection with an application for, or receipt of, Federal Workers' Compensation Benefits.

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 made a false statement or report to the Department of Labor, Office of Workers' Compensation Programs;

(2) the false statement or report was made in connection with an application for or receipt of Federal Workers' Compensation benefits; and

(3) the false statement or report related to a material fact.

A statement or report is "false" if it is untrue when made and the person making it knows it is untrue.

A "material fact" is an important fact, not some unimportant or trivial detail, that could influence a decision of the Department of Labor, Office of Workers' Compensation Programs.

The heart of the crime is attempting to influence the Office of Workers' Compensation Programs by willfully making a false statement or report concerning

a material fact. The Government does not have to prove that anyone was actually influenced or misled.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1920 provides:

> Whoever knowingly and willfully falsifies, conceals, or covers up a material fact, or makes a false, fictitious, or fraudulent statement or representation, or makes or uses a false statement or report knowing the same to contain any false, fictitious, or fraudulent statement or entry in connection with the application for or receipt of compensation or other benefit, or payment under subchapter I or III of chapter 81 of title 5 [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5)years imprisonment and applicable fine.

The materiality instruction is required by *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 444 (1995),

The committee believes that the general definition of "willfully" in Basic Instruction 9.1A would usually apply to this crime.

**O70.1**
**Interference with Commerce by Extortion**
**Hobbs Act: Racketeering**
**(Force or Threats of Force)**
**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; 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 part of income or wealth.

"Extortion" means obtaining property from a person who consents to give it up because of the wrongful use of actual or threatened force, violence, or fear.

"Fear" means a state of anxious concern, alarm, or anticipation of harm. It includes the fear of financial loss as well as fear of physical violence.

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

> 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].

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

In *United States v. Blanton*, 793 F.2d 1553 (11th Cir. 1986), the Eleventh Circuit upheld the District Court's refusal to instruct the jury that the Defendant must cause or threaten to cause the force, violence or fear to occur. The Court explained that the Defendant need only be aware of the victim's fear and intentionally exploit that fear to the Defendant's own possible advantage.

In *United States v. Kaplan*, 171 F.3d 1351, 1356-58 (11th Cir. 1999), the Eleventh Circuit held that under § 1951 the effect 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 Fed. Appx. 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.

**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.

**O70.3**
**Interference with Commerce by Robbery**
**Hobbs Act – Racketeering**
**(Robbery)**
**18 U.S.C. § 1951(a)**

It's a Federal crime to acquire someone else's property by robbery 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 knowingly acquired someone else's personal property;

(2) the Defendant took the property against the victim's will, by using actual or threatened force, or violence, or causing the victim to fear harm, either immediately or in the future; and

(3) the Defendant's actions obstructed, delayed, or affected interstate commerce.

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

"Fear" means a state of anxious concern, alarm, or anticipation of harm. It includes the fear of financial loss as well as fear of physical violence.

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

The Government doesn't have to prove that the Defendant specifically intended to affect interstate commerce. 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:

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

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

In *United States v. Thomas*, 8 F.3d 1552, 1562-63 (11th Cir. 1993), the Eleventh Circuit suggested that the Government need not prove specific intent in order to secure a conviction for Hobbs Act robbery. See also *United States v. Gray*, 260 F.3d 1267, 1283 (11th Cir. 2001) (noting that the Court in *Thomas* suggested that specific intent is not an element under § 1951).

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 Fed. Appx. 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.

**O71**
**Interstate Travel in Aid of Racketeering**
**18 U.S.C. § 1952(a)(3)**

It's a Federal crime for anyone to travel in [interstate] [foreign] commerce in order to carry on certain unlawful activities.

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

(1) the Defendant traveled in [interstate] [foreign] commerce on or about the dates and between the places described in the indictment;

(2) the Defendant traveled with the specific intent to promote, manage, establish or carry on an unlawful activity; and

(3) while traveling, the Defendant knowingly committed an act to promote, manage, establish, or carry on an unlawful activity.

[The term "interstate commerce" means travel, transportation, or movement between one state and another state.]

[The term "foreign commerce" means travel, transportation, or movement between some place within the United States and some place outside the United States.]

The Government must prove that the Defendant traveled in [interstate commerce] [foreign commerce] and specifically intended to promote, manage, establish, or carry on an unlawful activity. But the Government does not have to

prove that the unlawful activity was the only or even primary reason the Defendant traveled.

"Unlawful activity" includes any business enterprise involving [describe the unlawful activity, e.g., gambling that violates a state law where it takes place].

[Under [state's name] law [quote description of unlawful conduct] is unlawful.]

A "business enterprise" is a continuous course of conduct or series of transactions to make a profit, not a casual, sporadic, or isolated activity. For this crime, the term includes illegal activities. It doesn't matter whether the illegal activity lasted for a particular length of time or was or was not the Defendant's primary occupation. What the Government must prove beyond a reasonable doubt is that the Defendant was involved in a business enterprise, as just defined, rather than casual, sporadic, or isolated activities.

The crime charged is traveling in [interstate commerce] [foreign commerce] with the intent to promote, manage, establish, and carry on an unlawful activity. The statute lists various ways or methods that violate the law. So if you find beyond a reasonable doubt that any one method or way of violating the law occurred, that's sufficient. But you must all agree on the particular way involved.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1952(a)(3) provides:

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to - - (3)… promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraph… (3) [shall be guilty of an offense against the United States].

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which they are committed or of the United States, or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title…

Maximum Penalty: Five (5)years imprisonment and applicable fine.

A conviction under this statute does not require the Government to prove that the Defendant knew or intended that interstate facilities be used in the commission of the offense. *See United States v. Broadwell*, 870 F.2d 594 (11th Cir. 1989).

**O72**
**Interstate Transportation of Wagering Paraphernalia**
**(Bookmaking)**
**18 U.S.C. § 1953**

It's a Federal crime to carry or send bookmaking materials 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 carried, sent, or caused to be sent in interstate commerce the items described in the indictment;

(2) the items carried or sent were used or intended to be used in "bookmaking"; and

(3) the Defendant acted knowingly.

"Interstate commerce" means business, trade, or movement between one state and another. It includes travel, trade, transportation, and communication between states, including the mail.

"Bookmaking" means the business of setting terms or conditions, usually called a "line" or "odds," on the outcome of a specified event and accepting bets from customers in order to make a profit. The profit does not come from the bets themselves but from an additional payment, sometimes called a "percentage" or "commission," collected from the customers who place bets. In short, bookmaking is a gambling business.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1953 provides:

> Whoever… knowingly carries or sends in interstate… commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing or other device used, or to be used,… in bookmaking [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and applicable fine.

**O73**
**Illegal Gambling Business**
**18 U.S.C. § 1955**

It's a Federal crime to conduct an illegal gambling business.

An "illegal gambling business" is a gambling business that:

(1) violates the law of the state where the business operates; and

(2) involves five or more people who conduct, finance, manage, supervise, direct, or own all or part of the business; and

(3) has been or remains in substantially continuous operation for at least 30 days or has gross revenue of at least $2,000 in any single day.

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

(1) At least five people, including the Defendant, knowingly conducted, financed, managed, supervised, directed, or owned all or part of a gambling business;

(2) the gambling business violated the laws of [name of state]; and

(3) the gambling business was in substantially continuous operation for at least 30 days or had gross revenue of at least $2,000 on any one day.

"Bookmaking" means the business of setting terms or conditions, usually called a "line" or "odds," on the outcome of a specified event and accepting bets from customers in order to make a profit. The profit does not come from the bets themselves but from an additional payment, sometimes called a "percentage" or

"commission," collected from the customers who place bets. In short, bookmaking is a gambling business.

You are instructed that bookmaking is unlawful in the state of [state name].

To "conduct a business" is to work for the business, especially as an employee of the business, with or without a voice in management or a share in the profits. But a customer who merely places a bet does not participate in the conduct of the business.

The Government must prove that at least five people conducted, financed, or supervised an illegal gambling business that was in substantially continuous operation for at least 30 days, or had gross revenue of at least $2,000 on any single day.

But it doesn't matter whether five or more people have been charged with a crime; nor whether those same five or more people – including the Defendant – conducted, financed, or owned the business. It doesn't matter whether the Defendant even knew the identities of others involved in the business. And it doesn't matter whether bets were accepted every day over a 30-day period; nor whether accepting bets was the Defendant's primary business or employment.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1955 provides:

> Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and applicable fine.

For purposes of the statute, one "conducts" an illegal gambling business by performing any necessary function in the gambling operation, other than that of mere bettor. Thus, a Defendant's proposed instruction that "[a] person who took bets on five or six occasions over a year's time could not be considered [a] participant in conduct[ing] [a] gambling business" was properly refused where the evidence established that the Defendant, in addition to taking bets, collected gambling debts and forwarded them to another participant. *United States v. Miller*, 22 F.3d 1075 (11th Cir. 1994).

*See United States v. Herring*, 955 F.2d 703 (11th Cir. 1992) (discussing "layoff bets").

**O74.1**
**Money Laundering:**
**Promoting Unlawful Activity**
**18 U.S.C. § 1956(a)(1)(A)(i)**

It's a Federal crime to knowingly engage in certain kinds of financial transactions commonly known as money laundering.

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 conducted or tried to conduct, a financial transaction;

(2) the Defendant knew that the money or property involved in the transaction were the proceeds of some kind of unlawful activity;

(3) the money or property did come from an unlawful activity, specifically [describe the specified unlawful activity alleged in the indictment]; and

(4) the Defendant was involved in the financial transaction with the intent to promote the carrying on of that specified unlawful activity.

To "conduct a transaction" means to start or finish a transaction, or to participate in a transaction at any point.

A "transaction" means a purchase, sale, loan, promise, gift, transfer, delivery, or other disposition of money or property. [A transaction with a financial institution also includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, use of a safe deposit box, or

purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument.]

A "financial transaction" means –

[a transaction that in any way or to any degree affects interstate or foreign commerce by sending or moving money by wire or other means.]

or

[a transaction that in any way or to any degree affects interstate or foreign commerce by involving one or more "monetary instruments." The phrase "monetary instruments" includes coins or currency of any country, travelers or personal checks, bank checks or money orders, or investment securities or negotiable instruments in a form that allows ownership to transfer on delivery.]

or

[a transaction that in any way or to any degree affects interstate or foreign commerce by involving the transfer of title to any real property, vehicle, vessel, or aircraft.]

or

[a transaction involving the use of a financial institution that is involved in interstate or foreign commerce, or whose activities affect interstate or foreign commerce, in any way or degree. The phrase "financial institution: includes [give

appropriate reference from 31 U.S.C. § 5312(a)(2) or the regulations promulgated under it]].

"Interstate or foreign commerce" means trade and other business activity between people or businesses in at least two states or between people or businesses in the United States and people or businesses outside the United States.

To "know that the money or property involved in the transaction came from some kind of unlawful activity" is to know that the money or property came from an activity that's a felony under state, federal, or foreign law.

The term "proceeds" means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of the activity.

The term "specified unlawful activity" means [describe the specified unlawful activity listed in subsection (c)(7) of the statute and alleged in the indictment].

The term "with the intent to promote the carrying on of specified unlawful activity" means that the Defendant must have [conducted] [attempted to conduct] the financial transaction for the purpose of making easier or helping to bring about the "specified unlawful activity" as just defined.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1956(a)(1) provides:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity - -
>
> > (A)(i) with the intent to promote the carrying on of specified unlawful activity [shall be guilty of an offense against the United States].

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

In *United States v. Cancelliere*, 69 F.3d 1116 (11th Cir. 1995), the Court held that although proof of willfulness is not a statutory element of money laundering, where the indictment expressly charged willfulness, the District Court erred in not giving the usual instruction on willfulness (Basic Instruction 9.1A).

The term "proceeds" in 18 U.S.C. § 1956 was expressly defined by the Fraud Enforcement and Recovery Act of 2009 ("FERA"), Pub. L. No. 111-21, effective May 20, 2009. The FERA expanded the concept of monetary proceeds, for purposes of enforcing prohibitions against money laundering, to include gross receipts. *See* 18 U.S.C. § 1956(c)(9).

The FERA was a direct response to *United States v. Santos*, 128 S. Ct. 2020 (2008). In *Santos*, a plurality of the U.S. Supreme Court held that the definition of the term "proceeds" in 18 U.S.C. § 1956(a)(1)(A)(i) refers to "profits" rather than "receipts" when applied to a prosecution arising from an illegal stand-alone gambling operation. Until the FERA, the definition of "proceeds" in the money laundering statute remained unclear.

The Eleventh Circuit has construed the fragmented *Santos* opinion narrowly. In *United States v. Demarest*, 570 F.3d 1232 (11th Cir. 2009), a case in which the trial took place prior to the FERA's enactment, the Court noted:

> *Santos* has limited precedential value… The narrow holding in [the case], at most, was that the gross receipts of an unlicensed gambling operation were not 'proceeds' under section 1956…

*Id*. at 1242.

**O74.2**
**Money Laundering: Concealing Proceeds of Specified Unlawful Activity or Avoiding Transaction Reporting Requirement**
**18 U.S.C. § 1956(a)(1)(B)(i) and (ii)**

It's a Federal crime to knowingly engage in certain kinds of financial transactions commonly known as money laundering.

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 conducted or tried to conduct financial transactions;

(2) the Defendant knew that the money or property involved in the transaction were the proceeds of some kind of unlawful activity;

(3) money or property did come from an unlawful activity, specifically [describe the specified unlawful activity alleged in the indictment]; and

[(4) the Defendant knew that the transaction was designed, in whole or in part, to conceal or disguise the nature, location, source, ownership, or the control of the proceeds.]

or

[(4) the Defendant participated in the transaction to avoid a transaction-reporting requirement under state or Federal law.]

To "conduct a transaction" means to start or finish a transaction, or to participate in a transaction at any point.

A "transaction" means a purchase, sale, loan, promise, gift, transfer, delivery, or other disposition of money or property. [A transaction with a financial institution also includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, use of a safe deposit box, or purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument.]

A "financial transaction" means –

[a transaction that in any way or to any degree affects interstate or foreign commerce by sending or moving money by wire or other means.]

or

[a transaction that in any way or to any degree affects interstate or foreign commerce by involving one or more "monetary instruments." The phrase "monetary instruments" includes coins or currency of any country, travelers or personal checks, bank checks or money orders, or investment securities or negotiable instruments in a form that allows ownership to transfer on delivery.]

or

[a transaction that in any way or to any degree affects interstate or foreign commerce by involving the transfer of title to any real property, vehicle, vessel or aircraft.]

or

[a transaction involving the use of a financial institution that is involved in interstate or foreign commerce, or whose activities affect, interstate or foreign commerce in any way or degree. The phrase "financial institution" includes [give appropriate reference from 31 U.S.C. § 5312(a)(2) or the regulations thereunder]].

"Interstate or foreign commerce" means trade and other business activity between people or businesses in at least two states or between people or businesses in the United States and people or businesses outside the United States.

To know "that the money or property involved in the transaction came from some kind of unlawful activity" is to know that the money or property came from an activity that's a felony under state, Federal, or foreign law.

The term "proceeds" means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of the activity.

The phrase "specified unlawful activity" means [describe the specified unlawful activity listed in subsection (c)(7) of the statute and alleged in the indictment].

[A "transaction-reporting requirement" means a legal requirement that a domestic financial institution must report any transaction involving a payment, receipt, or transfer of United States coins or currency totaling more than $10,000.

But personal or cashier's checks, wire transfers, or transactions involving other monetary instruments do not have to be reported.]

[A "transaction-reporting requirement" means a legal requirement that a person who causes or attempts to cause the transportation, mailing, or shipment of currency [or [description of other reportable instruments from the indictment]] totaling more than $10,000 at one time from a place inside the United States to a place outside the United States or from a place outside the United States to a place inside the United States.]

[A "transaction reporting requirement" means a legal requirement that a person engaged in a trade or business who in the course of that trade or business receives currency totaling more than $10,000 in a single transaction or in two or more related transactions must file a report with the Internal Revenue Service.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1956(a)(1) provides:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity - -
>
> (B) knowing that the transaction is designed in whole or in part - -
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
>
> (ii) to avoid a transaction reporting requirement under State or Federal law [shall be guilty of an offense against the United States].

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

In *United States v. Cancelliere*, 69 F.3d 1116 (11th Cir. 1995), the Court held that although proof of willfulness is not a statutory element of money laundering, where the indictment expressly charged willfulness, the District Court erred in not giving the usual instruction on willfulness (Basic Instruction 9.1A).

The term "proceeds" in 18 U.S.C. § 1956 was expressly defined by the Fraud Enforcement and Recovery Act of 2009 ("FERA"), Pub. L. No. 111-21, effective May 20, 2009. The FERA expanded the concept of monetary proceeds, for purposes of enforcing prohibitions against money laundering, to include gross receipts. *See* 18 U.S.C. § 1956(c)(9).

The FERA was a direct response to *United States v. Santos*, 128 S. Ct. 2020 (2008). In *Santos*, a plurality of the U.S. Supreme Court held that the definition of the term "proceeds" in 18 U.S.C. § 1956(a)(1)(A)(i) refers to "profits" rather than "receipts" when applied to a prosecution arising from an illegal stand-alone gambling operation. Until the FERA, the definition of "proceeds" in the money laundering statute remained unclear.

The Eleventh Circuit has construed the fragmented *Santos* opinion narrowly. In *United States v. Demarest*, 570 F.3d 1232 (11th Cir. 2009), a case in which the trial took place prior to the FERA's enactment, the Court noted:

> *Santos* has limited precedential value… The narrow holding in [the case], at most, was that the gross receipts of an unlicensed gambling operation were not 'proceeds' under section 1956…
>
> *Id*. at 1242.

In *Cuellar v. United States*, 128 S. Ct. 1994 (2008), the Supreme Court held that although the Government doesn't need to show that the defendant attempted to make illegal funds appear legitimate, it is required to show that the defendant did more than merely hide the funds during transport; to sustain a conviction, the Government must prove that the defendant knew that a purpose of the transportation was to conceal or disguise the illicit funds' nature, locations, source, ownership, or control.

**O74.3**
**Money Laundering: International**
**Transportation of Monetary Instruments**
**18 U.S.C. § 1956(a)(2)(A)**

It's a Federal crime to knowingly engage in certain kinds of financial transactions commonly known as money laundering.

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 [transported] [transmitted] [transferred] a monetary instrument or money [from a place in the United States to or through a place outside the United States] [to a place in the United States from or through a place outside the United States] [or attempted to do so]; and

(2) the Defendant acted with the intent to promote the carrying on of specified unlawful activity.

To "transport, transmit, or transfer" includes all means to carry, send, mail, ship, or move money. It includes any physical means of transferring or transporting funds, and also electronic transfer by wire or computer or other means.

It doesn't matter whether the monetary instrument or money involved in this case was derived from criminal activity. It could be legitimately earned income [even money provided by a government agent in the course of an undercover operation].

A "monetary instrument" includes the coin or currency of any country, travelers or personal checks, bank checks or money orders, or investment securities or negotiable instruments in a form that allows ownership to transfer on delivery.

The term "specified unlawful activity" means [describe the specified unlawful activity listed in subsection (c)(7) of the statute and alleged in the indictment].

The term "with the intent to promote the carrying on of specified unlawful activity" means that the Defendant must have [conducted] [attempted to conduct] the financial transaction for the purpose of making easier or helping to bring about the "specified unlawful activity" as just defined.

[To "attempt" an act means to intentionally take some substantial step toward accomplishing the act so that the act will occur unless something happens to interrupt or frustrate it.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1956(a)(2) provides:

> Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States - -
>
> (A) with the intent to promote the carrying on of specified unlawful activity [shall be guilty of an offense against the United States].

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

In *United States v. Cancelliere*, 69 F.3d 1116 (11th Cir. 1995), the Court held that although proof of willfulness is not a statutory element of money laundering, where the indictment expressly charged willfulness, the District Court erred in not giving the usual instruction on willfulness (Basic Instruction 9.1A).

In *Cuellar v. U.S.*, 128 S. Ct. 1994 (2008)), the Supreme Court held that although the Government does not need to show that the defendant attempted to make illegal funds appear legitimate, it is required to show that the defendant did more than merely hide the funds during transport; to sustain a conviction, the Government must prove that the defendant knew that a purpose of the transportation was to conceal or disguise the illicit funds' nature, location, source, ownership, or control.

**O74.4**
**Money Laundering Sting**
**18 U.S.C. § 1956(a)(3)(A) or (a)(3)(B) or (a)(3)(C)**

It's a Federal crime to knowingly engage in certain kinds of financial transactions commonly known as money laundering.

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

(1) the Defendant knowingly [conducted] [attempted to conduct] a financial transaction;

(2) the [attempted] transaction involved property that [a law-enforcement officer represented as coming from a specified unlawful activity] [was used to carry out or make it easier to carry out specified unlawful activity]; and

[(3) the Defendant engaged in the [attempted] transaction with the intent to promote the carrying on of specified unlawful activity.

or [(a)(3)(B)]

(3) the Defendant engaged in the [attempted] transaction with the intent to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity.

or [(a)(3)(C)]

[(3) the Defendant engaged in the [attempted] transaction with the intent to avoid a transaction- reporting requirement under state or federal law.]

The Government alleges that the property involved in the financial transaction [was represented as coming from] [was used to carry out or to make

easier to carry out] [describe the specified unlawful activity alleged in the indictment]. For purposes of this case [describe the specified unlawful activity alleged in the indictment] is a kind of specified unlawful activity.

[(a)(3)(A) or i.(a)(3)(B)]

[The government also alleges that the Defendant was involved in the the [attempted] transaction with the intent [to promote the carrying on of] [to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of] [describe specified unlawful activity that the Defendant allegedly intended to promote], which I remind you is a kind of specified unlawful activity.

[A "representation" is any communication made by a law-enforcement officer or by another person directed by, or with the approval of, a federal official authorized to investigate or prosecute violations of this law.]

To "conduct" a transaction means to start or finish a transaction or to participate in a transaction at any point.

A "transaction" means a purchase, sale, loan, promise, gift, transfer, delivery, or other disposition of money or property. [A transaction with a financial institution also includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, use of a safe deposit box, or

purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument.]

A "financial transaction" means –

[a transaction that in any way or to any degree affects interstate or foreign commerce by sending or moving money by wire or other means.]

or

[a transaction that in any way or to any degree affects interstate or foreign commerce by involving one or more "monetary instruments." the phrase "monetary instruments" includes coins or currency of any country, travelers or personal checks, bank checks or money orders, or investment securities or negotiable instruments in a form that allows ownership to transfer on delivery.]

or

[a transaction that in any way or to any degree affects interstate or foreign commerce by involving the transfer of title to any real property, vehicle, vessel, or aircraft.]

or

[a transaction involving the use of a financial institution that is involved in interstate or foreign commerce, or whose activities affect interstate or foreign commerce, in any way or degree. The phrase "financial institution" includes [give

appropriate reference from 31 U.S.C. § 5312(a)(2) or the regulations promulgated under it].]

The term "with the intent to promote the carrying on of specified unlawful activity" means that the defendant must have [conducted] [attempted to conduct] the financial transaction for the purpose of making easier or helping to bring about the specified unlawful activity.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1956(a)(3)(A), (B) and (C) provide:

> (3) Whoever, with the intent - -
>
> (A) to promote the carrying on of specified unlawful activity;
>
> (B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or
>
> (C) to avoid a transaction reporting requirement under State or Federal law,
>
> conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term 'represented' means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

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

In *United States v. Starke*, 62 F.3d 1374, 1382 (11th Cir. 1995), the Eleventh Circuit held that, to satisfy the representation element of section 1956(a)(3), "the Government need only prove that a law enforcement officer or other authorized person made the defendant aware of circumstances from which a reasonable person would infer that the property"

was proceeds from the specified unlawful activity. The court explained that there is no requirement of any particular statement by the officer regarding the source of the property.

In *Cuellar v. United States*, 128 S. Ct. 1994 (2008), the Supreme Court held that although the Government doesn't need to show that the defendant attempted to make illegal funds appear legitimate, it is required to show that the defendant did more than merely hide the funds during transport. To sustain a conviction, the Government must prove that the defendant knew that a purpose of the transportation was to conceal or disguise the illicit funds' nature, locations, source, ownership, or control.

**O74.5**
**Money Laundering Conspiracy**
**18 U.S.C. § 1956(h)**

It's a Federal crime to conspire to engage in money laundering or transactions involving the proceeds of specified unlawful activity that violates Title 18, United States Code, Section [1956 or 1957].

[Describe the elements of the relevant provision of 18 U.S.C. §1956 (money laundering) or 18 U.S.C. §1957 (transactions involving the proceeds of specified unlawful activity).]

A "conspiracy" is an agreement by two or more persons to commit an unlawful act. In other words, it is a kind of partnership for criminal purposes. Every member of the conspiracy becomes the agent or partner of every other member.

The Government does not have to prove that all the people named in the indictment were members of the plan, or that those who were members made any kind of formal agreement. The heart of a conspiracy is the making of the unlawful plan itself, so the Government does not have to prove that the conspirators succeeded in carrying out the plan.

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

(1) two or more people agreed to try to accomplish a common and unlawful plan to violate [18 U.S.C. Section 1956 or 1957]; and

(2) the Defendant knew about the plan's unlawful purpose and voluntarily joined in it.

A person may be a conspirator even without knowing all the details of the unlawful plan or the names and identities of all the other alleged conspirators.

If the Defendant played only a minor part in the plan but had a general understanding of the unlawful purpose of the plan – and voluntarily joined in the plan on at least one occasion – that's sufficient for you to find the Defendant guilty.

But simply being present at the scene of an event or merely associating with certain people and discussing common goals and interests doesn't establish proof of a conspiracy. Also a person who doesn't know about a conspiracy but happens to act in a way that advances some purpose of one doesn't automatically become a conspirator.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1956(h) provides:

> (h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

Maximum Penalty: As stated above.

In *United States v. Cancelliere*, 69 F.3d 1116, 1120 (11th Cir. 1995), the Eleventh Circuit held that proof of willfulness is not an element of the substantive offense of money laundering.

In *Whitfield v. United States*, 543 U.S. 209 (2005), the Supreme Court affirmed the Eleventh Circuit's holding that 1956(h) does not require proof of an overt act in furtherance of the alleged conspiracy.

The FERA was a direct response to *United States v. Santos*, 128 S. Ct. 2020 (2008). In *Santos*, a plurality of the U.S. Supreme Court held that the definition of the term "proceeds" in 18 U.S.C. § 1956(a)(1)(A)(i) refers to "profits" rather than "receipts" when applied to a prosecution arising from an illegal stand-alone gambling operation. Until the FERA, the definition of "proceeds" in the money laundering statute remained unclear.

The Eleventh Circuit has construed the fragmented *Santos* opinion narrowly. In *United States v. Demarest*, 570 F.3d 1232 (11th Cir. 2009), a case in which the trial took place prior to the FERA's enactment, the Court noted:

> *Santos* has limited precedential value . . . . The narrow holding in [the case], at most, was that the gross receipts of an unlicensed gambling operation were not 'proceeds' under section 1956 . . . .

*Id*. at 1242.

In *Cuellar v. United States*, 128 S. Ct. 1994 (2008), the Supreme Court held that although the Government doesn't need to show that the Defendant attempted to make illegal funds appear legitimate, it is required to show that the Defendant did more than merely hide the funds during transport. To sustain a conviction, the Government must prove that the Defendant knew that a purpose of the transportation was to conceal or disguise the illicit funds' nature, locations, source, ownership, or control.

**O74.6**
**Money Laundering**
**18 U.S.C. § 1957**

It's a Federal crime for anyone to engage in certain kinds of financial transactions commonly known as money laundering.

The Defendant can be found guilty of this offense only if all the following are proved beyond a reasonable doubt;

(1) the Defendant knowingly engaged or attempted to engage in a monetary transaction;

(2) the Defendant knew the transaction involved property or funds that were the proceeds of some criminal activity;

(3) the property had a value of more than $10,000;

(4) the property was in fact proceeds of [describe the specified unlawful activity alleged in the indictment]; and

(5) the transaction took place in [the United States][in the special maritime and territorial jurisdiction of the United States] [outside the United States but the Defendant was a United States person as defined by 18 U.S.C. § 3077 (excluding section (2)(D))].

The term "monetary transaction" means the [deposit] [withdrawal] [transfer] [exchange of funds or a monetary instrument] by, through, or to a financial institution in a way that affects interstate commerce. [The term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the Sixth Amendment to the Constitution.]

A "financial institution" means [identify type of institution listed in 31 U.S.C § 5312 as alleged in the indictment].

The term "proceeds" means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of the activity.

It doesn't matter whether the Defendant knew the precise nature of the crime or that the property came from committing [unlawful activity alleged in indictment]. But the Government must prove that the Defendant knew that the property involved in the monetary transaction was obtained or derived from committing some crime.

Also it doesn't matter whether all the property involved was derived from a crime. The Government only has to prove that $10,000 worth of the property was obtained or derived from committing a crime.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1957(a) and (d) provide:

> (a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).
>
> * * * * *
>
> (d) The circumstances referred to in subsection (a) are - -
>
> (1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

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

*United States v. Adams*, 74 F.3d 1093, 1101 (11th Cir. 1996), the Eleventh Circuit recommended that district courts make clear in the jury instruction that at least $10,000 of the property at issue must be criminally derived.

In *United States v. Christo*, 129 F.3d 578, 580 (11th Cir. 1997), the Eleventh Circuit held that the predicate crime must be completed before the offense of money laundering can occur under section 1957.

The term "proceeds" as used in both 18 U.S.C. § 1956 and § 1957 was expressly defined by the Fraud Enforcement and Recovery Act of 2009 ("FERA"), Pub. L. No. 111-21, effective May 20, 2009. The FERA expanded the concept of monetary proceeds, for purposes of enforcing prohibitions against money laundering, to include gross receipts. *See* 18 U.S.C. § 1956(c)(9).

The FERA was a direct response to *United States v. Santos*, 128 S. Ct. 2020 (2008). In *Santos*, a plurality of the U.S. Supreme Court held that the definition of the term "proceeds" in 18 U.S.C. § 1956(a)(1)(A)(i) refers to "profits" rather than "receipts" when applied to a prosecution arising from an illegal stand-alone gambling operation. Until the FERA, the definition of "proceeds" in the money laundering statute remained unclear.

The Eleventh Circuit has construed the fragmented *Santos* opinion narrowly. In *United States v. Demarest*, 570 F.3d 1232 (11th Cir. 2009), a case in which the trial took place prior to the FERA's enactment, the Court noted:

> *Santos* has limited precedential value… The narrow holding in [the case], at most, was that the gross receipts of an unlicensed gambling operation were not 'proceeds' under section 1956…

*Id*. at 1242.

*See United States v. Velez*, 586 F.3d 875 (11th Cir. 2009) (holding that the plain language of § 1957(f)(1) clearly exempts criminally derived proceeds used to secure legal representation to which an accused is entitled to under the Sixth Amendment).

**O75.1**

**RICO – Substantive Offense**
**18 U.S.C. § 1962(c)**

It's a Federal crime to knowingly participate in conducting the activities of an enterprise whose activities involve or affect interstate commerce through a pattern of racketeering activity.

An "enterprise" includes legal entities such as any partnership, corporation, or association. It also includes a nonlegal entity that is a group of people associated for a common purpose of engaging in a course of conduct.

"Racketeering activity" includes any acts that violate [cite relevant statute(s), e.g., Title 18 of the United States Code relating to mail fraud (section 1341) and wire fraud (Section 1343)].

A "pattern of racketeering activity" means that at least two acts of racketeering activity were committed within ten years. At least one of the acts must have occurred after October 15, 1970.

Count of the indictment charges that beginning on or about and continuing through [date indictment was filed], the named Defendants participated in conducting the activities of an enterprise, whose activities use or affect interstate commerce, "through a pattern of racketeering activity."

To establish that a Defendant named in count committed the crime charged in that count, five specific facts must be proved beyond a reasonable doubt:

(1) the Defendant was associated with an enterprise;

(2) the Defendant knowingly committed, or aided and abetted in committing, at least two acts of racketeering activity;

(3) the two acts of racketeering activity were connected by a common scheme, plan, or motive constituting a pattern of criminal activity, and not just a series of separate, isolated, or disconnected acts;

(4) by committing the two or more connected acts, the Defendant participated in conducting the enterprise's affairs; and

(5) the enterprise engaged in, or the activities of the enterprise affected, interstate commerce.

For the first specific fact, you must find that the Defendant was associated with the enterprise. "Associated" means having an awareness of something's general existence. So the Government must prove beyond a reasonable doubt that the Defendant was aware of the general existence of the enterprise described in the indictment.

For the second specific fact, the Government must prove beyond a reasonable doubt that the Defendant knowingly committed, or aided and abetted in committing, at least *two* acts of racketeering activity specifically described in the indictment [under the headings "Racketeering Act One" and "Racketeering Act Two."] [in Counts through .]

But if you find that the Defendant was involved in at least two acts of racketeering activity, you must all agree on exactly *which* two acts of racketeering activity the Defendant committed or aided and abetted in committing. It isn't enough for you to agree that the Defendant committed two acts if you can't agree on the same two acts.

For the fourth specific fact, "participating in conduct" means having some inside role in managing or operating the enterprise at some level. It doesn't matter whether the Defendant had primary responsibility for anything or a managerial position. But "participating in conduct" doesn't include being an outsider and helping out in some way.

So the Government must prove beyond a reasonable doubt that the Defendant had some inside role in managing or operating the enterprise, and that the Defendant was not an outsider helping the enterprise.

For the fifth specific fact, "interstate commerce" means business, trade, or movement between one state and another. The Government must prove beyond a reasonable doubt that the enterprise engaged in, or the activities of the enterprise affected, interstate commerce by [describe interstate commerce activity from indictment; e.g. using interstate communications facilities by making long-distance phone calls; by traveling from one state to another; by sending funds by mail or wire

from one state to another]. If you find that these transactions or events occurred, and that they occurred or were done in the course of or as a direct result of conducting the enterprise's affairs, then the required involvement in or effect on interstate commerce is established, but if you don't so find, then the required effect on interstate commerce is not established.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . .

In *United States v. Kotvas*, 941 F.2d 1141, 1144 (11th Cir. 1991), the Eleventh Circuit held that this pattern instruction properly instructed the jury on the continuity requirement discussed by the United States Supreme Court in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 241–50 (1989). In *United States v. Browne*, 505 F.3d 1229, 1260 (11th Cir. 2007), the Eleventh Circuit reaffirmed this holding.

In *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993), the Supreme Court held that a Defendant participates in the conduct of an enterprise's affairs by participating in the "operation or management" of the enterprise. The Eleventh Circuit has held that *Reves*, a civil RICO action, applies to criminal proceedings as well. *See United States v. Starrett*, 55 F.3d 1525, 1551–52 (11th Cir. 1995). *Starrett* nevertheless upheld the district court's refusal to give a proposed instruction that the Defendant must have occupied a "leadership" position in the enterprise. *Id.* at 1551.

In *Boyle v. United States*, 556 U.S. 938 (2009), the Supreme Court held that an association-in-fact enterprise under RICO, 18 U.S.C. § 1961, *et seq.*, "must have at least three structural features: a purpose, relationships among those associated with

the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose" but the enterprise "need not have a hierarchical structure or a 'chain of command.'" *Id.* at 946, 948. The *Boyle* Court reiterated that an association-in-fact enterprise under RICO is a "group of persons associated together for a common purpose of engaging in a course of conduct." *Id.* at 946 (quoting *United States v. Turkette*, 452 U.S. 576, 583 (1981)).

If the indictment seeks a forfeiture of property under § 1963(a), see Trial Instruction No. 6.

With regard to the second element, "RICO does not contain any separate mens rea or scienter elements beyond those encompassed in its predicate acts." *United States v. Pepe*, 747 F.2d 632, 675–76 (11th Cir. 1984). Thus, in the second essential element, the jury instruction should conform to the mental state required by the predicate act(s).

## O75.2

## RICO – Conspiracy Offense

## 18 U.S.C. § 1962(d)

It's a Federal crime for anyone associated with an enterprise whose activities involve or affect interstate commerce to participate in conducting the activities of the enterprise through a pattern of racketeering activity.

The meaning of certain terms and an explanation of what the Government must prove for this crime are in the instructions covering Count _____ of the indictment. The Defendants named in Count _____ of the indictment – the conspiracy count – are not charged with violating Section 1962(c). They are charged with willfully and knowingly conspiring to violate that law by [insert alleged racketeering acts]. Conspiracy is a separate crime, and violates Section 1962(d).

A "conspiracy" is an agreement by two or more persons to commit an unlawful act. In other words, it is a kind of partnership for criminal purposes. Every member of the conspiracy becomes the agent or partner of every other member.

The Government does not have to prove that all the people named in the indictment were members of the plan, or that those who were members made any kind of formal agreement. The heart of a conspiracy is the making of the unlawful plan itself, so the Government does not have to prove that the conspirators succeeded in carrying out the plan.

An "enterprise" includes legal entities such as any partnership, corporation, or association. It also includes a non-legal entity that is a group of people associated for a common purpose of engaging in a course of conduct.

"Racketeering activity" includes any acts that violate [cite relevant statute(s), e.g. Title 18 of the United States Code relating to mail fraud (Section 1341) and wire fraud (Section 1343)].

A "pattern of racketeering activity" means that at least two acts of racketeering activity were committed within ten (10) years. At least one of the acts must have occurred after October 15, 1970.

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

(1) two or more people agreed to try to accomplish an unlawful plan to participate in the affairs of an enterprise through a pattern of racketeering activity;
(2) the enterprise engaged in, or the activities of the enterprise affected, interstate commerce;
(3) the Defendant knowingly and willfully joined in the conspiracy; and
(4) when the Defendant joined in the agreement, the Defendant had the specific intent either to personally participate in committing at least two acts of racketeering, or else to participate in the enterprise's affairs, knowing that other members of the conspiracy would commit at least two acts of

racketeering and intending to help them as part of a pattern of racketeering activity.

A person may be a conspirator even without knowing all the details of the unlawful plan or the names and identities of all the other alleged conspirators.

If the Defendant played only a minor part in the plan but had a general understanding of the unlawful purpose of the plan – and willfully joined in the plan on at least one occasion – that's sufficient for you to find the Defendant guilty.

But simply being present at the scene of an event or merely associating with certain people and discussing common goals and interests doesn't establish proof of a conspiracy. Also, a person who doesn't know about a conspiracy but happens to act in a way that advances some purpose of one doesn't automatically become a conspirator.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1962(d) provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section.

*United States v. Browne*, 505 F.3d 1229, 1264 (11th Cir. 2007) (quoting *United States v. Abbell*, 271 F.3d 1286, 1299 (11th Cir. 2001) ("The touchstone of liability is an agreement to participate in a RICO conspiracy, which may be shown in two ways: (1) showing an agreement on the overall objective of the conspiracy, or (2) showing that a defendant agreed to commit personally two predicate acts, thereby agreeing to participate in a 'single objective.'")).

*United States v. To*, 144 F.3d 737 (11th Cir. 1998) (discussing "single objective" and "overall objective" RICO conspiracy theories); *see also United States v. Beale*, 921 F.2d 1412 (11th Cir. 1991) (discussing the alternate methods of proving a RICO conspiracy).

*Salinas v. United States*, 522 U.S. 52, 63 (1997) (finding that no overt act is required under the RICO conspiracy statute); *see also United States v. Starrett*, 55 F.3d 1525 (11th Cir. 1995) (observing that no overt act is required under § 1962(d)).

The Committee believes that the general definition of "willfully" in Basic Instruction 9.1A generally should apply to this crime.

**O76.1**
**Bank Robbery**
**18 U.S.C. § 2113(a)**
**(Subsection (a) Only)**

It's a Federal crime to take [or to attempt to take] from or in the presence of another person [by force and violence] [by intimidation] any property or money possessed by a federally insured [bank] [credit union] [savings-and- Loan association]. This crime is called bank robbery.

