Proposed Revisions to the Seventh Circuit Criminal Jury Instructions

The Seventh Circuit Pattern Criminal Jury Instruction Committee submits the attached proposed revised criminal pattern jury instructions for public comment. Each proposed revised instruction is marked "PROPOSED REVISION" and bears in the title a short notation indicating whether the proposed revision involves the instruction, the committee comment, or both. Each proposed revised instruction is followed by the current version of the instruction, marked "CURRENT INSTRUCTION." The proposed revised version of the instruction is redlined to reflect the addition of any text and the current version of the instruction is redlined to reflect the deletion of any text. Each entirely new instruction is marked "NEW INSTRUCTION."

The revisions concern the following instructions:

- 6.09(A) (changes to title only)
- 6.09(B) (new instruction)
- 18 U.S.C. § 201 Official Act (new instruction)
- 18 U.S.C. § 666(a)(1)(B) (changes to instruction and comment)
- 18 U.S.C. § 666(a)(2) (changes to instructions and comment)
- 18 U.S.C. § 1028A (changes to instructions and comment)
- 18 U.S.C. § 1028(d)(7) (changes to comment only)
- 18 U.S.C. § 1030(a)(1) (changes to comment only)
- 18 U.S.C. § 1111 (new instructions)
- 18 U.S.C. § 1112 (new instructions)
- 18 U.S.C. § 1341, 1343 & 1346 (changes to comment only)
- 18 U.S.C. § 1951 Color of Official Right - Definition (changes to comment only)
- 18 U.S.C. § 1951 Sex Trafficking of a Minor or by Force, Fraud, or Coercion (new instruction and comment)
- 18 U.S.C. § 1959(a) (new instruction)
- 18 U.S.C. § 2252A(a)(1) (changes to instruction and comment)
- 18 U.S.C. § 2252A(a)(2)(A) (changes to instruction and comment)
- 18 U.S.C. § 2252A(a)(2)(B) (changes to instruction and comment)
- 18 U.S.C. § 2252A(a)(3)(A) (changes to instruction and comment)
- 18 U.S.C. § 2252A(a)(4)(A) (changes to instruction and comment)
- 18 U.S.C. § 2252A(a)(4)(B) (changes to instruction and comment)
- 18 U.S.C. § 2252A(a)(5)(A) (changes to instruction and comment)
- 18 U.S.C. § 2252A(a)(5)(B) (changes to instruction and comment)
- 18 U.S.C. § 2252A(a)(6)(A), (B) and (C) (changes to instruction and comment)
- 18 U.S.C. § 2252A(a)(7) (changes to instruction and comment)
- 18 U.S.C. § 2422(b) (changes to comments only)

The Committee, which includes judges, prosecutors, defense attorneys, and law professors, welcomes comment before submission of the proposed revisions to the Circuit Council for approval and promulgation. Please email your comments to jicomments@ca7.uscourts.gov, with a subject line of "Pattern Jury Instruction Comment." The Committee will accept comments through November 20, 2018.

Respectfully,

The Honorable Amy J. St. Eve
Chair, Seventh Circuit Pattern
Criminal Jury Instructions Committee

PROPOSED REVISION

6.09(A) VOLUNTARY INTOXICATION
[changes to title only]

You have heard evidence that the defendant was voluntarily intoxicated by [name intoxicant(s)] at the time of the commission of the offense[s] charged in [Count[s] ___ of] the indictment. You may consider this evidence in determining whether the defendant was capable of [insert intent element of crime at issue, *e.g.*, acting with intent to commit murder, acting with intent to defraud, corruptly influencing the due administration of justice].

Committee Comment

Voluntary intoxication is not generally a defense to a general intent crime, that is, one that is done "knowingly." *United States v. Smith*, 606 F.3d 1270, 1281–82 (10th Cir. 2010). But it can negate the intent required to prove crimes with a specific intent element. To warrant a voluntary intoxication instruction, the defendant must produce some evidence that he was intoxicated enough "to completely lack the capacity to form the requisite [specific] intent." *United States v. Nacotee*, 159 F.3d 1073, 1076 (7th Cir. 1998). "A high degree of intoxication can conceivably, under limited circumstances, render the defendant incapable of attaining the required state of mind to commit the crime." *United States v. Boyles*, 57 F.3d 535, 541 (7th Cir. 1995). (Note that Federal Rule of Evidence 704(b) limits a defendant's ability to prove this point at trial by means of expert testimony. *Id.* at 543.)

Where the defense only apples to certain counts in a multi-count indictment, the court should specifically reference those counts to which it does apply. *United States v. Kenyon*, 481 F.3d 1054, 1070–71 (8th Cir. 2007).

CURRENT INSTRUCTION
6.09 VOLUNTARY INTOXICATION

You have heard evidence that the defendant was voluntarily intoxicated by [name intoxicant(s)] at the time of the commission of the offense[s] charged in [Count[s] ___ of] the indictment. You may consider this evidence in determining whether the defendant was capable of [insert intent element of crime at issue, *e.g.*, acting with intent to commit murder, acting with intent to defraud, corruptly influencing the due administration of justice].

Committee Comment

Voluntary intoxication is not generally a defense to a general intent crime, that is, one that is done “knowingly.” *United States v. Smith*, 606 F.3d 1270, 1281–82 (10th Cir. 2010). But it can negate the intent required to prove crimes with a specific intent element. To warrant a voluntary intoxication instruction, the defendant must produce some evidence that he was intoxicated enough “to completely lack the capacity to form the requisite [specific] intent.” *United States v. Nacotee*, 159 F.3d 1073, 1076 (7th Cir. 1998). “A high degree of intoxication can conceivably, under limited circumstances, render the defendant incapable of attaining the required state of mind to commit the crime.” *United States v. Boyles*, 57 F.3d 535, 541 (7th Cir. 1995). (Note that Federal Rule of Evidence 704(b) limits a defendant’s ability to prove this point at trial by means of expert testimony. *Id*. at 543.)

Where the defense only apples to certain counts in a multi-count indictment, the court should specifically reference those counts to which it does apply. *United States v. Kenyon*, 481 F.3d 1054, 1070–71 (8th Cir. 2007).

NEW INSTRUCTION
6.09(B) DIMINISHED CAPACITY

You have heard evidence that the defendant may have had [*insert mental disorder*] at the time of the commission of the offense[s] charged in [Count[s] ___ of] the indictment. You may consider this evidence in determining whether the defendant was capable of [*insert intent element of crime at issue, e.g., acting with intent to commit murder, acting with intent to defraud, corruptly influencing the due administration of justice*].

Committee Comment

Diminished capacity is not a defense to a general intent crime, that is, one that must be committed "knowingly," but it may negate the intent required to prove a crime with a specific intent element. *See United States v. Navarrete*, 125 F.3d 559, 563 n.1 (7th Cir. 1997) (noting that conspiracy to distribute narcotics is a specific intent crime); *United States v. Reed*, 991 F.2d 399, 400-01 (7th Cir. 1993) (noting that firearm-possession offenses are general intent crimes). *See also, e.g., United States v. Moore*, 425 F.3d 1061, 1065 n.3 (7th Cir. 2005) (diminished capacity defense was not available for crime of distribution of narcotics because it is a general intent crime); *United States v. Fazzini*, 871 F.2d 635, 641 (7th Cir. 1989) (diminished capacity is not a defense to bank robbery because it is a general intent crime).

Where the defense only apples to certain counts in a multi-count indictment, the court should specifically reference those counts to which it does apply. *United States v. Kenyon*, 481 F.3d 1054, 1070–71 (8th Cir. 2007).

NEW INSTRUCTION
18 U.S.C. § 201 OFFICIAL ACT

An "official act" is a decision or action on[, or an agreement to make a decision or take action on,] a [question], [matter], [cause], [suit], [proceeding] or [controversy], which may at any time be pending, or which may by law be brought before the public official, in his official capacity[, or in his place of trust or profit].

[A "question" or "matter" must involve a formal exercise of governmental power and must be something specific and focused.]

In this case, the [question(s)], [matter(s)], [cause(s)], [suit(s)], [proceeding(s)] or [controversy(ies)] at issue [is] [are] [describe in specific and focused terms].

[To qualify as a decision or action on a [question], [matter], [cause], [suit], [proceeding] or [controversy], the public official must do more than merely set up a meeting, host an event, or call another public official. [But a public official does make a decision or take action on a [question], [matter], [cause], [suit], [proceeding] or [controversy] when he uses his official position to exert pressure on another official to perform an official act, or to advise another official, knowing or intending that the advice will form the basis for an official act by another official.]]

Committee Comment

In *McDonnell v. United States*, 136 S. Ct. 2355, (2016), the Supreme Court interpreted the term "official act" in the context of federal bribery laws. Specifically, McDonnell was charged with honest services fraud, 18 U.S.C. § 1346, and Hobbs act extortion, 18 U.S.C. § 1951. To define what qualifies as an "official act" for purposes of bribery under those statutes, the Supreme Court used and interpreted the definition of that term found in 18 U.S.C. § 201(a)(3). The Committee thus adopts *McDonnell*'s definition here, even though the McDonnell prosecution was brought under different bribery laws.

The Supreme Court held that a "question" or "matter" must involve, like a "cause, suit, proceeding, or controversy," "a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." 136 S. Ct. at 2372. Like a lawsuit, agency determination, or committee hearing, the question or matter must be "specific and focused." *Id.* at 2372. That could include questions or matters such as whether researchers at a state university would initiate a study of a particular drug's efficacy, or whether a state agency would allocate grant money to the study of the drug. *Id.* at 2374.

