# JUDICIAL COUNCIL
# OF
# THE UNITED STATES ELEVENTH JUDICIAL CIRCUIT

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On 30 January 2015, the Judicial Council approved revised and new instructions for the 2010 Eleventh Circuit Pattern Jury Instructions, Criminal Cases. On 10 June 2015, the Judicial Council approved a second set of changes that follow:

## Offense Instructions

1.1 Forcibly Assaulting a Federal Officer: without Use of a Deadly Weapon

1.2 Forcibly Assaulting a Federal Officer: with Use of A deadly Weapon or Inflicting Bodily Injury

35.5 Aiding and Abetting: Possessing a Firearm

35.6 Aiding and Abetting: Using or Carrying a Firearm

35.7 Aiding and Abetting: Using or Carrying and Possessing a Firearm

35.8 Brandishing

40.3 Aggravated Identity Theft

52 Bank Fraud

93.2 Travel with Intent to Engage in Illicit Sexual Conduct

T5 Modified Allen Charge

All other instructions in the 2010 Pattern Jury Instructions for Criminal Cases and the revisions to instructions 4, 21, 34.1, 35.2, 35.3, 35.4, 35.9, 35.10, 41.2, 50.2, 50.3, 50.4, 53, 74.5, and 92.2 approved by the Judicial Council on 30 January 2015 and announced in a memorandum on 30 March 2015 remain in effect. The June 2010 resolution of the Judicial Council of the Eleventh Circuit applies limitations and

conditions upon the use and approval of the 2010 pattern jury instructions. Those limitations and conditions also apply to the instructions listed above.

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

FOR THE JUDICIAL COUNCIL:

James P. Gerstenlauer
Secretary to the Judicial Council

**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.

## O35.5
## Aiding and Abetting: Possessing a Firearm
## 18 U.S.C. § 24(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. § 24(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.

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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. § 24(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.

**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.

**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].

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], only that there was no legal authority for the Defendant to transfer, possess, or use them.

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.

Further, the Government must prove that the means of identification was possessed "during and in relation to" the crime specified in the count of the indictment. The phrase "during and in relation to" means that there must be a

firm connection between the Defendant, the means of identification, and the crime specified in the indictment. The means of identification must have helped with some important function or purpose of the crime, and not simply have been there accidentally or coincidentally. The means of identification at least must facilitate, or have the potential of facilitating, the crime specified in the count of the indictment.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 1028A(a)(1)provides:

> (a) Offenses. - -
>
> > (1) In general. - - Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

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

*Hurtado*'s holding that § 1028A(a)(1)does not require the Government to prove that the defendant obtained another person's identification documents by "stealing" has not been overruled. *See id*. at 608. In other words, the phrase "without lawful authority" prohibits methods of obtaining another person's identification beyond stealing. *See id*.; *see also Flores-Figueroa*, 556 U.S. at 655 (noting that examples of identity theft identified in the legislative history of § 1028A include "dumpster diving," "accessing information that was originally collected for an authorized purpose," "hack[ing] into computers," and "steal[ing] paperwork likely to contain personal

information" (citing H. R. Rep No. 108-528, at 4-5 (2004))).

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

**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 do something with the specific intent to deceive or cheat someone, usually for personal financial gain or to cause financial loss to someone else.

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.

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).

**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).

**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.