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 took [or attempted to take] money or property possessed by a federally insured [bank] [credit union] [savings-and-loan association] from or in the presence of the person described in the indictment; and

(2) the Defendant did so [by means of force and violence] [by means of intimidation].

[A "federally insured bank" means any bank whose deposits are insured by the Federal Deposit Insurance Corporation.]

[A "federally insured credit union" means any Federal credit union and any State-chartered credit union whose accounts are insured by the National Credit Union Administration Board.]

[A "federally insured savings and loan association" means any savings-and-loan association whose deposits are insured by the Federal Savings-and-Loan Insurance Corporation.]

[To take "by means of intimidation" is to say or do something in a way that would make an ordinary person fear bodily harm.

The heart of the crime is taking money or property by using intimidation. It doesn't matter whether the victim was actually scared or whether the Defendant's behavior was violent enough to cause terror, panic, or hysteria as long as an ordinary person in the victim's position would have felt a threat of bodily harm by the Defendant's conduct.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2113(a) provides:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another… any property or money… belonging to… or in the possession of, any bank, credit union, or any savings-and-loan association [shall be guilty of an offense against the United States].

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

The statute creates various modes of committing the offense (force and violence or intimidation) (assault or use of a dangerous weapon) and care must be taken in adapting the instruction to the allegations of the indictment. *See United States v. Bizzard*, 615 F.2d 1080 (5th Cir. 1980).

In *Carter v. United States*, 530 U.S. 255, 120 S. Ct. 2159 (2000), the court held that the bank larceny provision of § 2113(b) is not a lesser included offense of § 2113(a).

In *United States v. King*, 178 F.3d 1376 (11th Cir. 1999), the court held, in a prosecution under § 2113(b), that money being transferred in a contractor's armored vehicle from a bank to the Federal Reserve was money still "in the care, custody, control, management or possession" of the bank because the bank retained legal title to the funds.

In *United States v. Mitchell*, 146 F.3d 1338 (11th Cir. 1998), the court upheld arguably inconsistent verdicts finding the Defendant guilty under § 2113(d) (armed bank robbery), but acquitting him under § 924(c) (carrying a firearm during a crime of violence).

"Intimidation" occurs "when an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts." *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005). "Whether a particular act constitutes intimidation is viewed objectively." *Id*. The defendant need not intend for the act to be intimidating. *Id*.

A taking "from the person or in the presence of another" occurs when the money or property is "so within [the victim's] reach, inspection, observation or control, that [the victim] could if not overcome by violence or prevented by fear, retain his possession of it." *United States v. Kelley*, 412 F.3d 1240, 1246 (11th Cir. 2005).

**O76.2**
**Bank Robbery**
**18 U.S.C. § 2113(a) and (d)**
**(Subsections (a) and (d) Alleged in Separate Counts)**

It's a Federal crime to take [or to attempt to take] from or in the presence of another person [by force and violence] [by intimidation] any property or money possessed by a federally [insured bank] [insured credit union] [insured savings-and-loan association]. This crime is called bank robbery.

The Defendant can be found guilty of this crime as charged in Count _____ of the indictment, only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant knowingly took [or attempted to take] money or property possessed by a federally insured [bank] [credit union] [savings-and-loan association] from or in the presence of the person described in the indictment; and

(2) the Defendant did so [by means of force and violence] [by means of intimidation].

[A "federally insured bank" means any bank whose deposits are insured by the Federal Deposit Insurance Corporation.]

[A "federally insured credit union" means any Federal credit union and any State-chartered credit union whose accounts are insured by the National Credit Union Administration Board.]

[A "federally insured savings-and-loan association" means any savings-and-loan association whose deposits are insured by the Federal Savings-and-Loan Insurance Corporation.]

[To take "by means of intimidation" is to say or do something in a way that would make an ordinary person fear bodily harm.

The heart of the crime is taking money or property by using intimidation. It doesn't matter whether the victim was actually scared or whether the Defendant's behavior was violent enough to cause terror, panic, or hysteria as long as an ordinary person in the victim's position would have felt a threat of bodily harm by the Defendant's conduct.]

Under Federal law, it's a more serious federal crime [to assault] [to put in jeopardy the life of any person by the use of a dangerous weapon or device] while committing bank robbery.

The Defendant can be found guilty of the more serious crime charged in Count [subsection (d) count] if the Government proves the two facts necessary for the crime in count [subsection (a) count) and proves this third fact beyond a reasonable doubt, namely:

> (3) that the Defendant knowingly [assaulted a person] [put the life of a person in jeopardy by using a dangerous weapon or device] while stealing property or money from the [bank] [credit union] [savings-and-loan association].

[An "assault" may be committed without actually touching or hurting another person. An assault occurs when a person intentionally attempts or threatens to hurt someone else, and has an apparent and immediate ability to carry out the threat, such as by pointing or brandishing a dangerous weapon or device.]

[A "dangerous weapon or device" includes any object that a person can readily use to inflict serious bodily harm on someone else.]

[So to "put someone's life in jeopardy by using a dangerous weapon or device" means to expose someone else to a risk of death by using a dangerous weapon or device.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2113(a) and (d) provide:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another,… any property or money… belonging to… or in the possession of any bank, credit union, or any savings-and-loan association [shall be guilty of an offense against the United States].
>
> (d) Whoever, in committing, or attempting to commit, any offense defined in subsection (a)… of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device [shall be punished as provided by law.

Maximum Penalty: Twenty (20) years imprisonment and applicable fine as to subsection (a); and Twenty-five (25) years imprisonment and applicable fine as to subsection (d).

The statute creates various modes of committing the offense (force and violence or intimidation) (assault or use of a dangerous weapon) and care must be taken in adapting the instruction to the allegations of the indictment. *See United States v. Blizzard*, 615 F.2d 1080 (5th Cir. 1980).

In *McLaughlin v. United States*, 476 U.S. 16, 19, 106 S. Ct. 1677, 1678, 90 L. Ed. 2d 15 (1986) the Supreme Court held that an unloaded gun is a dangerous weapon. One of the three reasons given for this conclusion, each of which the Court characterized as "independently sufficient," was that the display of a gun instills fear in the average citizen and creates an immediate danger of a violent response. Id.

Citing to *McLaughlin*, the Eleventh Circuit held that a toy gun should be considered a dangerous weapon under § 2113(d). *United States v. Garrett*, 3 F.3d 390, 391 (11th Cir. 1993).

In *United States v. King*, 178 F.3d 1376 (11th Cir. 1999), the court held, in a prosecution under § 2113(b), that money being transferred in a contractor's armored vehicle from a bank to the Federal Reserve was money still "in the care, custody, control, management or possession" of the bank because the bank retained legal title to the funds.

In *United States v. Mitchell*, 146 F.3d 1338 (11th Cir. 1998), the court upheld arguably inconsistent verdicts finding the Defendant guilty under § 2113(d) (armed bank robbery), but acquitting him under § 924(c) (carrying a firearm during a crime of violence).

"Intimidation" occurs "when an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts." *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005). "Whether a particular act constitutes intimidation is viewed objectively." *Id*. The defendant need not intend for the act to be intimidating. *Id*.

A taking "from the person or in the presence of another" occurs when the money or property is "so within [the victim's] reach, inspection, observation or control, that [the victim] could if not overcome by violence or prevented by fear, retain his possession of it." " *Id*. at 1246.

**O76.3**
**Bank Robbery**
**18 U.S.C. § 2113(a) And (d)**
**(Subsections (a) and (d) Alleged in the Same Count)**

It's a Federal crime to take [or attempt to take] from or in the presence of another person [by force and violence] [by intimidation] any property or money possessed by a federally insured [bank] [credit union] [saving and loan association], and while doing so to [assault any person] [put the life of any person in jeopardy by using a dangerous weapon or device].

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 took money or property possessed by a federally insured [bank] [credit union] [savings-and-loan association] from or in the presence of the person described in the indictment;

(2) the Defendant did so [by means of force and violence] [by means of intimidation]; and

(3) the Defendant [assaulted someone] [put someone's life in jeopardy by using a dangerous weapon or device] while stealing the property or money.

[A "federally insured bank" means any bank whose deposits are insured by the Federal Deposit Insurance Corporation.]

[A "federally insured credit union" means any Federal credit union and any State-chartered credit union whose accounts are insured by the National Credit Union Administration Board.]

[A "federally insured savings-and-loan association" means any savings-and-loan association whose deposits are insured by the Federal Savings-and-Loan Insurance Corporation.]

[To take "by means of intimidation" is to say or do something in a way that would make an ordinary person fear bodily harm.

The heart of the crime is taking money or property by using intimidation. It doesn't matter whether the victim was actually scared or whether the Defendant's behavior was violent enough to cause terror, panic, or hysteria as long as an ordinary person in the victim's position would have felt a threat of bodily harm by the Defendant's conduct.]

[An "assault" may be committed without actually touching or hurting another person. An assault occurs when a person intentionally attempts or threatens to hurt someone else, and has an apparent and immediate ability to carry out the threat, such as by pointing or brandishing a dangerous weapon or device.]

[A "dangerous weapon or device" includes any object that a person can readily use to inflict serious bodily harm on someone else.]

[So to "put someone's life in jeopardy by using a dangerous weapon or device" means to expose someone else to a risk of death by using a dangerous weapon or device.]

In some cases, the law that a Defendant is charged with breaking actually covers two separate crimes. One is less serious than the other, and is generally called a "lesser-included offense."

So, if you all find the Defendant "Not Guilty" of the crime charged in count _____ of the indictment, you must then determine whether the Defendant is guilty or not guilty of the lesser-included offense.

The crime of bank robbery combined with [an assault] [using a dangerous weapon or device and putting someone's life in jeopardy] includes the lesser offense of bank robbery without [an assault] [using a dangerous weapon or device and putting in someone's life in jeopardy].

So if you find the Defendant not guilty of the crime charged in count _____ of the indictment, then you must decide whether the Defendant is guilty or not guilty of the lesser-included offense of bank robbery *without* [committing an assault] [endangering another by using a dangerous weapon or device].

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2113(a) and (d) provide:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another,… any property or money… belonging to… or in the possession of any bank, credit union, or any savings-and-loan association [shall be guilty of an offense against the United States].
>
> (d) Whoever, in committing, or attempting to commit, any offense defined in subsection (a)… of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device [shall be punished as provided by law].

Maximum Penalty: Twenty (20) years imprisonment and applicable fine as to subsection (a); and Twenty-five (25) years imprisonment and applicable fine as to subsection (d).

The statute creates various modes of committing the offense (force and violence or intimidation) (assault or use of a dangerous weapon) and care must be taken in adapting the instruction to the allegations of the indictment. *See United States v. Blizzard*, 615 F.2d 1080 (5th Cir. 1980).

In *McLaughlin v. United States*, 476 U.S. 16, 19, 106 S. Ct. 1677, 1678, 90 L. Ed. 2d 15 (1986), the Supreme Court held that an unloaded gun is a dangerous weapon. One of the three reasons given for this conclusion, each of which the Court characterized as "independently sufficient," was that the display of a gun instills fear in the average citizen and creates an immediate danger of a violent response. *Id*.

Citing to *McLaughlin*, the Eleventh Circuit held that a toy gun should be considered a dangerous weapon under § 2113(d). *United States v. Garrett*, 3 F.3d 390, 391 (11th Cir. 1993).

In *United States v. King*, 178 F.3d 1376 (11th Cir. 1999), the court held, in a prosecution under § 2113(b), that money being transferred in a contractor's armored vehicle from a bank to the Federal Reserve was money still "in the care, custody, control, management or possession" of the bank because the bank retained legal title to the funds.

In *United States v. Mitchell*, 146 F.3d 1338 (11th Cir. 1998), the court upheld arguably inconsistent verdicts finding the Defendant guilty under § 2113(d) (armed bank robbery), but acquitting him under § 924(c) (carrying a firearm during a crime of violence).

"Intimidation" occurs "when an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts." *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005). "Whether a particular act constitutes intimidation is viewed objectively." *Id*. The defendant need not intend for the act to be intimidating. *Id*.

A taking "from the person or in the presence of another" occurs when the money or property is "so within [the victim's] reach, inspection, observation or control, that [the victim] could if not overcome by violence or prevented by fear, retain his possession of it." " *Id*. at 1246.

**O76.4**
**Bank Robbery**
**18 U.S.C. § 2113(e)**
**(Subsection (e) Only – Alleged in a Separate Count)**

It's a separate Federal crime for anyone while [committing the crime described in Count _____ of the indictment] [avoiding or attempting to avoid being arrested for committing the crime described in Count _____ of the indictment] to force any person to accompany [him] [her] without the person's consent. So if you find beyond a reasonable doubt that the Defendant [committed the bank robbery as described in Count _____] [avoided or attempted to avoid being arrested for committing the crime described in Count _____], you may find the Defendant guilty of this crime also if all the following facts are proved beyond a reasonable doubt:

(1) while [committing the bank robbery] [attempting to avoid being arrested for committing the bank robbery], the Defendant forced at least one person to accompany [him] [her]; and

(2) the other person or people did not voluntarily consent to accompany the Defendant.

To force another person to do something without "voluntary consent" is to compel the person to act against his or her will through the use of intimidation or threats of harm.

To force a victim to "accompany" the Defendant is to force the victim to move with the defendant from place to place rather than being forced to move alone or with someone other than the Defendant.

The crime requires a forced movement of some substance or significance in the company of the Defendant, more than some small or trivial movement. But a substantial or significant movement doesn't have to involve leaving the premises, covering a particular distance, lasting a particular amount of time, or producing any particular level of fear in the victim. What the Government must prove beyond a reasonable doubt is that the victim's forced movement in the Defendant's company was of some substance or significance and not a trivial or insignificant movement.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2113(e) provides:

> (e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself from arrest or confinement for such offense… forces any person to accompany him [or her] without the consent of such person [shall be guilty of an offense against the United States].

Maximum Penalty: Mandatory minimum of ten (10) years imprisonment. If death results, then the maximum penalty is death.

The definition of "accompany," including the enumeration of things that need not be proved, is derived from *United States v. Bauer*, 956 F.2d 239 (11th Cir. 1992), *cert. denied* 506 U.S. 976, 113 S. Ct. 469, 121 L. Ed. 2d 376 (1992).

**O77**
**Armed Postal/U.S. Property Robbery**
**18 U.S.C. § 2114(a)**

It's a Federal crime to take or attempt to take mail matter, money, or property from a person in lawful custody of mail matter or of money or other property of the United States, if in so doing the [person is wounded] [person's life is jeopardized by the use of a dangerous weapon].

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

(1) the Defendant intentionally [took] [attempted to take] from the person or the presence of the person described in the indictment any mail matter or any other money or any other property of the United States then in the lawful charge, control or custody of that person;

(2) the Defendant took the property against the victim's will, [by means of force and violence] [by means of intimidation]; and

(3) while [committing] [attempting to commit] the robbery, the Defendant [wounded the person described in the indictment] [jeopardized the life of the person described in the indictment by using a dangerous weapon].

The Government is not required to prove that the Defendant knew the money or other property was property of the United States.

To take "by means of intimidation" is to say or do something in a way that would cause an ordinary person to fear bodily harm. It doesn't matter whether the

alleged victim was actually frightened, or whether the Defendant was so violent that it was likely to cause terror, panic, or hysteria.

The heart of the crime is the taking of mail matter, money, or property and the Defendant's intentional intimidation of the alleged victim.

[A "dangerous weapon" includes anything capable of being readily operated or wielded by one person to inflict severe bodily harm or injury upon another person.

To "put in jeopardy" the life of a person "by the use of a dangerous weapon" means, then, to expose someone else to a risk of death by using a dangerous weapon or device.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2114(a) provides:

> A person who assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs or attempts to rob any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned not more than twenty-five years.

Maximum Penalty: Ten (10) years imprisonment for the first offense (without wounding the person with control of the property or putting that person's life in jeopardy by use of a dangerous weapon); and
Twenty-five (25) years imprisonment for a subsequent offense or for wounding the person with control of the property or putting that

person's life in jeopardy by use of a dangerous weapon in robbing or attempting to rob the property.

This instruction is designed for the offense of armed postal robbery which requires a finding that the Defendant wounded or jeopardized the life of a postal employee by using a dangerous weapon. If the Defendant is not charged with armed postal robbery, then the third essential element should not be included in the instruction.

The defendant need not know that the property he is stealing is property of the United States. *United States v. Smithen*, 213 F.3d 1342, 1344 (11th Cir. 2000).

Section 2114 is not limited to robbery of "postal" money or property; it extends to "any money or other property of the United States." *Garcia v. United States*, 469 U.S. 70, 80, 105 S. Ct. 479, 485 (1985) (finding that robbery of Secret Service agent's "flash money" fell within § 2114's prohibitions).

**O78**
**Motor Vehicles: "Carjacking"**
**18 U.S.C. § 2119**

It's a Federal crime for anyone to take or attempt to take a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from or in the presence of another person, [by force and violence] [by intimidation] with the intent to cause death or serious bodily harm.

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

(1) the Defendant [took] [attempted to take] a motor vehicle from or in the presence of another;

(2) the Defendant did so [by force and violence] [by intimidation];

(3) the motor vehicle had previously been transported, shipped, or received in interstate or foreign commerce; and

(4) the Defendant intended to cause death or serious bodily harm when the Defendant took the motor vehicle[.] [; and]

[(5) [death] [serious bodily injury] resulted from the commission of the offense.]

"By force and violence" means the use of actual physical strength or actual physical violence.

To take "by intimidation" is to say or do something that would make an ordinary person fear bodily harm. It doesn't matter whether the victim in this case actually felt fear.

To "transport, ship, or receive" a vehicle in interstate or foreign commerce means to move the vehicle between any two states or between the United States and a foreign country. It doesn't matter whether the Defendant knew that the vehicle had moved in interstate or foreign commerce. The Government only has to prove that the vehicle actually moved in interstate or foreign commerce.

To decide whether the Defendant "intended to cause death or serious bodily harm," you must objectively judge the Defendant's conduct as shown by the evidence and from what someone in the victim's position might reasonably conclude.

[The Government contends that the Defendant intended to cause death or serious bodily harm if the victim refused to turn over the car. If you find beyond a reasonable doubt that the Defendant had that intent, then the Government has proved this element of the crime.]

["Serious bodily injury" means physical harm that involves [a substantial risk of death] [extreme physical pain] [obvious and long-term or permanent disfigurement] [long-term or permanent loss or impairment of the function of a bodily member, organ, or mental faculty]. It also includes knowingly compelling another person to perform a sexual act by using force against that person] [or describe the other mode of sexual abuse in violation of § 2241 or § 2242 as alleged in the indictment.]

## ANNOTATIONS AND COMMENTS

18 U.S.C. § 2119 provides:

> Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall [violate this section].

Maximum Penalty varies depending on injury to victim.

(1) When no serious bodily injury or death results, the maximum penalty is imprisonment for not more than 15 years and applicable fine.

(2) When serious bodily injury results, the maximum penalty is imprisonment for not more than 25 years and applicable fine.

(3) When death results, the maximum penalty is death and applicable fine.

In the context of a violation of 18 U.S.C. § 113(c) - - assault with a dangerous weapon with intent to do bodily harm - - "[t]he intent of the defendant 'is not to be measured by the secret motive of the actor, or some undisclosed purpose merely to frighten, not to hurt,' but rather 'is to be judged objectively from the visible conduct of the actor and what one in the position of the victim might reasonably conclude.'" *United States v. Guilbert*, 692 F.2d 1340, 1344 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 1260 (1983) (quoting *Shaffer v. United States*, 308 F.2d 654, 655 (5th Cir. 1962) (per curiam)). *See United States v. Gibson*, 896 F.2d 206 (6th Cir. 1990) (citing *United States v. Guilbert* and explaining that "[a] defendant's state of mind is a question of fact, often determined by objective evaluation of all the surrounding facts and circumstances").

If the victim turns over the car without the Defendant attempting to inflict (or actually inflicting) serious bodily harm, the "intent to cause…" requirement is satisfied if the Government proves that the Defendant would have attempted to harm or kill the victim had the victim offered resistance. *Holloway v. United States*, 526 U.S. 1, 11-12, 119 S. Ct. 966 (1999); *accord United States v. Douglas*, 489 F.3d 1117, 1127 (11th Cir. 2007).

*United States v. Lumley*, 135 F.3d 758 (11th Cir. 1998). "We decline to interpret section 2119 to require a perpetrator to have 'the intent to cause death or serious bodily harm' only as to the person from whom the perpetrator takes the motor vehicle." (The Defendant shot at an armed guard while fleeing a robbery, then ordered a victim out of her truck and drove off in the vehicle.)

The Fifth element should be included under the principle of *Apprendi* if the indictment triggers the enhanced maximum sentences provided by the statute in cases resulting in serious bodily injury or death.

The court may give an instruction on the lesser included offense of simple carjacking if the evidence supports such an instruction, but such an instruction is not appropriate if the defendant causes serious bodily harm to the victim and the question for the jury is therefore whether there is a nexus between the force used and the taking of the car. *United States v. LeCroy*, 441 F.3d 914, 923 (11th Cir. 2006).

**O79.1**
**Aggravated Sexual Abuse: by Force or Threat**
**18 U.S.C. § 2241(a)**

It's a Federal crime in [the special maritime jurisdiction of the United States] [the territorial jurisdiction of the United States] [a Federal prison] to sexually abuse another person by using force or threats.

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 [victim's name] to participate in a sexual act;

(2) the Defendant used force against [victim's name] or threatened [him] [her] or caused [him] [her] to believe that [he] [she] or any other person would be killed, suffer serious bodily injury, or be kidnapped;

(3) the Defendant did these acts knowingly; and

(4) the acts occurred within [the special maritime jurisdiction of the United States] [the territorial jurisdiction of the United States] [a Federal prison].

The term "sexual act" means:

- contact between the penis and the vulva, or the penis and the anus, involving penetration however slight; or

- contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or

- the penetration – however slight – of another person's anal or genital opening by a hand, finger, or any object, with an intent to abuse, humiliate, harass, or degrade the person, or to arouse or

gratify the sexual desire of the Defendant or any other person[.] [;or]

- [an intentional touching – not through the clothing – of the genitalia of a person younger than 16 years old, with the intent to abuse, humiliate, harass, or degrade the person, or to arouse or gratify the sexual desire of the Defendant or any other person.]

"Serious bodily injury" means physical harm that involves a substantial risk of death, unconsciousness, extreme physical pain, obvious and long-term or permanent disfigurement, or long-term or permanent loss or impairment of the function of a bodily member, organ, or mental faculty.

[If you find beyond a reasonable doubt that the crime occurred at the location described in the indictment, that location is [within the [special maritime] [territorial] jurisdiction of the United States] [within a federal prison].

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2241(a) provides:

> Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly causes another person to engage in a sexual act - -
>
> (1) by using force against that other person; or
>
> (2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;
>
> or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

Maximum Penalty: Life in prison and applicable fine.

**O79.2**
**Aggravated Sexual Abuse:**
**Crossing a State Line with the Intent to Engage**
**in a Sexual Act with Child Under 12**
**18 U.S.C. § 2241(c)**

It's a Federal crime for anyone to cross a State line with the intent to engage in a sexual act with a person younger than 12 years old.

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

(1) the Defendant crossed a State line with the intent to engage in a sexual act; and

(2) the [victim] was less than 12 years old.

The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

The term "sexual act" means:

- contact between the penis and the vulva, or the penis and the anus, involving penetration however slight; or

- contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or

- the penetration – however slight – of another person's anal or genital opening by a hand, finger, or any object, with an intent to abuse, humiliate, harass, or degrade the person, or to arouse or gratify the sexual desire of the Defendant or any other person[.] [;or]

- [an intentional touching – not through the clothing – of the genitalia of a person, with the intent to abuse, humiliate, harass, or

> degrade the person, or to arouse or gratify the sexual desire of the Defendant or any other person.]

It doesn't matter whether the Defendant's sole or even primary purpose in crossing the state line was to engage in a sexual act with a person under the age of 12. The Government must show that the intent was at least one of the motives or purposes for the Defendant's travel. In other words, the Government must show that the Defendant's criminal purpose was not merely incidental to the travel.

[In this case, the alleged victim was a fictitious person appearing to be younger than 12 years old. The Government doesn't have to prove that the intended victim actually existed, but it must prove beyond a reasonable doubt that the Defendant believed that the intended victim was a person younger than 12 years old.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2241(c) provides, in relevant part:

> Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years… shall be fined under this title and imprisoned for not less than 30 years or for life. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.

Maximum Penalty: Mandatory minimum of thirty (30) years for first offense; maximum term of life in prison and applicable fine. For a subsequent offense of § 2241(c), the sentence is life in prison.

18 U.S.C. § 2260A provides for an enhanced sentence for persons required to register as sex offenders. 18 U.S.C. § 2241(c) provides for a life sentence if the defendant was previously convicted of another offense under § 2241(c). 18 U.S.C. § 2247 provides that the maximum sentence for a repeat offender under chapter 109A is twice the term otherwise provided by the chapter. 18 U.S.C. § 3559 provides for mandatory life imprisonment for repeated sex offenses against children.

The defendant's dominant purpose in crossing a State line or traveling in foreign commerce need not be to engage in a sexual act with a child. However, to meet the intent requirement the Government must prove that one of the defendant's motives was to engage in a sexual act with a child. *United States v. Garcia-Lopez*, 234 F.3d 217, 220 (5th Cir. 2000) (construing intent requirement of 18 U.S.C. § 2423 and affirming district court's refusal to give instruction that illicit activity must have been "dominant purpose" for defendant's trip). *Cf. United States v. Hoschouer*, 224 Fed. Appx. 923, 925 (2007) (finding that intent requirement of § 2423(a) was met when defendant brought child on interstate trip and evidence supported the conclusion that he did so to facilitate his sexual relationship with her).

The object of the sexual act need not actually exist for the defendant to be convicted of a violation of § 2241(c). *United States v. Grossman*, 233 Fed. Appx. 963, 965 (11th Cir. 2007).

**O79.3**
**Aggravated Sexual Abuse:**
**Sexual Act with a Child Under 12**
**18 U.S.C. § 2241(c)**

It's a Federal crime for anyone within [the special maritime jurisdiction of the United States] [the territorial jurisdiction of the United States] [a Federal prison] to engage in a sexual act with a person younger than 12 years old.

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 engaged in a sexual act with [victim's name];

(2) at the time, [the victim's name] was younger than 12 years old; and

(3) the acts occurred [within the special maritime jurisdiction of the United States] [within the territorial jurisdiction of the United States] [in a Federal prison].

The Government doesn't have to prove that the Defendant knew that [victim's name] was younger than 12 years old.

The term "sexual act" means:

- contact between the penis and the vulva, or the penis and the anus, involving penetration however slight; or

- contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or

- the penetration – however slight – of another person's anal or genital opening by a hand, finger, or any object, with an intent to abuse, humiliate, harass, or degrade the person, or to arouse or

gratify the sexual desire of the Defendant or any other person[.] [;or]

- [an intentional touching – not through the clothing – of the genitalia of a person, with the intent to abuse, humiliate, harass, degrade the person, or to arouse or gratify the sexual desire of the Defendant or any other person.]

[If you find beyond a reasonable doubt that the offense occurred at the location alleged and described in the indictment, you are instructed that the location would be [within the [special maritime] [territorial] jurisdiction of the United States] [in a Federal prison.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2241(c) provides, in relevant part:

> Whoever … in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or attempts to do so, shall be fined under this title and imprisoned for not less than 30 years or for life. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.

Maximum Penalty: Mandatory minimum of thirty (30) years for first offense; maximum term of life in prison and applicable fine. For a subsequent offense of § 2241(c), the sentence is life in prison.

"In a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years." 18 U.S.C. § 2241(d).

Mistake as to the victim's age is not a defense if the victim is under the age of 12. *United States v. Juvenile Male*, 211 F.3d 1169, 1171 (9th Cir. 2000).

18 U.S.C. § 2260A provides for an enhanced sentence for persons required to register as sex offenders. 18 U.S.C. § 2241(c) provides for a life sentence if the defendant was previously convicted of another offense under § 2241(c). 18 U.S.C. § 2247 provides that the maximum sentence for a repeat offender under chapter 109A is twice the term otherwise provided by the chapter. 18 U.S.C. § 3559 provides for mandatory life imprisonment for repeated sex offenses against children.

Whether the crime alleged occurred at a particular location is a question of fact. Whether the location is within the special maritime and territorial jurisdiction of the United States or a federal prison is a question of law.

**O79.4**
**Aggravated Sexual Abuse:**
**Sexual Act with Child Between 12 and 16**
**18 U.S.C. § 2241(c)**

It's a Federal crime for anyone [within the special maritime jurisdiction of the United States] [within the territorial jurisdiction of the United States] [in a Federal prison] to force a person who is at least 12 years old but younger than 16 years old to engage in a sexual act by using force or threats when the victim is at least four years younger than the person using force or threats.

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 engaged in a sexual act with [victim's name or initials];

(2) the Defendant did so by [using force against [the person]] [threatening or placing [the person] in fear that [the person], or any other person, would be subjected to death, serious bodily injury, or kidnapping] [rendering [the person] unconscious] [administering to [the person] a drug, intoxicant, or similar substance that substantially impaired the ability of [the person] to appraise or control [his] [her] own conduct];

(3) at the time, [the person with whom Defendant engaged in the sexual act] was at least 12 years old but less than 16 years old;

(4) at the time, [the person with whom Defendant engaged in such sexual act] was at least four years younger than the Defendant; and

(5) the acts occurred [within the special maritime jurisdiction of the United States] [within the territorial jurisdiction of the United States] [in a Federal prison].

The term "sexual act" means:

- contact between the penis and the vulva, or the penis and the anus, involving penetration however slight; or

- contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or

- the penetration – however slight – of another person's anal or genital opening by a hand, finger, or any object, with an intent to abuse, humiliate, harass, or degrade the person, or to arouse or gratify the sexual desire of the Defendant or any other person[.] [;or]

- [an intentional touching – not through the clothing – of the genitalia of a person, with the intent to abuse, humiliate, harass, or degrade the person, or to arouse or gratify the sexual desire of the Defendant or any other person.]

"Serious bodily injury" means physical harm that involves a substantial risk of death, unconsciousness, extreme physical pain, obvious and long-term or permanent disfigurement, or long-term or permanent loss or impairment of the function of a bodily member, organ, or mental faculty.

[If you find beyond a reasonable doubt that the crime occurred at the location described in the indictment, that location is [within the [special maritime] [territorial] jurisdiction of the United States].] [in a federal prison.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2241(c) provides, in relevant part:

> Whoever … in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in

> which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency… knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging), or attempts to do so, shall be fined under this title and imprisoned for not less than 30 years or for life. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.

Maximum Penalty: Mandatory minimum of thirty (30) years for first offense; maximum term of life in prison and applicable fine. For a subsequent offense of § 2241(c), the sentence is life in prison.

Whether the crime alleged occurred at a particular location is a question of fact. Whether the location is within the special maritime and territorial jurisdiction of the United States or a federal prison is a question of law.

18 U.S.C. § 2260A provides for an enhanced sentence for persons required to register as sex offenders. 18 U.S.C. § 2241(c) provides for a life sentence if the defendant was previously convicted of another offense under § 2241(c). 18 U.S.C. § 2247 provides that the maximum sentence for a repeat offender under chapter 109A is twice the term otherwise provided by the chapter. 18 U.S.C. § 3559 provides for mandatory life imprisonment for repeated sex offenses against children.

**O80**
**Sexual Abuse of a Minor**
**18 U.S.C. § 2243(a)**

It's a Federal crime for anyone [within the special maritime jurisdiction of the United States] [within the territorial jurisdiction of the United States] [in a Federal prison] to engage in a sexual act with a person who is at least 12 years old but younger than 16 years old, and who is at least four years younger than the person engaging in the conduct.

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 engaged in a sexual act with [the person named in the indictment];

(2) at the time, [the person with whom Defendant engaged in the sexual act] was at least 12 years old but less than 16 years old;

(3) at the time, [the person with whom Defendant engaged in the sexual act] was at least four years younger than the defendant; and

(4) the acts occurred [within the special maritime jurisdiction of the United States] [within the territorial jurisdiction of the United States] [in a Federal prison].

The Government does not need to prove that the Defendant knew the victim's age or knew what the requisite age difference was.

The term "sexual act" means:

- contact between the penis and the vulva, or the penis and the anus, involving penetration however slight; or

- contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or

- the penetration – however slight – of another person's anal or genital opening by a hand, finger, or any object, with an intent to abuse, humiliate, harass, or degrade the person, or to arouse or gratify the sexual desire of the Defendant or any other person[.] [;or]

- [an intentional touching – not through the clothing – of the genitalia of a person younger, with the intent to abuse, humiliate, harass, or degrade the person, or to arouse or gratify the sexual desire of the Defendant or any other person.]

[If you find beyond a reasonable doubt that the crime occurred at the location described in the indictment, that location is [within the [special maritime] [territorial] jurisdiction of the United States] [in a federal prison].

[The defense asserts that although the Defendant may have committed the acts charged in the indictment, the Defendant [reasonably believed that [the person named in the indictment] was 16 years or older at the time of the acts charged in the indictment] [and that [he] [she] and [the person named in the indictment] were married to each other]. The Defendant has to prove, by a preponderance of the evidence, that [he] [she] [reasonably believed that [the person named in the indictment] was 16 years or older at the time of the acts charged in the indictment [and that [he] [she] and [the person named in the indictment] were married to each other at the time of the acts charged in the indictment]. This is sometimes called the burden of proof or burden of persuasion. A preponderance of the evidence simply means an amount of evidence that is enough to persuade you that the

Defendant's claim is more likely true than not true. If you find that the Defendant has met this burden of proof, then you should find the Defendant not guilty of Count _____, Sexual Abuse of a Minor.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2243(a) provides:

> Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who - -
>
> (1) has attained the age of 12 years but has not attained the age of 16 years; and
>
> (2) is at least four years younger than the person so engaging;
>
> or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

Maximum Penalty: Fifteen (15) years. For repeat offenders, the maximum is thirty (30) years. 18 U.S.C. § 2247. For registered sex offenders, the sentence is enhanced by ten (10) years. 18 U.S.C. § 2260A.

Whether the crime alleged occurred at a particular location is a question of fact. Whether the location is within the special maritime and territorial jurisdiction of the United States or a federal prison is a question of law.

18 U.S.C. § 2260A provides for an enhanced sentence for persons required to register as sex offenders. 18 U.S.C. § 2247 provides that the maximum sentence for a repeat offender under chapter 109A is twice the term otherwise provided by the chapter.

The government does not need to prove that the defendant knew the victim's age or that the requisite age difference existed. 18 U.S.C. § 2243(d). *United States v. Wilcox*, 487 F.3d 1163, 1174 (8th Cir. 2007) (finding no error where trial court so instructed the jury).

Mistake of age is a defense if the defendant reasonably believed that the other person was 16 or older. 18 U.S.C. § 2243(c). The defendant must prove that defense by a preponderance of the evidence.

**O81.1**
**Abusive Sexual Contact**
**18 U.S.C. § 2244(a)(3)**

It's a Federal crime for anyone within [the special maritime jurisdiction of the United States] [the territorial jurisdiction of the United States] [a Federal prison] [ a detention facility] to [engage in sexual contact with a person who is at least 12 years old but younger than 16 and is at least four years younger than the person engaging in the conduct] [cause sexual contact with or by a person who is at least 12 years old but younger than 16 and is at least four years younger than the person causing the contact].

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 engaged in sexual contact with [the person named in the indictment]] [knowingly caused sexual contact with or by [the person named in the indictment]];

(2) at the time, [the person named in the indictment] was at least 12 years old but less than 16 years old;

(3) at the time, [the person named in the indictment] was at least four years younger than the defendant; and

(4) the acts occurred [within the special maritime jurisdiction of the United States] [within the territorial jurisdiction of the United States] [in a Federal prison] [in a prison, institution, or facility in which people are held in custody by direction of or under a contract or agreement with the head of any Federal department or agency].

The Government does not need to prove that the Defendant knew the victim's age or knew what the requisite age difference was.

The term "sexual act" means:

- contact between the penis and the vulva, or the penis and the anus, involving penetration however slight; or

- contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or

- the penetration – however slight – of another person's anal or genital opening by a hand, finger, or any object, with an intent to abuse, humiliate, harass, or degrade the person, or to arouse or gratify the sexual desire of the Defendant or any other person[.] [;or]

- [an intentional touching – not through the clothing – of the genitalia of a person younger than 16 years old, with the intent to abuse, humiliate, harass, or degrade the person, or to arouse or gratify the sexual desire of the Defendant or any other person.]

[If you find beyond a reasonable doubt that the offense occurred at the location alleged and described in the indictment, that location is within the [special maritime] [territorial] jurisdiction of the United States.] [in a Federal prison.] [in a detention facility.]

[For the affirmative defense of mistake of age or marriage see Instruction 80.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2244(a)(3) provides:

> Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in or causes sexual contact with or by another person, if so to do would violate… subsection (a) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both.

Maximum Penalty: Two (2) years. For repeat offenders, the maximum is four (4) years. 18 U.S.C. § 2247. For registered sex offenders, the sentence is enhanced by ten (10) years. 18 U.S.C. § 2260A.

Whether the crime alleged occurred at a particular location is a question of fact. Whether the location is within the special maritime and territorial jurisdiction of the United States or a federal prison is a question of law.

18 U.S.C. § 2260A provides for an enhanced sentence for persons required to register as sex offenders. 18 U.S.C. § 2247 provides that the maximum sentence for a repeat offender under chapter 109A is twice the term otherwise provided by the chapter.

The government does not need to prove that the defendant knew the victim's age or that the requisite age difference existed. 18 U.S.C. § 2243(d). *United States v. Wilcox*, 487 F.3d 1163, 1174 (8th Cir. 2007) (finding no error where trial court so instructed the jury). Mistake of age is a defense if the defendant reasonably believed that the other person was 16 or older. 18 U.S.C. § 2243(c). The defendant must prove that defense by a preponderance of the evidence. See the pattern instruction on 18 U.S.C. § 2243(a) for an instruction on this defense.

**O81.2**
**Abusive Sexual Contact:**
**Sexual Contact with Child Under 12**
**18 U.S.C. §§ 2244(a)(3) and 2244(c)**

It's a Federal crime for anyone [within the special maritime jurisdiction of the United States] [within the territorial jurisdiction of the United States] [in a Federal prison] [in a prison, institution, or facility in which people are held in custody by direction of or under a contract or agreement with the head of any Federal department or agency] to [engage in sexual contact with a person who is less than 12 years old] [cause sexual contact with or by a person who is less than 12 years old].

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 engaged in sexual contact with [the person named in the indictment]] [knowingly caused sexual contact with or by [the person named in the indictment]];

(2) at the time, [the person named in the indictment] was less than 12 years old; and

(3) the acts occurred [within the special maritime jurisdiction of the United States] [within the territorial jurisdiction of the United States] [in a Federal prison] [in a prison, institution, or facility in which people are held in custody by direction of or under a contract or agreement with the head of any Federal department or agency].

The Government does not need to prove that the Defendant knew the victim's age.

The term "sexual act" means:

- contact between the penis and the vulva, or the penis and the anus, involving penetration however slight; or

- contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or

- the penetration – however slight – of another person's anal or genital opening by a hand, finger, or any object, with an intent to abuse, humiliate, harass, or degrade the person, or to arouse or gratify the sexual desire of the Defendant or any other person[.] [;or]

- [an intentional touching – not through the clothing – of the genitalia of a person, with the intent to abuse, humiliate, harass, or degrade the person, or to arouse or gratify the sexual desire of the Defendant or any other person.]

[If you find beyond a reasonable doubt that the offense occurred at the location alleged and described in the indictment, you are instructed that the location would be within the [special maritime] [territorial] jurisdiction of the United States.] [in a Federal prison.] [in a prison, institution, or facility in which people are held in custody by direction of or under a contract or agreement with the head of any Federal department or agency.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2244(a)(3) provides:

> Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in or causes sexual contact with or by another person, if

> so to do would violate… subsection (a) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both.