In addition to the requirement that the question or matter be specific and focused, the "public official must make a decision or take an action *on* that question or matter, or agree to do so." *Id.* at 2370 (emphasis in original). Certain commonplace acts, such as setting up a meeting, contacting another official, or organizing an event—without more—do *not* qualify as making a "decision" or taking "action" on a question or matter. *Id.* at 2371. That is not to say, however, that the government must prove that the official directly made the ultimate decision or directly took the ultimate action. Making a decision or taking an action on a question or matter can include using the official's position "to exert pressure on *another* official to perform an 'official act.'" *Id.* (emphasis in original). And it does include using the official's position "to provide advice to another official, knowing or intending that such advice will form the basis for an 'official act' by another official." *Id.*

The first paragraph of the instruction is a quote of the entirety of Section 201(a)(3), so the parties should tailor it to the specific type of official act at issue in their case and omit what could otherwise be unnecessary and confusing terms. For example, most bribery cases likely will involve a defendant's "official capacity," rather than the defendant's "place of trust or profit," which is not a well-defined term.

In cases where something less concrete than a cause, suit, proceeding, or controversy is at issue—in other words, a "question" or "matter" is at issue—the second paragraph may be necessary to ensure that the jury does not interpret "question" or "matter" at too high of a level of generality.

The third paragraph (the description of the question or matter) must be tailored to the particular case. *McDonnell* requires that the question or matter involve a formal exercise of governmental power and must be something specific and focused.

The fourth paragraph also must be tailored to the particular case, depending on the government's and defense's respective theories.

PROPOSED REVISION

18 U.S.C. § 666(a)(1)(B) ACCEPTING A BRIBE

[changes to instruction and comment]

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] bribery. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [five] following elements beyond a reasonable doubt:

1. That the defendant was an agent of [an organization; a [state; local; Indian tribal] government, or any agency of that government] [, such as [name charged entity here if status is not in dispute]]; and

2. That the defendant solicited, demanded, accepted or agreed to accept a thing of value from another person; and

3. That the defendant acted corruptly with the intent to be influenced or rewarded in connection with some business, transaction or series of transactions of the [organization; government; government agency]; and

4. That this business, transaction or series of transactions involved a thing of a value of $5,000 or more; and

5. That the [organization; government; government agency], in a one-year period, received benefits of more than $10,000 under any Federal program involving a grant, contract subsidy, loan, guarantee, insurance or other assistance. [The one-year period must begin no more than 12 months before the defendant committed these acts and must end no more than 12 months afterward.]

[A person acts corruptly when that person acts with the understanding that something of value is to be offered or given to reward or influence him/her in connection with his [organizational; official] duties.]

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

The government is not required to prove that the bribe or other payment affected the federal funds received by the organization or agency. *Salinas v. United States*, 522 U.S. 52, 55–60 (1997). The jury should be so instructed in the event a contrary position is raised.

The definition of "corruptly" set forth above is derived from *United States v. Bonito*, 57 F.3d 167, 171 (2nd Cir. 1995). The term has been defined somewhat differently in the context of other criminal statutes. See, e.g., *Roma Construction Co. v. aRusso*, 96 F.3d 566, 573–74 (1st Cir. 1996). It is not necessary that this instruction contain the word "bribe" or "bribery," but it must define the term "corruptly." See *United States v. Medley*, 913 F.2d 1248 (7th Cir. 1990).

A defendant need only be partially motivated by the expectation of or desire for reward. *United States v. Coyne*, 4 F.3d 100 (2nd Cir. 1993).

The agent need not have unilateral control over the business or transaction; influence is sufficient. *United States v. Gee*, 432 F.3d 713, 715 (7th Cir. 2005) (rejecting defense argument that legislator did not control executive-branch grants: "This confuses influence with power to act unilaterally.... One does not need to live in Chicago to know that a job description is not a complete measure of clout.")

The "business" or "transaction" of the government agency or organization may include the "intangible" business or transaction of the agency or organization, "such as the law-enforcement 'business' of a police department that receives federal funds." *United States v. Robinson*, 663 F.3d 265, 271–73 (7th Cir. 2011). The Committee notes that, in *McDonnell v. United States*, 136 S. Ct. 2355, 2371-72 (2016), the Supreme Court interpreted what constitutes an "official act" for purposes of three bribery laws: 18 U.S.C. § 201 (federal-employee bribery); § 1346 (honest services fraud); and § 1951 (Hobbs Act extortion). Section 666 does not use the term "official act," and instead uses "any business, transaction, or series of transactions of such organization, government, or agency." § 666(a)(1)(B), (a)(1)(2). But lawyers and judges should consider the potential impact of *McDonnell* on § 666 cases.

The definition of the one-year federal-funds period reflects 18 U.S.C. § 666(d)(5).

CURRENT INSTRUCTION

18 U.S.C. § 666(a)(1)(B) ACCEPTING A BRIBE

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] bribery. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [five] following elements beyond a reasonable doubt:

1. That the defendant was an agent of [an organization; a [state; local; Indian tribal] government, or any agency of that government] [, such as [name charged entity here if status is not in dispute]]; and

2. That the defendant solicited, demanded, accepted or agreed to accept ~~something~~ of value from another person; and

3. That the defendant acted corruptly with the intent to be influenced or rewarded in connection with some business, transaction or series of transactions of the [organization; government; government agency]; and

4. That this business, transaction or series of transactions involved ~~something~~ of a value of $5,000 or more; and

5. That the [organization; government; government agency], in a one-year period, received benefits of more than $10,000 under any Federal program involving a grant, contract subsidy, loan, guarantee, insurance or other assistance. [The one-year period must begin no more than 12 months before the defendant committed these acts and must end no more than 12 months afterward.]

[A person acts corruptly when that person acts with the understanding that something of value is to be offered or given to reward or influence him/her in connection with his [organizational; official] duties.]

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

The government is not required to prove that the bribe or other payment affected the federal funds received by the organization or agency. *Salinas v. United States*, 522 U.S. 52, 55–60 (1997). The jury should be so instructed in the event a contrary position is raised.

The definition of "corruptly" set forth above is derived from *United States v. Bonito*, 57 F.3d 167, 171 (2nd Cir. 1995). The term has been defined somewhat differently in the context of other criminal statutes. See, *e.g.*, *Roma Construction Co. v. aRusso*, 96 F.3d 566, 573–74 (1st Cir. 1996). It is not necessary that this instruction contain the word "bribe" or "bribery," but it must define the term "corruptly." See *United States v. Medley*, 913 F.2d 1248 (7th Cir. 1990).

A defendant need only be partially motivated by the expectation of or desire for reward. *United States v. Coyne*, 4 F.3d 100 (2nd Cir. 1993).

The agent need not have unilateral control over the business or transaction; influence is sufficient. *United States v. Gee*, 432 F.3d 713, 715 (7th Cir. 2005) (rejecting defense argument that legislator did not control executive-branch grants: "This confuses influence with power to act unilaterally.... One does not need to live in Chicago to know that a job description is not a complete measure of clout.")

The definition of the one-year federal-funds period reflects 18 U.S.C. § 666(d)(5).

~~In *United States v. Blagojevich*, 794 F.3d 729, 735 (7th Cir. 2015), the Seventh Circuit limited the definition of bribery in 18 U.S.C. § 666, § 1951, and § 1346. In that case, a governor offered to use his official authority to appoint a person to a Senate seat in exchange for the President's use of his official authority to appoint the governor to a Cabinet position. *Blagojevich* held that the proposed exchange did not fit within the definition of bribery because the deal was a proposed "political logroll." *Id.* at 735. In an appropriate case, if there is a risk that the jury might premise a bribery verdict on conduct that is outside the definition of bribery as interpreted by *Blagojevich*, then an instruction might be warranted to exclude that possibility.~~

PROPOSED REVISION

18 U.S.C. § 666(a)(2) PAYING A BRIBE

[changes to instruction and comment]

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [paying or offering to pay] a bribe. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. That the defendant gave, offered, or agreed to give a thing of value to another person; and

2. That the defendant did so corruptly with the intent to influence or reward an agent of [an organization; a [State; local; Indian tribal] government, or any agency thereof] in connection with some business, transaction, or series of transactions of the [organization; government; government agency]; and

3. That this business, transaction, or series of transactions involved a thing with a value of $5,000 or more; and

4. That the [organization; government; government or agency], in a one-year period, received benefits of more than $10,000 under any Federal program involving a grant, contract subsidy, loan, guarantee, insurance or other assistance. [The one-year period must begin no more than 12 months before the defendant committed these acts and must end no more than 12 months afterward.]

[A person acts corruptly when that person acts with the intent that something of value is given or offered to reward or influence an agent of an [organization; government; government agency] in connection with the agent's [organizational; official] duties.]

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

The government is not required to prove that the bribe or other payment affected the federal funds received by the organization or agency. *Sabri v. United States*, 541 U.S. 600, 606 (2004); *Salinas v. United States*, 522 U.S. 52, 55–60 (1997). The jury should be so instructed in the event a contrary position is raised.

The definition of "corruptly" set forth above is derived from *United States v. Bonito*, 57 F.3d 167, 171 (2nd Cir. 1995). The term has been defined somewhat differently in the context of other criminal statutes. See, e.g., *Roma Construction Co. v. aRusso*, 96 F.3d 566, 573–74 (1st Cir. 1996). It is not necessary that this instruction contain the word "bribe" or "bribery," but it must define the term "corruptly." See *United States v. Medley*, 913 F.2d 1248 (7th Cir. 1990).

The agent need not have unilateral control over the business or transaction; influence is sufficient. *United States v. Gee*, 432 F.3d 713, 715 (7th Cir. 2005) (rejecting defense argument that legislator did not control executive-branch grants: "This confuses influence with power to act unilaterally.... One does not need to live in Chicago to know that a job description is not a complete measure of clout.")

The "business" or "transaction" of the government agency or organization may include the "intangible" business or transaction of the agency or organization, "such as the law-enforcement 'business' of a police department that receives federal funds." *United States v. Robinson*, 663 F.3d 265, 271–73 (7th Cir. 2011). The Committee notes that, in *McDonnell v. United States*, 136 S. Ct. 2355, 2371-72 (2016), the Supreme Court interpreted what constitutes an "official act" for purposes of three bribery laws: 18 U.S.C. § 201 (federal-employee bribery); § 1346 (honest services fraud); and § 1951 (Hobbs Act extortion). Section 666 does not use the term "official act," and instead uses "any business, transaction, or series of transactions of such organization, government, or agency." § 666(a)(1)(B), (a)(1)(2). But lawyers and judges should consider the potential impact of *McDonnell* on § 666 cases.