18 U.S.C. § 2244(c) provides:

> If the sexual contact that violates [§ 2244(a)(3)] is with an individual who has not attained the age of 12 years, the maximum term of imprisonment that may be imposed for the offense shall be twice that otherwise provided in this section.

Maximum Penalty: Four (4) years. For repeat offenders, the maximum is eight (8) years. 18 U.S.C. § 2247. For registered sex offenders, the sentence is enhanced by ten (10) years. 18 U.S.C. § 2260A.

Whether the crime alleged occurred at a particular location is a question of fact. Whether the location is within the special maritime and territorial jurisdiction of the United States or a federal prison is a question of law.

18 U.S.C. § 2260A provides for an enhanced sentence for persons required to register as sex offenders. 18 U.S.C. § 2247 provides that the maximum sentence for a repeat offender under chapter 109A is twice the term otherwise provided by the chapter.

The government does not need to prove that the defendant knew the victim's age. 18 U.S.C. § 2243(d). *United States v. Wilcox*, 487 F.3d 1163, 1174 (8th Cir. 2007) (finding no error where trial court so instructed the jury).

**O82**
**Sexual Exploitation of Children**
**Producing/Transmitting Visual Depiction of Sexually Explicit Conduct**
**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 or affecting interstate or foreign commerce, with the intent that the minor engage in sexually explicit conduct for the purpose of producing any visual depiction of the conduct or for the purpose of transmitting a live visual depiction of such conduct], if [the person knows or has reason to know that the visual depiction will be transported in or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed] [the visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer] [the visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting 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] 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] of the conduct; OR the Defendant transported the minor [in or affecting interstate or foreign commerce] [in foreign commerce], with the intent that such minor engage in sexually explicit conduct for the purpose of producing a [visual depiction, e.g., video] of the conduct or for the purpose of transmitting a live visual depiction of such conduct; and (3) either (a) the Defendant knew or had reason to know that the [visual depiction, e.g., video] would be mailed or transported in or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce; (b) the [visual depiction, e.g., video] was produced or transmitted using materials that had been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer; or (c) the [visual depiction, e.g., video] was mailed or actually transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting 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, property, or communication from one state to another state, from one state to another country, or from another country into one or more states, or from another country into 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 video, data stored on computer disk or by electronic means which is capable of conversion into

a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.

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 anus, genitals, or pubic area of any person.

"Lascivious exhibition" means indecent exposure of the anus, 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 anus, genitals, 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 anus, genitals, 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 or affecting 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 or for the purpose of transmitting a live 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 or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed. Definitions of the relevant terms are taken from 18 U.S.C. § 2256. The 2018 amendments to § 2256 added the word "anus" in § 2256(2)(A)(v) as part of the definition of "sexually explicit conduct." 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 F.3d 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 *Smith*, 459 F.3d at 1296 n.17, 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 (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 factfinder limits the potential universe of objectionable images.
>
> *Ibid*. (footnote omitted). 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 genitals 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.

*See Williams*, 444 F.3d at 1299 n.62. However, the Eleventh Circuit has not officially adopted the *Dost* factors as part of the law of this Circuit. *See United States v. Grzybowicz*, 747 F.3d 1296, 1306 n.8 (11th Cir. 2014) ("Deciding whether the *Dost* factors should be part of the law of our circuit is unnecessary in this case.").

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." *Dost*, 636 F. Supp. at 832 (quotation marks omitted).

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, 1316 (11th Cir. 2016); *United States v. Lebowitz*, 676 F.3d 1000, 1013–15 (11th Cir. 2012).

**O82.1**
**Sexual Exploitation of Children**
**Advertising Visual Depiction of Sexually Explicit Conduct**
**18 U.S.C. § 2251(d)**

It's a federal crime for any person to make, print, or publish, or cause to be made, printed, or published, any notice or advertisement seeking or offering [to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct] [participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct], if [such person knows or has reason to know such notice or advertisement will be transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer or mailed] or [such notice or advertisement is transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer or mailed].

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 [made] [printed] [published] [[caused to be [made] [printed] [published]] a [[notice] [advertisement]] [[seeking] [offering]];

(2) to [receive] [exchange] [buy] [produce] [display] [distribute] [reproduce] any visual depiction involving the use of a minor

engaged in sexually explicit conduct, and the visual depiction is of such conduct; or

(3) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct; and

(4) the Defendant [knows] [has reason to know] the [notice] [advertisement] would be transported [using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce] by any means, including by computer or mailed; or

(5) such [notice] [advertisement] [was transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce] by any means, including by computer or mailed.

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

The term "interstate or foreign commerce" means the movement of a person, property, or communication from one state to another state, from one state to another country, or from another country into one or more states, or from another country into the United States. [It is not necessary for the Government to prove the Defendant knew the [notice] [advertisement] had moved in interstate or foreign commerce.]

The term "visual depiction" includes undeveloped film and video, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.

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

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

(b) bestiality;

(c) masturbation;

(d) sadistic or masochistic abuse; or

(e) lascivious exhibition of the anus, genitals, or pubic area of any person.

"Lascivious exhibition" means indecent exposure of the anus, 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 anus, genitals, 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 anus, genitals, 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.

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.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2251(d) provides:

> (1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering –
>
> > (A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or
> >
> > (B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct;
> >
> > shall be punished as provided under subsection (e).
>
> (2) The circumstance referred to in paragraph (1) is that –
>
> > (A) such person knows or has reason to know that such notice or advertisement will be transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer or mailed; or
> >
> > (B) such notice or advertisement is transported using any means or facility of interstate or foreign commerce or in or

> affecting interstate or foreign commerce by any means, including by computer or mailed.

Definitions of the relevant terms are taken from 18 U.S.C. § 2256. The 2018 amendments to § 2256 added the word "anus" in § 2256(2)(A)(v) as part of the definition of "sexually explicit conduct."

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 F.3d 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 *Smith*, 459 F.3d at 1296 n.17, 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 (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 factfinder limits the potential universe of objectionable images.

*Ibid.* (footnote omitted). 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 genitals 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.

*See Williams*, 444 F.3d at 1299 n.62. However, the Eleventh Circuit has not officially adopted the *Dost* factors as part of the law of this Circuit. *See United States v. Grzybowicz*, 747 F.3d 1296, 1306 n.8 (11th Cir. 2014) ("Deciding whether the *Dost* factors should be part of the law of our circuit is unnecessary in this case.").

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." *Dost*, 636 F. Supp. at 832 (quotation marks omitted).

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, 1316 (11th Cir. 2016); *United States v. Lebowitz*, 676 F.3d 1000, 1013–15 (11th Cir. 2012).

**O83.1**
**Sexual Exploitation of Minors**
**Transporting or Shipping Visual Depiction Involving**
**Sexual Exploitation of Minors**
**18 U.S.C. § 2252(a)(1)**

It's a federal crime to knowingly transport or ship using any means or facility of interstate or foreign commerce, or in or affecting interstate or foreign commerce, by any means, including by computer or mails, any visual depiction, produced by using a minor engaging in sexually explicit conduct and depicting the conduct.

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 [transported] [shipped] a visual depiction of a minor, using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer or mails;

(2) producing the visual depiction involved using a minor engaged in sexually explicit conduct;

(3) the depiction shows a minor engaged in sexually explicit conduct; and

(4) the Defendant knew that at least one performer in the visual depiction was a minor and knew that the depiction showed the minor engaged in sexually explicit conduct.

The term "interstate or foreign commerce" means the movement of a person, property, or communication from one state to another state, from one state to another country, or from another country into one or more states, or from another country into the United States. [It is not necessary for the Government to prove that

the Defendant knew that the visual depiction had moved in interstate or foreign commerce.]

[The term "computer" includes any high-speed data-processing device that can perform logical, arithmetic, or storage functions, including any data-storage facility or communications facility that is directly related to or operates in conjunction with the device. It doesn't include an automated typewriter or typesetter, a portable hand-held calculator, or other similar device that is limited in function to only word-processing or mathematical calculations.]

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 anus, genitals, or pubic area of any person.

"Lascivious exhibition" means indecent exposure of the anus, 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 anus, genitals, 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 anus, genitals, 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.

A visual depiction need not have all these factors to be a lascivious exhibition.

The term "visual depiction" includes undeveloped film and video, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.

A "minor" is any person younger than 18 years old.

**ANNOTATIONS AND COMMENTS**

(a) 18 U.S.C. § 2252(a)(1) provides: Any person who - -

> (1) knowingly transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer or mails . . . any visual depiction, if - -
>
> > (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct . . .

shall be punished as provided in subsection (b) of this section.

Definitions of the relevant terms are taken from 18 U.S.C. § 2256. The 2018 amendments to § 2256 added the word "anus" in § 2256(2)(A)(v) as part of the definition of "sexually explicit conduct."

*See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77–78 (1994) (setting out the scienter requirement).

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 (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 factfinder limits the potential universe of objectionable images.

*Ibid*. (footnote omitted). 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 genitals 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.

*See Williams*, 444 F.3d at 1299 n.62. However, the Eleventh Circuit has not officially adopted the *Dost* factors as part of the law of this Circuit. *See United States v. Grzybowicz*, 747 F.3d 1296, 1306 n.8 (11th Cir. 2014) ("Deciding whether the *Dost* factors should be part of the law of our circuit is unnecessary in this case.").

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." *Dost*, 636 F. Supp. at 832 (quotation marks omitted).

**O83.2A**
**Sexual Exploitation of Minors**
**Receiving or Distributing Visual Depiction Involving**
**Sexual Exploitation of Minors**
**18 U.S.C. § 2252(a)(2)**

It's a federal crime to knowingly [receive] [distribute] any visual depiction [using any means or facility of interstate or foreign commerce] [that has been mailed] [that has been shipped or transported in or affecting interstate or foreign commerce] [which contains materials which have been mailed or so shipped or transported by any means, including by computer] when the visual depiction was produced by using a minor engaging in sexually explicit conduct and depicts the conduct.

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 [received] [distributed] a visual depiction;(2) [using any means or facility of interstate or foreign commerce] [that has been mailed] [that has been shipped or transported in or affecting interstate or foreign commerce] [which contains materials which have been mailed or so shipped or transported by any means, including by computer];

(3) producing the visual depiction involved using a minor engaged in sexually explicit conduct;

(4) the depiction is of a minor engaged in sexually explicit conduct; and

(5) the Defendant knew that at least one performer in the visual depiction was a minor and knew that the depiction showed the minor engaged in sexually explicit conduct.

[To "distribute" something simply means to deliver or transfer possession of it to someone else, with or without any financial interest in the transaction.]

[To "receive" something simply means knowingly to accept or take possession of something. Receipt does not require proof of ownership.]

"Minor" means any person younger than 18 years old.

The term "interstate or foreign commerce" means the movement of a person, property, or communication from one state to another state, from one state to another country, or from another country into one or more states, or from another country into 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 "computer" includes any high-speed data-processing device that can perform logical, arithmetic, or storage functions, including any data-storage facility or communications facility that is directly related to or operates in conjunction with the device. It doesn't include an automated typewriter or typesetter, a portable hand-held calculator, or similar devices which are limited in function to word-processing or mathematical calculations.]

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 anus, genitals, or pubic area of any person.

"Lascivious exhibition" means indecent exposure of the anus, 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 anus, genitals, 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 anus, genitals, 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.

A visual depiction need not have all these factors to be a lascivious exhibition.

The term "visual depiction" includes undeveloped film and video, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2252(a)(2) provides:

> (a) Any person who - -
> . . .
> (2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means, including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails . . . if - -
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct . . .
>
> shall be punished as provided in subsection (b) of this section.

Definitions of the relevant terms are taken from 18 U.S.C. § 2256. The 2018 amendments to § 2256 added the word "anus" in § 2256(2)(A)(v) as part of the definition of "sexually explicit conduct."

*See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77–78 (1994) (setting out scienter requirement).

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 (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 factfinder limits the potential universe of objectionable images.

*Ibid*. (footnote omitted). 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 genitals 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.

*See Williams*, 444 F.3d at 1299 n.62. However, the Eleventh Circuit has not officially adopted the *Dost* factors as part of the law of this Circuit. *See United States v. Grzybowicz*, 747 F.3d 1296, 1306 n.8 (11th Cir. 2014) ("Deciding whether the *Dost* factors should be part of the law of our circuit is unnecessary in this case.").

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." *Dost*, 636 F. Supp. at 832 (quotation marks omitted).

**O83.2B**
**Sexual Exploitation of Minors**
**Reproducing Visual Depiction Involving**
**Sexual Exploitation of Minors**
**18 U.S.C. § 2252(a)(2)**

It's a federal crime to knowingly reproduce any visual depiction [using any means or facility of interstate or foreign commerce] [in or affecting interstate or foreign commerce] [that has been mailed] when the visual depiction was produced by using a minor engaging in sexually explicit conduct and depicts the conduct.

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 reproduced a visual depiction;

(2) [using any means or facility of interstate or foreign commerce] [in or affecting interstate or foreign commerce] [that has been mailed];

(3) producing the visual depiction involved using a minor engaged in sexually explicit conduct;

(4) the depiction is of a minor engaged in sexually explicit conduct; and

(5) the Defendant knew that at least one performer in the visual depiction was a minor and knew that the depiction showed the minor engaged in sexually explicit conduct.

[To "distribute" something simply means to deliver or transfer possession of it to someone else, with or without any financial interest in the transaction.]

[To "receive" something simply means knowingly to accept or take possession of something. Receipt does not require proof of ownership.]

"Minor" means any person younger than 18 years old.

The term "interstate or foreign commerce" means the movement of a person, property, or communication from one state to another state, from one state to another country, or from another country into one or more states, or from another country into the United States. [It is not necessary for the Government to prove that the Defendant knew that the visual depiction had moved in interstate or foreign commerce.]

[The term "computer" includes any high-speed data-processing device that can perform logical, arithmetic, or storage functions, including any data-storage facility or communications facility that is directly related to or operates in conjunction with the device. It doesn't include an automated typewriter or typesetter, a portable hand-held calculator, or similar devices which are limited in function to word-processing or mathematical calculations.]

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 anus, genitals, or pubic area of any person.

"Lascivious exhibition" means indecent exposure of the anus, 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 anus, 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 anus, 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.

A visual depiction need not have all these factors to be a lascivious exhibition.

The term "visual depiction" includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2252(a)(2) provides:

(a) Any person who - -

. . .

> (2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means, including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails . . . if - -
>
> > (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
> >
> > (B) such visual depiction is of such conduct . . .
>
> shall be punished as provided in subsection (b) of this section.

Definitions of the relevant terms are taken from 18 U.S.C. § 2256. The 2018 amendments to § 2256 added the word "anus" in § 2256(2)(A)(v) as part of the definition of "sexually explicit conduct."

*See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77–78 (1994) (setting out scienter requirement).

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 (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 factfinder limits the potential universe of objectionable images.

*Ibid*. (footnote omitted). 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.

*See Williams*, 444 F.3d at 1299 n.62.

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." *Dost*, 636 F. Supp. at 832 (quotation marks omitted).

**O83.2C**
**Sexual Exploitation of Minors**
**Selling or Possessing with Intent to Sell Visual Depiction Involving Sexual Exploitation of Minors**
**18 U.S.C. § 2252(a)(3)(B)**

It's a federal crime to knowingly [sell] [possess with intent to sell] [any visual depiction] that [has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce] [has been shipped or transported in or affecting interstate or foreign commerce] [was produced using materials which have been mailed or so shipped or transported using any means or facility of interstate or foreign commerce, including by computer] when the visual depiction was produced by using a minor engaging in sexually explicit conduct and depicts the conduct.

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 [sold] [possessed with intent to sell] any visual depiction;

(2) that [has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce] [has been shipped or transported in or affecting interstate or foreign commerce] [was produced using materials which have been mailed or so shipped or transported using any means or facility of interstate or foreign commerce, including by computer];

(3) producing the visual depiction involved using a minor engaged in sexually explicit conduct;

(4) the depiction is of a minor engaged in sexually explicit conduct; and

(5) the Defendant knew that at least one performer in the visual depiction was a minor and knew that the depiction showed the minor engaging in sexually explicit conduct.

[To "distribute" something simply means to deliver or transfer possession of it to someone else, with or without any financial interest in the transaction.]

[To "receive" something simply means knowingly to accept or take possession of something. Receipt does not require proof of ownership.]

"Minor" means any person younger than 18 years old.

The term "interstate or foreign commerce" means the movement of a person, property, or communication from one state to another state, from one state to another country, or from another country into one or more states, or from another country into 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 "computer" includes any high-speed data-processing device that can perform logical, arithmetic, or storage functions, including any data-storage facility or communications facility that is directly related to or operates in conjunction with the device. It doesn't include an automated typewriter or typesetter, a portable hand-held calculator, or similar devices which are limited in function to word-processing or mathematical calculations.]

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 anus, genitals, or pubic area of any person.

"Lascivious exhibition" means indecent exposure of the anus, 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 anus, 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 anus, 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.

A visual depiction need not have all these factors to be a lascivious exhibition.

The term "visual depiction" includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2252(a)(3)(B) provides:

> (a) Any person who - -
> . . .
> (B) knowingly sells or possesses with intent to sell any visual depiction that has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce, or has been shipped or transported in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported using any means or facility of interstate or foreign commerce, including by computer, if - -
>
> > (i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
> >
> > (ii) such visual depiction is of such conduct . . .
>
> shall be punished as provided in subsection (b) of this section.

Definitions of the relevant terms are taken from 18 U.S.C. § 2256. 2018 amendments to § 2256 added the word "anus" in § 2256(2)(A)(v) as part of the definition of "sexually explicit conduct."

*See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77–78 (1994) (setting out scienter requirement).

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 (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 factfinder limits the potential universe of objectionable images.

*Ibid*. (footnote omitted). 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.

*See Williams*, 444 F.3d at 1299 n.62.

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." *Dost*, 636 F. Supp. at 832 (quotation marks omitted).

**O83.2D**
**Sexual Exploitation of Minors**
**Possessing or Accessing with Intent to View Visual Depiction Involving Sexual Exploitation of Minors**
**18 U.S.C. § 2252(a)(4)(B)**

It's a federal crime to knowingly [possess] [access with intent to view] one or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that [has been mailed] [has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce] [was produced using materials which have been mailed or so shipped or transported, by any means, including by computer] when the visual depiction was produced by using a minor engaging in sexually explicit conduct and depicts the conduct.

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 [possessed] [accessed with intent to view] one or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction;

(2) [has been mailed] [has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce] [was produced using materials which have been mailed or so shipped or transported, by any means, including by computer] when the visual depiction was produced by using a minor engaging in sexually explicit conduct and depicts the conduct;

(3) producing the visual depiction involved using a minor engaged in sexually explicit conduct;

(4) the depiction is of a minor engaged in sexually explicit conduct; and

(5) the Defendant knew that at least one performer in the visual depiction was a minor and knew that the depiction showed the minor engaged in sexually explicit conduct.

[To "distribute" something simply means to deliver or transfer possession of it to someone else, with or without any financial interest in the transaction.]

[To "receive" something simply means knowingly to accept or take possession of something. Receipt does not require proof of ownership.]

"Minor" means any person younger than 18 years old.

The term "interstate or foreign commerce" means the movement of a person, property, or communication from one state to another state, from one state to another country, or from another country into one or more states, or from another country into 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 "computer" includes any high-speed data-processing device that can perform logical, arithmetic, or storage functions, including any data-storage facility or communications facility that is directly related to or operates in conjunction with the device. It doesn't include an automated typewriter or typesetter, a portable hand-held calculator, or similar devices which are limited in function to word-processing or mathematical calculations.]

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 anus, genitals, or pubic area of any person.

"Lascivious exhibition" means indecent exposure of the anus, 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 anus, 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 anus, 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.

A visual depiction need not have all these factors to be a lascivious exhibition.

The term "visual depiction" includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2252(a)(4)(B) provides:

(a) Any person who - -

. . .

(B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means, including by computer, if - -

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

Definitions of the relevant terms are taken from 18 U.S.C. § 2256. The 2018 amendments to § 2256 added the word "anus" in § 2256(2)(A)(v) as part of the definition of "sexually explicit conduct."

*See United States v. X-Citement Video, Inc.*, 513 U.S. 64 77–78 (1994) (setting out scienter requirement).

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 (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 factfinder limits the potential universe of objectionable images.

*Ibid*. (footnote omitted). 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.

*See Williams*, 444 F.3d at 1299 n.62.

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." *Dost*, 636 F. Supp. at 832 (quotation marks omitted).

**O83.3A**
**Child Pornography**
**Mailing, Transporting, or Shipping (Visual Depiction of Actual Minor as Defined in 18 U.S.C. § 2256(8)(A), (C))**
**18 U.S.C. § 2252A(a)(1)**

It's a federal crime to knowingly [mail] [transport] [ship] any child pornography [using any means or facility of interstate or foreign commerce] [in or affecting interstate or foreign commerce, including by computer].

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

(1) the Defendant [mailed] [transported] [shipped] child pornography;

(2) [using any means or facility of interstate or foreign commerce] [in or affecting interstate or foreign commerce, including by computer]; and

(3) the Defendant knew the material was child pornography.

The term "interstate or foreign commerce" means the movement of a person, property, or communication from one state to another state, from one state to another country, or from another country into one or more states, or from another country into the United States. [It is not necessary for the Government to prove that the Defendant knew that the child pornography had moved in interstate or foreign commerce.]

[The term "computer" includes any high-speed data-processing device that can perform logical, arithmetic, or storage functions, including any data-storage facility or communications facility that is directly related to or operates in

conjunction with the device. It doesn't include an automated typewriter or typesetter, a portable hand-held calculator, or similar devices which are limited in function to word-processing or mathematical calculations.]

The term "child pornography" means any visual depiction, including any photograph, film, video, picture or computer or computer-generated image or picture made or produced by electronic, mechanical, or other means, of sexually explicit conduct where [the visual depiction's production involves using a minor engaging in sexually explicit conduct] [the visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct].

A "minor" is a person younger than 18 years old.

[An "identifiable minor" is a person [who was a minor when the visual depiction was created, adapted, or modified] [whose image as a minor was used in creating, adapting, or modifying the visual depiction] and who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature. The government does not have to prove the actual identity of the identifiable minor.]

The term "visual depiction" includes undeveloped film and video, data stored on computer disk or by electronic means which is capable of conversion into

a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.

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 anus, genitals, or pubic area of any person.

"Lascivious exhibition" means indecent exposure of the anus, 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 anus, genitals, 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 anus, genitals, 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.

A visual depiction need not have all these factors to be a lascivious exhibition.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2252A(a)(1) provides:

> (a) Any person who --
>
> > (1) knowingly mails, or transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including, by computer, any child pornography; . . . [shall be guilty of an offense against the United States].

For cases where the alleged child pornography consists of a digital or computer image that appears indistinguishable from an actual minor but may not be an actual person, see instruction O83.3B.

Definitions of the relevant terms are taken from 18 U.S.C. § 2256. The 2018 amendments to § 2256 added the word "anus" in § 2256(2)(A)(v) as part of the definition of "sexually explicit conduct."

Note that the 1998 amendment to § 2252A added subsections (c) and (d), allowing certain affirmative defenses.

*United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77–78 (1994), held that 18 U.S.C. § 2252(a)(1) and (2) require proof of scienter as to the age of the performer. While the structure of § 2252A(a)(1) and (2) is different (using "child pornography" instead of "visual depiction involving the use of a minor"), § 2252A(a)(1) and (2) also contain as an element of scienter the age of the performer. *See United States v. Acheson*, 195 F.3d 645, 653 (11th Cir. 1999), *overruled on other grounds by Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (the government must show not only that the individual received or distributed the material, but that he did so believing that the material was sexually explicit in nature and that it depicted a person who appeared to him to be, or that he anticipated would be, under 18 years of age).

Knowledge of the interstate nexus is not a required element of the crime. *United States v. Smith*, 459 F.3d 1276, 1289 (11th Cir. 2006).

In *Smith*, 459 F.3d at 1296 n.17, 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 (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.

*Ibid*. (footnote omitted). 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 genitals 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.

*See Williams*, 444 F.3d at 1299 n.62. However, the Eleventh Circuit has not officially adopted the *Dost* factors as part of the law of this Circuit. *See United States v.*

*Grzybowicz*, 747 F.3d 1296, 1306 n.8 (11th Cir. 2014) ("Deciding whether the *Dost* factors should be part of the law of our circuit is unnecessary in this case.").

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." *Dost*, 636 F. Supp. at 832 (quotation marks omitted).

**O83.3B**
**Child Pornography**
**Mailing, Transporting, or Shipping (Computer or Digital Image that Appears Indistinguishable from Actual Minor but may not be of an Actual Person as Defined in 18 U.S.C. § 2256(8)(B))**
**18 U.S.C. § 2252A(a)(1)**

It's a federal crime to knowingly [mail] [transport] [ship] any child pornography [using any means or facility of interstate or foreign commerce] [in or affecting interstate or foreign commerce, including by computer].

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

(1) the Defendant [mailed] [transported] [shipped] child pornography;

(2) [using any means or facility of interstate or foreign commerce] [in or affecting interstate or foreign commerce, including by computer]; and

(3) the Defendant knew the material was child pornography.

The term "interstate or foreign commerce" means the movement of a person, property, or communication from one state to another state, from one state to another country, or from another country into one or more states, or from another country into the United States. [It is not necessary for the Government to prove that the Defendant knew that the child pornography had moved in interstate or foreign commerce.]

[The term "computer" includes any high-speed data-processing device that can perform logical, arithmetic, or storage functions, including any data-storage

facility or communications facility that is directly related to or operates in conjunction with the device. It doesn't include an automated typewriter or typesetter, a portable hand-held calculator, or similar devices which are limited in function to word-processing or mathematical calculations.]

The term "child pornography" means any visual depiction, including any photograph, film, video, picture or computer or computer-generated image or picture made or produced by electronic, mechanical, or other means, of sexually explicit conduct where the visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct.

The term "indistinguishable" means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This term does not include drawings, cartoons, sculptures, or paintings.

A "minor" is a person younger than 18 years old.

The term "visual depiction" includes undeveloped film and video, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.

The term "sexually explicit conduct" means:

- graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;
- graphic or lascivious simulated bestiality;
- graphic or lascivious simulated masturbation;
- graphic or lascivious simulated sadistic or masochistic abuse; or
- graphic or simulated lascivious exhibition of the anus, genitals, or pubic area of any person.

"Graphic" means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted.

"Lascivious exhibition" means indecent exposure of the anus, 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 anus, genitals, 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 anus, genitals, 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.

A visual depiction need not have all these factors to be a lascivious exhibition.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2252A(a)(1) provides:

> (a) Any person who - -
>
> > (1) knowingly mails, or transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any child pornography; . . . [shall be guilty of an offense against the United States].

Definition of the relevant terms is taken from 18 U.S.C. § 2256. Where the alleged child pornography involves an actual person, the statutory definition of sexually explicit conduct in 18 U.S.C. § 2256(2)(A) applies. However, where the alleged child pornography is "a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct[,]" the statutory definition of sexually explicit conduct in 18 U.S.C. § 2256(2)(B) should be used. *See* 18 U.S.C. § 2256(8)(B). The 2018 amendments to § 2256 added the word "anus" in § 2256(2)(B)(iii) as part of the definition of "sexually explicit conduct."

The Supreme Court struck down as unconstitutional former 18 U.S.C. § 2256(8)(B) in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). In response, Congress revised the definition of "sexually explicit conduct" for those cases where the depiction of such conduct is "a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct." 18 U.S.C. §§ 2256(2)(B) and (8)(B); *see also United States v. Williams*, 444 F.3d 1286, 1295–96 (11th Cir. 2006), *rev'd on other grounds*, 553 U.S. 285 (2008). The Committee has incorporated those changes in this instruction and recommends giving this instruction in those cases where the alleged digital/computer pornography may not depict an actual person. For all other cases, the Committee recommends that Instruction 83.3A be given.

Note that the 1998 amendment to § 2252A added subsections (c) and (d), allowing certain affirmative defenses.

*United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77–78 (1994), held that 18 U.S.C. § 2252(a)(1) and (2) require proof of scienter as to the age of the performer. While the structure of § 2252A(a)(1) and (2) is different (using "child pornography" instead of "visual depiction involving the use of a minor"), § 2252A(a)(1) and (2) also contain as an element of scienter the age of the performer. *See United States v. Acheson*, 195 F.3d 645, 653 (11th Cir. 1999), *overruled on other grounds by Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (the government must show not only that the individual received or distributed the material, but that he did so believing that the material was sexually explicit in nature and that it depicted a person who appeared to him to be, or that he anticipated would be, under 18 years of age).

Knowledge of the interstate nexus is not a required element of the crime. *United States v. Smith*, 459 F.3d 1276, 1289 (11th Cir. 2006).

In *Smith*, 459 F.3d at 1296 n.17, 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." *Williams*, 444 F.3d at 1299. 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.

*Ibid*. (footnote omitted). 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 genitals 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.

*See Williams*, 444 F.3d at 1299 n.62. However, the Eleventh Circuit has not officially adopted the *Dost* factors as part of the law of this Circuit. *See United States v. Grzybowicz*, 747 F.3d 1296, 1306 n.8 (11th Cir. 2014) ("Deciding whether the *Dost* factors should be part of the law of our circuit is unnecessary in this case.").

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." *Dost*, 636 F. Supp. at 832 (quotation marks omitted).

**O83.4A**
**Child Pornography**
**Receiving or Distributing (Visual Depiction of Actual Minor as Defined in 18 U.S.C. § 2256(8)(A), (C))**
**18 U.S.C. § 2252A(a)(2)(A)**

It's a federal crime to knowingly [receive] [distribute] any child pornography [using any means or facility of interstate or foreign commerce] [that has been mailed] [that has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer].

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 [received] [distributed] any child pornography;

(2) [using any means or facility of interstate or foreign commerce] [that has been mailed] [that has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer]; and

(3) the Defendant knew the material was child pornography.

[To "distribute" something means to deliver or transfer possession of it to someone else, with or without any money involved in the transaction.]

[To "receive" something simply means knowingly to accept or take possession of something. Receipt does not require proof of ownership.]

The term "interstate or foreign commerce" means the movement of a person, property, or communication from one state to another state, from one state to another country, or from another country into one or more states, or from another

country into the United States. [It is not necessary for the Government to prove that the Defendant knew that the child pornography had moved in interstate or foreign commerce.]

[The term "computer" includes any high-speed data-processing device that can perform logical, arithmetic, or storage functions, including any data-storage facility or communications facility that is directly related to or operates in conjunction with the device. It doesn't include an automated typewriter or typesetter, portable hand-held calculator, or similar devices that are solely capable of word-processing or arithmetic calculations.]

The term "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer generated image or picture, made or produced by electronic, mechanical, or other means, of sexually explicit conduct where [the visual depiction's production involves using a minor engaging in sexually explicit conduct] [the visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct].

"Minor" is any person under 18 years old.

[An "identifiable minor" is a person [who was a minor when the visual depiction was created, adapted, or modified] [whose image as a minor was used in creating, adapting, or modifying the visual depiction] and who is recognizable as

an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature. The Government does not have to prove the actual identity of the identifiable minor.]

The term "visual depiction" includes undeveloped film and video, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.

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 anus, genitals, or pubic area of any person.

"Lascivious exhibition" means indecent exposure of the anus, 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 anus, genitals, 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 anus, genitals, 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.

A visual depiction need not have all these factors to be a lascivious exhibition.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2252A(a)(2)(A) provides:

> (a) Any person who - -
>
> . . .
>
> (2) knowingly receives or distributes - -
>
> (A) any child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer . . . [shall be guilty of an offense against the United States].

For cases where the alleged pornography consists of a digital or computer image that appears indistinguishable from an actual minor but may not be an actual person, see Instruction 83.4B.

Definitions of the relevant terms are taken from 18 U.S.C. § 2256. The 2018 amendments to § 2256 added the word "anus" in § 2256(2)(A)(v) as part of the definition of "sexually explicit conduct."

Note that the 1998 amendment to § 2252A added subsections (c) and (d), allowing certain affirmative defenses.

*United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77–78 (1994), held that 18 U.S.C. § 2252(a)(1) and (2) require proof of scienter as to the age of the performer. While the structure of § 2252A(a)(1) and (2) is different (using "child pornography" instead of "visual depiction involving the use of a minor"), § 2252A(a)(1) and (2) also contain as an element of scienter the age of the performer. *See United States v. Acheson*, 195 F.3d 645, 653 (11th Cir. 1999), *overruled on other grounds by Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (the government must show not only that the individual received or distributed the material, but that he did so believing that the material was sexually explicit in nature and that it depicted a person who appeared to him to be, or that he anticipated would be, under 18 years of age).

Knowledge of the interstate nexus is not a required element of the crime. *United States v. Smith*, 459 F.3d 1276, 1289 (11th Cir. 2006).

In *Smith*, 459 F.3d at 1296 n.17, 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 (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 factfinder limits the potential universe of objectionable images.

*Ibid*. (footnote omitted). 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 genitals 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.

*See Williams*, 444 F.3d at 1299 n.62. However, the Eleventh Circuit has not officially adopted the *Dost* factors as part of the law of this Circuit. *See United States v. Grzybowicz*, 747 F.3d 1296, 1306 n.8 (11th Cir. 2014) ("Deciding whether the *Dost* factors should be part of the law of our circuit is unnecessary in this case.").

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." *Dost*, 636 F. Supp. at 832 (quotation marks omitted).

**O83.4B**
**Child Pornography**
**Receiving or Distributing (Computer or Digital Image that Appears Indistinguishable from Actual Minor but may not be of an Actual Person as Defined in 18 U.S.C. §2256(8)(B))**
**18 U.S.C. § 2252A(a)(2)(A)**

It's a federal crime to knowingly [receive] [distribute] any child pornography [using any means or facility of interstate or foreign commerce] [that has been mailed] [that has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer].

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 [received] [distributed] any child pornography;

(2) [using any means or facility of interstate or foreign commerce] [that has been mailed] [that has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer]; and

(3) the Defendant knew the material was child pornography.

[To "distribute" something means to deliver or transfer possession of it to someone else, with or without any money involved in the transaction.]

[To "receive" something simply means knowingly to accept or take possession of something. Receipt does not require proof of ownership.]

The term "interstate or foreign commerce" means the movement of a person, property, or communication from one state to another state, from one state to

another country, or from another country into one or more states, or from another country into the United States. [It is not necessary for the Government to prove that the Defendant knew that the child pornography had moved in interstate or foreign commerce.]

[The term "computer" includes any high-speed data-processing device that can perform logical, arithmetic, or storage functions, including any data-storage facility or communications facility that is directly related to or operates in conjunction with the device. It doesn't include an automated typewriter or typesetter, portable hand-held calculator, or similar devices that are solely capable of word-processing or arithmetic calculations.]

The term "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer generated image or picture, made or produced by electronic, mechanical, or other means, of sexually explicit conduct where the visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct.

The term "indistinguishable" means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This term does not include drawings, cartoons, sculptures, or paintings.

"Minor" is any person under 18 years old.

The term "visual depiction" includes undeveloped film and video, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.

The term "sexually explicit conduct" means:

- graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;
- graphic or lascivious simulated bestiality;
- graphic or lascivious simulated masturbation;
- graphic or lascivious simulated sadistic or masochistic abuse; or
- graphic or simulated lascivious exhibition of the anus, genitals, or pubic area of any person.

"Graphic" means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted.

"Lascivious exhibition" means indecent exposure of the anus, 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 anus, genitals, 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 anus, genitals, 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.

A visual depiction need not have all these factors to be a lascivious exhibition.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2252A(a)(2)(A) provides:

> (a) Any person who - -
>
> . . .
>
> (2) knowingly receives or distributes - -
>
> (A) any child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer . . . [shall be guilty of an offense against the United States].

Definitions of the relevant terms are taken from 18 U.S.C. § 2256. Where the alleged child pornography involves an actual person, the statutory definition of sexually explicit conduct in 18 U.S.C. § 2256(2)(A) applies. However, where the alleged child pornography is "a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct[,]" the statutory definition of sexually explicit conduct in 18 U.S.C. § 2256(2)(B) should be

used. *See* 18 U.S.C. § 2256(8)(B). The 2018 amendments to § 2256 added the word "anus" in § 2256(2)(B)(iii) as part of the definition of "sexually explicit conduct."

The Supreme Court struck down as unconstitutional former 18 U.S.C. § 2256(8)(B) in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). In response, Congress revised the definition of "sexually explicit conduct" for those cases where the depiction of such conduct is "a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct." 18 U.S.C. §§ 2256(2)(B) and (8)(B); *see also United States v. Williams*, 444 F.3d 1286, 1295–96 (11th Cir. 2006), *rev'd on other grounds*, 553 U.S. 285 (2008). The Committee has incorporated those changes in this instruction and recommends giving this instruction in those cases where the alleged digital/computer pornography may not depict an actual person. For all other cases, the Committee recommends that Instruction 83.4A be given.

Note that the 1998 amendment to § 2252A added subsections (c) and (d), allowing certain affirmative defenses.

*United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77–78 (1994), held that 18 U.S.C. § 2252(a)(1) and (2) require proof of scienter as to the age of the performer. While the structure of § 2252A(a)(1) and (2) is different (using "child pornography" instead of "visual depiction involving the use of a minor"), § 2252A(a)(1) and (2) also contain as an element of scienter the age of the performer. *See United States v. Acheson*, 195 F.3d 645, 653 (11th Cir. 1999), *overruled on other grounds by Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (the government must show not only that the individual received or distributed the material, but that he did so believing that the material was sexually explicit in nature and that it depicted a person who appeared to him to be, or that he anticipated would be, under 18 years of age).

Knowledge of the interstate nexus is not a required element of the crime. *United States v. Smith*, 459 F.3d 1276, 1289 (11th Cir. 2006).

In *Smith*, 459 F.3d at 1296 n.17, 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." *Williams*, 444 F.3d at 1299. 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.

*Ibid*. (footnote omitted). 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 genitals 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.

*See Williams*, 444 F.3d at 1299 n.62. However, the Eleventh Circuit has not officially adopted the *Dost* factors as part of the law of this Circuit. *See United States v. Grzybowicz*, 747 F.3d 1296, 1306 n.8 (11th Cir. 2014) ("Deciding whether the *Dost* factors should be part of the law of our circuit is unnecessary in this case.").

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." *Dost*, 636 F. Supp. at 832 (quotation marks omitted).

**O83.5A**
**Child Pornography**
**Possessing or Accessing with Intent to View (Visual Depiction of Actual Minor as Defined in 18 U.S.C. § 2256(8)(A), (C))**
**18 U.S.C. § 2252A(a)(5)(B)**

It's a federal crime to knowingly [possess] [access with intent to view] any child pornography [that has been mailed] [that has been shipped or transported using any means or facility of interstate or foreign commerce] [that has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer] [that has been produced using materials that have been mailed] [that has been produced using materials that have been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer].

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 [possessed] [accessed with intent to view] any child pornography;

(2) [that has been mailed] [that has been shipped or transported using any means or facility of interstate or foreign commerce] [that has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer] [that has been produced using materials that have been mailed] [that has been produced using materials that have been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer]; and

(3) the Defendant knew the material was child pornography.

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 child pornography had moved in interstate or foreign commerce.]

[The term "computer" includes any high-speed data-processing device that can perform logical, arithmetic, or storage functions, including any data-storage facility or communications facility that is directly related to or operates in conjunction with the device. It doesn't include an automated typewriter or typesetter, portable hand-held calculator, or similar devices that are solely capable of word-processing or arithmetic calculations.]

The term "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer generated image or picture, made or produced by electronic, mechanical, or other means, of sexually explicit conduct where [the visual depiction's production involves using a minor engaging in sexually explicit conduct] [the visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct].

"Minor" is any person under 18 years old.

[An "identifiable minor" is a person [who was a minor when the visual depiction was created, adapted, or modified] [whose image as a minor was used in creating, adapting, or modifying the visual depiction] and who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature. The Government does not have to prove the actual identity of the identifiable minor.]

The term "visual depiction" includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.

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 anus, genitals, or pubic area of any person.

"Lascivious exhibition" means indecent exposure of the anus, 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 anus, 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 anus, 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.

A visual depiction need not have all these factors to be a lascivious exhibition.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2252A(a)(5)(B) provides:

> (a) Any person who - -
>
> . . .
>
> (5)(B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign

> commerce by any means, including by computer; . . . [shall be guilty of an offense against the United States].

For cases where the alleged pornography consists of a digital or computer image that appears indistinguishable from an actual minor but may not be an actual person, see Instruction O83.5B.

Definitions of the relevant terms are taken from 18 U.S.C. § 2256. The 2018 amendments to § 2256 added the word "anus" in § 2256(2)(A)(v) as part of the definition of "sexually explicit conduct."

Note that the 1998 amendment to § 2252A added subsections (c) and (d), allowing certain affirmative defenses.

*United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77–78 (1994), held that 18 U.S.C. § 2252(a)(1) and (2) require proof of scienter as to the age of the performer. While the structure of § 2252A(a)(1) and (2) is different (using "child pornography" instead of "visual depiction involving the use of a minor"), § 2252A(a)(1) and (2) also contain as an element of scienter the age of the performer. *See United States v. Acheson*, 195 F.3d 645, 653 (11th Cir. 1999), *overruled on other grounds by Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (the government must show not only that the individual received or distributed the material, but that he did so believing that the material was sexually explicit in nature and that it depicted a person who appeared to him to be, or that he anticipated would be, under 18 years of age).

Knowledge of the interstate nexus is not a required element of the crime. *United States v. Smith*, 459 F.3d 1276, 1289 (11th Cir. 2006).

In *Smith*, 459 F.3d at 1296 n.17, 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 (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 factfinder limits the potential universe of objectionable images.

*Ibid.* (footnote omitted). 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.

*See Williams*, 444 F.3d at 1299 n.62.

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." *Dost*, 636 F. Supp. at 832 (quotation marks omitted).

**O83.5B**
**Child Pornography**
**Possessing or Accessing with Intent to View (Computer or Digital Image that Appears Indistinguishable from Actual Minor but may not be of an Actual Person as Defined in 18 U.S.C. § 2256(8)(B))**
**18 U.S.C. § 2252A(a)(5)(B)**

It's a federal crime to knowingly [possess] [access with intent to view] any child pornography [that has been mailed] [that has been shipped or transported using any means or facility of interstate or foreign commerce] [that has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer] [that has been produced using materials that have been mailed] [that has been produced using materials that have been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer].

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 [possessed] [accessed with intent to view] any child pornography;

(2) [that has been mailed] [that has been shipped or transported using any means or facility of interstate or foreign commerce] [that has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer] [that has been produced using materials that have been mailed] [that has been produced using materials that have been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer]; and

(3) the Defendant knew the material was child pornography.

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 child pornography had moved in interstate or foreign commerce.]

[The term "computer" includes any high-speed data-processing device that can perform logical, arithmetic, or storage functions, including any data-storage facility or communications facility that is directly related to or operates in conjunction with the device. It doesn't include an automated typewriter or typesetter, portable hand-held calculator, or similar devices that are solely capable of word-processing or arithmetic calculations.]

The term "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer generated image or picture, made or produced by electronic, mechanical, or other means, of sexually explicit conduct where the visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct.

The term "indistinguishable" means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude

that the depiction is of an actual minor engaged in sexually explicit conduct. This term does not include drawings, cartoons, sculptures, or paintings.

"Minor" is any person under 18 years old.

The term "visual depiction" includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.

The term "sexually explicit conduct" means:

- graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;
- graphic or lascivious simulated bestiality;
- graphic or lascivious simulated masturbation;
- graphic or lascivious simulated sadistic or masochistic abuse; or
- graphic or simulated lascivious exhibition of the anus, genitals, or pubic area of any person.

"Graphic" means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted.

"Lascivious exhibition" means indecent exposure of the anus, 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 anus, 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 anus, 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.

A visual depiction need not have all these factors to be a lascivious exhibition.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2252A(a)(5)(B) provides:

> (a) Any person who - -
>
> . . .
>
> (5)(B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign

> commerce by any means, including by computer; . . . [shall be guilty of an offense against the United States].

Definitions of the relevant terms are taken from 18 U.S.C. § 2256. Where the alleged child pornography involves an actual person, the statutory definition of sexually explicit conduct in 18 U.S.C. § 2256(2)(A) applies. However, where the alleged child pornography is "a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct[,]" the statutory definition of sexually explicit conduct in 18 U.S.C. § 2256(2)(B) should be used. *See* 18 U.S.C. § 2256(8)(B). The 2018 amendments to § 2256 added the word "anus" in § 2256(2)(B)(iii) as part of the definition of "sexually explicit conduct."

The Supreme Court struck down as unconstitutional former 18 U.S.C. § 2256(8)(B) in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). In response, Congress revised the definition of "sexually explicit conduct" for those cases where the depiction of such conduct is "a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct." 18 U.S.C. §§ 2256(2)(B) and (8)(B); *see also United States v. Williams*, 444 F.3d 1286, 1295–96 (11th Cir. 2006), *rev'd on other grounds*, 553 U.S. 285 (2008). The Committee has incorporated those changes in this instruction and recommends giving this instruction in those cases where the alleged digital/computer pornography may not depict an actual person. For all other cases, the Committee recommends that Instruction O83.5A be given.

Note that the 1998 amendment to § 2252A added subsections (c) and (d), allowing certain affirmative defenses.

*United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77–78 (1994), held that 18 U.S.C. § 2252(a)(1) and (2) require proof of scienter as to the age of the performer. While the structure of § 2252A(a)(1) and (2) is different (using "child pornography" instead of "visual depiction involving the use of a minor"), § 2252A(a)(1) and (2) also contain as an element of scienter the age of the performer. *See United States v. Acheson*, 195 F.3d 645, 653 (11th Cir. 1999), *overruled on other grounds by Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (the government must show not only that the individual received or distributed the material, but that he did so believing that the material was sexually explicit in nature and that it depicted a person who appeared to him to be, or that he anticipated would be, under 18 years of age).

Knowledge of the interstate nexus is not a required element of the crime. *United States v. Smith*, 459 F.3d 1276, 1289 (11th Cir. 2006).

In *Smith*, 459 F.3d at 1296 n.17, 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 (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 factfinder limits the potential universe of objectionable images.

*Ibid.* (footnote omitted). 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.

*See Williams*, 444 F.3d at 1299 n.62.

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." *Dost*, 636 F. Supp. at 832 (quotation marks omitted).

**O84**
**Transportation of Explosive, Biological,**
**Chemical or Radioactive or Nuclear Materials**
**18 U.S.C. § 2283(a)**

It's a Federal crime to knowingly transport aboard any vessel [within the Admiralty and Maritime jurisdiction of the United States] [outside the United States and on the high seas] an explosive or incendiary device, a biological agent, a chemical weapon, or radioactive or nuclear material, knowing that the item is intended to be used to commit [the offense of: specify offense(s) listed in 18 U.S.C. § 2332b(g)(5)(B), e.g., act of terrorism transcending national boundaries as defined in 18 U.S.C. § 2332b].

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 transported [an explosive or incendiary device] [a biological agent] [a chemical weapon] [radioactive or nuclear material];

(2) the Defendant transported the [explosive or incendiary device] [biological agent] [chemical weapon] [radioactive or nuclear material] aboard a vessel [within the United States and on waters subject to the jurisdiction of the United States] [outside the United States and on the high seas]; and

(3) the Defendant knew that the [explosive or incendiary device] [biological agent] [chemical weapon] [radioactive or nuclear material] was intended to be used to commit [the offense of: specify offense listed in 18 U.S.C. § 2332b(g)(5)(B)].

The term “vessel” means any watercraft or other contrivance used or designed for transportation or navigation on, under, or immediately above water.

[The term “biological agent” means any biological agent, toxin, or vector, including [a biological agent, such as a bacteria capable of causing death or disease in a human, animal, plant, or other living organism]].

[The term “chemical weapon” means [a munition or device specifically designed to cause death or other harm by using a toxic chemical that would be released when the munition or device was used]].

[The term “explosive or incendiary device” means [any explosive bomb, grenade, missile or similar device]].

[The term “nuclear material” means material containing any plutonium, uranium, enriched uranium, or uranium 233. It does not include uranium in the form of ore or ore residue that contains the mixture of isotopes as occurring in nature.]

[The term “radioactive material” includes [source material such as [uranium, thorium, etc.] and special nuclear material such as [plutonium, uranium 233, etc.], but does not include natural or depleted uranium] [nuclear by-product material such as [the tailings or wastes produced by extracting or concentrating uranium from any ore processed primarily for the uranium content]] [material that was

made radioactive by bombardment in an accelerator] [all refined isotopes of radium]].

If you find beyond a reasonable doubt that the vessel was in the location alleged and described in the indictment, you are instructed that the location is [within the United States and on waters subject to the jurisdiction of the United States] [outside the United States and on the high seas].

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2283(a)provides:

> Whoever knowingly transports aboard any vessel within the United States and on waters subject to the jurisdiction of the United States or any vessel outside the United States and on the high seas or having United States nationality an explosive or incendiary device, biological agent, chemical weapon, or radioactive or nuclear material, knowing that any such item is intended to be used to commit an offense listed under section 2332b(g)(5)(B), shall be fined under this title or imprisoned for any term of years or for life, or both.

Maximum Penalty: Life in prison and applicable fine. Note: if a person causes the death of a person by engaging in conduct prohibited by § 2283(a), then the person may be punished by death. 18 U.S.C. § 2283(b). Of course, an instruction on this additional element should be given if necessary.

Definitions of materials derived from various statutes as specified in 18 U.S.C. § 2283(c); definition of "vessel" is from 18 U.S.C. § 2311. For additional definitions, *see* 18 U.S.C. § 178 (providing definitions of biological agents).

The statute also prohibits transporting the prohibited items outside the United States and having United States nationality. If this offense is charged, an additional instruction defining "United States nationality" and how nationality is determined will be necessary.

**O85**
**Transportation of Terrorists**
**18 U.S.C. § 2284(a)**

It's a Federal crime to knowingly and intentionally transport aboard any vessel [within the United States and on waters subject to the jurisdiction of the United States] [outside the United States and on the high seas] a terrorist.

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 intentionally transported [person described in the indictment as a terrorist];

(2) the Defendant transported [person described in the indictment as a terrorist] aboard a vessel [within the United States and on waters subject to the jurisdiction of the United States] [outside the United States and on the high seas]; and

(3) the Defendant knew that [person described in the indictment as a terrorist] was a terrorist.

The term "vessel" means any watercraft or other contrivance used or designed for transportation or navigation on, under, or immediately above water.

The term "terrorist" means a person who intends to commit, or is avoiding capture after committing, the offense[s] of [specify offense(s) listed in 18 U.S.C. § 2332b(g)(5)(B), e.g., act of terrorism transcending national boundaries as defined in 18 U.S.C. § 2332b].

If you find beyond a reasonable doubt that the vessel was in the location alleged and described in the indictment, you are instructed that the location is

[within the United States and on waters subject to the jurisdiction of the United States] [outside the United States and on the high seas].

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2284(a)provides:

> Whoever knowingly and intentionally transports any terrorist aboard any vessel within the United States and on waters subject to the jurisdiction of the United States or any vessel outside the United States and on the high seas or having United States nationality, knowing that the transported person is a terrorist, shall be fined under this title or imprisoned for any term of years or for life, or both.

Maximum Penalty: Life in prison and applicable fine.

The definition of "vessel" is from 18 U.S.C. § 2311.

The statute also prohibits transporting the prohibited items outside the United States and having United States nationality. If this offense is charged, an additional instruction defining "United States nationality" and how nationality is determined will be necessary.

**O86**
**Interstate Transportation of**
**a Stolen Motor Vehicle**
**18 U.S.C. § 2312**

It's a Federal crime to transport, or cause to be transported, a stolen motor vehicle 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 [transported a stolen motor vehicle] [caused a stolen motor vehicle to be transported] in interstate commerce; and

(2) the Defendant knew the vehicle had been stolen.

The word "stolen" includes any wrongful and dishonest taking of a motor vehicle with the intent to deprive the owner of the rights and benefits of ownership.

The offense is to transport a motor vehicle or cause it to be transported in interstate commerce with knowledge that it had been stolen. It doesn't matter whether the Defendant or someone else stole the vehicle.

"Interstate or foreign commerce" is the movement of property between different states or between the United States and anyplace outside of the United State.

A "state" is a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

If a vehicle is driven under its own power or otherwise transported across state lines from one state to another it has been transported in interstate commerce.

## ANNOTATIONS AND COMMENTS

18 U.S.C. § 2312 provides:

> Whoever transports in interstate… commerce a motor vehicle… knowing the same to have been stolen, [shall be guilty of an offense against the United States].

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

Definition of State taken from 18 U.S.C. § 2313(b), also referred to in definition of interstate commerce 18 U.S.C. § 10.

*See* 18 U.S.C. § 2312 (crime not limited simply to person driving the car across state lines).

**O87**
**Sale or Receipt of a Stolen Motor Vehicle**
**18 U.S.C. § 2313**

It's a Federal crime [to receive] [to possess] [to conceal] [to store] [to sell] [to dispose of] any [motor vehicle] [aircraft] that has crossed a State or United States boundary after it was stolen, knowing it is stolen.

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

(1) the [motor vehicle] [aircraft] described in the indictment was stolen;

(2) after the [motor vehicle] [aircraft] was stolen, it crossed a [State] [United States] boundary;

(3) after the stolen [motor vehicle] [aircraft] crossed a [State] [United States] boundary, the Defendant [received] [possessed] [concealed] [stored] [sold] [disposed of] it; and

(4) when the Defendant [received] [possessed] [concealed] [stored] [sold] [disposed of] the stolen [motor vehicle] [aircraft], Defendant knew it had been stolen.

"Stolen" means the wrongful and dishonest taking of [a motor vehicle] [an aircraft], with the intent to deprive the owner of the rights and benefits of ownership.

It doesn't matter whether the Defendant or someone else stole the [vehicle] [aircraft], or whether the Defendant knew that the [vehicle] [aircraft] had crossed a State or United States boundary after it had been stolen. The Government must

prove beyond a reasonable doubt that the Defendant knew that the [vehicle] [aircraft] was stolen.

The word "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2313 provides:

> Whoever receives, possesses, conceals, stores,… sells or disposes of any motor vehicle... which has crossed a State or United States boundary after being stolen, knowing the same to have been stolen, [shall be guilty of an offense against the United States].

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

An indictment often alleges that the defendant "received, possessed, concealed, sold, and disposed of" a particular motor vehicle. It is not necessary for the government to prove that all of these acts were in fact committed because any one of them is a violation of the statute. The Fifth Circuit held, however, that the statute describes two conceptual types of wrongdoing – housing of the vehicle and marketing of the vehicle – and the jury must agree unanimously upon which way the offense was committed. *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977). A plurality of the Supreme Court criticized the reasoning of *Gipson* in *Schad v. Arizona*, 501 U.S. 624, 111 S. Ct. 2491 (1991), and the Eleventh Circuit has questioned *Gipson*'s validity in light of *Schad*. *United States v. Verbitskaya*, 406 F.3d 1324, 1334 n.12 (11th Cir. 2005) (declining to follow *Gipson* and finding that the district court did not need to require a unanimous verdict on the government's four alternative theories on how interstate commerce was affected by extortion).

Where "concealment" is an issue, *see United States v. Casey*, 540 F.2d 811 (5th Cir. 1976) ("Although the term 'conceal' as used in § 2313 is not limited to physically secreting the vehicle, all of the cases which have found sufficient evidence to sustain a conviction for concealment have involved some overt physical act on the part of the Defendant. For example, this Circuit, as others, has held that acts such as altering title papers, changing vehicle identification numbers, changing license plates, or making false statements on title applications, fall within the broad definition of the term.")

*See* definition of "State" at 18 U.S.C. § 2313(b).

**O88.1**
**Interstate Transportation of Stolen Property**
**18 U.S.C. § 2314**
**(First Paragraph)**

It's a Federal crime to transport, or to cause to be transported in interstate commerce, property that has been [stolen] [converted] [taken by fraud] and has a value of at least $5,000.

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

(1) the Defendant [transported] [transmitted] [transferred] or caused to be [transported] [transmitted] [transferred] in interstate commerce property that was [stolen] [converted] [taken by fraud] as described in the indictment;

(2) the property had a value of at least $5,000; and

(3) when the Defendant transported the items the Defendant knew that the property had been [stolen] [converted] [taken by fraud].

[To "steal" property is to wrongfully or dishonestly take property with the intent to deprive someone of the rights and benefits of owning it.]

[To "convert" property is to take control over the property without permission and to control it in a way that interferes with the owner's rights.]

[To "take by fraud" is to deceive or cheat someone out of property by false or fraudulent pretenses, representations, or promises.]

[The "value" of something is the greater of either (1) its face, par, or market value, or (2) its cost price, either wholesale or retail.]

It doesn't matter whether the Defendant [stole the property] [converted the property] [took the property by fraud] or someone else did, but to find the Defendant guilty, you must find that the Defendant knew it had been [stolen] [converted] [taken by fraud].

"Interstate commerce" includes any movement or transportation of goods, wares, merchandise, securities or money from one state into another state, the District of Columbia, and any commonwealth, territory, or possession of the United States.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2314 (first paragraph) provides:

> Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud [shall be guilty of an offense against the United States].

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

The language "or caused to be transported," although not found in the first paragraph of the statute, has been expressly allowed by *United States v. Block*, 755 F.2d 770 (11th Cir. 1985).

In *United States v. LaSpesa*, 956 F.2d 1027, 1035 (11th Cir. 1992), the Eleventh Circuit held that 18 U.S.C. § 2314 prohibits interstate wire transfers of stolen money.

In *United States v. Baker*, 19 F.3d 605, 614 (11th Cir. 1994), the Eleventh Circuit held that the substitution of "stolen or taken by fraud" for "stolen" in the jury instructions was allowable under the statute, where the property in question was taken by fraud.

The definition of "State" taken from 18 U.S.C. § 2313(b).

**O88.2**
**Causing Interstate Travel in Execution**
**of a Scheme to Defraud**
**18 U.S.C. § 2314**
**(Second Paragraph)**

It's a Federal crime for anyone to transport someone or induce someone to travel in interstate commerce for the purpose of carrying out a scheme to defraud that person of money or property.

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

(1) the Defendant transported or caused to be transported, or induced travel by [victim's name] in interstate commerce;

(2) the purpose of the travel was to carry out or conceal a scheme to defraud [him] [her];

(3) the Defendant knew the scheme was fraudulent and acted with intent to defraud [victim's name]; and

(4) the purpose of the scheme to defraud was to get money or property worth at least $5,000 from the victim.

The "value" of something is the greater of either (1) its face, par or market value, or (2) its cost or price, either wholesale or retail.

"Interstate commerce" includes any movement or transportation of goods, wares, merchandise, securities or money from one state into another state, the District of Columbia, and any commonwealth, territory, or possession of the United States.

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

A statement or representation is "false" or "fraudulent" if it relates to a material fact and the speaker knows it is untrue or makes it with reckless indifference to its truth and, it is made with the intent to defraud. A statement or representation may also be "false" or "fraudulent" when it is a half-truth, or effectively conceals a material fact, and is made with intent to defraud.

A "material fact" is an important fact, not some unimportant or trivial detail, that a reasonable person would use to decide whether or not to do a particular thing.

To act with "intent to defraud" means to do something with the specific intent to deceive or cheat someone, usually for personal financial gain or to cause financial loss to someone else.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2314 (second paragraph) 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, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate or foreign commerce in the execution or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of $5,000 or more [shall be guilty of an offense against the United States].

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

**O89**
**Sale or Receipt of Stolen Property**
**18 U.S.C. § 2315**
**(First Paragraph)**

It's a Federal crime to knowingly [receive] [possess] [conceal] [store] [barter] [sell] [dispose of] stolen property worth at least $5,000 that has crossed a State or United States boundary after it was stolen, taken, or unlawfully converted.

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

(1) the Defendant [received] [possessed] [concealed] [stored] [bartered] [sold] [disposed of] stolen property as described in the indictment;

(2) the property crossed a State or United States boundary after it was unlawfully converted, or unlawfully taken;

(3) the Defendant knew the property had been stolen, unlawfully converted, or taken; and

(4) the property had a value of at least $5,000.

The law specifies several different ways in which this crime may be committed. The indictment alleges that the Defendant received, possessed, concealed, stored, sold, and disposed of certain property. The Government does not have to prove all of these; it only has to prove beyond a reasonable doubt that the Defendant received *or* possessed *or* concealed *or* stored *or* sold *or* disposed of the stolen property. But to find the Defendant guilty, you must unanimously agree upon which of those things the Defendant did.

The Government must prove beyond a reasonable doubt that the Defendant knew the property had been stolen. But it doesn't matter whether the Defendant knew the property had crossed a State or United States boundary after it was stolen.

A "State" is a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

The "value" of something is the greater of either (1) its face, par, or market value, or (2) its cost or price, either wholesale or retail.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2315 (first paragraph) provides:

> Whoever receives, possesses, conceals, stores, barters, sells, or disposes of any goods, wares, merchandise, securities or money of the value of $5,000 or more,… which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, the same to have been stolen, unlawfully converted, or taken [shall be guilty of an offense against the United States].

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

*See United States v. King*, 87 F.3d 1255, 1256 (11th Cir. 1996) (reciting the elements of the offense as stated in this instruction).

**O90**
**Use of Weapons of Mass Destruction**
**Against Person or Property in the United States**
**18 U.S.C. § 2332a(a)(2)**

It's a Federal crime for anyone without lawful authority to use, threaten, or attempt or conspire to use, a weapon of mass destruction against any person or property within the United States, and [use the mail or any facility of interstate or foreign commerce to further the offense] [use the property in interstate or foreign commerce or in an activity that affects interstate or foreign commerce] [for any perpetrator to travel in or cause another to travel in interstate or foreign commerce to further the offense] [the offense, or the results of the offense, affect interstate or foreign commerce] [the offense would have affected interstate or foreign 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 [used] [threatened to use] [attempted to use] [conspired to use] a weapon of mass destruction against any person or property within the United States;

(2) the Defendant did not have lawful authority to use the weapon of mass destruction; and

(3) [the mail or any facility of interstate or foreign commerce was used to further the offense] [the property was used in interstate or foreign commerce or in an activity that affects interstate or foreign commerce] [any perpetrator traveled in or caused another to travel in interstate or foreign commerce to further the offense] [the offense, or the results of the offense, affected interstate or foreign

> commerce] [the offense would have affected interstate or foreign commerce].

The term "weapon of mass destruction" means [a destructive device, including any explosive, incendiary, or poison-gas bomb, grenade (insert device as defined under 18 U.S.C. § 921)] [any weapon that is designed or intended to cause death or serious bodily injury through the release, dissemination, or effect of toxic or poisonous chemicals, or their precursors] [any weapon involving a biological agent, toxin, or vector, including a microorganism capable of causing death or disease in a human, animal, plant, or other living organism] [any weapon that is designed to release radiation or radioactivity at a level dangerous to human life].

[The term "interstate commerce" includes any movement or transportation of persons, goods, wares, merchandise, securities or money from one state into another state, the District of Columbia, and any commonwealth, territory, or possession of the United States.]

[The term "facility of interstate commerce" includes means of transportation and communication.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2332(a)(2) provides:

> A person who, without lawful authority, uses, threatens, or attempts or conspires to use, a weapon of mass destruction … against any person or property within the United States, and

(A) the mail or any facility of interstate or foreign commerce is used in furtherance of the offense;

(B) such property is used in interstate or foreign commerce or in an activity that affects interstate or foreign commerce;

(C) any perpetrator travels in or causes another to travel in interstate or foreign commerce in furtherance of the offense; or

(D) the offense, or the results of the offense, affect interstate or foreign commerce, or, in the case of a threat, attempt, or conspiracy, would have affected interstate or foreign commerce;

Maximum sentence: Life in prison. If death results, this offense may be punished by death. Of course, an instruction on this additional element should be given if necessary.

The term "facility of interstate commerce" is defined in 18 U.S.C. § 1958(b)(2). For additional definitions, *see* 18 U.S.C. § 178 (providing definitions of biological agents).

**O91.1**
**Providing Material Support to Terrorists**
**18 U.S.C. § 2339A**

It's a Federal crime for anyone to provide material support or resources, knowing or intending that they are to be used [to prepare for, or to carry out, a violation of (insert section), which prohibits (insert summary of prohibition)] [to prepare for, or to carry out, covering up an escape after violating (insert section), which prohibits (insert summary of prohibition)].

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

(1) the Defendant provided material support or resources to [person(s) described in the indictment]; and

(2) the Defendant did so knowing or intending that the material support or resources were to be used [to prepare for, or to carry out, a violation of (insert section), which prohibits (insert summary of prohibition)] [to prepare for, or to carry out, covering up an escape after violating (insert section), which prohibits (insert summary of prohibition)].

The term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, [training], [expert advice or assistance], safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation. Medicine or religious materials are not included.

## ANNOTATIONS AND COMMENTS

18 U.S.C. § 2339A provides:

> Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section 32, 37, 81, 175, 229, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, or 2340A of this title, section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), section 46502 or 60123(b) of title 49, or any offense listed in section 2332b(g)(5)(B) (except for sections 2339A and 2339B) or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.

Maximum sentence: Fifteen (15) years and applicable fine. If death results, this offense may be punished by life in prison. Of course, an instruction on this additional element should be given if necessary.

The bracketed terms in the definition of "material support or resources" (training and expert advice or assistance) have been found impermissibly vague by the Ninth Circuit. *Humanitarian Law Project v. Mukasey*, 509 F.3d 1122, 1134-36 (9th Cir. 2007). In addition, the term "service" was found to be impermissibly vague because it encompasses training and expert advice or assistance. *Id*. at 1136.

*Humanitarian Law Project v. Mukasey*, 509 F.3d 1122 (9th Cir. 2007), *superseded on other grounds* by 552 F.3d 916 (9th Cir. 2009), *cert. granted*, 130 S. Ct. 48 (2009).

**O91.2**
**Providing Material Support or Resources**
**to Designated Foreign Terrorist Organizations**
**18 U.S.C. § 2339B**

It's a Federal crime for anyone to knowingly provide material support or resources to a foreign terrorist organization, knowing that the organization [is a designated terrorist organization] [has engaged or engages in terrorist activity] [has engaged or engages in terrorism].

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 provided material support or resources to [organization described in the indictment]; and

(2) the Defendant did so knowing that the organization [was a designated terrorist organization] [engaged or engages in terrorist activity] [engaged or engages in terrorism].

The term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, [training], [expert advice or assistance], safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation. Medicine or religious materials are not included.

[The term "designated terrorist organization" means an organization designated by the Secretary of State as a foreign terrorist organization, as provided in 8 U.S.C. § 1189.]

[The term "engage in terrorist activity" means [describe activity engaged in by the organization that is proscribed by 8 U.S.C. § 1182(a)(3)(B)(iv), e.g., to commit terrorist activity, which means any activity that is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and that involves, for example, the highjacking or sabotage of an aircraft, vessel, or vehicle.]

[The term "terrorism" means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2339B provides:

> Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140 (d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

Maximum sentence: Fifteen (15) years and applicable fine. If death results, this offense may be punished by life in prison. Of course, an instruction on this additional element should be given if necessary.

"Terrorism" is defined in 22 U.S.C. § 2656f(d)(2).

An additional instruction will be necessary if the material support or resources is the provision of personnel: the provision of personnel is unlawful if the personnel are provided "to work under [the] terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of [the] organization." 18 U.S.C. § 2339B(h).

The bracketed terms in the definition of "material support or resources" (training and expert advice or assistance) have been found impermissibly vague by the Ninth Circuit. *Humanitarian Law Project v. Mukasey*, 509 F.3d 1122, 1134-36 (9th Cir. 2007). In addition, the term "service" was found to be impermissibly vague because it encompasses training and expert advice or assistance. *Id*. at 1136.

The mens rea requirement is met if the government proves that the donor defendant knew that the organization was a designated terrorist organization, that the organization engaged in terrorist activity, or that the organization engaged in terrorism. *Id*. at 1130.

**O92.1**
**Inducement of Juvenile to Travel to Engage in Criminal Sexual Activity**
**18 U.S.C. § 2422(a)**

It's a Federal crime to [persuade] [induce] [entice] [coerce] an individual to travel in interstate or foreign commerce with the intent that the individual engage in [prostitution] [sexual activity for which any person can be charged with a criminal offense].

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 [persuaded] [induced] [enticed] [coerced] [person named in indictment] to travel in [interstate] [foreign] commerce;

(2) at the time the travel commenced, the Defendant intended that [person named in indictment] would engage in [prostitution] [any sexual activity for which any person can be charged with a criminal offense].

[It is not necessary for the Government to prove anyone actually engaged in any prostitution or other illegal sexual activity after traveling across state lines. What the Government must prove beyond a reasonable doubt is that a person was [persuaded] [induced] [enticed] [coerced] to travel across state lines by the Defendant, and that the Defendant intended at the time for the person to engage in prostitution or other illegal sexual activity, even if the person who traveled did not have the same intention to engage in such activity.]

The Government must prove that, if the intended sexual activity had occurred, [the Defendant] [one or more of the individuals engaging in the sexual activity] could have been charged with a criminal offense under the laws of [state]. As a matter of law the following acts are crimes under [state] law. [Describe the applicable state law].

[The term "sexual activity for which any person can be charged with a criminal offense" includes the production of child pornography.]

[As used in this instruction, the term "prostitution" means engaging in or agreeing or offering to engage in any lewd act with or for another person in exchange for money or other consideration.]

[As used in this instruction, "induce" means to stimulate the occurrence of or to cause.]

To "travel in interstate commerce" means to move from one state to another. 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 to show that the Defendant knew that state lines were being crossed, but the Government must prove that state lines were crossed.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2423(a) provides:

> Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce … to engage in prostitution, or

> in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

Maximum Penalty: Twenty (20) years imprisonment and applicable fine. 18 U.S.C. § 3559 provides for a mandatory life sentence for repeated sex offenses against children.

18 U.S.C. § 2260A provides for an enhanced sentence for persons required to register as sex offenders. 18 U.S.C. § 2426 provides that the maximum sentence for a repeat offender under chapter 117 is twice the term otherwise provided by the chapter. 18 U.S.C. § 3559 provides for mandatory life imprisonment for repeated sex offenses against children.

The defendant's sole or dominant purpose in transporting the person in interstate or foreign commerce need not be for the person to engage in prostitution or illegal sexual activity. However, to meet the intent requirement, the Government must prove that one of the defendant's motives was for the traveler to do so, even if the traveler did not know of the plan or intend to engage in such activity. *See United States v. Drury*, 582 F.2d 1181, 1184 (8th Cir. 1978); *United States v. Rashkovski*, 301 F.3d 1133 (9th Cir. 2002) (finding that intent requirement of § 2422(a) was met when defendant offered to pay for tickets for two Russian women to travel to the United States to engage in prostitution, even though women were eager to travel to the United States and had no intention of actually engaging in prostitution upon their arrival); *cf. United States v. Hoschouer*, 224 Fed. Appx. 923, 925 (11th Cir. 2007) (finding that intent requirement of § 2423(a) was met when defendant brought child on interstate trip and evidence supported the conclusion that he did so to facilitate his sexual relationship with her).

If the "sexual activity for which any person can be charged with a criminal offense" is an offense involving a minor, the jury should be instructed that the Government is not required to prove that the defendant knew the child's age. *See U.S. v. Cox*, 577 F.3d 833 (7th Cir. 2009) (holding that 18 U.S.C. § 2423(a) does not require the Government to prove that the Defendant knew that the victim was under the age of 18).

The term "prostitution" is not defined in Title 18. The Supreme Court has defined the term as the "offering of the body to indiscriminate lewdness for hire." *Cleveland v. United States*, 329 U.S. 14, 17 (1946). The term should not be defined by reference to state law, as doing so would make the term superfluous, since the statute already punishes "any sexual activity for which any person can be charged with a criminal offense."

18 U.S.C. § 2427 provides that the term "sexual activity for which any person can be charged with a criminal offense" includes the production of child pornography, as defined in section 2256(8). If the charged unlawful sexual activity is the production of

child pornography, the definitions in section 2256(8) should be included in the instructions to the jury.

**O92.2**
**Coercion and Enticement of a Minor to Engage in Sexual Activity**
**18 U.S.C. § 2422(b)**

It's a Federal crime for anyone, using [the mail or] any facility [or means] of interstate or foreign commerce [including transmissions by computer on the Internet], to [persuade] [induce] [entice] [coerce] anyone under 18 years old to engage in [prostitution] [any sexual activity for which any person could be charged with a criminal offense].

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 persuaded, induced, enticed, or coerced [individual named in the indictment] to engage in [prostitution] [sexual activity], as charged;

(2) the Defendant used [the mail] [a computer] [describe other interstate facility as alleged in indictment] to do so;

(3) when the Defendant did these acts, [individual named in the indictment] was less than 18 years old; and

(4) one or more of the individual(s) engaging in the sexual activity could have been charged with a criminal offense under the law of [identify the state].

So the Government must prove that one or more of the individuals engaging in the sexual activity could have been charged with a criminal offense under the laws of [state].

As a matter of law the following acts are crimes under [state] law. [Describe the applicable state law].

[As used in this instruction, "induce" means to stimulate the occurrence of or to cause.]

[As used in this instruction, the term "prostitution" means engaging in or agreeing or offering to engage in any lewd act with or for another person in exchange for money or other consideration.]

[[A telephone] [A cellular telephone] [The Internet] is a facility of interstate commerce.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2422(b) provides:

> Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

Maximum Penalty: Life imprisonment and applicable fine. Minimum sentence is ten (10) years imprisonment and applicable fine. 18 U.S.C. § 3559 provides for a mandatory life sentence for repeated sex offenses against children.

A defendant can also be guilty if he willfully attempts, via the mail or a facility of interstate commerce, to persuade, induce, entice or coerce anyone under eighteen years of age to engage in prostitution or sexual activity. In that circumstance, the court should give the appropriate charge on attempt.

18 U.S.C. § 2260A provides for an enhanced sentence for persons required to register as sex offenders. 18 U.S.C. § 2426 provides that the maximum sentence for a repeat

offender under chapter 117 is twice the term otherwise provided by the chapter. 18 U.S.C. § 3559 provides for mandatory life imprisonment for repeated sex offenses against children.

The defendant need not communicate directly with the minor; it is sufficient if the defendant induces (or attempts to induce) the minor via an adult intermediary. *United States v. Hornaday*, 392 F.3d 1306, 1310-11 (11th Cir. 2004); *United States v. Murrell*, 368 F.3d 1283, 1287 (11th Cir. 2004). In *Murrell*, the Eleventh Circuit also approved "to stimulate the occurrence of; cause" as the definition of "induce."

The Internet is an instrumentality of interstate commerce. *United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004). Telephones and cellular telephones are instrumentalities of interstate commerce, even when they are used intrastate. *United States v. Evans*, 476 F.3d 1176, 1180-81 (11th Cir. 2007).

*United States v. Evans*, 476 F.3d 1176 (11th Cir. 2007) involved a defendant who did not induce the minor into having sex with <u>him</u>; rather, he induced the minor into being a prostitute, and he was her pimp. The jury instructions as written contemplate a fact situation where the defendant attempts to induce a minor to have sex with <u>him</u>, and they would need to be rewritten for a case like *Evans*. *See also United States v. Murrell*, 368 F.3d 1283, 1286 (11th Cir. 2004) (noting that § 2422(b)prohibits a person from persuading a minor to engage in sexual conduct, with himself or with a third party).

In some cases, the government may proceed under an "aiding and abetting" theory. 18 U.S.C. § 2 "permits one to be found guilty as a principal for aiding or procuring someone else to commit the offense." *United States v. Hornaday*, 392 F.3d 1306, 1312-13 (11th Cir. 2004) (noting that indictment need not mention 18 U.S.C. § 2). In those cases, it is appropriate to give an instruction on aiding and abetting. However, it is not appropriate to give such an instruction if the theory is that an undercover agent acted as an intermediary to offer up a fictitious minor to the defendant. *Id*. at 1314.

*See United States v. Daniels*, 685 F.3d 1237, 1248 (11th Cir. 2012), *cert. denied,* 133 S. Ct. 1240 (2013), (holding that a defendant's knowledge of a victim's age is not an element of an offense under § 2422(b)); *U.S. v. Cox*, 577 F.3d 833 (7th Cir. 2009) (holding that 18 U.S.C. § 2423(a), a statute which the Committee finds to be substantively similar, does not require the Government to prove that the Defendant knew that the victim was under the age of 18).

The term "prostitution" is not defined in Title 18. The Supreme Court has defined the term as the "offering of the body to indiscriminate lewdness for hire." *Cleveland v. United States*, 329 U.S. 14, 17 (1946). The term should not be defined by reference to state law, as doing so would make the term superfluous, since the statute already punishes "any sexual activity for which any person can be charged with a criminal offense."

**O92.3**

**Attempted Coercion and Enticement of a Minor**

**to Engage in Sexual Activity**

**18 U.S.C. § 2422(b)**

It's a Federal crime for anyone, using [the mail] [or] any facility [or means] of interstate or foreign commerce [including a cellular telephone or the Internet], to attempt to [persuade] [induce] [entice] [coerce] a minor to engage in [prostitution] [any sexual activity for which any person could be charged with a criminal offense], even if the attempt fails.

The Defendant is charged in [Count(s)] with attempting to commit the offense of enticement of a minor.

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

(1) the Defendant knowingly intended to persuade, induce, entice, or coerce [individual named in the indictment] to engage in [prostitution] [sexual activity], as charged;

(2) the Defendant used [the mail] [the Internet] [a cellular telephone] [describe other facility of interstate or foreign commerce as alleged in indictment] to do so;

(3) at the time, the Defendant believed that [individual named in the indictment] was less than 18 years old;

(4) if the sexual activity had occurred, one or more of the individual(s) engaging in sexual activity could have been charged with a criminal offense under the law of [identify the state or specify the United States] [If only prostitution is charged, delete this element.]; and

(5) the Defendant took a substantial step towards committing the offense.

It is not necessary for the Government to prove that the intended victim was in fact less than 18 years of age; but it is necessary for the Government to prove that Defendant believed such individual to be under that age.

Also, it is not necessary for the Government to prove that the individual was actually [persuaded] [or induced] [or enticed] [or coerced] to engage in [prostitution or] sexual activity; but it is necessary for the Government to prove that the Defendant intended to cause agreement on the part of the individual to engage in [prostitution or] some form of unlawful sexual activity and knowingly took some action that was a substantial step toward causing agreement on the part of the individual to engage in [prostitution or] some form of unlawful sexual activity. A "substantial step" is an important action leading up to committing an offense – not just an inconsequential act. It must be more than simply preparing. It must be an act that would normally result in the persuasion, inducement, enticement, or coercion.

So, the Government must prove that if the intended sexual activity had occurred, one or more of the individuals engaging in the sexual activity could have been charged with a criminal offense under the laws of [state] [the United States]. As a matter of law, the following acts are crimes under [state] [federal] law. [Describe the applicable state or federal law]. [If only prostitution is charged, delete this paragraph.]

[As used in this instruction, "induce" means to stimulate the occurrence of or to cause.]

[As used in this instruction, the term "prostitution" means engaging in or agreeing or offering to engage in any lewd act with or for another person in exchange for money or other consideration.]

[[A telephone] [A cellular telephone] [The Internet] is a facility of interstate commerce.]

**ANNOTATIONS AND COMMENTS**

18 USC § 2422(b) provides:

(b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

Maximum Penalty: Life imprisonment and applicable fine. Minimum sentence is ten (10) years of imprisonment and applicable fine. 18 U.S.C. § 3559 provides for a mandatory life sentence for repeated sex offenses against children. This offense also carries a minimum of five years of supervised release up to a maximum of lifetime supervised release.