The definition of the one-year federal-funds period reflects 18 U.S.C. § 666(d)(5).

CURRENT INSTRUCTION
18 U.S.C. § 666(a)(2) PAYING A BRIBE

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [paying or offering to pay] a bribe. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. That the defendant gave, offered, or agreed to give ~~something~~ of value to another person; and

2. That the defendant did so corruptly with the intent to influence or reward an agent of [an organization; a [State; local; Indian tribal] government, or any agency thereof] in connection with some business, transaction, or series of transactions of the [organization; government; government agency]; and

3. That this business, transaction, or series of transactions involved ~~something~~ with a value of $5,000 or more; and

4. That the [organization; government; government or agency], in a one-year period, received benefits of more than $10,000 under any Federal program involving a grant, contract subsidy, loan, guarantee, insurance or other assistance. [The one-year period must begin no more than 12 months before the defendant committed these acts and must end no more than 12 months afterward.]

[A person acts corruptly when that person acts with the intent that something of value is given or offered to reward or influence an agent of an [organization; government; government agency] in connection with the agent's [organizational; official] duties.]

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

The government is not required to prove that the bribe or other payment affected the federal funds received by the organization or agency. *Sabri v. United*

States, 541 U.S. 600, 606 (2004); *Salinas v. United States*, 522 U.S. 52, 55–60 (1997). The jury should be so instructed in the event a contrary position is raised.

The definition of "corruptly" set forth above is derived from *United States v. Bonito*, 57 F.3d 167, 171 (2nd Cir. 1995). The term has been defined somewhat differently in the context of other criminal statutes. See, *e.g.*, *Roma Construction Co. v. aRusso*, 96 F.3d 566, 573–74 (1st Cir. 1996). It is not necessary that this instruction contain the word "bribe" or "bribery," but it must define the term "corruptly." See *United States v. Medley*, 913 F.2d 1248 (7th Cir. 1990).

The agent need not have unilateral control over the business or transaction; influence is sufficient. *United States v. Gee*, 432 F.3d 713, 715 (7th Cir. 2005) (rejecting defense argument that legislator did not control executive-branch grants: "This confuses influence with power to act unilaterally.... One does not need to live in Chicago to know that a job description is not a complete measure of clout.")

The definition of the one-year federal-funds period reflects 18 U.S.C. § 666(d)(5).

The "business" or "transaction" of the government agency or organization may include the "intangible" business or transaction of the agency or organization, "such as the law-enforcement 'business' of a police department that receives federal funds." *United States v. Robinson*, 663 F.3d 265, 271–73 (7th Cir. 2011).

~~In *United States v. Blagojevich*, 794 F.3d 729, 735 (7th Cir. 2015), the Seventh Circuit limited the definition of bribery in 18 U.S.C. § 666, § 1951, and § 1346. In that case, a governor offered to use his official authority to appoint a person to a Senate seat in exchange for the President's use of his official authority to appoint the governor to a Cabinet position. *Blagojevich* held that the proposed exchange did not fit within the definition of bribery because the deal was a proposed "political logroll." *Id.* at 735. In an appropriate case, if there is a risk that the jury might premise a bribery verdict on conduct that is outside the definition of bribery as interpreted by *Blagojevich*, then an instruction might be warranted to exclude that possibility.~~

PROPOSED REVISION

18 U.S.C. § 1028A AGGRAVATED IDENTITY THEFT – ELEMENTS

[changes to instruction and comment]

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] aggravated identity theft. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [three; five] following elements beyond a reasonable doubt:

1. The defendant knowingly transferred, possessed, or used a means of identification;

2. The defendant knew the means of identification belonged to another person;

3. The defendant knew that such transfer, possession or use was without lawful authority;

4. The defendant did so during and in relation to [name charged felony].

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

This instruction may be used alternatively for both general and terrorism-related aggravated-identity-theft offenses. 18 U.S.C. § 1028A(a)(1)–(2). Use the alternate first element for the terrorism offense under § 1028A(a)(2). The term "false identification document" in the second element should also be used only in connection with the terrorism offense. The fourth and fifth elements are applicable only if the offense charged is § 1028A(a)(1), involving a means of identification rather than a false identification document.

In *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), the Supreme Court held that 18 U.S.C. § 1028A(a)(1) required the government to prove that the defendant knew that the means of identification at issue belonged to another person.

In *United States v. LaFaive*, 618 F.3d 613, 615–18 (7th Cir. 2010), the Seventh Circuit decided that the phrase "another person" in subsection (a)(1) of § 1028A includes both living and deceased persons. The court stated that its conclusion

was supported by the plain language of § 1028A(a)(1), the structure of § 1028A, and decisions of other courts. In *United States v. Aslan*, 644 F.3d 526, 550 (7th Cir. 2011), the court held that a defendant must know that the "means of identification" belonged to a real person, not a purely fictitious creation not tied to any person. In *United States v. Spears*, 729 F.3d 753, 757 (7th Cir. 2013), the court ruled that "another person" means a "person who did not consent to the information's use, rather than a person other than the defendant." Further, in *United States v. Thomas*, 763 F.3d 689, 692-93 (7th Cir. 2014), the court found that forging someone's name on a document is a "knowing use" of that name "without lawful authority" and that a name is a "means of identification" within the meaning of the statute. The court also outlined the elements of the offense that must be proven to sustain a violation of the statute. *Id.* at 692.

The term "knowingly" is defined in Pattern Instruction 4.10, which should also be given to define the term "knew" in the third element of this instruction.

CURRENT INSTRUCTION

18 U.S.C. § 1028A AGGRAVATED IDENTITY THEFT – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] aggravated identity theft. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [three; five] following elements beyond a reasonable doubt:

~~[1. The defendant committed the felony offense of [title of offense] as charged in Count [__]];~~

~~– or –~~

~~[1. The defendant committed [the terrorism offense of [title of offense] as charged in Count [__]];~~

~~2. During and in relation to that offense, the defendant knowingly [transferred; possessed; used] a [means of identification; false identification document]; [and]~~

~~3. The defendant did so without lawful authority[.] [; and]~~

~~[4. The means of identification belonged to another person; and~~

~~5. The defendant knew that the means of identification belonged to another person.]~~

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

This instruction may be used alternatively for both general and terrorism-related aggravated-identity-theft offenses. 18 U.S.C. § 1028A(a)(1)–(2). Use the alternate first element for the terrorism offense under § 1028A(a)(2). The term "false identification document" in the second element should also be used only in connection with the terrorism offense. The fourth and fifth elements are applicable only if the offense charged is § 1028A(a)(1), involving a means of identification rather than a false identification document.

In *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), the Supreme Court held that 18 U.S.C. § 1028A(a)(1) required the government to prove that the defendant knew that the means of identification at issue belonged to another person.

In *United States v. LaFaive*, 618 F.3d 613, 615–18 (7th Cir. 2010), the Seventh Circuit decided that the phrase "another person" in subsection (a)(1) of § 1028A includes both living and deceased persons. The court stated that its conclusion was supported by the plain language of § 1028A(a)(1), the structure of § 1028A, and decisions of other courts.

PROPOSED REVISION

18 U.S.C. § 1028(d)(7) DEFINITION OF "MEANS OF IDENTIFICATION"

[changes to comment only]

"Means of identification" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual. A means of identification includes any

[name; social security number; date of birth; official State or government issued driver's license or identification number; alien registration number; government passport number; employer or taxpayer identification number.]

[unique biometric data, such as fingerprint, voice print, retina or iris image; or other unique physical representation.]

[unique electronic [identification number; address; routing code.]

[electronic serial number or any other number or signal that identifies a specific telecommunications instrument or account; a specific communication transmitted from a telecommunications instrument.]

[card; plate; code; account number; electronic serial number; mobile identification number; personal identification number; or other telecommunications service, equipment, or instrument identifier; or other means of account access] that can be [used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value; used to initiate a transfer of funds (other than a transfer originated solely by paper instrument).]

Committee Comment

This instruction is applicable to offenses under 18 U.S.C. § 1028(a)(7)–(8) and § 1028A(a)(1)–(2) and the definitions of "authentication feature," "issuing authority" and "false authentication feature."

The statutory definition of "means of identification" provides an uncommonly long list of examples, all of which are reproduced here as alternative sets of examples. In crafting a jury instruction from this pattern definition, the court should incorporate only those examples that are most relevant to the facts of the particular case on trial.

The final set of examples of a "means of identification" provided by § 1028(d)(7)(D) contains a cross-reference to § 1029(e)'s definitions of "telecommunication identifying information" and "access device." Accordingly, the final two sets of examples in this pattern definition reproduce the definitions of those terms provided by § 1029(e)(1), (11).

In *United States v. Thomas*, 763 F.3d 689, 692-93 (7th Cir. 2014), the court found that a name is a "means of identification" within the meaning of the statute.

CURRENT INSTRUCTION

18 U.S.C. § 1028(d)(7) DEFINITION OF "MEANS OF IDENTIFICATION"

"Means of identification" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual. A means of identification includes any

[name; social security number; date of birth; official State or government issued driver's license or identification number; alien registration number; government passport number; employer or taxpayer identification number.]

[unique biometric data, such as fingerprint, voice print, retina or iris image; or other unique physical representation.]

[unique electronic [identification number; address; routing code].]

[electronic serial number or any other number or signal that identifies a specific telecommunications instrument or account; a specific communication transmitted from a telecommunications instrument.]

[[card; plate; code; account number; electronic serial number; mobile identification number; personal identification number; or other telecommunications service, equipment, or instrument identifier; or other means of account access] that can be [used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value; used to initiate a transfer of funds (other than a transfer originated solely by paper instrument).]