*United States v. Lee*, 603 F.3d 904, 917 (11th Cir. 2010) ("We have explained what the government must establish to prove a violation of section 2422(b) when a defendant communicates directly with the target minor. With regard to intent, the government must prove that the defendant intended to cause assent on the part of the minor, not that he acted with the specific intent to engage in sexual activity. With regard to conduct, the government must prove that the defendant took a substantial step toward causing assent, not toward causing actual sexual contact. Section 2422(b) expressly proscribes . . . the persuasion, inducement, enticement, or coercion of a minor to engage in illicit sexual activity, and not the sexual activity itself. The statute criminalizes an intentional attempt to achieve a *mental* state—a minor's assent.") (citations and internal punctuation omitted).

*United States v. Murrell*, 368 F.3d 1283, 1286 (11th Cir. 2004) ("Combining the definition of attempt with the plain language of § 2422(b), the government must first prove that [the defendant], using the internet, acted with a specific intent to persuade, induce, entice, or coerce a minor to engage in unlawful sex. The underlying criminal conduct that Congress expressly proscribed in passing § 2422(b) is the persuasion, inducement, enticement, or coercion of the minor rather than the sex act itself. That is, if a person persuaded a minor to engage in sexual conduct (e.g. with himself or a third party), without then actually committing any sex act himself, he would nevertheless violate § 2422(b).") (internal footnotes omitted).

The existence of an actual minor victim is not required for an attempt conviction under § 2422(b), so long as the defendant intended to cause assent on the part of a minor and took a substantial step toward causing assent, not toward causing actual sexual contact. *United States v. Jockisch*, 857 F.3d 1122, 1129 (11th Cir. 2017). In addition, the defendant can be convicted under § 2422(b) even though he only communicated with an adult intermediary. *United States v. Lee*, 603 F.3d 904, 912 (11th Cir. 2010).

The Internet is an instrumentality of interstate commerce. *United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004). Telephones and cellular telephones are instrumentalities of interstate commerce, even when they are used intrastate. *United States v. Evans*, 476 F.3d 1176, 1180-81 (11th Cir. 2007).

The term "prostitution" is not defined in Title 18. The Supreme Court has defined the term as the "offering of the body to indiscriminate lewdness for hire." *Cleveland v. United States*, 329 U.S. 14, 17 (1946). The term should not be defined by reference to state law, as doing so would make the term superfluous, since the statute already punishes "any sexual activity for which any person can be charged with a criminal offense."

The term "sexual activity for which any person can be charged with a criminal offense" includes the production of child pornography, as defined in 18 U.S.C. § 2256(8). 18 U.S.C. § 2427.

**O93.1**
**Transportation with Intent to Engage in**
**Criminal Sexual Activity**
**18 U.S.C. § 2423(a)**

It's a Federal crime to transport an individual under 18 years old in interstate or foreign commerce with the intent that the individual engage in [prostitution] [sexual activity for which any person can be charged with a criminal offense].

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 transported [person named in indictment] in [interstate] [foreign] commerce;

(2) at the time of the transportation, [person named in indictment] was less than 18 years old; and

(3) at the time of the transportation, Defendant intended that [person named in indictment] would engage in prostitution or other unlawful sexual activity.

[It is not necessary for the Government to prove anyone actually engaged in illegal sexual activity after being transported across state lines. The Government must prove beyond a reasonable doubt that a person under 18 years old was knowingly transported across state lines by the Defendant and that the Defendant intended at the time for the person under 18 to engage in prostitution or other illegal sexual activity.]

The Government must prove that [if the intended sexual activity had occurred, the Defendant] [one or more of the individuals engaging in the sexual activity] could have been charged with a criminal offense under the laws of [state].

Under [state] law [Describe the applicable state law] is a crime.

[As used in this instruction, the term "prostitution" means engaging in or agreeing or offering to engage in any lewd act with or for another person in exchange for money or other consideration.]

To "transport in interstate commerce" means to move or carry someone, or cause someone to be moved or carried, from one state to another. 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 to show that the Defendant knew that state lines were being crossed, but the Government must prove that state lines were crossed.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2423(a) provides:

> A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life.

Maximum Penalty: Life imprisonment and applicable fine. Minimum sentence is ten (10) years imprisonment and applicable fine. 18 U.S.C. § 3559 provides for a mandatory life sentence for repeated sex offenses against children.

18 U.S.C. § 2260A provides for an enhanced sentence for persons required to register as sex offenders. 18 U.S.C. § 2426 provides that the maximum sentence for a repeat offender under chapter 117 is twice the term otherwise provided by the chapter. 18 U.S.C. § 3559 provides for mandatory life imprisonment for repeated sex offenses against children.

The defendant's dominant purpose in transporting the child in interstate or foreign commerce need not be to engage in a sexual act with a child. However, to meet the intent requirement the Government must prove that one of the defendant's motives was to engage in a sexual act with a child. *See United States v. Hoschouer*, 224 Fed. Appx. 923, 925 (2007) (finding that intent requirement of § 2423(a) was met when defendant brought child on interstate trip and evidence supported the conclusion that he did so to facilitate his sexual relationship with her).

The statute contemplates a situation where a person transports a minor for the purpose of engaging in illegal sexual activity with a third party. The jury instructions as written contemplate a fact situation where the defendant intends for the minor to engage in illegal sexual activity with him, and they would need to be rewritten for a case where the defendant transported the minor intending that the minor engage in illegal sexual activity with a third party.

*See U.S. v. Cox*, 577 F.3d 833 (7th Cir. 2009) (holding that 18 U.S.C. § 2423(a)does not require the Government to prove that the Defendant knew that the victim was under the age of 18).

The term "prostitution" is not defined in Title 18. The Supreme Court has defined the term as the "offering of the body to indiscriminate lewdness for hire." *Cleveland v. United States*, 329 U.S. 14, 17 (1946). The term should not be defined by reference to state law, as doing so would make the term superfluous, since the statute already punishes "any sexual activity for which any person can be charged with a criminal offense."

**O93.2**
**Travel with Intent to Engage in**
**Illicit Sexual Conduct**
**18 U.S.C. § 2423(b)**

It's a Federal crime to [travel in interstate commerce] [travel into the United States] [travel in foreign commerce] for the purpose of engaging in illicit sexual conduct.

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

(1) the Defendant traveled in [interstate] [foreign] commerce;

(2) the Defendant traveled for the purpose of engaging in illicit sexual conduct.

For purposes of this offense, the term "illicit sexual conduct" means [causing a person under 18 years of age to engage in a sexual act by using force or placing that person in fear that any person will be subjected to death, serious bodily injury, or kidnapping] [a sexual act with a person under 18 years of age after rendering that person unconscious or administering a drug, intoxicant, or other substance that substantially impairs that person] [a sexual act with a person who is under 16 years of age and is at least four years younger than the defendant] [a commercial sex act with a person under 18 years of age].

[The term "sexual act" means:

- contact between the penis and the vulva, or the penis and the anus, involving penetration however slight; or

- contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or

- the penetration – however slight – of another person's anal or genital opening by a hand, finger, or any object, with an intent to abuse, humiliate, harass, or degrade the person, or to arouse or gratify the sexual desire of the Defendant or any other person[.] [;or]

- [an intentional touching – not through the clothing – of the genitalia of a person younger than 16 years old, with the intent to abuse, humiliate, harass, or degrade the person, or to arouse or gratify the sexual desire of the Defendant or any other person.]]

["Commercial sex act" means any sex act, for which anything of value is given to or received by any person.]

The Government does not have to show that the Defendant's only purpose in traveling in [interstate] [foreign] commerce was to engage in illicit sexual conduct, but the Government must show that it was one of the motives or purposes for the travel. In other words, the Government must show that the Defendant's criminal purpose was not merely incidental to the travel.

["Interstate or foreign commerce" is the movement or transportation of a person from one state to another state or from a place within the United States to a place outside the United States.]

[The defense asserts that although the Defendant may have committed the acts charged in the indictment, the Defendant reasonably believed that [the person named in the indictment] was 18 years or older at the time of the acts charged in

the indictment. If you find that the Government has proven beyond a reasonable doubt both elements of the offense, then you should consider whether the Defendant has come forward and presented sufficient evidence to prove this defense. The Defendant has to prove, by a preponderance of the evidence, that [he] [she] reasonably believed that [the person named in the indictment] was 18 years or older at the time of the acts charged in the indictment. This is sometimes called the burden of proof or burden of persuasion. A preponderance of the evidence simply means an amount of evidence that is enough to persuade you that the Defendant's claim is more likely true than not true. If you find that the Defendant has met this burden of proof, then you should find the Defendant not guilty of Count _____, Travel With Intent To Engage In Illicit Sexual Conduct.][1]

[1] Pursuant to 18 U.S.C. § 2423(g), this affirmative defense applies only if the "illicit sexual conduct" charged in the Indictment is "any commercial sex act with a person under 18 years of age."

## ANNOTATIONS AND COMMENTS

18 U.S.C. § 2423(b) provides:

> A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

Maximum Penalty: Thirty (30) years imprisonment and applicable fine. 18 U.S.C. § 2426 provides that the maximum sentence for a repeat offender under chapter 117 is twice the term otherwise provided by the chapter. 18 U.S.C. § 3559 provides for a mandatory life sentence for repeated sex offenses against children.

18 U.S.C. § 2260A provides for an enhanced sentence for persons required to register as sex offenders. 18 U.S.C. § 2426 provides that the maximum sentence for a repeat offender under chapter 117 is twice the term otherwise provided by the chapter. 18 U.S.C. § 3559 provides for mandatory life imprisonment for repeated sex offenses against children.

Note: to be convicted of this section for traveling in foreign commerce, the defendant must be a U.S. citizen or permanent resident. This additional element should be included if applicable.

The statute does provide for a defense if the defendant reasonably believed that the person with whom the defendant engaged in a commercial sex act was 18 or older. 18 U.S.C. § 2423(g). The defendant has the burden to prove this defense by a preponderance of the evidence.

The defendant may be convicted of attempting to travel with intent to engage in illicit sexual conduct even if the other person is fictitious. *United States v. Vance*, 494 F.3d 985 (11th Cir. 2007).

The defendant's dominant purpose in crossing a State line or traveling in foreign commerce need not be to engage in illicit sexual conduct. However, to meet the intent requirement the Government must prove that one of the defendant's motives was to engage in illicit sexual conduct. *United States v. Garcia-Lopez*, 234 F.3d 217, 220 (5th Cir. 2000) (construing intent requirement of 18 U.S.C. § 2423 and affirming district court's refusal to give instruction that illicit activity must have been "dominant purpose" for defendant's trip). *Cf. United States v. Hoschouer*, 224 Fed. Appx. 923, 925 (2007) (finding that intent requirement of § 2423(a) was met when defendant brought child on

interstate trip and evidence supported the conclusion that he did so to facilitate his sexual relationship with her).

It is not necessary for the Government to prove that prostitution is illegal in the country to which Defendant traveled. *United States v. Clarke*, 159 Fed. Appx. 128, 130 (11th Cir. 2005).

**O93.3**
**Engaging in Illicit Sexual Conduct**
**in a Foreign Place**
**18 U.S.C. § 2423(c)**

It's a Federal crime for [a United States citizen] [permanent resident alien of the United States] to travel in foreign commerce and engage in any illicit sexual conduct with another person.

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

(1) the Defendant is [a United States citizen] [an alien admitted to the United States for permanent residence];

(2) the Defendant traveled in foreign commerce; and

(3) while the Defendant was in the foreign place, [he][she] engaged in illicit sexual conduct with another person, that is, [person named in indictment].

To "travel in foreign commerce" means that the defendant moved from a place within the United States to a place outside the United States.

For purposes of this offense, the term "illicit sexual conduct" means [causing a person under 18 years of age to engage in a sexual act by using force or placing that person in fear that any person will be subjected to death, serious bodily injury, or kidnapping] [a sexual act with a person under 18 years of age after rendering that person unconscious or administering a drug, intoxicant, or other substance that substantially impairs that person] [a sexual act with a person who is

under 16 years of age and is at least four years younger than the defendant] [a commercial sex act with a person under 18 years of age].

[The term "sexual act" means:

- contact between the penis and the vulva, or the penis and the anus, involving penetration however slight; or

- contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or

- the penetration – however slight – of another person's anal or genital opening by a hand, finger, or any object, with an intent to abuse, humiliate, harass, or degrade the person, or to arouse or gratify the sexual desire of the Defendant or any other person[.] [;or]

- [an intentional touching – not through the clothing – of the genitalia of a person younger than 16 years old, with the intent to abuse, humiliate, harass, or degrade the person, or to arouse or gratify the sexual desire of the Defendant or any other person.]]

It is <u>not</u> necessary for the Government to prove that the illicit sexual conduct violated the laws of the foreign country where it occurred or that the Defendant intended to engage in the illicit sexual conduct at the time he departed the United States.

["Commercial sex act" means any sex act, for which anything of value is given to or received by any person.]

[The defense asserts that although the Defendant may have committed the acts charged in the indictment, the Defendant reasonably believed that [the person named in the indictment] was 18 years or older at the time of the acts charged in

the indictment. If you find that the Government has proven beyond a reasonable doubt all three elements of the offense, then you should consider whether the Defendant has come forward and presented sufficient evidence to prove this defense. The Defendant has to prove, by a preponderance of the evidence, that [he] [she] reasonably believed that [the person named in the indictment] was 18 years or older at the time of the acts charged in the indictment. This is sometimes called the burden of proof or burden of persuasion. A preponderance of the evidence simply means an amount of evidence that is enough to persuade you that the Defendant's claim is more likely true than not true. If you find that the Defendant has met this burden of proof, then you should find the Defendant not guilty of Count _____, Engaging in Illicit Sexual Conduct in a Foreign Place.][1]

[1] Pursuant to 18 U.S.C. § 2423(g), this affirmative defense applies only if the "illicit sexual conduct" charged in the Indictment is "any commercial sex act with a person under 18 years of age."

## ANNOTATIONS AND COMMENTS

18 U.S.C. § 2423(c) provides:

> Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

Maximum Penalty: Thirty (30) years imprisonment and applicable fine. 18 U.S.C. § 2426 provides that the maximum sentence for a repeat offender under chapter 117 is twice the term otherwise provided by the chapter. 18 U.S.C. § 3559 provides for a mandatory life sentence for repeated sex offenses against children.

18 U.S.C. § 2260A provides for an enhanced sentence for persons required to register as sex offenders. 18 U.S.C. § 2426 provides that the maximum sentence for a repeat offender under chapter 117 is twice the term otherwise provided by the chapter. 18 U.S.C. § 3559 provides for mandatory life imprisonment for repeated sex offenses against children.

The statute does provide for a defense if the defendant reasonably believed that the person with whom the defendant engaged in a commercial sex act was 18 or older. 18 U.S.C. § 2423(g). The defendant has the burden to prove this defense by a preponderance of the evidence.

The defendant may be convicted of attempting to travel with intent to engage in illicit sexual conduct even if the other person is fictitious. *United States v. Strevell*, 185 Fed. Appx. 841 (11th Cir. 2006); *United States v. Clarke*, 159 Fed. Appx. 128 (11th Cir. 2005); 18 U.S.C. § 2423(e).

It is not necessary for the Government to prove that the Defendant intended to engage in illegal sexual conduct at the time he departed the United States. *See United States v. Clark*, 435 F.3d 1100, 1105 (9th Cir. 2006) ("The conference report accompanying the PROTECT Act explains that Congress removed the intent requirement from § 2423(c) so that 'the government would only have to prove that the defendant engaged in illicit sexual conduct with a minor while in a foreign country.' H.R. Rep. No. 108-66 at 51; see also H.R. Rep. No. 107-525, at 2 (same statement in report for failed 2002 bill). Consequently, for § 2423(c) to apply, the two key determinations are whether the defendant 'travel[ed] in foreign commerce' and 'engages in any illicit sexual conduct.'").

It is not necessary for the Government to prove that prostitution is illegal in the country to which Defendant traveled. *United States v. Clarke*, 159 Fed. Appx. 128, 130 (11th Cir. 2005).

**O93.4**
**Facilitating Travel of Another**
**to Engage in Illicit Sexual Conduct**
**18 U.S.C. § 2423(d)**

It's a Federal crime to [arrange] [induce] [procure] [facilitate] the travel of another person knowing that such a person is traveling in interstate or foreign commerce for the purpose of engaging in illicit sexual conduct and to do so for the purpose of commercial advantage or private financial gain.

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

(1) the Defendant [arranged] [induced] [procured] [facilitated] the travel of [person named in indictment], in interstate or foreign commerce;

(2) the Defendant knew that [person named in indictment] was traveling for the purpose of engaging in illicit sexual conduct; and

(3) the Defendant did so for the purpose of commercial advantage or private financial gain.

[As used in this instruction, "induce" means to stimulate the occurrence of or to cause.]

To "travel in interstate or foreign commerce" means to move from one State to another or to move from within the United States to a place outside the United States. 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 to show that the Defendant knew that state or international lines were being crossed, but the Government must prove that such lines were crossed.

It is no defense to the crime charged in Count _____ that the intended illicit sexual conduct was not accomplished. In other words, it is not necessary for the Government to prove that anyone, in fact, engaged in any illicit sexual activity after being transported in interstate or foreign commerce. Instead, the offense is complete if the Government proves, beyond a reasonable doubt, that, for purposes of commercial advantage or private financial gain, the Defendant facilitated the travel of the person named in the indictment, and that the Defendant knew at that time that the traveler intended to engage in illicit sexual conduct.

For purposes of this offense, the term "illicit sexual conduct" means [causing a person under 18 years of age to engage in a sexual act by using force or placing that person in fear that any person will be subjected to death, serious bodily injury, or kidnapping] [a sexual act with a person under 18 years of age after rendering that person unconscious or administering a drug, intoxicant, or other substance that substantially impairs that person] [a sexual act with a person who is under 16 years of age and is at least four years younger than the defendant] [a commercial sex act with a person under 18 years of age].

[The term "sexual act" means:

- contact between the penis and the vulva, or the penis and the anus, involving penetration however slight; or

- contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or

- the penetration – however slight – of another person's anal or genital opening by a hand, finger, or any object, with an intent to abuse, humiliate, harass, or degrade the person, or to arouse or gratify the sexual desire of any person[.] [;or]

- [an intentional touching – not through the clothing – of the genitalia of a person younger than 16 years old, with the intent to abuse, humiliate, harass, or degrade the person, or to arouse or gratify the sexual desire of any person.]]

It is not necessary for the Government to prove that the illicit sexual conduct violated the laws of the foreign country to which the other person was traveling.

["Commercial sex act" means any sex act, for which anything of value is given to or received by any person.]

[The defense asserts that although the Defendant may have committed the acts charged in the indictment, the Defendant reasonably believed that [the person named in the indictment] traveled to engage in illicit sexual conduct with a person who was 18 years or older at the time of the acts charged in the indictment. If you find that the Government has proven beyond a reasonable doubt all three elements of the offense, then you should consider whether the Defendant has come forward and presented sufficient evidence to prove this defense. The Defendant has to prove, by a preponderance of the evidence, that [he] [she] reasonably believed that [the person named in the indictment] intended to engage in illicit sexual conduct

with a person 18 years or older at the time of the acts charged in the indictment. This is sometimes called the burden of proof or burden of persuasion. A preponderance of the evidence simply means an amount of evidence that is enough to persuade you that the Defendant's claim is more likely true than not true. If you find that the Defendant has met this burden of proof, then you should find the Defendant not guilty of Count _____, Facilitating the Travel of Another to Engage in Illicit Sexual Conduct.][1]

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[1] Pursuant to 18 U.S.C. § 2423(g), this affirmative defense applies only if the "illicit sexual conduct" charged in the Indictment is "any commercial sex act with a person under 18 years of age."

## ANNOTATIONS AND COMMENTS

18 U.S.C. § 2423(d) provides:

> Whoever, for the purpose of commercial advantage or private financial gain, arranges, induces, procures, or facilitates the travel of a person knowing that such a person is traveling in interstate commerce or foreign commerce for the purpose of engaging in illicit sexual conduct shall be fined under this title, imprisoned not more than 30 years, or both.

Maximum Penalty: Thirty (30)years imprisonment and applicable fine. 18 U.S.C. § 2426 provides that the maximum sentence for a repeat offender under chapter 117 is twice the term otherwise provided by the chapter. 18 U.S.C. § 3559 provides for a mandatory life sentence for repeated sex offenses against children.

18 U.S.C. § 2260A provides for an enhanced sentence for persons required to register as sex offenders. 18 U.S.C. § 2426 provides that the maximum sentence for a repeat offender under chapter 117 is twice the term otherwise provided by the chapter. 18 U.S.C. § 3559 provides for mandatory life imprisonment for repeated sex offenses against children.

The statute does provide for a defense if the defendant reasonably believed that the person with whom the intended traveler engaged in a commercial sex act was 18 or older. 18 U.S.C. § 2423(g). The defendant has the burden to prove this defense by a preponderance of the evidence.

As with other sections of the Mann Act, the violation of Section 2423(d) is completed upon the facilitation of the travel, even if the traveler never engages in the illicit sexual conduct. *Cf. Cleveland v. United States*, 329 U.S. 14, 20 (1946) ("guilt under the Mann Act turns on the purpose which motivates the transportation, not on its accomplishment") (citing *Wilson v. United States*, 232 U.S. 563, 570-71 (1914)); *Reamer v. United States*, 318 F.2d 43, 49 (8th Cir.), *cert. denied*, 375 U.S. 869 (1963) ("If the necessary intent is present and there is knowing interstate transportation, it is immaterial whether the immoral act took place or whether there was consummation. Actual fulfillment of the purpose is not necessary.") (citing *Cleveland* and *Wilson*).

The traveler's sole or dominant purpose for traveling in interstate or foreign commerce need not be for the person to engage in illegal sexual activity. However, to meet the intent requirement, the Government must prove that the Defendant knew that one of the traveler's motives was to engage in such activity. *Cf. United States v. Hoschouer*, 224

Fed. Appx. 923, 925 (11th Cir. 2007) (finding that intent requirement of § 2423(a) was met when defendant brought child on interstate trip and evidence supported the conclusion that he did so to facilitate his sexual relationship with her).

The defendant may be convicted of facilitating the travel of another to engage in illicit sexual conduct even if the intended victim is fictitious. *Cf. United States v. Strevell*, 185 Fed. Appx. 841 (11th Cir. 2006); *United States v. Clarke*, 159 Fed. Appx. 128 (11th Cir. 2005); 18 U.S.C. § 2423(e).

It is not necessary for the Government to prove that the illicit sexual conduct is illegal in the country to which the traveler visited. *Cf. United States v. Clarke*, 159 Fed. Appx. 128, 130 (11th Cir. 2005).

**O94**
**Failure to Appeal: Bail Jumping**
**18 U.S.C. § 3146**

It's a Federal crime for anyone who has been released on bail from this Court to knowingly fail to [appear when required to do so] [surrender to serve a sentence under court order].

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 released on bail by order of a judge or magistrate of this court;

(2) after being released, the Defendant knowingly failed to [appear before a judge or magistrate of this court as required] [surrender to serve a sentence under a court order]; and

(3) the Defendant was charged with a crime punishable by a term of [state maximum punishment applicable in charged offense] when released on bail.

The Defendant should be excused from Failure to Appear if he proves by a preponderance of the evidence:

- uncontrollable circumstances prevented the Defendant from appearing in court;

- the Defendant didn't create the circumstances or contribute to their creation in reckless disregard of the requirement to appear; and

- the Defendant appeared as soon as the circumstances ceased to exist.

A preponderance of the evidence is enough evidence to persuade you that the Defendant's claim is more likely true than not true.

## ANNOTATIONS AND COMMENTS

While 18 U.S.C. § 3146(c) provides for an affirmative defense, it does not address the burden of production or persuasion. In the context of this statute which only requires that a defendant act "knowingly," and in the absence of any authority to the contrary, the Committee believes that the burdens rest with the defendant who relies upon the exception. *See Dixon v. United States*, 548 U.S. 1, 126 S. Ct. 2437 (2006) (jury instructions do not run afoul of the Due Process Clause when they place the burden on the defendant to establish the defense of duress by a preponderance of the evidence). *See also Dixon*, 548 U.S. at 18, 126 U.S. at 2449 ("the facts needed to prove or disprove the defense lie peculiarly in the knowledge of the defendant") (Kennedy, J. concurring) (internal quotations and citations omitted). *See also Dixon*, 548 U.S. at 13-14, 126 S. Ct. at 2446 ("… Congress was familiar with both the long-established common-law rule and the rule applied in *McKelvey* and that it would have expected federal courts to apply a similar approach to any affirmative defense that might me asserted as a justification or excuse for violating the new law." *See McKelvey v. United States*, 260 U.S. 353, 357, 43 S. Ct. 132, 67 L. Ed. 301 (1922).

**O95**
**Unlawful Possession of Food Stamps**
**7 U.S.C. § 2024(b)**

It's a Federal crime for anyone to knowingly [transfer] [acquire] [alter] [possess] United States Department of Agriculture benefits in any manner not authorized by law or Department regulations where the benefits have a value of $100 [$5,000] or more.

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

(1) the Defendant [transferred] [acquired] [altered] [possessed] benefits in a manner not authorized by law or Department of Agriculture regulations;

(2) the Defendant knew that [he] [she] was acting unlawfully and intended to violate the law; and

(3) the benefits had a value of at least $100 [$5,000].

No law or Department of Agriculture regulation allows anyone to sell or purchase benefits for cash [to [use] [transfer] [acquire] benefits in exchange for clothes, drugs, cigarettes, liquor, or [describe other violation]]. The Government need not show that the Defendant had knowledge of the specific law or regulation, only that [he] [she] knew that [his] [her] conduct was unlawful.

[The "value" of benefits are their face value.]

**ANNOTATIONS AND COMMENTS**

7 U.S.C. § 2024(b)(1) provides:

> … whoever knowingly uses, transfers, acquires, alters, or possesses benefits in any manner contrary to this chapter or the regulations issued pursuant to this chapter shall, if such benefits are of a value of $5,000 or more, be guilty of a felony and shall be fined not more than $250,000 or imprisoned for not more than twenty years, or both, and shall, if such benefits are of a value of $100 or more, but less than $5,000, or if the item used, transferred, acquired, altered, or possessed is a benefit that has a value of $100 or more, but less than $5,000, be guilty of a felony and shall, upon the first conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, and, upon the second and any subsequent conviction thereof, shall be imprisoned for not less than six months nor more than five years and may also be fined not more than $10,000.

Maximum Penalty: See above

The third element, prompted by the *Apprendi* doctrine, is required when the indictment alleges a value that would result in an enhanced penalty.

If a disputed issue is whether the food stamp coupons had a value of $5,000 or more, the Court should consider giving the lesser included offense instruction.

The knowledge element of the statute has been analyzed in *Liparota v. United States*, 471 U.S. 419 (1985); *see also United States v. Saldana*, 12 F.3d 160, 162-63 (9th Cir. 1993).

# O96.1
# Bringing Aliens into the United States
# 8 U.S.C. § 1324(a)(1)(A)(i)

It's a Federal crime for anyone to [bring] [attempt to bring] an alien into the United States at a place other than a designated point of entry.

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

(1) the Defendant [brought] [attempted to bring] [alien's name] into the United States;

(2) [alien's name] was an alien;

(3) the Defendant knew [alien's name] was an alien; and

(4) the entry was not made at a designated port of entry.

An "alien" is any person who isn't a natural-born or naturalized citizen, or a national of the United States.

A "national of the United States" includes any United States citizen and any noncitizen who owes permanent allegiance to the United States.

## ANNOTATIONS AND COMMENTS

8 U.S.C. § 1324 provides:

(a)(1)(A) Any person who

> (i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of

> any future official action which may be taken with respect to such alien [shall be guilty of an offense against the United States].

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

The mens rea requirement for this crime is discussed in *United States v. Zayas-Morales*, 685 F.2d 1272, 1277 (11th Cir. 1982) ("By our decision in this case, we simply articulate that which is inherent in the prosecution of any serious crime-proof of a general intent to commit an illegal act.").

**O96.2**
**Unlawfully Transporting Aliens**
**8 U.S.C. § 1324(a)(1)(A)(ii)**

It's a Federal crime for anyone who [knows] [acts with reckless disregard of the fact] that an alien is in the United States illegally to transport the alien to further the alien's illegal presence.

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

(1) an alien [entered] or [remained in] the United States in violation of law;

(2) the Defendant knew or recklessly disregarded the fact that the alien was in the United States in violation of the law; [and]

(3) the Defendant transported the alien within the United States to further the alien's unlawful presence[.] [; and]

[(4) the Defendant's motive was commercial advantage or private financial gain.]

To act with "reckless disregard of the fact" means to be aware of but consciously and carelessly ignore facts and circumstances clearly indicating that the person transported was an alien who had entered or remained in the United States illegally.

An alien is any person who isn't a natural-born or naturalized citizen, or a national of the United States.

A "citizen of the United States" is a person who was born within the United States or naturalized through judicial proceedings. A person who was born outside the United States is a citizen of the United States if both parents were United States citizens and at least one of them had a residence in the United States before the birth.

A "national of the United States" includes any United States citizen and any noncitizen who owes permanent allegiance to the United States.

For transportation to further an alien's unlawful presence, there must be a direct and substantial relationship between the Defendant's act of transportation and the furthering of the alien's presence in the United States. The act of transportation must be something more than merely incidental to furthering the alien's presence.

**ANNOTATIONS AND COMMENTS**

8 U.S.C. § 1324(a)(1)(A)(ii) provides:

(1)(A) Any person who - -

> (ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years and applicable fine.

Though the word "willfully" does not appear in the statute, and therefore is not included in this jury charge, a number of circuits do include "willfully" as an element of the crime,

such that the Defendant must be found to have transported the alien "willfully in furtherance" of his illegal presence in the United States. *See United States v. Barajas-Chavez*, 162 F.3d 1285, 1287 (10th Cir. 1999); *United States v. Parmelee*, 42 F.3d 387, 390 (7th Cir. 1994); *United States v. Velasquez-Cruz*, 929 F.2d 420, 422 (8th Cir. 1991); *United States v. 1982 Ford Pick-Up*, 873 F.2d 947, 951 (6th Cir. 1989); see also 2B Fed. Jury Prac. & Instr. § 61.06 (5th ed.). In *United States v. Rivera*, 879 F.2d 1247, 1251 (5th Cir. 1989). The Committee believes that the legislative history supports the conclusion that § 1324(a)(1)(A)(ii) only requires that the Defendant knew the alien was in the U.S. illegally, or recklessly disregarded that fact, and transported the alien in furtherance of the alien's violation of law. See H.R. Rep. No. 682(l), 99th Cong., 2d Sess. 65 (1986), *reprinted in* 1986 U.S. Code Cong. and Adm. News, 5649 at 5669-70.

The Circuits look to the purpose for which transportation is provided to an illegal alien to determine whether this law was violated. The Ninth Circuit reversed a conviction under Section 1324, where the evidence at trial showed the Defendant was transporting aliens "as part of the ordinary and required course of his employment as foreman" and noted as well that the transporting of an undocumented alien to a hospital following an injury does not come within the confines of Section 1324. *See United States v. Moreno*, 561 F.2d 1321, 1322 n.3 (9th Cir. 1977). The Eighth Circuit uses the "incidental connection" test, which looks to whether the transportation of the alien has only an "incidental connection" to the furtherance of the violation of the law. *United States v. Velasquez-Cruz*, 929 F.2d 420, 422-23 (8th Cir. 1991). The Sixth Circuit's test is based on the purpose of the Defendant in transporting the alien. *United States v. 1982 Ford Pick-Up*, 873 F.2d 947, 951 (6th Cir. 1989). The Fifth, Seventh, and Tenth Circuits adopted a general approach that allowed the Government to prove the "in furtherance" element by reference to the facts and circumstances of each case. The fact finder can "consider any and all relevant evidence bearing on the 'in furtherance of' element (time, place, distance, reason for trip, overall impact of trip, defendant's role in organizing and/or carrying out the trip)." *United States v. Barajas-Chavez*, 162 F.3d 1285, 1289 (10th Cir. 1999); *United States v. Parmelee*, 42 F.3d 387, 391 (7th Cir. 1994); *United States v. Williams*, 132 F.3d 1055, 1062 (5th Cir. 1998); *United States v. Merkt*, 764 F.2d 266, 272 (5th Cir. 1985) (holding that the factfinder should "consider all of the evidence it finds credible about [the Defendant's] intentions, direct as well as circumstantial").

*See United States v. Zlatogur*, 271 F.3d 1025, 1029 (11th Cir. 2001). *See also United States v. Perez*, 443 F.3d 772, 781 (11th Cir. 2006).

The statute describes aggravating factors raising the statutory maximum penalty which, under the principle of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), must be submitted as additional elements if charged in the indictment. These include: whether the offense was done for the purpose of commercial advantage or private gain, 8 U.S.C. § 1324(a)(1)(B)(i); whether the Defendant caused serious bodily injury (as

defined in 18 U.S.C. § 1365) to a person or placed a person's life in jeopardy (8 U.S.C. § 1324(a)(1)(B)(iii)); or whether death resulted (8 U.S.C. § 1324(a)(1)(B)(iv)).

**O96.3**
**Concealing or Harboring Aliens**
**8 U.S.C. § 1324(a)(1)(A)(iii)**

It's a Federal crime to [conceal][harbor] an alien [knowing] [in reckless disregard of the fact] that the alien [entered] [is in] the United States illegally.

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

(1) the alien [entered] [remained in] the United States illegally;

(2) the Defendant knowingly [concealed the alien] [harbored the alien] [sheltered the alien from detection] within the United States; and

(3) the Defendant either knew or acted in reckless disregard of the fact that the alien [had entered] [remained in] the United States in violation of law[.] [; and]

[(4) the Defendant's motive was commercial advantage or private financial gain.]

An "alien" is any person who isn't a natural-born or naturalized citizen, or a national of the United States.

A "citizen of the United States" is a person who was born within the United States or naturalized through judicial proceedings. A person who was born outside the United States is a citizen of the United States if both parents were United States citizens and at least one of them had a residence in the United States before the birth.

A "national of the United States" includes any United States citizen and any noncitizen who owes permanent allegiance to the United States.

To act with "reckless disregard of the fact" means to be aware of but consciously and carelessly ignore facts and circumstances clearly indicating that the person transported was an alien who had entered or remained in the United States illegally.

To [conceal] [harbor] [shield from detection] includes knowingly doing something to help the alien escape detection.

**ANNOTATIONS AND COMMENTS**

8 U.S.C. § 1324(a)(1)(A)(iii) provides:

> (1)(A) Any person who
>
> > (iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in anyplace, including any building or any means of transportation [shall be guilty of an offense against the United States].

The statute describes aggravating factors raising the statutory maximum penalty which, under the principle of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), must be submitted as additional elements if charged in the indictment. These include: whether the offense was done for the purpose of commercial advantage or private gain, 8 U.S.C. § 1324(a)(1)(B)(i); whether the Defendant caused serious bodily injury (as defined in 18 U.S.C. § 1365) to a person or placed a person's life in jeopardy, 8 U.S.C. § 1324(a)(1)(B)(iii); or whether death resulted, 8 U.S.C. § 1324(a)(1)(B)(iv).

See *United States v. Zlatogur*, 271 F.3d 1025, 1029 (11th Cir. 2001). See also *United States v. Perez*, 443 F.3d 772, 781 (11th Cir. 2006).

**O96.4**
**Conspiracy to Encourage or Induce Aliens**
**to Enter the United States**
**8 U.S.C. § 1324(a)(1)(A)(v)(I)**

Title 8, United States Code, Section 1324 (a)(1)(A)(v)(I), makes it a crime for anyone to conspire with someone else to encourage or induce aliens to come to, enter, or reside in the United States, knowing and in reckless disregard of the fact that such coming to, entry, and residence is and will be in violation of the law.

A conspiracy is an agreement by two or more persons to commit an unlawful act. In other words, it is a kind of partnership for criminal purposes. Every member of the conspiracy becomes the agent or partner of every other member.

The Government does not have to prove that all the people named in the indictment were members of the plan, or that those who were members made any kind of formal agreement. The heart of a conspiracy is the making of the unlawful plan itself, so the Government does not have to prove that the conspirators succeeded in carrying out the plan.

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

> First: The defendant and one or more persons in some way agreed to try to accomplish a shared and unlawful plan;
>
> Second: The defendant knew the unlawful purpose of the plan and willfully joined in it; and
>
> Third: The object of the conspiracy was to encourage or induce an alien to come to, enter, or reside in the United States, knowing or in

> reckless disregard of the fact that such coming to, entry, and residence was or would be in violation of law.

A person may be a conspirator even without knowing all the details of the unlawful plan or the names and identities of all the other alleged conspirators.

If the Defendant played only a minor part in the plan but had a general understanding of the unlawful purpose of the plan – and willfully joined the plan on at least one occasion – that is sufficient for you to find the Defendant guilty.

But simply being present at the scene of an event or merely associating with certain people and discussing common goals and interests does not establish proof of conspiracy. Also, a person who does not know about a conspiracy but happens to act in a way that advances some purpose of one does not automatically become a conspirator.

**ANNOTATIONS AND COMMENTS**

8 U.S.C. § 1324(a)(1)(A)(v)(I) provides:

> Any person who –
>
> (i) knowing that a person is an alien, brings or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;

> (ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;
>
> (iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;
>
> (iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or
>
> (v)(I) engages in any conspiracy to commit any of the preceding acts, or
>
> > (II) aids or abets the commission of any of the preceding acts, shall be [guilty of an offense against the United States].

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

The Supreme Court has held that a conspiracy requires proof of an overt act only when explicitly stated in the statute's text. *See United States v. Shabani*, 513 U.S. 10, 13 (1994). Although the Eleventh Circuit has not yet held section 1324 (a)(1)(A)(v)(I) does not require proof of an overt act, other circuits have so decided. *United States v. Pascacio-Rodriguez*, 749 F.3d 353, 363 (5th Cir. 2014); *United States v. Torralba-Mendia*, 784 F.3d 652, 663 (9th Cir. 2015).

**O97**
**Illegal Entry by Deported Alien**
**8 U.S.C. § 1326**

It's a Federal crime for an alien to [enter] [be found in] the United States after the alien had been [deported] [excluded] [removed].

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 alien at the time stated in the indictment;

(2) the Defendant had been [deported] [excluded] [removed] from the United States;

(3) afterward, the Defendant [knowingly reentered] [was found to be voluntarily back in] the United States; and

(4) the Defendant did not have the consent of the [Attorney General of] [Secretary of Homeland Security for] the United States to apply for readmission to the United States.

An "alien" is any person who isn't a natural-born or naturalized citizen, or a national of the United States.

A "citizen of the United States" is a person who was born within the United States or naturalized through judicial proceedings. A person who was born outside the United States is a citizen of the United States if both parents were United States citizens and at least one of them had a residence in the United States before the birth.

A "national of the United States" includes any United States citizen and any noncitizen who owes permanent allegiance to the United States.

**ANNOTATIONS AND COMMENTS**

8 U.S.C. § 1326(a) provides:

> any alien who - -
>
> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be [guilty of an offense against the United States].

Maximum Penalty: Two (2) years imprisonment and applicable fine.

6 U.S.C. § 557 provides:

> With respect to any function transferred by or under this chapter… reference in any other Federal law to any department, commission, or agency or any officer or office the functions of which are so transferred shall be deemed to refer to the Secretary, other official, or component of the Department [of Homeland Security] to which such function is so transferred.

Specific intent is not an element of the unlawful reentry offense. *United States v. Henry*, 111 F.3d 111, 114 (11th Cir. 1997). Therefore, there is no mistake of law defense available. *See United States v. Miranda-Enriquez*, 842 F.2d 1211, 1213 (10th Cir. 1988) ("Because a mistake defense is possible only if there is some mental state required to establish a material element of the crime that the mistake can negate, a mistake instruction is required and a mistake defense is appropriate only if criminal intent plays a part in the crime charged.") (internal citations and quotations omitted).