Committee Comment

This instruction is applicable to offenses under 18 U.S.C. § 1028(a)(7)–(8) and § 1028A(a)(1)–(2) and the definitions of "authentication feature," "issuing authority" and "false authentication feature."

The statutory definition of "means of identification" provides an uncommonly long list of examples, all of which are reproduced here as alternative sets of examples. In crafting a jury instruction from this pattern definition, the court should incorporate only those examples that are most relevant to the facts of the particular case on trial.

The final set of examples of a "means of identification" provided by § 1028(d)(7)(D) contains a cross-reference to § 1029(e)'s definitions of "telecommunication identifying information" and "access device." Accordingly, the final two sets of examples in this pattern definition reproduce the definitions of those terms provided by § 1029(e)(1), (11).

~~Finally, for § 1028A purposes, a person's name, by itself, might not constitute a "means of identification of another." The Fourth Circuit has held that such a means of identification must contain other, valid information, in addition to a person's name, which identifies a specific individual. *United States v. Mitchell*, 518 F.3d 230, 235 (4th Cir. 2008). In *Mitchell*, the defendant was charged under § 1028A because he used a Georgia driver's license to commit bank fraud. The license bore the name "Marcus Jackson" (not the defendant's name). There were two Marcus Jacksons with driver's licenses in Georgia but neither had the same license number as the one on the defendant's license. Moreover, the defendant's license did not accurately state the birthday or address of either of the real Marcus Jacksons. The court reversed the defendant's § 1028A conviction because nothing established that the means of identification at issue was in fact the "means of identification of another person." The ID was fake. To sustain a conviction under § 1028A, according to the Fourth Circuit, the means of identification must contain some "valid unique identifier" to establish that the identification did in fact belong to someone else. *Id.* at 235–36.~~

PROPOSED REVISION

18 U.S.C. § 1030(a)(1) OBTAINING INFORMATION FROM COMPUTER INJURIOUS TO THE UNITED STATES – ELEMENTS

[changes to comment only]

[The indictment charges the defendant[s] with; Count[s]__ of the indictment charge[s] the defendant[s] with] obtaining government protected information from a computer. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly [accessed a computer without authorization; exceeded his authorized access to a computer]; and

2. In doing so, the defendant obtained [information that had been determined by the United States Government to require protection against disclosure for reasons of national defense or foreign relations; data regarding the design, manufacture or use of atomic weapons]; and

3. The defendant obtained the [information; data] with reason to believe that the information could be used to injure the United States or to the advantage of any foreign nation; and

4. The defendant willfully [communicated; delivered; transmitted] the [information; data] to any person not entitled to receive it] [retained the [information; data] and failed to deliver it to the officer or employee of the United States entitled to receive it].

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

The statute includes "causes to be communicated, delivered, or transmitted" and "attempts to communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted." The "causes to be communicated, delivered, or transmitted" and "attempts to communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted" language should be used where relevant to the particular case on trial. When the indictment alleges an attempt,

the Pattern Instruction 4.09 for attempt should also be employed

The term "knowingly" is defined in Pattern Instruction 4.10, which should be given to define the term "knowingly" in the first element of this instruction.

CURRENT INSTRUCTION

18 U.S.C. § 1030(a)(1) OBTAINING INFORMATION FROM COMPUTER INJURIOUS TO THE UNITED STATES – ELEMENTS

[The indictment charges the defendant[s] with; Count[s]__ of the indictment charge[s] the defendant[s] with] obtaining government protected information from a computer. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly [accessed a computer without authorization; exceeded his authorized access to a computer]; and

2. In doing so, the defendant obtained [information that had been determined by the United States Government to require protection against disclosure for reasons of national defense or foreign relations; data regarding the design, manufacture or use of atomic weapons]; and

3. The defendant obtained the [information; data] with reason to believe that the information could be used to injure the United States or to the advantage of any foreign nation; and

4. The defendant willfully [[communicated; delivered; transmitted] the [information; data] to any person not entitled to receive it] [retained the [information; data] and failed to deliver it to the officer or employee of the United States entitled to receive it].

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

The statute includes "causes to be communicated, delivered, or transmitted" and "attempts to communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted." The "causes to be communicated, delivered, or transmitted" and "attempts to communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted" language should be used where relevant to the particular case on trial. When the indictment alleges an attempt,

the Pattern Instruction 4.09 for attempt should also be employed.

NEW INSTRUCTION

18 U.S.C. § 1111 FIRST DEGREE MURDER – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] murder in the first degree. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. Within the [special maritime; territorial jurisdiction] of the United States;

2. Defendant unlawfully killed [X];

3. With malice aforethought; and

4. With premeditation.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge]. [You would then need to consider the charge of second-degree murder, which I will explain to you shortly.]

Committee Comment

Generally, "premeditation" is the element that distinguishes first degree murder from second degree murder. See *United States v. Delaney*, 717 F.3d 553, 555-56 (7th Cir. 2013) (premeditation distinguishes first and second-degree murder). However, 18 U.S.C. § 1111 provides that murder committed under any of the following circumstances also constitutes murder in the first degree (examples of premeditation or a premeditation substitute):

[by poison]
[by lying in wait]
[during the perpetration of, or attempt to perpetrate [arson] [escape] [murder] [kidnapping] [treason] [espionage] [sabotage] [aggravated sexual abuse or sexual abuse] [child abuse] [burglary] [robbery]]
[as part of a pattern or practice of assault or torture against a child or children]
[as the result of a premeditated design to affect the death of any human being other than him who is killed].

The United States Supreme Court has held that the burden is upon the government to prove the absence of heat of passion when the issue is properly raised. *Mullaney v. Wilbur*, 421 U.S. 684, 697-98 (1975). In that circumstance, the Committee recommends adding a fifth element:

5. Not in the heat of passion.

In *Mullaney v. Wilbur*, 421 U.S. 684, 697-98 (1975), Maine's murder statute defined murder as a killing with "malice aforethought," and malice aforethought was defined as a state of mind consisting of, among other things, an intent to kill "without considerable provocation." A killing with provocation was classified as manslaughter and subject to a lower punishment. In *Mullaney*, the Supreme Court held that the defendant's due process rights were violated by Maine's decision to place upon the defendant the burden of proving legal provocation. Because provocation negated the "malice aforethought" required to convict him of murder, the approach used in Maine violated *In re Winship*, 397 U.S. 358 (1970), which required the government to prove "beyond a reasonable doubt every fact necessary to constitute the crime charged." Instructions containing the elements and definitions applicable to voluntary manslaughter should then also be given. The Seventh Circuit discussion in *United States v. Delaney*, 717 F. 3d 553 (7th Cir. 2013), provides guidance on proper jury instruction in murder cases.

For many years, precedent also dictated that in cases where self-defense is properly invoked, a fifth element "not in self-defense" should also be added, thereby requiring the United States to disprove the defense. Following the Supreme Court's decision in *Dixon v. United States*, 548 U.S. 1 (2006), the issue of which party bears the burden of proof is unsettled. The Court in *Dixon* held that burden of proving the defense of duress is on the defendant. The most recent Seventh Circuit opinion addressing self-defense, *United States v. White Feather,* 768 F.3d 735 (7th Cir. 2014) affirmed the trial court's refusal of a jury instruction on the issue of self-defense but did not address the burden of proof. *See also* Michael D. Monico & Barry A. Spevack, Federal Criminal Practice: Seventh Circuit Criminal Handbook § 411 (2015) (discussing *White Feather,* "affirmative" as opposed to "substantive" defenses, and the burden of proof). Cf. *Patterson v. New York*, 432 U.S. 197, 207-09 (1977), in which the Supreme Court held that the government is not required to "prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree or culpability or the severity of the punishment."

NEW INSTRUCTION

18 U.S.C. §§ 1111, 1112 JURISDICTION

[The parties have agreed; The Court takes judicial notice] that the [charged location] is within the [special maritime; territorial jurisdiction] of the United States]. You should, therefore, find Element #1 as proven.

Committee Comment

The Committee suggests that this element will rarely be at issue and will be amenable to either a stipulation or a finding by judicial notice. 18 U.S.C. § 7 describes the locations included in the special maritime and territorial jurisdiction of the United States, and also includes Indian Territory when murder is the charged crime. *See,* 18 U.S.C. § 1152.

NEW INSTRUCTION

18 U.S.C. §§ 1111, 1112 CONDUCT CAUSED DEATH

That "defendant unlawfully killed [X]"—requires the government to prove that the defendant's conduct caused [X]'s death. This means that the government must prove that the defendant injured [X], or caused [his; her] injury, from which [X] died.

Committee Comment

If a defendant commits an unintended killing while committing another felony, the defendant can be convicted of murder for causing the death. *Dean v. United States*, 556 U.S. 568, 575 (2009) (citing 18 U.S.C. § 1111).

NEW INSTRUCTION
18 U.S.C. § 1111 DEFINITION OF MALICE AFORETHOUGHT

A person acts with "malice aforethought" if the person takes someone else's life deliberately and intentionally, or willfully acts with callous disregard for human life, knowing that a serious risk of death or serious bodily harm would result.

NEW INSTRUCTION

18 U.S.C. § 1111 DEFINITION OF PREMEDITATION

Premeditation requires planning and deliberation beyond the simple conscious intent to kill. Enough time must pass between the formation of the plan and fatal act for the defendant to have deliberated, and the defendant must have, in fact, deliberated during that time.

Committee Comment

Premeditation is the difference between first and second-degree murder. *United States v. Delaney*, 717 F.3d 553, 555-56 (7th Cir. 2013). In *United States v. Bell*, the Seventh Circuit noted, "Premeditation requires planning and deliberation beyond the simple conscious intent to kill. There must be an appreciable elapse of time between the formation of a design and the fatal act, [citations omitted] although no specific period of time is required. [Citations omitted.] But more is required than the simple passage of time: the defendant must, in fact, have deliberated during that time period." *United States v. Bell,* No. 14-3470, 2016 WL 629524, at *7 (7th Cir. Feb. 17, 2016)

That the death resulted from another predetermined criminal act does not make the death premeditated. *United States v. Prevatte*, 16 F.3d 767, 780 (7th Cir. 1994).