An alien who approaches a port of entry and makes a false claim of citizenship or nonresident alien status has attempted to enter the United States. *United States v. Cardenas-Alvarez*, 987 F.2d 1129, 113233 (5th Cir. 1993).

A violation of this section is a continuing offense that can run over a long period of time. The offense conduct begins when the alien illegally enters the United States and

continues until the alien is actually "found" by immigration authorities. *United States v. Scott*, 447 F.3d 1365, 1369 (11th Cir. 2006). The phrase "found in" refers to the actions of federal immigration officials, not state law enforcement. *United States v. Clarke*, 312 F.3d 1343, 1348 (11th Cir. 2002). The alien is constructively "found" in the United States "when the Government either knows of or, with the exercise of diligence typical of law enforcement authorities, could have discovered the illegality of the alien's presence." *Scott*, 447 F.3d at 1369 (citations and internal quotations omitted).

An indictment under this section may be dismissed if the Defendant makes a successful collateral attack on his prior deportation. *United States v. Holland*, 876 F.2d 1533, 1535-56 (11th Cir. 1989). He must show that: (i) he "exhausted any administrative remedies that may have been available to seek relief against the order; (ii) the deportation proceeding at which the order was issued improperly deprived the alien of an opportunity for judicial review; and (iii) the entry of the order was fundamentally unfair." *United States v. Zelaya*, 293 F.3d 1294, 1297 (11th Cir. 2002). "Fundamentally unfair" means, "at a minimum… that the outcome of the deportation proceeding would have been different but for a particular error." *Id*. at 1298.

Surreptitious reentry is not a prerequisite to prosecution of being "found" in the United States. *United States v. Gay*, 7 F.3d 200, 202 (11th Cir. 1993).

*See United States v. Barnes*, 244 F.3d 331, 334 (2d Cir. 2001).

An alien within the United States is not "found in" the United States if he or she approaches a recognized port of entry and produces his identity seeking admission. *United States v. Jose Manuel Angeles-Mascote*, 206 F.3d 529, 531 (5th Cir. 2000).

Proof of the Defendant's commission of an aggravated felony prior to deportation is not an element of the offense; rather it is a punishment provision used in addressing recidivism. *Almendarez-Torres v. United States*, 523 U.S. 224, 247-48, 118 S. Ct. 1219, 1232-33 (1998). The Eleventh Circuit speaks of the "non effect" of *Apprendi* and *Booker* on the *Almendarez-Torres* rule that the government is not required to prove prior convictions to a jury, beyond a reasonable doubt. *United States v. Greer*, 440 F.3d 1267, 1273-75 (11th Cir. 2006).

**O98.1**
**Controlled Substances –**
**Possession with Intent to Distribute**
**21 U.S.C. § 841(a)(1)**

It's a Federal crime for anyone to possess a controlled substance with intent to distribute it.

[Substance] is a "controlled substance."

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 possessed a controlled substance; and

(2) the Defendant intended to distribute the controlled substance.

The Defendant "knowingly" possessed a controlled substance if (1) the Defendant knew [he/she] possessed a substance listed on the federal schedules of controlled substances, even if the Defendant did not know the identity of the substance, or (2) the Defendant knew the identity of the substance [he/she] possessed, even if the Defendant did not know the substance was listed on the federal schedules of controlled substances.

To "intend to distribute" is to plan to deliver possession of a controlled substance to someone else, even if nothing of value is exchanged.

[The Defendant[s] [is/are] charged with possessing with intent to distribute at least [threshold(s)] of [substance(s)]. But you may find [the/any] Defendant guilty of the crime even if the amount of the controlled substance[s] for which

[he/she] should be held responsible is less than [threshold(s)]. So if you find [the/any] Defendant guilty, you must also find whether the Government has proved beyond a reasonable doubt the weight of [substance(s)] the Defendant possessed and specify the amount[s] on the verdict form.]

**ANNOTATIONS AND COMMENTS**

21 U.S.C. § 841(a) provides:

> . . . it shall be unlawful for any person knowingly or intentionally--
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013), when an indictment alleges drug quantity to subject a defendant to 21 U.S.C. § 841(b)'s enhanced penalties, a jury must find that the drug type and quantity have been proven beyond a reasonable doubt. In such cases, drug quantity becomes an "element" or "ingredient" of the offense for penalty purposes. *United States v. Colston*, 4 F.4th 1179, 1187–89 (11th Cir. 2021); *see also United States v. Gray*, 94 F.4th 1267, 1271 (11th Cir. 2024) ("In short, [the defendant]'s indictment for violating 21 U.S.C. § 841(a)(1) and § 846 required the government to prove only that he knew he possessed a controlled substance, not that he knew he possessed a certain controlled substance. The fact that the indictment named a specific substance [to establish penalties] does not change this general-knowledge requirement.").

In *McFadden v. United States*, 576 U.S. 186 (2015), the U.S. Supreme Court pronounced that there are two ways to satisfy the knowledge requirement under § 841(a)(1). "Th[e] knowledge requirement may be met by showing that the defendant knew he possessed a substance listed on the schedules, even if he did not know which substance it was." *Id.* at 192. "The knowledge requirement may also be met by showing that the defendant knew the identity of the substance he possessed," even if the defendant did not know that the drug is "listed on the schedules" as a controlled substance. *Ibid.*

Special Verdict

1. We, the Jury, find the Defendant [name of Defendant] _____ as charged in Count [One] of the indictment.

[Note: If you find the Defendant not guilty as charged in Count [One], you need not consider paragraph 2 below.]

2. We, the Jury, having found the Defendant guilty of the offense charged in Count [One], further find with respect to that Count that [he/she] possessed with intent to distribute the following controlled substance[s] in the amount[s] shown (place an X in the appropriate box[es]):

[(a) Marijuana - -

(i) Weighing 1000 kilograms or more ☐
(ii) Weighing 100 kilograms or more ☐
(iii) Weighing less than 100 kilograms ☐]

[(b) Cocaine - -

(i) Weighing 5 kilograms or more ☐
(ii) Weighing 500 grams or more ☐
(iii) Weighing less than 500 grams ☐]

[(c) Cocaine base ("crack" cocaine) - -

(i) Weighing 280 grams or more ☐
(ii) Weighing 28 grams or more ☐
(iii) Weighing less than 28 grams ☐]

SO SAY WE ALL.

Date: _____ _____

Foreperson

Multiple sets of the two paragraphs in this Special Verdict form will be necessary in the event of multiple counts of drug offenses against the same Defendant.

**O98.2**
**Controlled Substances –**
**Distribution**
**21 U.S.C. § 841(a)(1)**

It's a Federal crime for anyone to distribute a controlled substance. [Substance] is a "controlled substance."

The Defendant can be found guilty of this crime only if the Government proves beyond a reasonable doubt that the Defendant knowingly distributed a controlled substance.

The Defendant "knowingly" distributed a controlled substance if (1) the Defendant knew [he/she] distributed a substance listed on the federal schedules of controlled substances, even if the Defendant did not know the identity of the substance, or (2) the Defendant knew the identity of the substance [he/she] distributed, even if the Defendant did not know the substance was listed on the federal schedules of controlled substances.

To distribute is to deliver possession of a controlled substance to someone else, even if nothing of value is exchanged.

[The Defendant[s] [is/are] charged with distributing at least [threshold(s)] of [substance(s)]. But you may find [the/any] Defendant guilty of the crime even if the amount of the controlled substance[s] for which [he/she] should be held responsible is less than [threshold(s)]. So if you find [the/any] Defendant guilty, you must also find whether the Government has proved beyond a reasonable doubt

the weight of [substance(s)] the Defendant distributed and specify the amount[s] on the verdict form.]

## ANNOTATIONS AND COMMENTS

21 U.S.C. § 841(a) provides:

> . . . it shall be unlawful for any person knowingly or intentionally--
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013), when an indictment alleges drug quantity to subject a defendant to 21 U.S.C. § 841(b)'s enhanced penalties, a jury must find that the drug type and quantity have been proven beyond a reasonable doubt. In such cases, drug quantity becomes an "element" or "ingredient" of the offense for penalty purposes. *United States v. Colston*, 4 F.4th 1179, 1187–89 (11th Cir. 2021); *see also United States v. Gray*, 94 F.4th 1267, 1271 (11th Cir. 2024) ("In short, [the defendant]'s indictment for violating 21 U.S.C. § 841(a)(1) and § 846 required the government to prove only that he knew he possessed a controlled substance, not that he knew he possessed a certain controlled substance. The fact that the indictment named a specific substance [to establish penalties] does not change this general-knowledge requirement.").

In *McFadden v. United States*, 576 U.S. 186 (2015), the U.S. Supreme Court pronounced that there are two ways to satisfy the knowledge requirement under § 841(a)(1). "Th[e] knowledge requirement may be met by showing that the defendant knew he possessed a substance listed on the schedules, even if he did not know which substance it was." *Id.* at 192. "The knowledge requirement may also be met by showing that the defendant knew the identity of the substance he possessed," even if the defendant did not know that the drug is "listed on the schedules" as a controlled substance. *Ibid.*

Special Verdict

> 1. We, the Jury, find the Defendant [name of Defendant] _____ as charged in Count [One] of the indictment.

[Note: If you find the Defendant not guilty as charged in Count [One], you need not consider paragraph 2 below.]

2. We, the Jury, having found the Defendant guilty of the offense charged in Count [One], further find with respect to that Count that [he/she] distributed the following controlled substance[s] in the amount[s] shown (place an X in the appropriate box[es]):

[(a) Marijuana - -

(i) Weighing 1000 kilograms or more ☐

(ii) Weighing 100 kilograms or more ☐

(iii) Weighing less than 100 kilograms ☐]

[(b) Cocaine - -

(i) Weighing 5 kilograms or more ☐

(ii) Weighing 500 grams or more ☐

(iii) Weighing less than 500 grams ☐]

[(c) Cocaine base ("crack" cocaine) - -

(i) Weighing 280 grams or more ☐

(ii) Weighing 28 grams or more ☐

(iii) Weighing less than 28 grams ☐]

SO SAY WE ALL.

Date: _____ _____

Foreperson

Multiple sets of the two paragraphs in this Special Verdict form will be necessary in the event of multiple counts of drug offenses against the same Defendant.

**O99**
**Controlled Substances: Unlawful Use of Communications Facility**
**21 U.S.C. § 843(b)**

It's a separate Federal crime for anyone to knowingly use a communication facility to commit or help commit another crime violating [Section 841(a)(1) such as the crime charged in Count _____].

The Defendant can be found guilty of the offense of unlawful use of a communication facility as charged in Count _____ only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant used a "communication facility";

(2) the Defendant used the facility while committing or helping to commit the crime charged in Count _____; and

(3) the Defendant acted knowingly and intentionally.

The term "communication facility" includes all mail, telephone, wire, radio, and computer-based communication systems.

To "help to commit" a crime means to use a communication facility in a way that makes committing the crime easier or possible. It doesn't matter whether the other crime was successfully carried out.

**ANNOTATIONS AND COMMENTS**

21 U.S.C. § 843(b) provides:

> It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the

> commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter.

Maximum Penalty: Four (4) years imprisonment and applicable fine. 21 U.S.C. § 843(d)(1).

"Each separate use of a communication facility shall be a separate offense under this subsection." 21 U.S.C. § 843(b).

"Communication facility" means "any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio and all other means of communication." 21 U.S.C. § 843(b). In addition to wire-based email (e.g. on the Internet), computers can now communicate via microwave, FM-frequency, infrared and by other non-wire based media. The statute, however, contemplates "**any and all**" forms of communication facilities.

In *United States v. Mertilus*, 111 F.3d 870, 872 (11th Cir. 1997), the Eleventh Circuit elaborated on the proof requirements under this statute, saying "[t]o prove facilitation, the government must establish that the telephone communication made the narcotics offense easier or less difficult and, thereby, assisted or aided the crime. Where the charged underlying crime is a substantive narcotics offense, rather than an inchoate attempt or conspiracy, the government must prove the underlying offense. Section 843(b) does not require that the government prove that [the defendant] committed the facilitated, or underlying, offense; instead, the statute can be satisfied by showing his knowing, intentional use of a telephone to facilitate the commission of the underlying crime." (internal citations omitted).

In a recent case, *Abuelhawa v. United States*, 129 S. Ct. 2102 (2009), the Supreme Court unanimously rejected the argument that a person using a phone to call his dealer to make a misdemeanor drug purchase "facilitates" the felony of drug distribution in violation of § 843(b). The Court stated that "[w]here a transaction like a sale necessarily presupposes two parties with specific roles, it would be odd to speak of one party as facilitating the conduct of the other." *Id*. at 2105. The Court further explained that the "traditional law" is that where a statute treats one side of a bilateral transaction more leniently, such as it does with a drug purchaser and a drug distributor, "adding to the penalty of the party on that side for facilitating the action by the other would upend the calibration of punishment set by the legislature, a line of reasoning exemplified [in analogous cases]." *Id*. at 2106 (collecting and discussing cases).

# O100

## Controlled Substances: Conspiracy

## 21 U.S.C. § 846 and/or 21 U.S.C. § 963

It's a separate Federal crime for anyone to conspire to knowingly [distribute] [possess with intent to distribute] [import] a controlled substance.

[Title 21 United States Code Section 841(a)(1) makes it a crime for anyone to knowingly [distribute a controlled substance] [possess a controlled substance with intent to distribute it].]

[Title 21 United States Code Section 952 makes it a crime for anyone to knowingly import a controlled substance into the United States from some place outside the United States.]

A "conspiracy" is an agreement by two or more persons to commit an unlawful act. In other words, it is a kind of partnership for criminal purposes. Every member of the conspiracy becomes the agent or partner of every other member.

The Government does not have to prove that all of the people named in the indictment were members of the plan, or that those who were members made any kind of formal agreement. The heart of a conspiracy is the making of the unlawful plan itself, so the Government does not have to prove that the conspirators succeeded in carrying out the plan.

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

(1) two or more people in some way agreed to try to accomplish a shared and unlawful plan, the object of which was to [distribute] [possess with the intent to distribute] [import] a controlled substance; and

(2) the Defendant knew the unlawful purpose of the plan and willfully joined in it.

[Substance] is a "controlled substance."

A person may be a conspirator even without knowing all the details of the unlawful plan or the names and identities of all the other alleged conspirators.

If the Defendant played only a minor part in the plan but had a general understanding of the unlawful purpose of the plan—and willfully joined in the plan on at least one occasion—that's sufficient for you to find the Defendant guilty.

But simply being present at the scene of an event or merely associating with certain people and discussing common goals and interests doesn't establish proof of a conspiracy. Also a person who doesn't know about a conspiracy but happens to act in a way that advances some purpose of one doesn't automatically become a conspirator.

[The Defendant[s] [is] [are] charged with conspiring to [distribute] [possess with intent to distribute] [import] at least [threshold(s)] of [substance(s)]. But you may find [the] [any] Defendant guilty of the crime even if the amount of the controlled substance[s] for which [he/she] should be held responsible is less than [threshold(s)]. So if you find [the] [any] Defendant guilty, you must also find whether the Government has proved beyond a reasonable doubt the weight of [substance(s)] attributable to [the

Defendant] [each of the Defendants] and specify the amount[s] on the verdict form. A Defendant in a drug conspiracy is responsible for the amount[s] of [a] controlled substance[s] that [was] [were] reasonably foreseeable to [him/her].]

**ANNOTATIONS AND COMMENTS**

21 U.S.C. § 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter [Sections 801 through 904] [shall be guilty of an offense against the United States].

21 U.S.C. § 963 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter [Sections 951 through 966] [shall be guilty of an offense against the United States].

This instruction was previously designated to be given for 21 U.S.C. § 955(c), as well. This statute has been transferred to 46 U.S.C. § 70506(b), which provides:

> A person attempting or conspiring to violate section 70503 of this title is subject to the same penalties as provided for violating section 70503.

46 U.S.C. § 70503 criminalizes the knowing or intentional manufacture or distributing of controlled substances on board a vessel subject to the jurisdiction of the United States or on board any vessel by an individual who is a citizen or resident alien of the U.S. This instruction can still be properly used (as adapted) for this statute.

Unlike 18 U.S.C. § 371 (general conspiracy statute), no overt act need be alleged or proved under either § 846 or § 963, *United States v. Shabani*, 513 U.S. 10, 15–16 (1994); *United States v. Harriston*, 329 F.3d 779, 783 (11th Cir. 2003); *United States v. Jones*, 765 F.2d 996, 1001 (11th Cir. 1985), nor does the absence of that requirement violate the constitution. *United States v. Gibbs*, 190 F.3d 188, 197 n.2 (3d Cir. 1999) (citing *Shabani*, 513 U.S. at 15–16); *United States v. Pulido*, 69 F.3d 192, 209 (7th Cir. 1995).

Acts of concealment are not part of the original conspiracy. *United States v. Knowles*, 66 F.3d 1146, 1155–56 n.17 (11th Cir. 1995).

"[T]he mere presence of a defendant with the alleged conspirators is insufficient to support a conviction for conspiracy." *United States v. Hernandez*, 141 F.3d 1042, 1053

(11th Cir. 1998). However, "[a] conspiracy conviction will be upheld … when the circumstances surrounding a person's presence at the scene of conspiratorial activity are so obvious that knowledge of its character can fairly be attributed to him." *United States v. Calderon*, 127 F.3d 1314, 1326 (11th Cir. 1997) (alteration in original) (quoting *United States v. Parrado*, 911 F.2d 1567, 1570 (11th Cir.1990), *cert. denied*, 498 U.S. 1104 (1991)). For comparative citations analyzing the "mere presence" and "mere association" concepts, *see United States v. Lopez-Ramirez*, 68 F.3d 438, 440–41 (11th Cir. 1995).

"It is th[e] requirement of an agreement to participate in a criminal scheme that distinguishes conspiracy from the related offense, aiding and abetting." *United States v. Toler*, 144 F.3d 1423, 1426 n.4 (11th Cir. 1998).

"[T]he mere fact of the purchase by a consumer of an amount of an illegal substance does not make of the seller and buyer conspirators under the federal [controlled substances] statutes." *United States v. Brown*, 872 F.2d 385, 391 (11th Cir. 1989).

Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013), when an indictment alleges drug quantity to subject a defendant to 21 U.S.C. § 841(b)'s enhanced penalties, a jury must find that the drug type and quantity have been proven beyond a reasonable doubt. In such cases, drug quantity becomes an "element" or "ingredient" of the offense for penalty purposes. *United States v. Colston*, 4 F.4th 1179, 1187–89 (11th Cir. 2021); *see also United States v. Gray*, 94 F.4th 1267, 1271 (11th Cir. 2024) ("In short, [the defendant]'s indictment for violating 21 U.S.C. § 841(a)(1) and § 846 required the government to prove only that he knew he possessed a controlled substance, not that he knew he possessed a certain controlled substance. The fact that the indictment named a specific substance [to establish penalties] does not change this general-knowledge requirement.").

Generally, "conspirators are liable for all of the acts and foreseeable consequences of the conspiracy." *United States v. Alas*, 196 F.3d 1250, 1251 (11th Cir. 1999). However, the Eleventh Circuit has held "'that, in determining a defendant's penalty under 21 U.S.C. § 846, the drug quantity must be reasonably foreseeable to that defendant where the effect of the quantity is to require imposition of a statutory mandatory minimum sentence.'" *United States v. Bacon*, 598 F.3d 772, 778 (11th Cir. 2010) (quoting *United States v. O'Neal*, 362 F.3d 1310, 1315–16 (11th Cir. 2004), *reinstated on remand United States v. Sapp*, 154 F. App'x 161 (11th Cir. 2005)).

If a defendant is not charged with the underlying substantive offense, the court should instruct the jury on the elements of the substantive offense. That instruction can be inserted immediately after the reference to the substantive offense in the pattern instruction.

Special Verdict

1. We, the Jury, find the Defendant [name of Defendant] as charged in Count [One] of the indictment.

[Note: If you find the Defendant not guilty as charged in Count [One], you need not consider paragraph 2 below.]

2. We, the Jury, having found the Defendant guilty of the offense charged in Count [One], further find with respect to that Count that the following controlled substance[s] in the amount[s] shown (place an X in the appropriate box[es]) [was] [were] reasonably foreseeable to [him] [her]:

[(a) Marijuana - -

(i) Weighing 1000 kilograms or more ☐

(ii) Weighing 100 kilograms or more ☐

(iii) Weighing less than 100 kilograms ☐]

[(b) Cocaine - -

(i) Weighing 5 kilograms or more ☐

(ii) Weighing 500 grams or more ☐

(iii) Weighing less than 500 grams ☐]

[(c) Cocaine base ("crack" cocaine) - -

(i) Weighing 280 grams or more ☐

(ii) Weighing 28 grams or more ☐

(iii) Weighing less than 28 grams ☐]

SO SAY WE ALL.

Date: _____ _____

Foreperson

Multiple sets of the two paragraphs in this Special Verdict form will be necessary in the event of multiple counts of drug offenses against the same Defendant.

## O101.1
## Withdrawal as a Defense to Conspiracy – Quantity of Drugs

If you find Defendant _____ guilty of the conspiracy, you must also make a finding about the amount or weight of the drugs attributable to [him [her]. Defendant, _____, has raised the defense that [he] [she] withdrew from the conspiracy before certain quantities of drugs became the object of the conspiracy. This can affect the Defendant's sentence, but Defendant _____ has the burden of proving to you, by a preponderance of the evidence, that [he] [she] did in fact withdraw, and that [he] [she] did so before [a] certain event[s] involving a larger quantity of drugs took place.

To prove this defense, _____ must prove the following things:

(1) that [he] [she] completely withdrew from the agreement. A partial or temporary withdrawal is not enough.

(2) that [he] [she] took some affirmative step to renounce or defeat the purpose of the conspiracy. An affirmative step would include an act that is inconsistent with the purpose of the conspiracy. Just doing nothing, or just avoiding the other members of the group, would not be enough.

(3) that [he] [she] [made a reasonable effort to communicate the affirmative act [he] [she] had taken to defeat the purpose of the conspiracy to the other members of the conspiracy] [disclosed the scheme to law enforcement authorities.]

(4) that [he] [she] withdrew before any member of the group committed an act that increased the quantity of drugs attributable to the conspirators. If [he] [she] withdraws after that point, [he] [she] will be responsible for the increased amount.

If _____ proves all four elements, then you must find that [he] [she] is responsible for the lesser quantity of drugs associated with the conspiracy prior to his withdrawal. If [he] [she] proves the first three but does not prove the fourth, then you must find that [he] [she] is responsible for the greater quantity of drugs associated with the conspiracy for its duration.

The fact that _____ has raised this defense does not relieve the Government of its burden of proving, beyond a reasonable doubt, the underlying conspiracy.

**ANNOTATIONS AND COMMENTS**

An instruction on withdrawal from a drug conspiracy is not generally appropriate because no overt act is required. *See United States v. Nicoll*, 664 F.2d 1308, 1315 (5th Cir. Unit B 1982), overruled on other grounds by *United States v. Henry*, 749 F.2d 203 (5th Cir. 1984); *United States v. Williams*, 374 F.3d 941, 949-50 & nn.11-12 (10th Cir. 2004) ("Because there is no overt act requirement under the drug conspiracy statute, withdrawal cannot relieve a defendant of criminal responsibility for a conspiracy charged under § 846."); *United States v. Grimmett*, 150 F.3d 958, 961 (8th Cir. 1998) (discussing the "general rule that a defendant may not raise withdrawal as an affirmative defense to a conspiracy charge where no overt act is necessary").

However, under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), a jury must find beyond a reasonable doubt all facts that increase the penalty for a crime beyond the prescribed statutory maximum. Because the statutory sentence applicable to a drug conspiracy depends on the quantity of drugs involved, see 21 U.S.C. § 841, a withdrawal instruction may be necessary if there is evidence that the drug quantity attributable to the conspiracy at large increased after a particular defendant withdrew.

In order to assert a withdrawal defense, a defendant must prove that he "(1) undertook affirmative steps, inconsistent with the objects of the conspiracy, to disavow or to defeat the conspiratorial objectives, and (2) either communicated those acts in a manner reasonably calculated to reach his co-conspirators or disclosed the illegal scheme to law enforcement authorities." *United States v. Aviles*, 518 F.3d 1228, 1231 n.3 (11th Cir. 2008) (citation and internal quotations omitted); *United States v. Odom*, 252 F.3d 1289, 1299 (11th Cir. 2001); *United States v. Young*, 39 F.3d 1561, 1571 (11th Cir. 1994).

Where a defendant bears the burden of proof on an affirmative defense, such as this one, the burden of proof is preponderance of the evidence. *See, e.g., Dixon v. United States*, 548 U.S. 1, 17, 126 S. Ct. 2347, 2447-48 (2008). The Eleventh Circuit describes the defendant's burden on proving withdrawal from a conspiracy as "substantial." *United States v. Westry*, 524 F.3d 1198, 1216-17 (11th Cir. 2008). Neither arrest nor incarceration during the time frame of the conspiracy automatically triggers withdrawal from a conspiracy. *United States v. Gonzalez*, 940 F.2d 1413, 1427 (11th Cir. 1991). Also, "[a] mere cessation of activity in the conspiracy is not sufficient to establish withdrawal." *United States v. Finestone*, 816 F.2d 583, 589 (11th Cir. 1987), *cert. denied*, 484 U.S. 948, 108 S. Ct. 338 (1987).

**O101.2**
**Withdrawal as a Defense to Conspiracy**
**Based on the Statute of Limitations**

One of the Defendants, _____, has raised the defense that [he] [she] withdrew from the conspiracy before the date of _____, and that the statute of limitations ran out before the Government obtained an indictment charging [him [her] with the conspiracy.

The statute of limitations is a law that puts a limit on how much time the Government has to obtain an indictment. This can be a defense, but _____ has the burden of proving to you that [he] [she] did in fact withdraw, and that [he] [she] did so at least __ years before the date [he] [she] was indicted on _____.

To prove this defense, _____ must establish each and every one of the following things by a preponderance of the evidence:

(1) That [he] [she] completely withdrew from the conspiracy. A partial or temporary withdrawal is not sufficient.

(2) That [he] [she] took some affirmative step to renounce or defeat the purpose of the conspiracy. An affirmative step would include an act that is inconsistent with the purpose of the conspiracy and is communicated in a way that is reasonably likely to reach the other members. But some affirmative step is required. Just doing nothing, or just avoiding contact with the other members, would not be enough.

(3) That [he] [she] withdrew before the date of _____.

If _____ proves each of these elements by a preponderance of the evidence, then you must find [him [her] not guilty.

The fact that _____ has raised this defense does not relieve the Government of its burden of proving, beyond a reasonable doubt, the underlying conspiracy.

**ANNOTATIONS AND COMMENTS**

An instruction on withdrawal from a drug conspiracy is not generally appropriate because no overt act is required. *See United States v. Nicoll*, 664 F.2d 1308, 1315 (5th Cir. Unit B 1982), overruled on other grounds by *United States v. Henry*, 749 F.2d 203 (5th Cir. 1984); *United States v. Williams*, 374 F.3d 941, 949-50 & nn.11-12 (10th Cir. 2004) ("Because there is no overt act requirement under the drug conspiracy statute, withdrawal cannot relieve a defendant of criminal responsibility for a conspiracy charged under § 846."); *United States v. Grimmett*, 150 F.3d 958, 961 (8th Cir. 1998) (discussing the "general rule that a defendant may not raise withdrawal as an affirmative defense to a conspiracy charge where no overt act is necessary"). However, a withdrawal instruction may be proper when there is some evidence that a defendant withdrew from a conspiracy before the limiting date. limitations period.")

"[I]f a conspirator establishes the affirmative defense of withdrawal, the statute of limitations will begin to run at the time of withdrawal." *United States v. Arias*, 431 F.3d 1327, 1340 (11th Cir. 2005); *see also United States v. Adams*, 1 F.3d 1566, 1582 (11th Cir. 1993) ("For a conspiracy prosecution to be barred by the statute of limitations, the time between the conspiracy's end, or the defendant's affirmative withdrawal, and the indictment must be longer than the statutory limitations period."); *United States v. Reed*, 980 F.2d 1568, 1584 (11th Cir. 1993) (where a defendant withdraws from a conspiracy, "the statute of limitations does not begin to run on a co-conspirator until the final act in furtherance of the conspiracy has occurred or until the co-conspirator withdraws from the conspiracy.").

**O102.1**
**Controlled Substances: Continuing Criminal Enterprise**
**21 U.S.C. § 848**

It's a Federal crime for anyone to participate in a continuing criminal enterprise involving controlled substances.

[Title 21 United States Code Section 841(a)(1) makes it a crime for anyone to knowingly possess [substance] with intent to distribute it.]

[Title 21 United States Code Section 952 makes it a crime for anyone to knowingly import [substance] into the United States from some place outside the United States].

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

(1) the Defendant violated the narcotics law[s] charged in count[s] ____;

(2) the violation[s] [was] [were] a part of a continuing series of violations;

(3) the Defendant participated in the continuing series of violations together with at least five other people for whom the Defendant was an organizer, supervisor, or manager; [and]

(4) the Defendant got substantial income or resources from the continuing series of violations[.] [; and]

[(5) the Defendant was a principal administrator, organizer, or leader of the enterprise, and [the weight of the [substance] involved in the crime was at least [threshold]] [the enterprise received at least

$10 million in gross receipts in any 12-month period of its existence].]

A "continuing series of violations" means proof of at least three related violations of the Federal controlled-substances laws, as charged in count[s] _____ of the indictment, plus proof that the violations were connected as related, ongoing activities rather than isolated or disconnected acts. And you must unanimously agree on which three [or more] violations the Defendant committed.

The Government must prove that the Defendant engaged in the "continuing series of violations" with at least five other people. It doesn't matter whether those persons are named in the indictment or whether the same five or more people participated in each crime, or participated at different times.

The Government must also prove that the Defendant was an organizer, supervisor, or manager, and either organized or directed the activities of the others. In other words, the Defendant must have been more than a mere fellow worker. It doesn't matter whether the Defendant was the only organizer or supervisor or whether the Defendant delegated authority to a subordinate and didn't have personal contact with each of the people whom [he] [she] organized, supervised, or managed through directions given to someone else.

The Government must prove that the Defendant obtained "substantial income or resources" from the continuing series of violations. "Substantial income or resources" means significant sizes or amounts of money or property, but not

necessarily any profit, that the Defendant received from the crimes, not some relatively insubstantial, insignificant, or trivial amounts or sizes.

**ANNOTATIONS AND COMMENTS**

21 U.S.C. § 848(c) provides:

> … a person is engaged in a continuing criminal enterprise if
>
> (1) he violates any provision of [sections 801 through 966] the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of [sections 801 through 966]
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

Maximum Penalty: Not less than thirty (30) years and up to life imprisonment, and applicable fine.

The Government must prove at least three felony narcotics violations to establish a continuing series of violations. *Ross v. United States*, 289 F.3d 677, 683 (11th Cir. 2002), *cert. denied*, 537 U.S. 1113 (2003); *United States v. Alvarez-Moreno*, 874 F.2d 1402, 140809 (11th Cir. 1989), *cert. denied*, 494 U.S. 1032 (1990).

The jury "must agree unanimously about which three crimes the defendant committed." *Richardson v. United States*, 526 U.S. 813, 818 (1999) (emphasis added); *Ross v. United States*, 289 F.3d 677, 683 (11th Cir. 2002).

Failure to instruct on the *Richardson* unanimity requirement has been held to be harmless error unless the failure to give the instruction had a "substantial and injurious effect or influence in determining the jury's verdict." *Ross v. United States*, 289 F.3d 677, 683 (11th Cir. 2002)

How "related" must the three violations be? *See United States v. Maull*, 806 F.2d 1342-43 (8th Cir. 1986) ("A continuing offense is a continuous illegal act or series of acts

driven by a single impulse and operated by an unintermittent force."). 7th Cir. 1990), cited in 2B Fed. Jury Prac. & Instr. § 66.05 (5th ed. 2000).

In any event, the use of unindicted offenses is permissible in obtaining a conviction under § 848. The violations need not be charged or even set forth as predicate acts in the indictment. Hence, the law only requires evidence that the defendant committed three substantive offenses to provide the predicate for a § 848 violation, regardless of whether such offenses were charged in counts of the indictment or in separate indictments. What is important is proof that there was indeed a farflung operation. Whether this has led to other convictions is all but irrelevant to the nature of the CCE offense. *United States v. Alvarez-Moreno*, 874 F.2d 1402, 140809 (11th Cir. 1989).

The statute is "a carefully crafted prohibition," which should be given a "common-sense reading," *Garrett v. United States*, 471 U.S. 773, 781, 105 S. Ct. 2407, 2413 (1985). This language is designed "to reach the 'top brass' in the drug rings, not the lieutenants and foot solders." *Id*. Hence, "[a] mere buyer-seller relationship does not satisfy § 848's management requirement." *United States v. Witek*, 61 F.3d 819, 822 (11th Cir. 1995), *cert. denied*, *Hubbard v. United States*, 516 U.S. 1060, 116 S. Ct. 738 (1996). Rather, an organizer is one who arranges the activities of others into an orderly operation. *Id*. at 822-24.

A defendant who supervises less than five persons who, in turn, supervise the activities of others, can be found to have supervised and managed "five or more other persons" under § 848, provided that the total number of persons is five or more. Thus, if "a defendant personally hires only the foreman, that defendant is still responsible for organizing the individuals hired by the foreman to work as the crew… [M]ere delegation of authority does not detract from [the defendant's] ultimate status as organizer." *United States v. Rosenthal*, 793 F.2d 1214, 1226 (11th Cir. 1986), modified on other grounds, 801 F.2d 378 (11th Cir. 1986) acted in concert at the same time." *United States v. Boldin*, 818 F.2d 771, 775-76 (11th Cir. 1987); *see also United States v. Atencio*, 435 F.3d 1222, 1234 (10th Cir. 2006) ("[A] defendant need not have had regular personal contact with the five persons she supervised."); *United States v. Mathison*, 518 F.3d 935, 939 (8th Cir. 2008) ("The statute does not require that the defendant supervise all five people at the same time").

In contrast to the "three violation" requirement, the jury need not unanimously agree on which five persons the defendant organized, supervised, or managed. *United States v. Moorman*, 944 F.2d 801, 802-03 (11th Cir. 1991); *United States v. Lewis*, 476 F.3d 369, 382-83 (5th Cir. 2007); *United States v. Stitt*, 250 F.3d 878, 885-86 (4th Cir. 2001); Fifth Cir. Pattern Jury Instr. § 2.90 at 265 ("note") (2001) (collecting cases).

A jury need not find that a defendant obtained substantial income or resources from each violation, but only from the entire series of violations. *United States v. Gonzalez*, 940

F.2d 1413, 1424 (11th Cir. 1991); *see also United States v. Torres-Laranega*, 476 F.3d 1148, 1158 (10th Cir. 2007) (citing *Richardson v. United States*, 526 U.S. 813, 823 (1999)).

Jury instructions must be crafted in light of the double jeopardy considerations addressed in *Rutledge v. United States*, 517 U.S. 292, 296307 (1996). "[A] defendant cannot be cumulatively punished for violating both § 846 and § 848, because for purposes of the Double Jeopardy Clause, these two statutes proscribe the same offense." *United States v. Jeffers*, 388 F.3d 289, 292 (7th Cir. 2004), *cert. denied*, 544 U.S. 1010, 125 S. Ct. 1966 (2005). A § 846 drug conspiracy is a lesser included offense of the CCE charge, so if the defendant is convicted under § 846, the "in concert" element of an § 848 conviction cannot rest on the same agreement as the § 846 conspiracy. *Rutledge*, 517 U.S. at 307; see also *United States v. Harvey*, 78 F.3d 501 (11th Cir. 1996) (prior conviction of drug conspiracy precluded subsequent prosecution for continuing criminal enterprise on double jeopardy grounds). However, there are exceptions to this rule. *See United States v. Nyhuis*, 8 F.3d 731 (11th Cir. 1993) (upholding both Section 846 conviction in Florida and 848 conviction in Michigan because court found 2 separate conspiracies); *United States v. Maza*, 983 F.2d 1004 (11th Cir. 1993) (applying the "due diligence" exception to the Fifth Amendment Double Jeopardy clause to uphold successive convictions under 21 U.S.C. § 846 and 21 U.S.C. § 848).

**O102.2**
**Controlled Substances: Continuing Criminal Enterprise – Murder**
**21 U.S.C. § 848(e)**

It's a Federal crime to intentionally [kill] [order or otherwise cause the intentional killing] of someone while participating in or working to further a continuing criminal enterprise.

The Defendant can be found guilty of this crime only if you find the Defendant guilty of engaging in a continuing criminal enterprise that existed as charged in count _____, and all the following facts are proved beyond a reasonable doubt:

(1) the Defendant intentionally [killed the victim] [ordered or otherwise caused the killing of the victim] as charged in Count _____ of the indictment;

(2) the killing occurred because of and as part of the Defendant's participating in or working to further the continuing criminal enterprise charged in Count _____ of the indictment; and

(3) The Defendant intended that a killing would result.

**ANNOTATIONS AND COMMENTS**

21 U.S.C. § 848(e)(1) provides:

> (A) any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) of this title or section 960(b)(1) of this title who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death…

21 U.S.C. § 848(e) is a separate, chargeable offense; conviction thereunder requires a connection between the underlying continuing criminal enterprise and the murder. *United States v. Chandler*, 996 F.2d 1073, 109698 (11th Cir. 1993), *cert. denied*, 512 U.S. 1227 (1994).

Courts have held that a person charged with murder in furtherance of a CCE "need not be charged with engaging in the CCE so long as the government is able to prove that a CCE existed and [the defendant] committed murder in furtherance of the CCE." *United States v. Ray*, 238 F.3d 828, 833 (7th Cir. 2001).

The Second Circuit has held that those who aid and abet the commission of drug-related murders are death-penalty eligible. *United States v. Walker*, 142 F.3d 103, 113 (2d Cir. 1998).

**O103**
**Possession of Controlled Substance Near Schools or Public Housing**
**21 U.S.C. § 860**

It's a Federal crime to be within 1,000 feet of [a school] [a housing facility owned by a public-housing authority] and possess a controlled substance with intent to distribute it.

[Substance] is a "controlled substance."

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 possessed a controlled substance;

(2) the Defendant possessed the controlled substance at some place within 1,000 feet of [a school] [a housing facility owned by a public- housing authority]; and

(3) the Defendant intended to distribute the controlled substance.

To "intend to distribute" simply means to want or plan or prepare to deliver or transfer possession of a controlled substance to someone else, even if nothing of value is exchanged.

[The Defendant[s] [is/are] charged with [distributing] [possessing with intent to distribute] at least [threshold(s)] of [substance(s)]. But you may find [the/any] Defendant guilty of the crime even if the amount of the controlled substance[s] for which [he/she] should be held responsible is less than [threshold(s)]. So if you find [the/any] Defendant guilty, you must also find whether the Government has proved

beyond a reasonable doubt the weight of [substance(s)] the Defendant possessed and specify the amount[s] on the verdict form.]

## ANNOTATIONS AND COMMENTS

21 U.S.C. § 860 provides:

> Any person who violates section 841(a)(1) of this title or section 856 of this title by distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority [shall be guilty of an offense against the United States].

Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013), when an indictment alleges drug quantity to subject a defendant to 21 U.S.C. § 841(b)'s enhanced penalties, a jury must find that the drug type and quantity have been proven beyond a reasonable doubt. In such cases, drug quantity becomes an "element" or "ingredient" of the offense for penalty purposes. *United States v. Colston*, 4 F.4th 1179, 1187–89 (11th Cir. 2021); *see also United States v. Gray*, 94 F.4th 1267, 1271 (11th Cir. 2024) ("In short, [the defendant]'s indictment for violating 21 U.S.C. § 841(a)(1) and § 846 required the government to prove only that he knew he possessed a controlled substance, not that he knew he possessed a certain controlled substance. The fact that the indictment named a specific substance [to establish penalties] does not change this general-knowledge requirement.").

Special Verdict

1. We, the Jury, find the Defendant [name of Defendant] _____ as charged in Count [One] of the indictment. [Note: If you find the Defendant not guilty as charged in Count [One], you need not consider paragraph 2 below.]

2. We, the Jury, having found the Defendant guilty of the offense charged in Count [One], further find with respect to that Count that [he/she] [distributed] [possessed with intent to distribute] the following controlled substance[s] in the amount[s] shown (place an X in the appropriate box[es]):

[(a) Marijuana - -

(i) Weighing 1000 kilograms or more ☐

(ii) Weighing 100 kilograms or more ☐
(iii) Weighing less than 100 kilograms ☐]

[(b) Cocaine - -
(i) Weighing 5 kilograms or more ☐
(ii) Weighing 500 grams or more ☐
(iii) Weighing less than 500 grams ☐]

[(c) Cocaine base ("crack" cocaine) - -
(i) Weighing 280 grams or more ☐
(ii) Weighing 28 grams or more ☐
(iii) Weighing less than 28 grams ☐]

SO SAY WE ALL.

Date: _____ _____
Foreperson

Multiple sets of the two paragraphs in this Special Verdict form will be necessary in the event of multiple counts of drug offenses against the same Defendant.

# O104
# Controlled Substances: Importation
# 21 U.S.C. § 952(a)

It's a Federal crime to knowingly import any controlled substance into the United States.

[Substance] is a "controlled substance."

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

(1) the Defendant imported a controlled substance into the United States; and

(2) the Defendant did so knowingly.

To "import" a substance means to bring or transport that substance into the United States from some place outside the United States.

[The Defendant[s] [is/are] charged with importing at least [threshold(s)] of [substance(s)]. But you may find [the/any] Defendant guilty of the crime even if the amount of the controlled substance[s] for which [he/she] should be held responsible is less than [threshold(s)]. So if you find [the/any] Defendant guilty, you must also find whether the Government has proved beyond a reasonable doubt the weight of [substance(s)] the Defendant imported and specify the amount[s] on the verdict form.]

## ANNOTATIONS AND COMMENTS

21 U.S.C. § 952(a) provides:

> It shall be unlawful to import into. . . the United States from any place outside thereof. . . any controlled substance. . .

"Although knowledge that the substance imported is a particular narcotic need not be proven, 21 U.S.C. § 952(a) is a 'specific intent' statute and requires knowledge that such substance is a controlled substance." *United States v. Restrepo-Granda*, 575 F.2d 524, 527 (5th Cir. 1978); *United States v. Gomez*, 905 F.2d 1513, 1514 (11th Cir. 1990) ("[T]o sustain a conviction for possession with intent to distribute a controlled substance, it need not be proved that the defendant had knowledge of the particular drug involved, as long as he knew he was dealing with a controlled substance.") (citing *Restrepo-Granda*, 575 F.2d at 527); *United States v. Hernandez*, 218 F.3d 58, 65 (1st Cir. 2000) ("Knowledge of the particular controlled substance being imported or distributed is not necessary.").

Importation is a continuing crime and is not complete until the controlled substance reaches its final destination. *United States v. Camargo-Vergara*, 57 F.3d 993, 1001 (11th Cir. 1995).

The evidence may warrant a deliberate ignorance instruction. *United States v. Arias*, 984 F.2d 1139, 1143–44 (11th Cir. 1993). *See* Special Instruction 8.

Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013), when an indictment alleges drug quantity to subject a defendant to 21 U.S.C. § 841(b)'s enhanced penalties, a jury must find that the drug type and quantity have been proven beyond a reasonable doubt. In such cases, drug quantity becomes an "element" or "ingredient" of the offense for penalty purposes. *United States v. Colston*, 4 F.4th 1179, 1187–89 (11th Cir. 2021); *see also United States v. Gray*, 94 F.4th 1267, 1271 (11th Cir. 2024) ("In short, [the defendant]'s indictment for violating 21 U.S.C. § 841(a)(1) and § 846 required the government to prove only that he knew he possessed a controlled substance, not that he knew he possessed a certain controlled substance. The fact that the indictment named a specific substance [to establish penalties] does not change this general-knowledge requirement.").

Special Verdict

1. We, the Jury, find the Defendant [name of Defendant] _____ as charged in Count [One] of the indictment.

[Note: If you find the Defendant not guilty as charged in Count [One], you need not consider paragraph 2 below.]

2. We, the Jury, having found the Defendant guilty of the offense charged in Count [One], further find with respect to that Count that [he/she] imported the following controlled substance[s] in the amount[s] shown (place an X in the appropriate box[es]):

[(a) Marijuana - -

(i) Weighing 1000 kilograms or more ☐

(ii) Weighing 100 kilograms or more ☐

(iii) Weighing less than 100 kilograms ☐]

[(b) Cocaine - -

(i) Weighing 5 kilograms or more ☐

(ii) Weighing 500 grams or more ☐

(iii) Weighing less than 500 grams ☐]

[(c) Cocaine base ("crack" cocaine) - -

(i) Weighing 280 grams or more ☐

(ii) Weighing 28 grams or more ☐

(iii) Weighing less than 28 grams ☐]

SO SAY WE ALL.

Date: _____ _____

Foreperson

Multiple sets of the two paragraphs in this Special Verdict form will be necessary in the event of multiple counts of drug offenses against the same Defendant.

**O105**
**Possession or Transfer Of Non-Tax-Paid**
**Distilled Spirits**
**26 U.S.C. §§ 5604(a)(1) and 5301(d)**

It's a Federal crime to knowingly [transport] [possess] [buy] [sell] [transfer] any distilled spirits unless the spirits' immediate container has a closure showing that it complies with the Internal Revenue laws.

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 [transported] [possessed] [bought] [sold] [transferred] distilled spirits; and

(2) the immediate containers of the distilled spirits didn't bear a closure or other device required by law.

A "closure or other device as required by law" means a closure such as a seal that's designed to require breaking in order to open the container and was attached to the container when it was taken from bonded premises or from customs custody.

[The indictment charges that the Defendant [transported] [and] [possessed] [and] [bought] [and] [sold] [and] [transferred] distilled spirits in an unlawful manner. The law specifies various ways in which the crime may occur. The Government doesn't have to prove that the Defendant broke the law in all of those ways. It only has to prove beyond a reasonable doubt that the Defendant [transported] *[or]* [possessed] *[or]* [bought] *[or]* [sold] *[or]* [transferred] distilled

spirits in an unlawful manner. But you must all agree on the way the Defendant broke the law.]

**ANNOTATIONS AND COMMENTS**

26 U.S.C. § 5604(a) provides:

> Any person who shall - -
>
> > (1) transport, possess, buy, sell, or transfer any distilled spirits unless the immediate container bears the type of closure or other device required by section 5301(d) ["The immediate container of distilled spirits withdrawn from bonded premises, or from customs custody, on determination of tax shall bear a closure or other device which is designed so as to require breaking in order to gain assess to the contents of such container."], [shall be guilty of an offense against the United States.]

Maximum Penalty: Five (5) years imprisonment and $250,000 fine. See 26 U.S.C. § 5604 and 18 U.S.C. § 3571.

*See U.S. v. Swann*, 413 F.2d 271 (5th Cir. 1969).

**O106.1**
**Possession of Unregistered Firearm**
**26 U.S.C. § 5861(d)**

It's a Federal crime for anyone to possess certain kinds of firearms that are not properly registered to [him] [her] in the National Firearms Registration and Transfer Record.

A "firearm" includes [describe firearm alleged in the indictment, e.g., a shotgun having a barrel less than 18 inches in length.]

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 possessed a firearm; [and]

(2) the firearm was not registered to the Defendant in the National Firearms Registration and Transfer Record[.] [; and]

[(3) the Defendant knew of the specific characteristics or features of the firearm that made it subject to registration under the National Firearms Registration and Transfer Record.]

The Government does not have to prove that the Defendant knew the item described in the indictment was a firearm that must be legally registered. The Government only has to prove beyond a reasonable doubt that the Defendant knew about the specific characteristics or features of the firearm that made it subject to registration, namely [describe essential feature].

**ANNOTATIONS AND COMMENTS**

No annotation is associated with this instruction.

# O106.2
# Possession of Firearm Having Altered or Obliterated Serial Number
# 26 U.S.C. § 5861(h)

It's a Federal crime to possess a firearm with an [altered] [obliterated] serial number.

"Firearm" includes the kind of weapon described in the indictment.

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 possessed the firearm described in the indictment at the time and place charged in the indictment;

(2) the firearm's serial number had been [obliterated] [altered]; and

(3) the Defendant knew that the serial number had been [obliterated] [altered].

## ANNOTATIONS AND COMMENTS

26 U.S.C. § 5861(h) provides:

> It shall be unlawful for any person… (h) to receive or possess a firearm having the serial number or other identification required by this chapter obliterated, removed, changed, or altered.

[Note: For the definition of "firearm" within the context of this statute, see 26 U.S.C. § 5845.]

Maximum Penalty: Ten (10) years imprisonment and $250,000 fine. See 26 U.S.C. § 5871 and 18 U.S.C. § 3571.

**O106.3**
**Possession or Receipt of Firearm**
**Not Identified by a Serial Number**
**26 U.S.C. § 5861(i)**

It's a Federal crime to possess or receive a firearm that does not have a serial number.

"Firearm" includes the kind of weapon described in the indictment.

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 possessed the firearm described in the indictment at the time and place charged in the indictment;

(2) the firearm did not have a serial number; and

(3) the Defendant knew that the firearm did not have a serial number.

**ANNOTATIONS AND COMMENTS**

26 U.S.C. § 5861(i) provides:

> It shall be unlawful for any person… to receive or possess a firearm which is not identified by a serial number as required by this chapter.

[Note: For the definition of "firearm" within the context of this statute, see 26 U.S.C. § 5845.]

Maximum Penalty: Ten (10) years imprisonment and $250,000 fine. See 26 U.S.C. § 5871 and 18 U.S.C. § 3571.

**O107.1**
**Attempt to Evade or Defeat Income Tax**
**26 U.S.C. § 7201**

It's a federal crime to willfully attempt to evade or defeat paying federal income taxes.

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

(1) the Defendant owed substantial income tax in addition to the amount declared on [his/her] tax return;

(2) the Defendant knew when [he/she] filed that income tax return that [he/she] owed substantially more income taxes than the amount reported on [his/her] tax return; and

(3) the Defendant intended to evade or defeat paying income taxes [he/she] knew [he/she] was required by law to pay.

The Government does not have to prove the precise amount of additional tax due. But it must prove beyond a reasonable doubt that the Defendant knowingly attempted to evade or defeat paying a substantial part of the additional tax.

The word "attempt" indicates that the Defendant knew and understood that, during the particular tax year involved, [he/she] had income that (i) was taxable and (ii) had to be reported by law; but [he/she] tried to evade or defeat paying the tax or a substantial portion of the tax on that income by failing to report all of the income [he/she] knew [he/she] was required by law to report.

Federal income taxes are levied upon income that comes from compensation for personal services of every kind and in whatever form paid, whether it's wages,

commissions, or money earned for performing services. Income taxes are also levied on profits earned from any business, regardless of its nature, and from interest, dividends, rents, and the like. Income tax also applies to any gain from the sale of a capital asset.

In short, the term "gross income" means all income from whatever source, unless it's specifically excluded by law.

The law allows exemptions from income taxes for funds acquired from certain sources. The most common nontaxable sources are loans, gifts, inheritances, the proceeds of insurance policies, and funds received from selling an asset to the extent that the amount received is the same or less than the asset's cost.

**ANNOTATIONS AND COMMENTS**

Under 26 U.S.C. § 7201:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof [shall be guilty of an offense against the United States].

Although 26 U.S.C. § 7201 covers any tax imposed by this title, this instruction is limited to income tax.

Section 7201 requires willfulness. A willful violation of § 7201 has been defined as the voluntary, intentional violation of a known legal duty. *See United States v. Dean*, 487 F.3d 840, 850 (11th Cir. 2007) ("The term 'willfulness' presupposes the existence of a legal duty and knowledge of that duty."). Since this instruction incorporates this definition of willfulness in its elements, the committee does not believe that it is also necessary to include Basic Instruction 9.1B for this offense.

*United States v. Carter*, 721 F.2d 1514, 1538 (11th Cir. 1984), requires a detailed explanation to the jury concerning the Government's theory of proof (Net Worth, Bank Deposits, or Cash Expenditures, Instruction Nos. 107.2, 107.3, and 107.4), and it is plain error not to give such an instruction, i.e., no request is necessary.

*Boulware v. United States*, 552 U.S. 421, 433–34 (2008), requires proof of a tax deficiency as an essential element of tax evasion under 26 U.S.C. § 7201.

The Supreme Court has noted that there is a "good faith" exception under the federal criminal tax statutes. *Cheek v. United States*, 498 U.S. 192, 199–202 (1991). According to this exception, if someone simply fails to understand that he has a duty to pay income taxes under the Internal Revenue Code, he cannot be guilty of "willfully" evading those taxes. *Id.* at 201–02. If, however, someone recognizes that he has a duty to pay taxes, but simply refuses to pay or to declare his income because he believes that the Code is unconstitutional, he is not acting in "good faith." *Id.* at 204–07.

When a defendant asserts a "good-faith" defense, the defendant is entitled to the following charge:

> Good faith is a complete defense to the charges in the indictment since good faith on the part of the Defendant is inconsistent with the charge of tax evasion and the elements of this crime. The Government must establish beyond a reasonable doubt each and every element of the offense. Therefore, if a Defendant believes in good faith that [he/she] is acting within the law, [he/she] cannot be found guilty of the offense charged in the indictment. This is so even if the Defendant's belief was not objectively reasonable as long as [he/she] held the belief in good faith. Nevertheless, you may consider whether the Defendant's belief about the tax statutes was actually reasonable as a factor in deciding whether [he/she] held that belief in good faith.

*Dean*, 487 F.3d at 855.

**O107.2**
**Net Worth Method**

In this case the Government relies upon the “net-worth method” of proving unreported income.

Under this method of proof, a person's “net worth” is the difference between the person's total assets and total liabilities on a given date. In other words, it’s the difference between what the person owns and what the person owes. Until something is sold, the value of what the person owns is based on the cost rather than any increase in market value.

The “net worth method” of proving unreported income involves comparing the Defendant's net worth at the beginning of the year and the Defendant's net worth at the end of the year. If the evidence proves beyond a reasonable doubt that the Defendant's net worth increased during a taxable year, then you may infer that the Defendant received money or property during that year.

And if the evidence also proves that nontaxable sources don’t account for the increase in net worth, then you may further infer that the money and property received were taxable income to the Defendant.

In addition to the matter of the Defendant's net worth, if the evidence proves beyond a reasonable doubt that the Defendant spent money during the year on living expenses, taxes, or other expenses that didn’t add to the Defendant's net

worth by the end of the year, then you may infer that those expenditures also came from funds received during the year.

And, again, if the evidence proves that those funds used for expenses didn't come from nontaxable sources, and those expenses would not be deductible on the Defendant's tax return, then you may further infer that those funds were also taxable income.

As I said before, the "net worth method" of proving unreported income involves comparing the Defendant's net worth at the beginning of the year and the Defendant's net worth at the end of the year. So the result cannot be accepted as correct unless the starting net worth is reasonably accurate.

If it's proved that the assets owned by the Defendant at the starting point were insufficient, by themselves, to account for the later increases in the Defendant's net worth, then the proof does not have to show the exact value of the assets owned at the starting point, only the reasonably certain value.

So if you decide that the evidence doesn't prove with reasonable certainty what the Defendant's net worth was at the beginning of the year, you must find the Defendant not guilty.

To decide whether the Defendant's claimed net worth at the starting point is reasonably accurate, you may consider whether Government agents sufficiently investigated all reasonable leads suggested to them by the Defendant or that

otherwise surfaced during the investigation concerning the existence and value of other assets.

If you find that the Government's investigation failed to reasonably follow up on or failed to refute: (1) plausible explanations advanced by the Defendant, (2) explanations that otherwise arose during the investigation concerning other assets the Defendant had at the beginning of the year, or (3) other nontaxable sources of income the Defendant had during the year, then you should find the Defendant not guilty.

But the Government's obligation to reasonably investigate applies only to suggestions or explanations made by the Defendant, or to reasonable leads that otherwise turn up. The Government isn't required to investigate every conceivable asset or source of nontaxable funds.

If you decide that the evidence in the case proves beyond a reasonable doubt what was the maximum possible amount of the Defendant's net worth at the beginning of the tax year, and proves that any increase in the Defendant's net worth at the end of the year plus the amount of nondeductible expenditures made during the year was much more than the amount of income reported on the Defendant's tax return for that year, you must then decide whether the evidence also proves beyond a reasonable doubt that the additional funds are taxable income that the Defendant willfully attempted to evade paying taxes on.

## ANNOTATIONS AND COMMENTS

No annotations associated with this instruction.

## O107.3
## Bank-Deposits Method

In this case the Government relies upon the "bank-deposits method" of proving unreported income.

Under this method of proof, when a taxpayer participates in an income-producing business or occupation and periodically deposits money in bank accounts under the taxpayer's name or control, an inference is created that the deposits represent taxable income unless it appears that the deposits were actually redeposits or transfers of funds between accounts, or that the deposits came from nontaxable sources such as gifts, inheritances, or loans.

Similarly, when the taxpayer spends cash or currency from funds not deposited in any bank and not derived from a nontaxable source, an inference is created that the cash or currency is taxable income.

Because the "bank-deposits method" of proving unreported income involves reviewing the Defendant's deposits and cash expenditures that came from taxable sources, the Government must establish an accurate cash-on-hand figure for the beginning of the tax year.

But the proof need not show the exact amount of the beginning cash-on-hand as long as it establishes that the Government's claimed cash-on-hand figure is reasonably accurate.

So if you decide that the evidence doesn't prove with reasonable certainty what the Defendant's cash-on-hand was at the beginning of the year, you must find the Defendant not guilty.

To decide whether the Defendant's claimed cash-on-hand at the starting point is reasonably accurate, you may consider whether Government agents sufficiently investigated all reasonable leads suggested to them by the Defendant or that otherwise surfaced during the investigation concerning the existence of other funds.

If you find that the Government's investigation failed to reasonably follow up on or failed to refute (1) plausible explanations advanced by the Defendant, or (2) explanations that otherwise arose during the investigation, concerning the Defendant's cash-on-hand at the beginning of the year, then you should find the Defendant not guilty.

But the Government's obligation to reasonably investigate applies only to suggestions or explanations made by the Defendant, or to reasonable leads that otherwise turn up. The Government isn't required to investigate every conceivable source of nontaxable funds.

If you decide that the evidence in the case proves beyond a reasonable doubt that the Defendant's bank deposits plus the nondeductible cash expenditures during the year were much more than the amount of income reported on the Defendant's

tax return for that year, you must then decide whether the evidence also proves beyond a reasonable doubt that the additional deposits and expenditures are from taxable income that the Defendant willfully attempted to evade paying taxes on.

**ANNOTATIONS AND COMMENTS**

No annotations associated with this instruction.

## O107.4
## Cash Expenditures Method

In this case the Government relies upon the "cash-expenditures method" of proving unreported income.

Under this method of proof, if a taxpayer's expenditures for a particular taxable year plus any increase in net worth are more than the total of the taxpayer's reported income plus nontaxable receipts and available cash at the beginning of the year, then the taxpayer has understated [his] [her] income.

The "cash-expenditures method" requires examining the Defendant's expenditures during the taxable year and examining the Defendant's "net worth" at the beginning and at the end of that year.

A person's "net worth" is the difference between the person's total assets and total liabilities on a given date. In other words, it is the difference between what the person owns and what the person owes. Until something is sold, the value of what the person owns is based on cost rather than on any increase in market value.

If the evidence proves beyond a reasonable doubt that the Defendant's net worth increased during a taxable year, then you may infer that the Defendant received money or property during that year.

And if the evidence also proves that nontaxable sources don't account for the increase in net worth, then you may further infer that the money and property received were taxable income to the Defendant.

In addition to the matter of the Defendant's net worth, if the evidence proves beyond a reasonable doubt that the Defendant spent money during the year on living expenses, taxes, and other expenses that didn't add to the Defendant's net worth by the end of the year, then you may infer that those expenditures also came from funds received during the year.

And, again, if the evidence proves that those funds didn't come from nontaxable sources, and those expenses would not be deductible on the Defendant's tax return, then you may further infer that those funds were also taxable income.

The "net worth method" of proving unreported income involves comparing the Defendant's net worth at the beginning of the year and the Defendant's net worth at the end of the year. So the result cannot be accepted as correct unless the starting net worth is reasonably accurate.

If it's proved that the assets owned by the Defendant at the starting point were insufficient, by themselves, to account for the later increases in the Defendant's net worth, then the proof does not have to show the exact value of the assets owned at the starting point, only the reasonably certain value.

So, if you decide that the evidence doesn't prove with reasonable certainty what the Defendant's net worth was at the beginning of the year, you must find the Defendant not guilty.

To decide whether the Defendant's claimed net worth at the starting point is reasonably accurate, you may consider whether Government agents sufficiently investigated all reasonable "leads" suggested to them by the Defendant or that otherwise surfaced during the investigation concerning the existence and value of other assets.

If you find that the Government's investigation failed to reasonably follow up on or failed to refute (1) plausible explanations advanced by the Defendant, or (2) explanations that otherwise arose during the investigation concerning other assets the Defendant had at the beginning of the year, or (3) other nontaxable sources of income the Defendant had during the year, then you should find the Defendant not guilty.

But the Government's obligation to reasonably investigate applies only to suggestions or explanations made by the Defendant, or to reasonable leads that otherwise turn up. The Government isn't required to investigate every conceivable asset or source of nontaxable funds.

If you decide the evidence in the case proves beyond a reasonable doubt what was the maximum possible amount of the Defendant's net worth at the beginning of the tax year, and proves that any increase in the Defendant's net worth at the end of the year plus the amount of nondeductible expenditures made during the year was much more than the amount of income reported on the Defendant's

tax return for that year, you must then decide whether the evidence also proves beyond a reasonable doubt that the additional funds are taxable income that the Defendant willfully attempted to evade paying taxes on.

**ANNOTATIONS AND COMMENTS**

No annotations associated with this instruction.

**O108**
**Failure to File a Tax Return**
**26 U.S.C. § 7203**

It's a Federal crime to willfully fail to file a federal income-tax return when required to do so by the Internal Revenue laws or regulations.

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 required by law or regulation to file an income-tax return for the taxable year charged;

(2) the Defendant failed to file a return when required by law; and

(3) At the time the Defendant failed to file the return, he knew he was required by law to file a return.

A person is required to make a federal income-tax return for any tax year in which the person has gross income of more than [threshold].

"Gross income" includes the following:

- [Compensation for services – including fees, commissions and similar items;
- Gross income from business;
- Gains from dealing in property;
- Interest;
- Rents;
- Royalties;
- Dividends;

- Alimony and separate maintenance payments;
- Annuities;
- Income from life insurance and endowment contracts;
- Pensions;
- Income from discharge of indebtedness;
- Distributive share of partnership gross income;
- Income in respect of a decedent; and
- Income from an interest in an estate or trust.]

The Defendant is a person required to file a return if the Defendant's gross income for any calendar year is more than [threshold] even though the Defendant may be entitled to deductions from that income and ultimately owe no taxes. So the Government is not required to prove that taxes were due and unpaid, or that the Defendant intended to evade or defeat paying taxes. The Government only has to prove that the Defendant willfully failed to file the tax return.

**ANNOTATIONS AND COMMENTS**

26 U.S.C. § 7203 provides:

> Any person required [by law or regulation] to… make a return… who willfully fails to… make such return… at the time… required by law or regulations [shall be guilty of an offense against the United States].

Maximum Penalty: One (1) year imprisonment and $100,000 fine (or $200,000 in the case of a corporation), plus costs of prosecution. See 26 U.S.C. § 7203 and 18 U.S.C. § 3571.

Section 7203 requires willfulness. A willful violation of § 7203 has been defined as the voluntary, intentional violation of a known legal duty. Since this instruction incorporates this definition of willfulness in its elements, the committee does not believe that it is necessary to also include Basic Instruction 9.1B for this offense.

*See U.S. v. Dean*, 487 F.3d 840, 850 (11th Cir. 2007) ("[t]he term 'willfulness' presupposes the existence of a legal duty and knowledge of that duty." *See also U.S. v. Ware*, 2008 WL 4173845 (11th Cir. 2008) (defining "willfully" as "a voluntary and intentional violation of a known legal duty.").

When a defendant asserts a "good-faith" defense, the defendant is entitled to the following charge:

> Good-faith is a complete defense to the charges in the indictment since good faith on the part of the defendant is inconsistent with the charge of tax evasion and the elements of this crime. The Government must establish beyond a reasonable doubt each and every element of the offense. Therefore, if a defendant believes in good faith that he is acting within the law, he cannot be found guilty of the offense charged in the indictment. This is so even if the defendant's belief was not objectively reasonable as long as he held the belief in good faith. Nevertheless, you may consider whether the defendant's belief about the tax statutes was actually reasonable as a factor in deciding whether he held that belief in good faith.

*United States v. Dean*, 487 F.3d 840 (11th Cir. 2007).

**O109.1**
**Filing a False Tax-Related Document**
**26 U.S.C. § 7206(1)**

It's a Federal crime to wilfully and knowingly prepare and file a false tax return or other tax-related documents.

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

(1) the Defendant made or caused to be made a [describe tax-related document in question] for the year [year].

(2) the [tax-related document] contained a written declaration that it was made under the penalty of perjury;

(3) when the Defendant made or helped to make the [tax-related document], [he] [she] knew it contained false material information;

(4) when the Defendant did so, he intended to do something [he] [she] knew violated the law;

(5) the false matter in the [tax-related document] related to a material statement.

The government has the burden of proving each of these five elements beyond a reasonable doubt, for each of the years in question.

A declaration is "false" if it is untrue when it is made and the person making it knows it is untrue. A declaration in a document is "false" if it is untrue when the document is used and the person using it knows it is untrue.

A declaration is "material" if it concerns a matter of significance or importance, not a minor or insignificant or trivial detail.

The Government does not have to show that any taxes were not paid because of the false return, or that any additional taxes are due. It only has to prove that the Defendant intentionally helped to file a materially false return, which Defendant knew violated the law.

A false matter is "material" if the matter was capable of influencing the Internal Revenue Service.

**ANNOTATIONS AND COMMENTS**

26 U.S.C. § 7206(1) provides:

> Any person who willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter.

Section 7206(1) requires willfulness. A willful violation of § 7206(1) has been defined as the voluntary, intentional violation of a known legal duty. Since this instruction incorporates this definition of willfulness in its elements, the committee does not believe that it is necessary to also include Basic Instruction 9.1B for this offense.

**O109.2**
**Aiding or Assisting in Preparation**
**of False Documents Under Internal Revenue Laws**
**26 U.S.C. § 7206(2)**

It's a Federal crime to willfully aid or assist to prepare under the Internal Revenue laws a document that is false or fraudulent as to any material matter.

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

(1) That the Defendant [aided in] [assisted in] [procured] [counseled] [advised on] the preparation [presentation] of [a return] [an affidavit] [a claim] arising under [in connection with any matter arising under] the Internal Revenue laws; and

(2) this [return] [affidavit] [claim] falsely stated that _____ [state material matters asserted, e.g., _____ received gross income of $ _____ during the year _____];

(3) the defendant knew that the statement in the [return] [affidavit] [claim] was false;

(4) the false statement was material; and

(5) the defendant did so with the intent to do something the defendant knew the law forbids.

It is not necessary that the government prove that the falsity or fraud was with the knowledge or consent of the person authorized or required to present the [return] [claim] [affidavit] [document].

A declaration is "false" if it is untrue when it is made and the person making it knows it is untrue.

A declaration contained within a document is "false" if it is untrue when the document is used and the person using it knows it is untrue.

A declaration is "material" if it relates to a matter of significance or importance as distinguished from a minor or insignificant or trivial detail. The Government does not have to show that it was deprived of any tax because of the false return, or that additional tax is due. It only has to prove that the Defendant aided and abetted the filing of a materially false return, which the Defendant knew violated the law.

**ANNOTATIONS AND COMMENTS**

26 U.S.C. § 7206(2) provides:

> [Any person who] [w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under the Internal Revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is within the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document [shall be guilty of an offense against the United States].

Maximum Penalty: Three (3)years imprisonment and $250,000 fine (or $500,000 in the case of a corporation). See 26 U.S.C. § 7206 and 18 U.S.C. § 3571.

Section 7206(2) requires willfulness. A willful violation of § 7206(2) has been defined as the voluntary, intentional violation of a known legal duty. Since this instruction incorporates this definition of willfulness in its elements, the committee does not believe that it is necessary to also include Basic Instruction 9.1B for this offense.

The issue of "materiality" is for the jury, not the court. *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310 (1995).

**O110**
**False Tax Return, List, Account, or Statement**
**26 U.S.C. § 7207**

It's a Federal crime to willfully and knowingly file a materially false Federal income-tax return.

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

(1) the Defendant filed an [income-tax return] [a list] [an account] [a statement] that was false in a material way as charged in the indictment;

(2) when the Defendant filed the [return] [list] account] [statement], [he] [she] knew it was false; and

(3) when the Defendant did so, he acted with the intent to do something [he] [she] knew the law forbids.

A declaration is "false" if it is untrue when made the person making it knows it is untrue. A declaration contained within a document is "false" if it is untrue when the document is used and the person using it knows it is untrue.

A declaration is "material" if it relates to a matter of significance or importance, not some minor, insignificant, or trivial detail.

The Government does not have to show that any taxes were not paid because of the false return or that any additional taxes are due. It only has to show that the Defendant filed a materially false [return] [list] account] [statement], which Defendant knew violated the law.

## ANNOTATIONS AND COMMENTS

26 U.S.C. § 7207 provides:

> Any person who willfully delivers or discloses to the Secretary [of the Treasury] any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, [shall be guilty of a crime against the United States]. Any person required pursuant to section 6047(b), section 6104(d), or subsection (i) or (j) of section 527 to furnish any information to the Secretary or any other person who willfully furnishes to the Secretary or such other person any information known by him to be fraudulent or to be false as to any material matter [shall be guilty of a crime against the United States].

Maximum Penalty: One (1) year imprisonment and $10,000 fine (or $50,000 in the case of a corporation). See 26 U.S.C. § 7207 and 18 U.S.C. § 3571.

The issue of "materiality" is for the jury, not the Court. *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995). It is not necessary, however, for the Government to prove that any additional tax was due. *Boulware v. United States*, 552 U.S. 421, 128 S. Ct. 1168, 1178 n.2 (2008).

When a defendant asserts a "good-faith" defense, the defendant is entitled to the following charge:

> Good-faith is a complete defense to the charges in the indictment since good faith on the part of the defendant is inconsistent with the charge of tax evasion and the elements of this crime. The Government must establish beyond a reasonable doubt each and every element of the offense. Therefore, if a defendant believes in good-faith that he is acting within the law, he cannot be found guilty of the offense charged in the indictment. This is so even if the defendant's belief was not objectively reasonable as long as he held the belief in good-faith. Nevertheless, you may consider whether the defendant's belief about the tax statutes was actually reasonable as a factor in deciding whether he held that belief in good faith.

*United States v. Dean*, 487 F.3d 840 (11th Cir. 2007).

Section 7207 requires willfulness. A willful violation of § 7207 has been defined as the voluntary, intentional violation of a known legal duty. Since this instruction incorporates this definition of willfulness in its elements, the committee does not believe that it is necessary to also include Basic Instruction 9.1B for this offense.

**O111**
**Impeding Internal Revenue Service – Omnibus Clause**
**26 U.S.C. § 7212(a)**

It's a federal crime to [corruptly] [by force] [by threats of force] try to obstruct or impede the proper administration of the Internal Revenue laws.

(1) The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt: the Defendant knowingly tried to obstruct or impede the due administration of the Internal Revenue laws in connection with a pending or impending Internal Revenue Service (IRS) proceeding or other targeted administrative action;

(2) the proceeding or action was pending or reasonably foreseeable by the Defendant at the time the Defendant engaged in the obstructive conduct; and

(3) the Defendant did so [corruptly] [by force] [and/or] [by threats of force].

["Corruptly" means to act knowingly and dishonestly with the specific intent to secure an unlawful benefit.]

["Force" means physical force.]

["Threats of force" means threats of bodily harm to an Internal Revenue Officer or to an employee of the United States or to a member of [his] [her] family, whether made orally or by any threatening letter or other communication.]

To "try to obstruct or impede" is to consciously attempt to act to take some step to hinder, prevent, delay, or make more difficult the proper administration of the Internal Revenue laws.

The Government does not have to prove that the administration of the Internal Revenue laws was actually obstructed or impeded. It only has to prove that the Defendant corruptly tried to do so. The indictment alleges multiple methods in which the crime can be committed, but the Government doesn't have to prove all of them. The Government only has to prove beyond a reasonable doubt that the Defendant used any one of those methods with the corrupt intent to obstruct and impede the proper administration of the Internal Revenue laws. But you must all agree on which method the Defendant corruptly used.

**ANNOTATIONS AND COMMENTS**

26 U.S.C. § 7212(a) provides:

> Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, [shall be guilty of an offense against the United States] . . . . The term "threats of force", as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

Maximum Penalties: Three (3) years' imprisonment and a fine of not more than $5,000, or both. If the offense is committed only by threats of force, the maximum penalty is one (1) year imprisonment and a fine of not more than $3,000, or both.

In *Marinello v. United States*, 138 S. Ct. 1101, 1109-10 (2018), the Supreme Court read a "nexus" requirement into 26 U.S.C. § 7212(a). In *United States v. Graham*, 981 F.3d 1254, 1257 (11th Cir. 2020), the Eleventh Circuit explained:

> Not long ago in this Circuit, the government could have convicted [the defendant] under § 7212(a) by proving only that he (1) "knowingly tried to

> obstruct or impede the due administration of the internal revenue laws," and (2) "did so corruptly." . . . But recently the Supreme Court added a third element. Now, the government must also prove a "nexus between the defendant's conduct and a particular administrative proceeding, such as an investigation, an audit, or other targeted administrative action."

*Id.* at 1257 (quoting *Marinello*, 138 S. Ct. at 1109).

This nexus element "requires [showing] a 'relationship in time, causation, or logic with the [administrative] proceeding.'" *Marinello*, 138 S. Ct. at 1109 (second alteration in original) (quoting *United States v. Aguilar*, 515 U.S. 593, 599 (1995)). It also obligates the government to show "that the proceeding was pending at the time the defendant engaged in the obstructive conduct or, at the least, was then reasonably foreseeable by the defendant." *Id.* at 1110 (citing *Arthur Andersen LLP v. United States*, 544 U.S. 696, 707-08 (2005)).

The Supreme Court has declined to "exhaustively itemize the types of administrative conduct that fall within the scope of the statute[.]" *Id.* Yet, § 7212(a) does not cover "routine, day-to-day work carried out in the ordinary course by the IRS, such as the review of tax returns[.]" *Id.* The required administrative action may take many forms if it is "targeted" at particular individuals rather than at the general administration of federal tax law. *See Graham*, 981 F.3d at 1259-60 (concluding that various collection efforts made by the IRS, including issuance of notices of liens and levies to defendant and seizure of some of defendant's property, did not present even "a borderline case" under § 7212(a)).

# O112
# Evading a Currency-Transaction Reporting Requirement by Structuring Transaction 31 U.S.C. § 5324(a)(3)

It's a Federal crime under certain circumstances for anyone to knowingly evade a currency-transaction reporting requirement.

Domestic financial institutions and banks (with specific exceptions) must file currency-transaction reports with the Government. They must list all deposits, withdrawals, transfers, or payments involving more than $10,000 in cash or currency.

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 structured or helped to structure a currency transaction;

(2) the purpose of the structured transaction was to evade the transaction-reporting requirements; and

(3) the structured transaction involved one or more domestic financial institutions.

To "structure" a transaction means to deposit, withdraw, or otherwise participate in transferring a total of more than $10,000 in cash or currency using a financial institution or bank by intentionally setting up or arranging a series of separate transactions, each one involving less than $10,000, in order to evade the currency-reporting requirement that would have applied if fewer transactions had been made.

**ANNOTATIONS AND COMMENTS**

31 U.S. C. § 5313(a) provides:

> (a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

31 U.S.C. § 5324(a)(3) and (d)(2) provides:

> (a) Domestic coin and currency transactions involving financial institutions. - - No person shall for the purpose of evading the reporting requirements of section 5313(a) or 5325 or any regulation prescribed under any such section - -
>
> * * * * * *
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.
>
> * * * * * *
>
> (d) Criminal penalty. - -
>
> (1) In general. - - Whoever violates this section shall be fined in accordance with title 18 United States Code, imprisoned for not more than 5 years, or both.
>
> (2) Enhanced penalty for aggravated cases. - - Whoever violates this section while violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period shall be shall be fined twice the amount provided in subsection (b)(3) or (c)(3) (as the case may be) of section 3571 of title 18, United States Code, imprisoned for not more than 10 years, or both.

If the indictment alleges one of the sentence-enhancing circumstances listed in 31 U.S.C. § 5324(d)(2), the instruction should be modified in light of *Apprendi* to submit the

issue to the jury. *See United States v. Aunspaugh*, 792 F.3d 1302, 1311-12 (11th Cir. 2015). A special verdict form, similar to those used in the drug offense instructions (e.g., O98), may be appropriate.

In *Ratzlaf v. United States*, 510 U.S. 135, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994), the Court held that the Government must prove that the Defendant knew that the structuring was unlawful, but Congress then amended § 5324, eliminating the word "willfully" from the criminal penalty provision. Thus, willfulness is no longer an element of the offense. *See Blakely v. United States*, 276 F.3d 853, 875 n.10 (6th Cir. 2002).

**O113**
**Knowing Discharge of a Pollutant**
**in Violation of the Clean Water Act**
**33 U.S.C. § 1311(a)**
**33 U.S.C. § 1319(c)(2)(A)**

It is a Federal crime for any person to knowingly violate a permit condition or limitation or a National Pollutant Discharge Elimination System ("NPDES") permit issued by the federal Environmental Protection Agency or by an authorized state agency such as [name state agency].

Any person who knowingly discharges a pollutant in violation of a NPDES permit commits a crime. The defendant(s) here is (are) accused of knowingly discharging or causing the discharge of a pollutant into [name waterway], a water of the United States, in violation of the defendant('s) (s') NPDES permit.

To find a defendant guilty of the Count(s) of the Indictment, you must find each of the following events has been proved by the Government beyond a reasonable doubt:

(1) That on or about the dates alleged in the indictment, the defendant knowingly discharged or caused a discharge of a pollutant that is specified in the applicable NPDES permit;

(2) the defendant knew that the discharge contained the pollutant specified;

(3) the discharge was into a water of the United States; that is, that [name waterway] was a navigable waterway or a stream or tributary that flowed directly or indirectly into a navigable waterway;

(4) the discharge was in violation of the NPDES permit of the defendant. The Government does not have to prove that the defendant knew the terms of the permit.

For purposes of the Act, the term "navigable waterway" means a body of water that has a significant connection to waters that are or were navigable in fact or that could reasonably be made so. A "significant connection" is found when the discharge enters a water that, either alone or in combination with similarly situated lands in the region, significantly affects the chemical, physical, and biological integrity of other waters that are more readily navigable. The Government does not have to prove that the [name of waterway] that received the discharge is itself navigable in fact.

The Government does not have to prove that the discharge in question caused any harm to the waterway in order to prove a criminal offense.

To convict the defendant, you must find that the defendant acted knowingly. An act is done "knowingly" if it is done purposely and voluntarily, as opposed to mistakenly or accidentally. A person acts "knowingly" if that person acts consciously and with awareness and comprehension, and not because of ignorance, mistake, misunderstanding, or other similar reasons. Knowledge may be established by direct or circumstantial evidence.

"Pollutant" is defined by the Clean Water Act to mean dredged soil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical

wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water.