Premeditation may be proved by circumstantial evidence. *Bell at *7.*

NEW INSTRUCTION
18 U.S.C. § 1111 SECOND DEGREE MURDER – ELEMENTS

If you have found the defendant not guilty of the charge of murder in the first degree, or if you cannot unanimously agree that the defendant is guilty or not guilty of murder in the first degree, you must consider whether the government has proven the charge of murder in the second degree. In order for you to find the defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. Within the [special maritime; territorial jurisdiction] of the United States;

2. Defendant unlawfully killed [X];

3. With malice aforethought.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge]. [You would then need to consider the charge of [voluntary manslaughter] [involuntary manslaughter] which I will explain to you shortly.]

Committee Comment

The United States Supreme Court has held that the burden is upon the government to prove the absence of heat of passion when the issue is properly raised. *Mullaney v. Wilbur*, 421 U.S. 684, 697-98 (1975). In that circumstance, the Committee recommends adding a fourth element:

4. Not in the heat of passion.

The elements and definitions applicable to voluntary manslaughter should also be given. The Seventh Circuit discussion in *United States v. Delaney*, 717 F. 3d 553 (7th Cir. 2013), provides guidance on proper jury instruction in murder cases.

When involuntary manslaughter is raised as a lesser included offense, elements and definitions applicable to involuntary manslaughter should also be given.

If instructions on lesser included offenses are given, the jury should also be advised that the definitions provided as to the relevant elements of proof apply equally to the charge of second-degree murder, as they did to the charge of first-degree murder. The only difference between the two charges is that first-degree murder requires proof of premeditation whereas second-degree murder does not.

For many years, precedent also dictated that in cases where self-defense is properly invoked, a fifth element "not in self-defense" should also be added, thereby requiring the United States to disprove the defense. Following the Supreme Court's decision in *Dixon v. United States*, 548 U.S. 1 (2006), the issue of which party bears the burden of proof is unsettled. The Court in *Dixon* held that burden of proving the defense of duress is on the defendant. The most recent Seventh Circuit opinion addressing self-defense, *United States v. White Feather,* 768 F.3d 735 (7th Cir. 2014) affirmed the trial court's refusal of a jury instruction on the issue of self-defense but did not address the burden of proof. *See also* Michael D. Monico & Barry A. Spevack, Federal Criminal Practice: Seventh Circuit Criminal Handbook § 411 (2015) (discussing *White Feather,* "affirmative" as opposed to "substantive" defenses, and the burden of proof). Cf. *Patterson v. New York*, 432 U.S. 197, 207-09 (1977), in which the Supreme Court held that the government is not required to "prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree or culpability or the severity of the punishment."

NEW INSTRUCTION

18 U.S.C. § 1112 VOLUNTARY MANSLAUGHTER – ELEMENTS

If you have found the defendant not guilty of the charge of murder in the first degree and not guilty on the charge of murder in the second degree (or if you cannot reach a unanimous verdict on either of those charges), you should consider whether he is guilty of the lesser offense of voluntary manslaughter. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. [Within the [special maritime] [territorial jurisdiction] of the United States;]

2. Defendant unlawfully killed [X];

3. Intentionally; and

4. In the heat of passion but without malice.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

NEW INSTRUCTION

18 U.S.C. § 1112 – DEFINITION OF HEAT OF PASSION

"The heat of passion" means a passion of fear, rage or anger that caused the defendant to lose self-control and act upon impulse without self-reflection as a result of circumstances that would provoke such passion in a reasonable person, but which did not justify the use of deadly force.

[As noted, the government must prove beyond a reasonable doubt that the defendant was not acting in the heat of passion before you may find that the defendant acted with malice.]

Committee Comment

The bracketed paragraph should be read when the government has the burden of disproving heat of passion. If voluntary manslaughter is the charged crime, the bracketed paragraph would not be read.

The United States Supreme Court has held that the burden is upon the government to prove the absence of heat of passion when the issue is properly raised. *Mullaney v. Wilbur*, 421 U.S. 684, 697-98 (1975). See also *United States v. Delaney*, 717 F.3d 553, 559-60 (7th 2013), for discussion of heat of passion.

NEW INSTRUCTION

18 U.S.C. § 1112 DEFINITION OF VOLUNTARY MANSLAUGHTER

Unlike first- and second-degree murder, voluntary manslaughter involves an intentional killing in the heat of passion but without malice. Malice marks the boundary that separates the crimes of murder and manslaughter.

NEW INSTRUCTION

18 U.S.C. § 1112 INVOLUNTARY MANSLAUGHTER - ELEMENTS

The crime of murder also includes the lesser offense of involuntary manslaughter. If you have found the defendant not guilty of the charge of murder in the first degree and not guilty on the charge of murder in the second degree (or if you cannot reach a unanimous verdict on either of those charges), you should proceed to determine whether he is guilty or not guilty of the lesser offense of involuntary manslaughter.

Involuntary manslaughter is the unlawful killing of a human being without malice in the commission of an unlawful act not amounting to a felony.

In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. Within the [special maritime; territorial jurisdiction] of the United States;

2. [X] was unlawfully killed;

3. As a result of an act done by the defendant during the commission of [an unlawful act not amounting to a felony; a lawful act, done either in an unlawful manner or without due caution, which might produce death]; and

4. The defendant [knew that such conduct was a threat to the life of [X]; knew of circumstances that might would reasonably cause the defendant to foresee that such conduct might be a threat to the life of [X]].

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

In cases not involving an unlawful act, the *mens rea* requirement for involuntary manslaughter is equivalent to gross or criminal negligence. *United*

States v. Ganadonegro, 854 F. Supp. 2d 1068 (D. N.M. 2012). Wanton or reckless disregard for human life is required, but not of the nature that constitutes a finding of malice. *United States v. Paul*, 37 F.3d 496 (9th Cir. 1994). To be convicted of involuntary manslaughter, a defendant must have acted with gross negligence—meaning a wanton or reckless disregard for human life—and had knowledge that his conduct was a threat to the life of another or knowledge of such circumstances as could reasonably have enabled him to foresee the peril to which his act might subject another. *United States v. Hicks*, 389 F.3d 514 (5th Cir. 2004).

NEW INSTRUCTION
18 U.S.C. § 1112 DEFINITION OF ASSAULT

In considering the lesser-included offense of involuntary manslaughter, you would need to determine whether or not the defendant committed an assault on [X], and if so, whether or not the assault was an act amounting to a felony.

An assault is any intentional and voluntary attempt or threat to do injury to the person of another, when coupled with the apparent present ability to do so sufficient to put the person against whom the attempt is made in fear of immediate bodily harm. An assault by striking, beating, or wounding (that is, a simple assault) is an unlawful act not amounting to a felony.

Committee Comment

If there is an issue as to whether an assault is simple or aggravated, the following instructions may be given:

[An assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse is an unlawful act amounting to a felony, and an assault resulting in serious bodily injury is an unlawful act amounting to a felony. (These are referred to as aggravated assaults.)

If an assault not amounting to a felony was proven beyond a reasonable doubt, such an act would satisfy the first essential element of involuntary manslaughter. On the other hand, if an assault amounting to a felony was proven beyond a reasonable doubt, such an act would not satisfy the first essential element of involuntary manslaughter.]

NEW INSTRUCTION

18 U.S.C. § 1112   DEFINITION OF DANGEROUS WEAPON

A "dangerous weapon or device" means any object that can be used to inflict severe bodily harm or injury. The object need not actually be capable of inflicting harm or injury. Rather, an object is a dangerous weapon or device if it, or the manner in which it is used, would cause fear in the average person.

Committee Comment

See *McLaughlin v. United States*, 476 U.S. 16, 17–18 (1986) (holding that an unloaded handgun is a "dangerous weapon" within the meaning of § 2113(d) because "a gun is typically and characteristically dangerous;" "the display of a gun instills fear in the average citizen," consequently "it creates an immediate danger that a violent response will ensue"; and "a gun can cause harm when used as a bludgeon"); *United States v. Beckett*, 208 F.3d 140, 152 (3d Cir. 2000) (holding hoax bombs qualified as dangerous weapons under § 2113(d)); see also *United States v. Woods*, 556 F.3d 616, 623 (7th Cir. 2009) (relying on *McLaughlin* and concluding that BB guns qualify as dangerous weapons under U.S.S.G. § 2B3.1(b)(2)(E)).

NEW INSTRUCTION

18 U.S.C. § 1112 DEFINITION OF SERIOUS BODILY INJURY

ASerious bodily injury@ means bodily injury which involves a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ or mental faculty.

Committee Comment

This definition is found at 18 U.S.C. § 1365(h)(3).

PROPOSED REVISION

18 U.S.C. §§ 1341, 1343 & 1346 RECEIVING A BRIBE OR KICKBACK

[changes to comment only]

[A [public official] [employee] [corporate officer] [union official] [defendant] commits bribery when he [demands, solicits, seeks, or asks for, or agrees to accept or receive, or accepts or receives], directly or indirectly, something of value from another person in exchange for a promise for, or performance of, an [official act.].

[A kickback occurs when a [public official] [employee] [corporate officer] [union official] [defendant] [demands, solicits, seeks, or asks for, or agrees to accept or receive, or accepts or receives], directly or indirectly, something of value from another person in exchange for a promise for, or performance of, an [official act], and the act itself provides the source of the funds to be "kicked back."]

"Something of value" includes money or property [and prospective employment].

Committee Comment

In the first paragraph, the bracketed list of fiduciaries is not necessarily an exhaustive list. Also, in the first paragraph, the official act will vary in each case and the court may need to vary the instruction based on it. For the definition of an "official act," see the Pattern Instruction for the same term in 18 U.S.C. § 201, which discusses *McDonnell v. United States*, 136 S. Ct. 2355, 2371-72 (2016).

A kickback is a form of bribery where the official action, typically the granting of a government contract or license, is the source of the funds to be paid to the fiduciary. As *Skilling v. United States*, 130 S. Ct. 2896 (2010), explains, that is what happened in *McNally v. United States*, 483 U.S. 350, 359 (1987). See *Skilling*, 130 S. Ct. at 2932 ("a public official, in exchange for routing… insurance business through a middleman company, arranged for that company to share its commissions with entities in which the official held an interest"); see also, *e.g., United States v. Blanton*, 719 F.2d 815, 816–818 (6th Cir. 1983) (governor arranged for friends to receive state liquor licenses in exchange for a share of the profits).

Section 1346 only covers bribery and kickback schemes and does not cover mere gratuities. *United States v. Hawkins*, 777 F.3d 880, 883 (7th Cir. 2015). Section 1346 also does not apply if a public official makes a *false* promise to take official action. *Id.* at 883-84. In other words, if a public official is "scamming" the would-be bribe payers, then there is no bribery or kickback scheme. *Id.* at 884. If this defense theory is invoked, then the jury instructions should clarify that false promises of official action are not covered.

Skilling cites 18 U.S.C. § 201 as an example of a bribery statute that gives content to 1346's bribery scope, and § 201 refers to bribes comprising "anything of value." Accordingly, "anything of value" may include various forms of money and property, *United States v. Williams*, 705 F.2d 603, 622–23 (2d Cir. 1983)

(“anything of value” under § 201 includes shares in corporation), and may also include prospective employment, *United States v. Gorman*, 807 F.2d 1299, 1302, 1305 (6th Cir. 1986) (“anything of value” under § 201 includes a side job for federal employee as reward for official action).

The definition of “something of value” provides common examples but is not intended to be an exhaustive list.

When the alleged bribe is in the form of a campaign contribution, an additional instruction may be required. In *McCormick v. United States*, 500 U.S. 257, 273 (1991), the Court held that the jury should have been instructed that the receipt of campaign contributions constitutes extortion under color of official right, 18 U.S.C. § 1951, “only if the payments are made in return for an explicit promise or undertaking by the official to perform or not perform an official act.” In *Evans v. United States*, 504 U.S. 255 (1992), another Hobbs Act case involving campaign contributions, the Court elaborated on the *quid pro quo* requirement from *McCormick*, holding that “the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.” *Id.* at 268. The Court in *Evans* held that the following jury instruction satisfied *McCormick*:

> [I]f a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.

Id. at 258, 268 (second brackets in original). Furthermore, in *United States v. Allen*, 10 F.3d 405, (7th Cir. 1993), the court discussed the district court’s giving of a *McCormick* instruction in a case in which RICO predicate acts included bribery in violation of Indiana law.

The instruction defining “color of official right” for § 1951 purposes also addresses the role of campaign contributions. *See* Instruction 18 U.S.C. § 1951 Color of Official Right – Definition.

CURRENT INSTRUCTION

18 U.S.C. §§ 1341, 1343 & 1346 RECEIVING A BRIBE OR KICKBACK

[A [public official] [employee] [corporate officer] [union official] [defendant] commits bribery when he [demands, solicits, seeks, or asks for, or agrees to accept or receive, or accepts or receives], directly or indirectly, something of value from another person in exchange for a promise for, or performance of, an [official act.].

[A kickback occurs when a [public official] [employee] [corporate officer] [union official] [defendant] [demands, solicits, seeks, or asks for, or agrees to accept or receive, or accepts or receives], directly or indirectly, something of value from another person in exchange for a promise for, or performance of, an [official act], and the act itself provides the source of the funds to be "kicked back."]

"Something of value" includes money or property [and prospective employment].

Committee Comment

The official act will vary in each case and the court may need to vary the instruction based on it. ~~The bracketed list of fiduciaries is not necessarily an exhaustive list.~~ For the definition of an "official act" see ~~18 U.S.C. 201(a)(3).~~

A kickback is a form of bribery where the official action, typically the granting of a government contract or license, is the source of the funds to be paid to the fiduciary. As *Skilling v. United States*, 130 S.Ct. 2896 (2010), explains, that is what happened in *McNally v. United States*, 483 U.S. 350, 359 (1987). See *Skilling*, 130 S. Ct. at 2932 ("a public official, in exchange for routing… insurance business through a middleman company, arranged for that company to share its commissions with entities in which the official held an interest"); see also, *e.g., United States v. Blanton*, 719 F.2d 815, 816–818 (6th Cir. 1983) (governor arranged for friends to receive state liquor licenses in exchange for a share of the profits).

Skilling cites 18 U.S.C. § 201 as an example of a bribery statute that gives content to 1346's bribery scope, and § 201 refers to bribes comprising "anything of value." Accordingly, "anything of value" may include various forms of money and property, *United States v. Williams*, 705 F.2d 603, 622–23 (2d Cir. 1983) ("anything of value" under § 201 includes shares in corporation), and may also include prospective employment, *United States v. Gorman*, 807 F.2d 1299, 1302, 1305 (6th Cir. 1986) ("anything of value" under § 201 includes a side job for federal employee as reward for official action).

The definition of "something of value" provides common examples but is not intended to be an exhaustive list.

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(1991), the Court held that the jury should have been instructed that the receipt of campaign contributions constitutes extortion under color of official right, 18 U.S.C. § 1951, "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not perform an official act." In *Evans v. United States*, 504 U.S. 255 (1992), another Hobbs Act case involving campaign contributions, the Court elaborated on the *quid pro quo* requirement from *McCormick*, holding that "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Id*. at 268. The Court in *Evans* held that the following jury instruction satisfied *McCormick*:

> [I]f a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.

Id. at 258, 268 (second brackets in original). Furthermore, in *United States v. Allen*, 10 F.3d 405, (7th Cir. 1993), the court discussed the district court's giving of a *McCormick* instruction in a case in which RICO predicate acts included bribery in violation of Indiana law.

The instruction defining "color of official right" for § 1951 purposes also addresses the role of campaign contributions. See Instruction 18 U.S.C. § 1951 Color of Official Right – Definition.

~~Gratuities are not a form of bribery under § 1346 honest-services fraud. *United States v. Hawkins*, 777 F.3d 880, 882-83 (7th Cir. 2015). Honest-services bribery requires that the public official demand or accept money in *exchange* for the bribe, whereas a gratuity is merely a reward for the performance for official acts, without the bargained-for exchange. *Id.* In view of *Hawkins*, it might be appropriate in certain bribery prosecutions to give a limiting instruction explaining the difference between gratuities and bribes, especially if the defense theory relies on this distinction.~~

~~In *United States v. Blagojevich*, 794 F.3d 729, 735 (7th Cir. 2015), the Seventh Circuit limited the definition of bribery in 18 U.S.C. § 666, § 1951, and § 1346. In that case, a governor offered to use his official authority to appoint a person to a Senate seat in exchange for the President's use of his official authority to appoint the governor to a Cabinet position. *Blagojevich* held that the proposed exchange did not fit within the definition of bribery because the deal was a proposed "political logroll." *Id.* at 735. In an appropriate case, if there is a risk that the jury might premise a bribery verdict on conduct that is outside the definition of bribery as interpreted by *Blagojevich*, then an instruction might be warranted to exclude that possibility.~~

PROPOSED REVISION

18 U.S.C. § 1951 COLOR OF OFFICIAL RIGHT – DEFINITION

[changes to comment only]

[Attempted] Extortion under color of official right occurs when a public official receives [or attempts to obtain] money or property to which he is not entitled, knowing [believing] that the money or property is being [would be] given to [him] [her] in return for taking, withholding or influencing official action. [Although the official must receive [or attempt to obtain] the money or property, the government does not have to prove that the public official first suggested giving money or property, or that the official asked for or solicited it.] [While the official must receive [or attempt to obtain] the money or property in return for the official action, the government does not have to prove [that the official actually took or intended to take that action] [or] [that the official could have actually taken the action in return for which payment was made] [or] [that the official would not have taken the same action even without payment].]

[Acceptance by an elected official of a campaign contribution, by itself, does not constitute extortion under color of official right, even if the person making the contribution has business pending before the official. However, if a public official receives [or attempts to obtain] money or property, knowing [believing] that it is [would be] given in exchange for a specific requested exercise of [his][her] official power, [he][she] has committed extortion under color of official right, even if the money or property is [to be] given to the official in the form of a campaign contribution.]

Committee Comment

See *Evans v. United States*, 504 U.S. 255 (1992); *McCormick v. United States*, 500 U.S. 257 (1991); *United States v. Giles*, 246 F.3d 966 (7th Cir. 2001); *United States v. Abbas*, 560 F.3d 660 (7th Cir. 2009).

An extortion conviction "under color of official right" requires the government to prove a quid pro quo. In *McCormick*, 500 U.S. at 273, the Court held that the jury should have been instructed that the receipt of campaign contributions constitutes extortion under color of official right, 18 U.S.C. § 1951, "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not perform an official act." In *Evans*, 504 U.S. 255, another Hobbs Act case involving campaign contributions, the Court elaborated on the quid pro quo requirement from *McCormick*, holding that "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." Id. at 268. The Court in *Evans* held that the following jury instruction satisfied *McCormick*:

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Id. at 258, 268 (second brackets in original).

In *United States v. Giles*, the Court extended the *quid pro quo* requirement beyond campaign contributions and held that any extortion "under color of official right" conviction under the Hobbs Act requires the government to prove that a payment was made in exchange for a specific promise to perform an official act. 246 F.2d at 971–73 (approving the language of this instruction as sufficient to instruct jury on *quid pro quo* requirement).

The *quid pro quo* can be implied. Id. at 972 ("The official and the payor need not state the quid pro quo in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods. The inducement from the official is criminal if it is express or if it is implied from his works and actions, so long as he intends it to be so and the payor so interprets it.")