**ANNOTATIONS AND COMMENTS**

33 U.S. C. § 1311(a) states:

> (a) Illegality of pollutant discharges except in compliance with law. Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S. C. § 1319(c)(2)(A) states:

> (c) Criminal penalties
>
> (2) Knowing violations
>
> Any person who - -
>
> (A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State;
>
> shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

*U.S. v. Robison*, 505 F.3d 1208 (11th Cir. 2007); citing *Rapanos v. U.S.*, 547 U.S. 715, 126 S. Ct. 2208 (2006).

**O114**
**Fraudulent Receipt of V.A. Benefits**
**38 U.S.C. 6102(b)**

It's a federal crime for anyone to get money from the Department of Veterans Affairs without being entitled to it and with intent to defraud the United States.

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

(1) the Defendant received money or a check without being entitled to receive it under the laws administered by the V.A.; and

(2) the Defendant intended to defraud the United States.

To "intend to defraud" means to do something with the specific intent to deceive or cheat someone or some agency, usually for personal financial gain or to cause financial loss to someone else. But the Government doesn't have to prove that anyone was actually defrauded. It only has to prove that the Defendant intended to defraud.

The Government doesn't have to prove the precise amount of the pension benefits wrongfully received by the Defendant, but it must prove beyond a reasonable doubt that the Defendant knowingly received some substantial portion of the benefits.

**ANNOTATIONS AND COMMENTS**

38 U.S. C. § 6102(b) provides:

(b) Whoever obtains or receives any money or check under any of the laws administered by the Secretary without being entitled to it, and with intent to defraud the United States or any beneficiary of the United States, shall be fined in accordance with title 18, or imprisoned not more than one year, or both.

# O115
# Falsely Representing a Social Security Number
# 42 U.S.C. § 408(a)(7)(B)

It's a Federal crime for anyone to intentionally deceive someone else by falsely representing a Social Security number to be the person's own.

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 represented to someone that the Social Security number described in the indictment had been assigned to the Defendant by the Commissioner of Social Security;

(2) at the time, the Social Security number had not been assigned to the Defendant; and

(3) the Defendant intended to deceive someone in order to [state purpose as alleged in the indictment].

To "act with intent to deceive" simply means to act deliberately for the purpose of misleading someone. But the Government does not have to prove that someone was actually misled or deceived.

## ANNOTATIONS AND COMMENTS

42 U.S.C. § 408(a)(7)(B) provides:

> Whoever - -
>
> (B) with intent to deceive, falsely represents a number to be the social security account number assigned by the Commissioner of Social Security to him or to another person, when in fact such number is not the social security account number assigned by the Commissioner of Social Security to him or to such other person [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and applicable fine.

**O116**
**Forceful Intimidation Because of Race:**
**Occupancy of Dwelling (No Bodily Injury)**
**42 U.S.C. § 3631**

It's a Federal crime to use force or threats of force to willfully intimidate or interfere with another person because of that person's race and because the person has been occupying any dwelling.

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

(1) the Defendant used force or threats of force to intimidate or interfere with, or to attempt to intimidate or interfere with, [the person or people named in the indictment];

(2) the Defendant did so because of the [victm's] [victims'] race and because [he] [she] [they] [was] [were] occupying a dwelling; and

(3) the Defendant did so knowingly and willfully.

The term "willfully" means that the act was done voluntarily, for a bad purpose, and in disregard of the law. A person did not have to know the specific law or rule being violated, but must have acted with the intent to do something the law forbids.

To use "force" means to do something that causes another person to act against the person's will.

To use a "threat of force" or to "intimidate" or "interfere with" means to intentionally say or do something that would cause a person of ordinary

sensibilities under the same circumstances to be fearful of bodily harm if the person didn't comply.

A "dwelling" includes anyplace where people ordinarily live or reside.

**ANNOTATIONS AND COMMENTS**

42 U.S.C. § 3631 provides:

> Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with … (a) any person because of his race… and because he is or has been… occupying… any dwelling [shall be guilty of an offense against the United States].

Maximum Penalty: One (1) year imprisonment and $100,000 fine without bodily injury; Ten (10) years imprisonment and $250,000 fine with bodily injury and/or use of a dangerous weapon, explosive, or fire; or any term of years up to life imprisonment and $250,000 fine if death results or if such acts include kidnapping, aggravated sexual assault or an attempt to kill. See 42 U.S.C. § 3631 and 18 U.S.C. § 3571.

**O117.1**
**Controlled Substances –**
**Possession on Vessel of the United States**
**or Subject to the Jurisdiction of the United States**
**46 U.S.C. § 70503(a)**

It's a Federal crime for anyone [on board a vessel of the United States] [on board a vessel subject to the jurisdiction of the United States] to knowingly possess a controlled substance with intent to distribute it.

[Substance] is a controlled substance within the meaning of the law.

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

(1) the Defendant was [on board a vessel of the United States] [on board a vessel subject to the jurisdiction of the United States];

(2) the Defendant knowingly possessed a controlled substance; and

(3) the Defendant intended to distribute the controlled substance.

I instruct you as a matter of law that the vessel involved in this case [is a vessel of the United States] [is subject to the jurisdiction of the United States].

To "possess with intent to distribute" means to knowingly have something while intending to deliver or transfer it to someone else, even with no financial interest in the transaction.

[The Defendant[s] [is/are] charged with [distributing] [possessing with intent to distribute] at least [threshold(s)] of [substance(s)]. But you may find [the/any] Defendant guilty of the crime even if the amount of the controlled substance[s] for

which [he/she] should be held responsible is less than [threshold(s)]. So if you find [the/any] Defendant guilty, you must also find whether the Government has proved beyond a reasonable doubt the weight of [substance(s)] the Defendant possessed and specify the amount[s] on the verdict form.]

## ANNOTATIONS AND COMMENTS

The Maritime Drug Law Enforcement Act ("MDLEA") prohibits knowingly or intentionally possessing a controlled substance, with intent to distribute, onboard any vessel subject to the jurisdiction of the United States.

46 U.S.C. § 70502(b) provides that a vessel of the United States means:

> (1) a vessel documented under chapter 121 of this title or numbered as provided in chapter 123 of this title;
>
> (2) a vessel owned in any part by an individual who is a citizen of the United States, the United States Government, the government of a State or political subdivision of a State, or a corporation incorporated under the laws of the United States or of a State, unless—
>
> (A) the vessel has been granted the nationality of a foreign nation under article 5 of the 1958 Convention on the High Seas; and
>
> (B) a claim of nationality or registry for the vessel is made by the master or individual in charge at the time of the enforcement action by an officer or employee of the United States who is authorized to enforce applicable provisions of United States law; and
>
> (3) a vessel that was once documented under the laws of the United States and, in violation of the laws of the United States, was sold to a person not a citizen of the United States, placed under foreign registry, or operated under the authority of a foreign nation, whether or not the vessel has been granted the nationality of a foreign nation.

46 U.S.C. § 70502(c)(1) provides that a vessel subject to the jurisdiction of the United States includes:

> (A) a vessel without nationality;

(B) a vessel assimilated to a vessel without nationality under paragraph (2) of article 6 of the 1958 Convention on the High Seas;

(C) a vessel registered in a foreign nation if that nation has consented or waived objection to the enforcement of United States law by the United States;

(D) a vessel in the customs waters of the United States;

(E) a vessel in the territorial waters of a foreign nation if the nation consents to the enforcement of United States law by the United States; and

(F) a vessel in the contiguous zone of the United States, as defined in Presidential Proclamation 7219 of September 2, 1999 (43 U.S.C. 1331 note), that—

(i) is entering the United States;

(ii) has departed the United States; or

(iii) is a hovering vessel as defined in section 401 of the Tariff Act of 1930 (19 U.S.C. 1401).

The MDLEA provides that the United States' jurisdiction over a vessel is not an element of the offense, and that the jurisdiction is a preliminary question of law to be resolved by the district court. 46 U.S.C. § 70504(a) ("Jurisdiction of the United States with respect to a vessel subject to this chapter is not an element of an offense. Jurisdictional issues arising under this chapter are preliminary questions of law to be determined solely by the trial judge."). Because the jurisdictional requirement under the MDLEA is not an element of the offense, neither the Due Process Clause nor the Sixth Amendment are implicated when the jurisdictional requirement is not proven to the satisfaction of a jury. *United States v. Cruickshank*, 837 F.3d 1182, 1192 (11th Cir. 2016); *United States v. Campbell*, 743 F.3d 802, 809 (11th Cir. 2014) ("[W]e have rejected the argument that a jury must determine jurisdiction under the Act."); *see also United States v. Tinoco*, 304 F.3d 1088, 1110 (11th Cir. 2002).

Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013), when an indictment alleges drug quantity to subject a defendant to 21 U.S.C. § 841(b)'s enhanced penalties, a jury must find that the drug type and quantity have been proven beyond a reasonable doubt. In such cases, drug quantity becomes an "element" or "ingredient" of the offense for penalty purposes. *United States v. Colston*, 4 F.4th 1179, 1187–89 (11th Cir. 2021); *see also United States v. Gray*, 94 F.4th 1267, 1271 (11th Cir. 2024) ("In short, [the defendant]'s indictment for violating 21 U.S.C. § 841(a)(1) and § 846 required the government to prove only that he knew he possessed a controlled substance, not that he knew he possessed a certain controlled substance. The

fact that the indictment named a specific substance [to establish penalties] does not change this general-knowledge requirement.").

The offense of Possession of a Controlled Substance on a United States Vessel in Customs Waters, formerly codified at 21 U.S.C. § 955a(c), is now codified as part of 46 U.S.C. § 70502 by virtue of Congress including "a vessel in the customs waters of the United States" as part of the definition for a "vessel subject to the jurisdiction of the United States." 46 U.S.C. § 70502(c)(1)(D).

Special Verdict

1. We, the Jury, find the Defendant [name of Defendant] _____ as charged in Count [One] of the indictment. [Note: If you find the Defendant not guilty as charged in Count [One], you need not consider paragraph 2 below.]

2. We, the Jury, having found the Defendant guilty of the offense charged in Count [One], further find with respect to that Count that [he/she] [distributed] [possessed with intent to distribute] the following controlled substance[s] in the amount[s] shown (place an X in the appropriate box[es]):

[(a) Marijuana - -
(i) Weighing 1000 kilograms or more ☐
(ii) Weighing 100 kilograms or more ☐
(iii) Weighing less than 100 kilograms ☐]

[(b) Cocaine - -
(i) Weighing 5 kilograms or more ☐
(ii) Weighing 500 grams or more ☐
(iii) Weighing less than 500 grams ☐]

[(c) Cocaine base ("crack" cocaine) - -
(i) Weighing 280 grams or more ☐
(ii) Weighing 28 grams or more ☐
(iii) Weighing less than 28 grams ☐]

SO SAY WE ALL.

Date: _____ _____

Foreperson

Multiple sets of the two paragraphs in this Special Verdict form will be necessary in the event of multiple counts of drug offenses against the same Defendant.

**O117.2**
**Controlled Substances –**
**Possession on Vessel by United States Citizen or Resident Alien**
**46 U.S.C. § 70503(a)**

It's a Federal crime for anyone who is a citizen of the United States or a resident alien of the United States on board any vessel to knowingly possess a controlled substance with intent to distribute it.

[Substance] is a controlled substance within the meaning of the law.

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

(1) the Defendant is a citizen of the United States or a resident alien of the United States and was on board any vessel;

(2) the Defendant knowingly possessed a controlled substance; and

(3) the Defendant intended to distribute the controlled substance.

To "possess with intent to distribute" means to knowingly have something while intending to deliver or transfer it to someone else, even with no financial interest in the transaction.

[The Defendant[s] [is/are] charged in the indictment with [distributing] [possessing with intent to distribute] at least [threshold(s)] of [substance(s)]. But you may find [the/any] Defendant guilty of the crime even if the amount of the controlled substance[s] for which [he/she] should be held responsible is less than [threshold(s)]. So if you find [the/any] Defendant guilty, you must also find whether the Government has proved beyond a reasonable doubt the weight of

[substance(s)] the Defendant possessed and specify the amount[s] on the verdict form.]

**ANNOTATIONS AND COMMENTS**

46 U.S.C. § 70503 provides:

> (a) Prohibitions. – While on board a covered vessel, an individual may not knowingly or intentionally—
>
> (1) manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance.
>
> . . .
>
> (e) Covered vessel defined. – In this section the term "covered vessel" means—
>
> (1) a vessel of the United States or a vessel subject to the jurisdiction of the United States; or
>
> (2) any other vessel if the individual is a citizen of the United States or a resident alien of the United States.

Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013), when an indictment alleges drug quantity to subject a defendant to 21 U.S.C. § 841(b)'s enhanced penalties, a jury must find that the drug type and quantity have been proven beyond a reasonable doubt. In such cases, drug quantity becomes an "element" or "ingredient" of the offense for penalty purposes. *United States v. Colston*, 4 F.4th 1179, 1187–89 (11th Cir. 2021); *see also United States v. Gray*, 94 F.4th 1267, 1271 (11th Cir. 2024) ("In short, [the defendant]'s indictment for violating 21 U.S.C. § 841(a)(1) and § 846 required the government to prove only that he knew he possessed a controlled substance, not that he knew he possessed a certain controlled substance. The fact that the indictment named a specific substance [to establish penalties] does not change this general-knowledge requirement.").

The offense of Possession of a Controlled Substance on a United States Vessel in Customs Waters, formerly codified at 21 U.S.C. § 955a(c), is now codified as part of 46 U.S.C. § 70502 by virtue of Congress including "a vessel in the customs waters of the United States" as part of the definition for a "vessel subject to the jurisdiction of the United States." 46 U.S.C. § 70502(c)(1)(D).

Special Verdict

1. We, the Jury, find the Defendant [name of Defendant] _____ as charged in Count [One] of the indictment. [Note: If you find the Defendant not guilty as charged in Count [One], you need not consider paragraph 2 below.]

2. We, the Jury, having found the Defendant guilty of the offense charged in Count [One], further find with respect to that Count that [he/she] [distributed] [possessed with intent to distribute] the following controlled substance[s] in the amount[s] shown (place an X in the appropriate box[es]):

[(a) Marijuana - -
(i) Weighing 1000 kilograms or more ☐
(ii) Weighing 100 kilograms or more ☐
(iii) Weighing less than 100 kilograms ☐]

[(b) Cocaine - -
(i) Weighing 5 kilograms or more ☐
(ii) Weighing 500 grams or more ☐
(iii) Weighing less than 500 grams ☐]

[(c) Cocaine base ("crack" cocaine) - -
(i) Weighing 280 grams or more ☐
(ii) Weighing 28 grams or more ☐
(iii) Weighing less than 28 grams ☐]

SO SAY WE ALL.

Date: _____ _____
Foreperson

Multiple sets of the two paragraphs in this Special Verdict form will be necessary in the event of multiple counts of drug offenses against the same Defendant.

**O118**
**Assaulting or Intimidating a Flight Crew of an Aircraft**
**in United States: Without Dangerous Weapon**
**49 U.S.C. § 46504**

It's a Federal crime to [assault] [intimidate] a flight-crew member or attendant on an aircraft in flight in the United States.

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 on an aircraft in flight in the United States;

(2) the Defendant knowingly [assaulted] [intimidated] a flight-crew member or flight attendant of the aircraft; and

(3) the [assault] [intimidation] interfered with or lessened the ability of the crew member or flight attendant to perform [his] [her] duties.

An aircraft is "in flight" from the moment all external doors are closed after the passengers have boarded through the moment when one external door is opened to allow passengers to leave the aircraft. For purposes of this crime, an aircraft does not have to be airborne to be in flight.

[An "assault" may be committed without actually touching or hurting another person. An assault occurs when a person intentionally attempts or threatens to hurt someone else and has an apparent and immediate ability to carry out the threat, such as by pointing or brandishing a dangerous weapon or device.]

[To "intimidate" someone is to intentionally say or do something that would cause a person of ordinary sensibilities to fear bodily harm. It's also to say or do

something to make another person fearful or make that person refrain from doing something that the person would otherwise do – or do something that the person would otherwise not do.]

**ANNOTATIONS AND COMMENTS**

49 U.S.C. § 46504 provides:

> An individual on an aircraft in the special aircraft jurisdiction of the United States who, by assaulting or intimidating a flight crew member or flight attendant of the aircraft, interferes with the performance of the duties of the member or attendant or lessens the ability of the member or attendant to perform those duties, shall be fined under title 18 , imprisoned for not more than 20 years, or both.

Maximum Penalty: Twenty (20) years imprisonment and $250,000 fine.

"Aircraft in flight" and other definitions are set forth in 49 U.S.C. § 46501. Note that the definition of the "special aircraft jurisdiction of the United States" varies depending upon whether the aircraft is owned by the United States and whether the aircraft is in or outside the United States. This charge is based upon the aircraft not being owned by the United States but being in the United States.

This statute does not require any showing of specific intent. *United States v. Grossman*, 131 F.3d 1449 (11th Cir. 1997).

If venue problems are raised, *see United States v. Hall*, 691 F.2d 48 (1st Cir. 1982). Further, this case held the offense was committed so long as the crew was responding to defendant's behavior in derogation of their ordinary duties.

**O119**
**Attempting to Board Air Craft with**
**Concealed Weapon or Explosive Device**
**49 U.S.C. § 46505(b)**

It's a Federal crime to attempt to either (1) board an aircraft involved in air transportation while carrying a concealed deadly or dangerous weapon, or (2) have an explosive placed aboard an aircraft involved in air transportation.

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

(1) the Defendant attempted to board an aircraft;

(2) the Defendant knowingly [had on or about [his] [her] person a concealed dangerous weapon that [he] [she] could have reached in flight if [he] [she] had boarded the aircraft] [attempted to have an explosive device placed aboard the aircraft ]. [and]

[(3) the Defendant acted willfully and with reckless disregard for the safety of human life.]

To "attempt" an act means to knowingly take some substantial step toward accomplishing the act so the act will occur unless interrupted or frustrated by some event or condition.

An item is "concealed" if it is hidden from ordinary view.

The term "willfully" means that the act was done voluntarily, for a bad purpose, and in disregard of the law. A person did not have to know the specific law or rule being violated, but must have acted with the intent to do something the law forbids.

"Reckless disregard for the safety of human life" means more than mere negligence or more than the failure to use reasonable care by the Defendant. Instead, the Government must prove that the defendant acted with gross negligence and with the knowledge that his or her conduct was a threat to the life of another or with knowledge of such circumstances that would reasonably make it possible for the Defendant to foresee the peril that his or her act might create for another person.

**ANNOTATIONS AND COMMENTS**

49 U.S.C. § 46505(b) provides:

> "[a]n individual shall be fined under title 18, imprisoned for not more than ten years, or both, if the individual - -
>
> (1) when on, or attempting to get on, an aircraft in, or intended for operation in, air transportation, has on or about the individual or the property of the individual a concealed dangerous weapon that is or would be accessible to the individual in flight;
>
> (2) has placed, attempted to place, or attempted to have placed a loaded firearm on that aircraft in property not accessible to passengers in flight; or
>
> (3) has on or about the individual, or has placed, attempted to place, or attempted to have placed on that aircraft, an explosive or incendiary device.

Maximum Penalty: Ten years imprisonment and $250,000 fine. See 49 U.S.C. § 4605(b) and 18 U.S.C. § 3571. If an individual violates subsection (b) "willfully and without regard for the safety of human life, or with reckless disregard for the safety of human life, "the maximum term of imprisonment is 20 years and, if death results to any person, any term of imprisonment including life." See 49 U.S.C. § 46505(c).

The third element is in brackets because it is a sentencing issue. It should be included as an element only when charged in the indictment.

**O120**

**Procurement of Citizenship**

**or Naturalization Unlawfully**

**18 U.S.C. § 1425**

It's a Federal crime for any person to [(a) knowingly procure or attempt to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or citizenship] or [(b) for himself or another person not entitled thereto, to knowingly issue, procure, or obtain, or apply for or otherwise attempt to procure or obtain naturalization, or citizenship, or a declaration of intention to become a citizen, or a certificate of arrival or any certificate or evidence of nationalization or citizenship, documentary or otherwise, or duplicates or copies of any of the foregoing].

The Defendant can be found guilty of a violation of section 1425(a), only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant knowingly [procured] [attempted to procure];

(2) contrary to law;

(3) the naturalization of any person, or documentary or other evidence of naturalization or citizenship[.] [; and]

[(4) the Defendant did so [to facilitate an act of international terrorism] [to facilitate a drug trafficking crime].]

The Defendant can be found guilty of a violation of section 1425(b), only if all of the following facts are proved beyond a reasonable doubt:

(1) the Defendant [for himself] [for another person not entitled thereto] knowingly [issued, procured, obtained, applied for], [attempted to procure or obtain] [naturalization or citizenship, or a declaration of intention to become a citizen, or a certificate of arrival or any certificate or evidence of nationalization or citizenship, documentary or otherwise, or duplicate copies of the foregoing];

(2) [the Defendant is not entitled to naturalization or citizenship] [the other person is not entitled to naturalization or citizenship]; and

(3) [the Defendant knows he or she is not entitled to naturalization or citizenship]; [the Defendant knows the other person is not entitled to naturalization or citizenship[.] [; and]

[(4) the Defendant did so [to facilitate an act of international terrorism] [to facilitate a drug trafficking crime].]

[An "act of international terrorism" means (1) a criminal act that is dangerous to human life, (2) appears to be intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by assassination or kidnapping, and (3) occurs outside the United States or transcends national boundaries in terms of the means by which it is accomplished, the persons intended to be intimidated or coerced, or the locale in which the perpetrator operates or seeks asylum.]

[A "drug trafficking crime" means any felony punishable under the Controlled Substances Act, 21 U.S.C. §§ 801 et seq., the Controlled Substances Import and Export Act, 21 U.S.C. 951 et seq., or chapter 705 of title 46 of the United States Code.]

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1425 provides:

> (a) Whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship; or
>
> (b) Whoever, whether for himself or another person not entitled thereto, knowingly issues, procures or obtains or applies for or otherwise attempts to procure or obtain naturalization, or citizenship, or a declaration of intention to become a citizen, or a certificate of arrival or any certificate or evidence of nationalization or citizenship, documentary or otherwise, or duplicates or copies of any of the foregoing [shall be guilty of an offense against the United States].

Maximum Penalty: Imprisonment of not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both; and applicable fine.

The optional Fourth element is included in order to comply with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), where the indictment alleges facts triggering the enhanced penalties under the statute.

The definition of "act of international terrorism" is taken from 18 U.S.C. § 2331.

The definition of "drug trafficking crime" is taken from 18 U.S.C. § 929.

In *Maslenjak v. United States*, – U.S. –, 137 S. Ct. 1918 (2017), the Supreme Court held that to obtain a conviction under section 1425, the Government must show an illegal act by the defendant played some role in his or her acquisition of citizenship. *See id.* at 1923. "When the illegal act is a false statement, that means demonstrating that the defendant lied about facts that would have mattered to an immigration official, because they would have justified denying naturalization or would predictably have led to other facts warranting that result." *Id.* Furthermore, "the proper causal inquiry under § 1425(a) is framed in objective terms: To decide whether a defendant acquired citizenship by means of a lie, a jury must evaluate how knowledge of the real facts would have affected a reasonable government official properly applying naturalization law." *Id.* at 1928.

*United States v. Lopez*, 704 F.2d 1382 (5th Cir. 1983), held a birth certificate is "other evidence of citizenship" and its fraudulent procurement as proof of U.S. citizenship for an alien is proscribed by section 1425.

**T1.1**
**Cautionary Instruction**
**Similar Acts Evidence**
**(Rule 404(b), Fed. R. Evid.)**

You have just heard evidence of acts allegedly done by the Defendant that may be similar to those charged in the indictment, but were committed on other occasions. You must not consider this evidence to decide if the Defendant engaged in the activity alleged in the indictment. But you may consider this evidence to decide whether:

- the Defendant had the state of mind or intent necessary to commit the crime charged in the indictment;
- the Defendant had a motive or the opportunity to commit the acts charged in the indictment;
- the Defendant acted according to a plan or in preparation to commit a crime; or
- the Defendant committed the acts charged in the indictment by accident or mistake.

**ANNOTATIONS AND COMMENTS**

Rule 404. [FRE] Character Evidence; Crimes or Other Acts

* * * * *

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

*United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979), discusses at length the tests to be applied in admitting or excluding evidence under Rule 404(b); and, more specifically, the different standards that apply depending upon the purpose of the evidence, i.e., to show intent versus identity, for example. *See id*. at 911-12 n.15.

**T1.2**
**Cautionary Instruction**
**Similar Acts Evidence – Identity**
**(Rule 404(b), Fed. R. Evid.)**

You have just heard evidence of acts allegedly done by the Defendant that may be similar to those charged in the indictment, but were committed on other occasions. If you find the Defendant committed the allegedly similar acts, you may use this evidence to help you decide whether the similarity between those acts and the one[s] charged in this case suggests the same person committed all of them.

The Defendant is currently on trial only for the crime[s] charged in the indictment. You may not convict a person simply because you believe that person may have committed an act in the past that is not charged in the indictment.

**ANNOTATIONS AND COMMENTS**

Rule 404. [FRE] Character Evidence; Crimes or Other Acts

* * * * *

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

*United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979), discusses at length the tests to be applied in admitting or excluding evidence under Rule 404(b); and, more specifically, the different standards that apply depending upon the purpose of the evidence, i.e., to show intent versus identity, for example. *See id*. at 911-12 n.15.

**T2**
**Witness's Prior Statement or Testimony**
**Explanatory Instruction**

Members of the Jury: If a witness is questioned about earlier statements or testimony the witness made, the questioning is permitted to aid you in evaluating the truth or accuracy of the witness's testimony at this trial.

A witness's earlier testimony or statements are not ordinarily offered or received as evidence of their truth or accuracy. They are pointed out to give you a comparison and to help you decide whether you believe the witness's testimony.

Whether those prior statements are consistent or inconsistent with the witness's trial testimony is entirely up to you.

I'll give you additional instructions at the end of the trial about a number of things you may consider to determine the credibility or believability of the witnesses and the weight to give their testimony.

**ANNOTATIONS AND COMMENTS**

No annotations associated with this instruction.

**T3**
**Explanatory Instruction**
**Transcript of Conversation**

Members of the Jury: Exhibit _____ has been identified as a transcript [and partial translation from Spanish into English] of the oral conversation heard on the tape recording received in evidence as Exhibit _____. [The transcript also purports to identify the speakers engaged in the conversation.]

I've admitted the transcript for the limited purpose of helping you follow the content of the conversation as you listen to the tape recording [, particularly those portions spoken in Spanish,] [and also to help you identify the speakers.]

But you are specifically instructed that whether the transcript correctly reflects the content of the conversation [or the identities of the speakers] is entirely for you to decide based on your own evaluation of the testimony you have heard about the preparation of the transcript.

If you determine that the transcript is in any respect incorrect or unreliable, you should disregard it to that extent.

**ANNOTATIONS AND COMMENTS**

*United States v. Nixon*, 918 F.2d 895 (11th Cir. 1990), held that transcripts are admissible in evidence, including transcripts that purport to identify the speakers, and specifically approved the text of a similar instruction (T3) as given at the time the transcripts were offered and received.

**T4**
**Explanatory Instruction**
**Role of the Interpreter**

We seek a fair trial for all regardless of what language they speak. We are going to have an interpreter assist us through these proceedings, and you should know what [she] can do and what [she] cannot do. Basically, the interpreter is here only to help us communicate during the proceedings. [She] is not a party in the case, has no interest in the case, and will be completely neutral. Accordingly, [she] is not working for either party. The interpreter's sole responsibility is to enable us to communicate with each other.

Treat the interpreter of the witness's testimony as if the witness had spoken English and no interpreter was present. Do not allow the fact that testimony is given in a language other than English influence you in any way.

If any of you understand the language of the witness, disregard completely what the witness says in [her] language. Consider as evidence only what is provided by the interpreter in English. If you think an interpreter has made a mistake, you may bring it to the attention of the Court, but you should make your deliberations on the basis of the official interpretation.

**ANNOTATIONS AND COMMENTS**

No annotations associated with this instruction.

**T5**
**Modified Allen Charge**

Members of the Jury: I'm going to ask that you continue your deliberations in an effort to agree on a verdict and dispose of this case. And I have a few additional comments I'd like for you to consider as you do so.

This is an important case. The trial has been expensive in time, effort, money, and emotional strain to both the defense and the prosecution. If you fail to agree on a verdict, the case will be left open and may have to be tried again. Another trial would increase the cost to both sides, and there is no reason to believe that the case can be tried again by either side any better or more exhaustively than it has been tried before you.

Any future jury must be selected in the same manner and from the same source as you were chosen. There is no reason to believe that the case could ever be submitted to twelve people more conscientious, more impartial, or more competent to decide it – or that more or clearer evidence could be produced.

If a substantial majority of you are in favor of a conviction, those of you who disagree should reconsider whether your doubt is a reasonable one since it appears to make no effective impression upon the minds of the others. On the other hand, if a majority or even a smaller number of you are in favor of an acquittal, the rest of you should ask yourselves again – and most thoughtfully – whether you

should accept the weight and sufficiency of evidence that fails to convince your fellow jurors beyond a reasonable doubt.

Remember at all times that no juror is expected to give up an honest belief about the weight and effect of the evidence. But after fully considering the evidence in the case you must agree upon a verdict if you can.

You must also remember that if the evidence fails to establish guilt beyond a reasonable doubt, the Defendant must have your unanimous verdict of Not Guilty.

You should not be hurried in your deliberations and should take all the time you feel is necessary.

I now ask that you retire once again and continue your deliberations with these additional comments in mind. Apply them in conjunction with all the other instructions I have previously given to you.

**ANNOTATIONS AND COMMENTS**

*United States v. Elkins*, 885 F.2d 775, 783 (11th Cir. 1989), *cert. denied*, 494 U.S. 1005, 110 S. Ct. 1300, 108 L. Ed.2d 477 (1990). "This circuit allows the use of *Allen* charges."

*United States v. Chigbo*, 38 F.3d 543, 544-545 (11th Cir. 1994), *cert. denied*, 516 U.S. 826, 116 S. Ct. 92, 133 L. Ed.2d 48 (1995) approved a charged substantively indistinguishable from this one.

**T6**
**Forfeiture Proceedings**
(To be given before supplemental
evidentiary proceedings or
supplemental arguments of counsel)

Members Of The Jury: Your verdict in this case doesn't complete your jury service as it would in most cases because there is another matter you must now consider.

You must decide whether the Defendant[s], _____, should forfeit certain [money or] property to the United States as a part of the penalty for the crime charged in Count _____ of the indictment.

In a portion of the indictment not previously discussed or disclosed to you, it is alleged that the Defendant[s] got certain [money or] property from committing the offense charged in Count _____. In view of your verdict finding the Defendant[s] guilty of that offense, you must also decide whether the [money or] property should be forfeited to the United States.

To "forfeit" a thing is to be divested or deprived of the ownership of it as a part of the punishment allowed by the law for certain criminal offenses.

To decide whether [money or] property should be forfeited, you should consider all the evidence you have already heard plus any additional evidence that will be presented to you after these instructions.

A copy of the forfeiture allegations of the indictment will be given to you to consider during your supplemental deliberations. It describes in particular the [money or] property allegedly subject to forfeiture to the United States.

[List or summarize the items subject to forfeiture]

To be entitled to the forfeiture of any of those items, the Government must have proved [beyond a reasonable doubt] [by a preponderance of the evidence]:

Option No. 1

(Forfeitures under 18 USC § 982)

First: That the [money or] property to be forfeited constitutes the proceeds the Defendant obtained directly or indirectly as the result of the crime charged in Count _____ of the indictment;

**OR**

Second: That the [money or] property to be forfeited [was derived from] [traceable to] the proceeds the Defendant obtained directly or indirectly as the result of the crime charged in Count _____ of the indictment.

Option No. 2

(RICO - 18 USC § 1963(a))

First: That the [sum of money or proceeds] [property] sought to be forfeited constituted an interest acquired by the Defendant, as charged;

Second: That the interest [was acquired by the Defendant as a result of the conduct of the enterprise's affairs through the pattern of racketeering activity] [constituted or was derived from proceeds that the Defendant obtained, directly or indirectly, from racketeering activity] committed by the Defendants as

charged in Count _____ in violation of Title 18, United States Code, § 1962(c).

Option No. 3

(Child Pornography - 18 USC § 2253)

First: That the property to be forfeited is a visual depiction, or other matter containing a visual depiction, that was [produced] [transported] [received] in violation of [cite statutory offense of conviction].

**OR**

Second: That the property to be forfeited constituted, or is traceable to, gross profits or other proceeds obtained from the offense Defendant was convicted of.

**OR**

Third: That the property to be forfeited was used or intended to be used to commit or to promote committing the offense Defendant was convicted of.

Option No. 4

(Drug Offenses - 21 USC § 853)

First: That the property to be forfeited constitutes, or was derived from, the proceeds the Defendant obtained, directly or indirectly, as the result of committing the offense charged in Count _____ of the indictment,

**OR**

Second: That the property to be forfeited was used, or was intended to be used, in any manner or part, to commit or to help commit, the offense charged in Count _____ of the indictment.

[Before you can find that the Defendant must forfeit any property under either of those standards, you must unanimously agree upon which of the two standards should be applied in forfeiting a particular asset.]

[Proof "beyond a reasonable doubt" has the same meaning that I explained to you in my instructions at the end of the trial.]

**OR**

[A "preponderance of the evidence" simply means an amount of evidence that is enough to persuade you that a claim or contention is more likely true than not true.]

[To be "derived" from something means that the [money or] property under consideration must have been formed or developed out of the original source so as to be directly descended from that source.]

[To be "traceable" to something means that the [money or] property under consideration must have followed an ascertainable course or trail in successive stages of development or progress from the original source.]

[To "facilitate" the commission of an offense means to aid, promote, advance, or make easier, the commission of the act or acts constituting the offense. There must be more than an incidental connection between the property and the offense for you to find that the property facilitated, or was intended to facilitate, committing the offense. But the property doesn't have to be essential to

committing the offense, nor does the property have to have been used exclusively to commit the offense or as the exclusive means of committing the offense. Property used to facilitate an offense can be in virtually any form.]

While deliberating concerning the issue of forfeiture you must not reexamine your previous determination regarding the Defendant's guilt. But all the instructions previously given to you concerning your consideration of the evidence, the credibility of the witnesses, your duty to deliberate together, your duty to base your verdict solely on the evidence without prejudice, bias, or sympathy, and the necessity of a unanimous verdict, will continue to apply during these supplemental deliberations. [The specific instructions I gave you earlier concerning Count _____ and the definitions of the terms "enterprise" and "pattern of racketeering activity" also continue to apply.]

**ANNOTATIONS AND COMMENTS**

Federal Rule of Criminal Procedure 32.2 provides

> (a) Notice To The Defendant. A court shall not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.
>
> * * * * * *
>
> (b)(4) Upon a party's request in a case in which a jury returns a verdict of guilty, the jury shall determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

18 U.S.C. § 982, entitled "Criminal Forfeiture," is a general statute that provides for the forfeiture of property interests as a part of the sentence for a variety of offenses

enumerated in the several subsections of the statute. The definition of the nexus that must be shown to exist between the offense and the property as a prerequisite to forfeiture differs slightly from one subsection to the next:

982(a)(1) "involved in such offense"
"traceable to such property"

982(a)(2) "constituting or derived from proceeds… obtained directly or indirectly as the result"

982(a)(3) "which represents or is traceable to the gross receipts obtained directly or indirectly as a result"

982(a)(4) "obtained directly or indirectly, as a result"

982(a)(5) "which represents or is traceable to the gross receipts obtained directly or indirectly as a result"

982(a)(6) "any conveyance… vessel, vehicle or aircraft used" or "constitutes or is derived from or is traceable to proceeds obtained directly or indirectly from" or "is used to facilitate"

982(a)(7) "constitutes or is derived directly or indirectly from gross proceeds traceable to"

982(a)(8) "used to facilitate" or "constituting, derived from or traceable to"

Extreme care must be taken, therefore, in adapting and tailoring elements of proof as stated in this instruction to the standards stated in the specific subsection of § 982 applicable to the case.

18 U.S.C. § 1963(a) (RICO) provides:

> Whoever violates any provision of section 1962 of this chapter… shall forfeit to the United States (1) any interest the person has acquired or maintained in violation of section 1962; (2) any interest in; security of; claim against; or property or contractual right of any kind affording a source of influence over any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity… in violation of section 1962.

18 U.S.C. § 2253 (Child Pornography) provides:

(a) Property subject to criminal forfeiture. - - A person who is convicted of an offense under this chapter [18 U.S.C.A. § 2251 et seq.] involving a visual depiction described in section 2251, 2251A, 2252, 2252A, or 2260 of this chapter, or who is convicted of an offense under section 2421, 2422, or 2423 of chapter 117 [18 U.S.C.A. § 2421 et seq.], shall forfeit to the United States such person's interest in - -

(1) any visual depiction described in section 2251, 2251A, or 2252 of this chapter, or any book, magazine, periodical, film, videotape, or other matter which contains any such visual depiction, which was produced, transported, mailed, shipped or received in violation of this chapter;

(2) any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from such offense; and

(3) any property, real or personal, used or intended to be used to commit or to promote the commission of such offense.

21 U.S.C. § 853(a) (Drug Offenses) provides:

Any person convicted of a violation of this subchapter of subchapter II of this chapter [21 U.S.C. §§ 951 et seq.] punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law - -

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise [the defendant forfeits any interest in the enterprise itself]

With respect to the forfeitures under 18 U.S.C. § 982, the preponderance of the evidence standard applies. *United States v. Cabeza*, 258 F.3d 1256 (11th Cir. 2001) (holding also that the principle of *Apprendi* does not apply to forfeiture proceedings.)

With respect to the Government's burden of proof under 18 U.S.C. § 1963 (RICO), the Eleventh Circuit has not squarely decided the issue. *See United States v. Goldin Industries, Inc.*, 219 F.3d 1271, 1278 at note 10 (11th Cir. 2000) ("The government

contends for the first time on appeal that the correct burden of proof is preponderance of the evidence rather than beyond a reasonable doubt. We have never decided this issue with respect to RICO's forfeiture provision. We need not decide the issue here…")

Other Circuits, however, have held that the beyond a reasonable doubt standard applies. *See United States v. Pelullo*, 14 F.3d 881, 906 (3d Cir. 1994) (holding that government, in a criminal forfeiture proceeding under 18 U.S.C. § 1963(a), must prove beyond a reasonable doubt that the targeted property was derived from the defendant's racketeering activity); *United States v. Horak*, 833 F.2d 1235, 1243 (7th Cir. 1987). *See also United States v. Houlihan*, 92 F.3d 1271, 1299 at note 33 (1st Cir. 1996) (affirming district court's instruction that the government had the burden of proving entitlement to forfeiture pursuant to 18 U.S.C. § 1963(a) beyond a reasonable doubt, but noting that "the government may have conceded too much," and that the question was open).

In *United States v. Anderson*, 782 F.2d 908, 918 (11th Cir. 1986), the Eleventh Circuit held that "[a] defendant's conviction under the RICO statute subjects *all* of his interest in the enterprise to forfeiture 'regardless of whether those assets were themselves "tainted" by use in connection with the racketeering activity.'"

With respect to forfeitures sought under 21 U.S.C. § 853, the Eleventh Circuit has held that the preponderance of the evidence standard applies. *United States v. Elgersma*, 971 F.2d 690, 697 (11th Cir. 1992) (en banc) (holding that the preponderance standard applies in § 853(a)(1) forfeitures); *United States v. Dicter*, 198 F.3d 1284, 1289 (11th Cir. 1999) (the preponderance of the evidence standard governs forfeitures under § 853(a)(2)).

21 U.S.C. § 853(d) creates a rebuttable presumption that property is subject to forfeiture if the Government proves by a preponderance of the evidence that the drug offender (1) acquired the property during the period of time the offense of conviction was committed, or within a reasonable time thereafter, and (2) there was no likely source for such property other than the offense.

With respect to forfeiture proceedings under 18 U.S.C. § 2253, the statute (subsection (e)) requires proof beyond a reasonable doubt.