For the definition of an "official action," see the Pattern Instruction for the term "official act" in 18 U.S.C. § 201, which discusses *McDonnell v. United States*, 136 S. Ct. 2355, 2371-72 (2016).

In *Abbas*, the Seventh Circuit held that "under color of official right" liability applies only to public officials who misuse their official office. 560 F.3d at 664. Thus, a defendant who impersonated an FBI agent could not commit a crime against the public trust and was not subject to this "special brand of criminal liability." *Id.*

CURRENT INSTRUCTION
18 U.S.C. § 1951 COLOR OF OFFICIAL RIGHT – DEFINITION

[Attempted] Extortion under color of official right occurs when a public official receives [or attempts to obtain] money or property to which [he] [she] is not entitled, knowing [believing] that the money or property is being [would be] given to [him] [her] in return for taking, withholding or influencing official action. [Although the official must receive [or attempt to obtain] the money or property, the government does not have to prove that the public official first suggested giving money or property, or that the official asked for or solicited it.] [While the official must receive [or attempt to obtain] the money or property in return for the official action, the government does not have to prove [that the official actually took or intended to take that action] [or] [that the official could have actually taken the action in return for which payment was made] [or] [that the official would not have taken the same action even without payment].]

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Committee Comment

See *Evans v. United States*, 504 U.S. 255 (1992); *McCormick v. United States*, 500 U.S. 257 (1991); *United States v. Giles*, 246 F.3d 966 (7th Cir. 2001); *United States v. Abbas*, 560 F.3d 660 (7th Cir. 2009).

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> [I]f a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance

> does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.
>
> *Id.* at 258, 268 (second brackets in original).

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The *quid pro quo* can be implied. Id. at 972 ("The official and the payor need not state the quid pro quo in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods. The inducement from the official is criminal if it is express or if it is implied from his works and actions, so long as he intends it to be so and the payor so interprets it.")

~~In *United States v. Blagojevich*, 794 F.3d 729, 735 (7th Cir. 2015), the Seventh Circuit limited the definition of bribery in 18 U.S.C. § 666, § 1951, and § 1346. In that case, a governor offered to use his official authority to appoint a person to a Senate seat in exchange for the President's use of his official authority to appoint the governor to a Cabinet position. *Blagojevich* held that the proposed exchange did not fit within the definition of bribery because the deal was a proposed "political logroll." *Id.* at 735. In an appropriate case, if there is a risk that the jury might premise a bribery verdict on conduct that is outside the definition of bribery as interpreted by *Blagojevich*, then an instruction might be warranted to exclude that possibility.~~

In *Abbas*, the Seventh Circuit held that "under color of official right" liability applies only to public officials who misuse their official office. 560 F.3d at 664. Thus, a defendant who impersonated an FBI agent could not commit a crime against the public trust and was not subject to this "special brand of criminal liability." *Id.*

NEW INSTRUCTION

18 U.S.C. § 1591 SEX TRAFFICKING OF A MINOR OR BY FORCE, FRAUD, OR COERCION

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] sex trafficking [of a minor] [by force, fraud, or coercion]. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly [recruited] [enticed] [harbored] [transported] [provided][obtained][advertised][maintained][patronized][solicited] [the person identified in the indictment]; and

2. The defendant [knew][recklessly disregarded the fact]:

   (a) [force][threats of force][fraud][coercion] would be used to cause [the person identified in the indictment] to engage in a commercial sex act; or

   (b) [the person identified in the indictment] was under eighteen years of age and would be caused to engage in a commercial sex act; and

3. the offense was in or affecting interstate commerce.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

On or about May 29, 2015, Congress amended § 1591(a) to include the terms "advertises," "patronizes" and "solicits" in the list of conduct that was criminalized under the statute, thereby making clear that, at least as of May 29, 2015, the statute applied to conduct committed by consumers and advertisers of commercial sex acts, as well as suppliers. *See United States v. Jungers*, 702 F.3d 1066 (8th Cir. 2013) (prior to the May 29, 2015 amendment, holding that 18 U.S.C. § 1591 applies to both suppliers and purchasers of commercial sex

acts); *See* Justice for Victims of Trafficking Act of 2015, Pub.L. No. 114–22, 129 Stat. 227 (May 29, 2015).

In a prosecution involving the sex trafficking of minors, the parties should consider whether the language of 18 U.S.C. § 1591(c) should be incorporated into the second element of the jury instructions. As amended on May 29, 2015, § 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, maintained, patronized, or solicited, the government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years." Thus, § 1591(c) provides that, in cases other than those alleged under the "advertised" prong of § 1591(a), in lieu of proving knowledge of the minor's age or reckless disregard, the government can satisfy its burden by showing that the defendant had the reasonable opportunity to observe the minor-aged victim. *See United States v. Robinson*, 702 F.3d 22, 26 (2d Cir. 2012) (government "need not prove any *mens rea* with regard to the defendant's awareness of the victim's age if the defendant had a reasonable opportunity to observe the victim."); *United States v. Copeland*, 820 F.3d 809, 813 (5th Cir. 2016) (adopting *Robinson* and holding that 1591(c) "supplies an alternative to proving any *mens rea* with regard to the victim's age").

Certain courts have held that providing a jury instruction as to "reasonable opportunity to observe" is a constructive amendment of the indictment if not specifically alleged as a theory of liability in the indictment. *See United States v. Bolds*, 620 Fed. Appx. 592 (9th Cir. 2015); and *United States v. Lockhart*, 844 F.3d 501 (5th Cir. 2016). To date, the Seventh Circuit has not addressed this issue.

Acts that fall within the meaning of "commercial sex act" are listed in 18 U.S.C. §1591(e)(3). A completed "commercial sex act" is not an essential element of the offense. *United States v. Wearing*, 865 F.3d 553, 555-57 (7th Cir. 2017).

A person "recklessly disregards" a fact within the meaning of this offense when he is aware of, but consciously and carelessly ignores facts and circumstances that would reveal the fact that [either] [force][threats of force][fraud][coercion] would be used to cause the person identified in the identified to engage in a commercial sex act, [or] the person identified in the indictment was under the age of 18 and would be caused to engage in a commercial sex act. *United States v. Carson*, 870 F.3d 584, 2017 WL 3709137, *12 (7th Cir. Aug. 29, 2017); *see also United States v. Woods*, No. 16-2344, 2017 WL 2399462, *2 (7th Cir. June 2, 2017) (in a case involving minors and allegations of force, fraud or coercion, § 1591 requires only that the defendant "knew or recklessly disregarded the fact that the minors were under 18 years of age *or* that he knew or recklessly disregarded the fact that force, threats of force,

fraud, or coercion would be used to cause them to engage in a commercial sex act, not both.") (emphasis in original); *see United States v. Phea*, 755 F.3d 255, 261 (5th Cir. 2014) (in a § 1591 case involving a minor, holding that, "facts other than the victim's appearance or behavior may support a finding of reckless disregard to the victim's age, such as information from the victim, or others, or documentation that would cause a reasonable person to question whether the victim was actually eighteen years old. Circumstances of which a defendant was aware, such as the victim's grade level in school, or activities in which the victim engaged, could also constitute the basis for a finding of reckless disregard."); *United States v. Jackson*, 622 F. App'x 526, 529 (6th Cir. 2015) (adopting *Phea* and holding, "Section 1591 does not permit a defendant to remain willfully ignorant of facts" related to the victim's age); *United States v. Pina-Suarez*, 280 F. App'x 813, 2008 WL 2212047, at **3 (11th Cir. May 29, 2008) (in the context of 8 U.S.C. § 1324, a defendant acts with "reckless disregard" when he is "aware of, but consciously and carelessly ignores facts and circumstances . . .")..

The definitions of "interstate commerce" and "foreign commerce" are found at 18 U.S.C. §10 and are modified in the Pattern Instruction on Interstate/Foreign Commerce-Definition, above, which consolidates and harmonizes various definitions of those terms. The defendant need not have known or intended that his conduct would have any effect on interstate or foreign commerce. *United States v. Sawyer*, 733 F.3d 228, 230 (7th Cir. 2013). Moreover, while the offense conduct must have affected interstate or foreign commerce, the statute does not require that the specific acts listed in 18 U.S.C. § 1591(a)(1) affect interstate or foreign commerce. *Wearing*, 865 F.3d at 557–58.

NEW INSTRUCTION

18 U.S.C. § 1959(a) VIOLENT CRIMES IN AID OF RACKETEERING ACTIVITY

Count ___ of the indictment charges the defendant[s] with [committing] [conspiring to commit] [attempting to commit] _________ [specify the crime of violence] in aid of racketeering. In order for you to find [a; the] defendant guilty of this charge, the government must prove the following five elements beyond a reasonable doubt:

1. The [name of charged enterprise] was an enterprise;

2. The enterprise was engaged in racketeering activity;

3. The activities of the enterprise affected interstate or foreign commerce;

4. The defendant committed the ________ [as charged in Count ____ of the indictment]; and

5. The defendant committed the ________ to gain entrance to or maintain or increase his position in the enterprise. [The government does not have to prove this was the defendant's sole or principal purpose in committing the [crime of violence].]

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

For the terms in elements one through three, the pattern instructions provided in § 1961 should be used or referenced. *See* 18 U.S.C. § 1959(b)(1) and (2); see also *United States v. Rogers*, 89 F.3d 1326, 1332 (7th Cir. 1996) (the definition of "enterprise" as used in § 1959 is the same as that in § 1961(4); § 1959 was enacted to complement the RICO); *United States v. Carson*, 455 F.3d 336, 371 (D.C. Cir. 2006) (the term "racketeering activity" as used in § 1959 is defined in § 1961).

With regard to element four, the court should instruct the jury on the substantive law applicable to the charged predicate offense. The bracketed language in element four should be used if the predicate offense is specifically charged in a count in the indictment.

In addition to a crime of violence committed for the purpose of gaining entrance to or maintaining or increasing a position in the enterprise, Section 1959 also applies to a crime of violence committed as "consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activities." If that is the basis of the charged crime, the language of element five should be modified accordingly. *See United States v. Concepcion*, 983 F.2d 369, 384 (2d Cir. 1992) ("[W]e note that Section 1959 as a whole is sufficiently inclusive to encompass the actions of a so-called independent contractor, for it reaches not only those who seek to maintain or increase their positions within a RICO enterprise, but also those who perform violent crimes 'as consideration for the receipt of . . . anything of pecuniary value' from such an enterprise.") (citation omitted).

The jury need not find that a defendant's "sole or principal motive" in committing the crime of violence was to gain entrance to, increase, or maintain the defendant's position in the enterprise. *See United States v. Garcia*, 754 F.3d 460, 472-73 (7th Cir. 2014) (the jury instruction "correctly states that the jury did not need to find that Zambrano's sole or principal motive was to maintain his position in the gang.") (citing *United States v. DeSilva*, 505 F.3d 711, 715-16 (7th Cir. 2007) ("The motive requirement … is met if the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership."); *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992); *United States v. Carson*, 455 F.3d 336, 371 (D.C. Cir. 2006); *United States v. Tse*, 135 F.3d 200, 206 (1st Cir. 1998)).

PROPOSED REVISION

18 U.S.C. § 2252A(a)(1) MAILING, TRANSPORTING OR SHIPPING MATERIAL CONTAINING CHILD PORNOGRAPHY – ELEMENTS

[changes to instruction and comment]

[The indictment charges the defendant[s] with; Count[s] ___ of the indictment charge[s] the defendant[s] with] [mailing] [transporting] [shipping] of material containing child pornography. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly [mailed] [transported] [shipped] the material identified in the indictment;

2. [The material identified in the indictment was [transported] [shipped] using a means or facility of interstate or foreign commerce];

3. The material identified in the indictment is child pornography; and

4. The defendant knew both that the material depicted one or more minor[s] and that the minor[s] were engaged in sexually explicit conduct.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

18 U.S.C § 2252A encompasses the primary theories of prosecution under 18 U.S.C. § 2252. Accordingly, the committee has not prepared pattern instructions for Section 2252.

"Child pornography" is defined in the Pattern Instruction for 18 U.S.C. § 2256(8).

"Interstate/foreign commerce" is defined in the pattern instruction that follows the instructions related to 18 U.S.C. § 1465.

"Minor" is defined in the Pattern Instruction for 18 U.S.C. § 2256(1).

“Sexually explicit conduct” is defined in the Pattern Instruction for 18 U.S.C. § 2256(2)(B).

In *United States v. X-Citement Video*, 513 U.S. 64, 77-78 (1994), the United States Supreme Court held that the “knowingly” requirement in Section 2252 extends to the minority status of the person depicted in the image and the fact that the image depicted sexually explicit conduct. *See also United States v. Malik*, 385 F.3d 758, 760 (7th Cir. 2004) (§§ 2252A and 2252 are “materially identical” and therefore the Supreme Court’s holding in *X-Citement Video* applies to § 2252A); *United States v. Rogers*, 474 Fed. Appx. 463, 476-77 (7th Cir. 2012).

CURRENT INSTRUCTION

18 U.S.C. § 2252A(a)(1) MAILING, TRANSPORTING OR SHIPPING MATERIAL CONTAINING CHILD PORNOGRAPHY – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [mailing] [transporting] [shipping] of material containing child pornography. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the ~~[three]~~ following elements beyond a reasonable doubt:

~~1. The defendant knowingly [mailed] [transported in interstate commerce] [shipped in interstate commerce] [the material identified in the indictment]; and~~

~~2. [The material identified in the indictment] is child pornography; and~~

~~3. The defendant knew that one or more persons depicted in [the material identified in the indictment] was under the age of eighteen years.~~

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

18 U.S.C. §2252A encompasses the primary theories of prosecution under 18 U.S.C. §2252. Accordingly, the committee has not prepared pattern instructions for Section 2252.

"Child pornography" is defined in the Pattern Instruction for 18 U.S.C.§ 2256(8).

"Interstate/foreign commerce" is defined in a pattern instruction that follows the instructions related to 18 U.S.C. § 1465.

PROPOSED REVISION

18 U.S.C. § 2252A(a)(2)(A) RECEIPT OR DISTRIBUTION OF CHILD PORNOGRAPHY – ELEMENTS

[changes to instruction and comment]

[The indictment charges the defendant[s] with; Count[s] of the indictment charge[s] the defendant[s] with] [receipt][distribution] of child pornography. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly [received] [distributed] [the material identified in the indictment]; and

2. [The material identified in the indictment] is child pornography; and

3. The defendant knew both that the material depicted one or more minors and that the minors were engaged in sexually explicit conduct.

4. [The material identified in the indictment] was [mailed] [shipped] [transported] using a means or facility of interstate or foreign commerce].

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

"Child pornography" is defined in the Pattern Instruction for 18 U.S.C.§ 2256(8).

"Interstate/foreign commerce" is defined in a pattern instruction that follows the instructions related to 18 U.S.C. § 1465.

"Minor" is defined in the Pattern Instruction for 18 U.S.C. § 2256(1).

"Sexually explicit conduct" is defined in the Pattern Instruction for 18 U.S.C. § 2256(2)(B).

In *United States v. X-Citement Video*, 513 U.S. 64, 77-78 (1994), the United

States Supreme Court held that the "knowingly" requirement in Section 2252A extends to the minority status of the person depicted in the image and the fact that the image depicted sexually explicit conduct. *See also United States v. Malik*, 385 F.3d 758, 760 (7th Cir. 2004); *United States v. Rogers*, 474 Fed. App'x 463, 476-77 (7th Cir. 2012).

CURRENT INSTRUCTION

18 U.S.C. § 2252A(a)(2)(A) RECEIPT OR DISTRIBUTION OF CHILD PORNOGRAPHY – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [receipt] [distribution] of child pornography. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly [received] [distributed] [the material identified in the indictment]; and

2. [The material identified in the indictment] is child pornography; and

~~3. The defendant knew that one or more persons depicted in [the material identified in the indictment] was under the age of eighteen years; and~~

~~4. [The material identified in the indictment] was [mailed] [shipped in interstate or foreign commerce] [transported in interstate or foreign commerce] [shipped or transported in a manner affecting interstate or foreign commerce].~~

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

"Child pornography" is defined in the Pattern Instruction for 18 U.S.C.§ 2256(8).

"Interstate/foreign commerce" is defined in a pattern instruction that follows the instructions related to 18 U.S.C. § 1465.

PROPOSED REVISION

18 U.S.C. § 2252A(a)(2)(B) RECEIPT OR DISTRIBUTION OF MATERIAL CONTAINING CHILD PORNOGRAPHY – ELEMENTS
[changes to instruction and comment]

[The indictment charges the defendant[s] with; Count[s] of the indictment charge[s] the defendant[s] with] [receipt][distribution] of material containing child pornography. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly [received] [distributed] [the material identified in the indictment];

2. [The material identified in the indictment] contained child pornography;

3. The defendant knew both that the material depicted one or more minors and that the minor[s] were engaged in sexually explicit conduct; and

4. [The material identified in the indictment] was [mailed] [shipped] [transported] using a means or facility of interstate or foreign commerce.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

"Child pornography" is defined in the Pattern Instruction for 18 U.S.C.§ 2256(8).

"Interstate/foreign commerce" is defined in a pattern instruction that follows the instructions related to 18 U.S.C. § 1465.

"Minor" is defined in the Pattern Instruction for 18 U.S.C. § 2256(1).

"Sexually explicit conduct" is defined in the Pattern Instruction for 18 U.S.C. § 2256(2)(B).

In *United States v. X-Citement Video*, 513 U.S. 64, 77-78 (1994), the United

States Supreme Court held that the “knowingly” requirement in Section 2252A extends to the minority status of the person depicted in the image and the fact that the image depicted sexually explicit conduct. *See also United States v. Malik*, 385 F.3d 758, 760 (7th Cir. 2004); *United States v. Rogers*, 474 Fed. App’x 463, 476-77 (7th Cir. 2012).

CURRENT INSTRUCTION

18 U.S.C. § 2252A(a)(2)(B) RECEIPT OR DISTRIBUTION OF MATERIAL CONTAINING CHILD PORNOGRAPHY – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [receipt] [distribution] of material containing child pornography. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly [received] [distributed] [the material identified in the indictment];

2. [The material identified in the indictment] contained child pornography;

~~3. The defendant knew that one or more persons depicted in [the material identified in the indictment] was under the age of eighteen years; and'~~

~~4. [The material identified in the indictment] was [mailed] [shipped in interstate or foreign commerce] [transported in interstate or foreign commerce] [shipped or transported in a manner affecting interstate or foreign commerce].~~

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

"Child pornography" is defined in the Pattern Instruction for 18 U.S.C.§ 2256(8).

"Interstate/foreign commerce" is defined in a pattern instruction that follows the instructions related to 18 U.S.C. § 1465.

PROPOSED REVISION

18 U.S.C. § 2252A(a)(3)(A) REPRODUCTION OF CHILD PORNOGRAPHY FOR DISTRIBUTION – ELEMENTS

[changes to instruction and comment]

[The indictment charges the defendant[s] with; Count[s] of the indictment charge[s] the defendant[s] with] reproduction of child pornography for distribution. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly reproduced [the material identified in the indictment];

2. [The material identified in the indictment] is child pornography;

3. The defendant knew both that the material depicted one or more minors and that the minor[s] were engaged in sexually explicit conduct; and

4. The defendant intended to distribute [the material identified in the indictment] by [mailing it] [shipping it] [transporting it] using a means or facility of interstate or foreign commerce.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

"Child pornography" is defined in the Pattern Instruction for 18 U.S.C.§ 2256(8).

"Interstate/foreign commerce" is defined in a pattern instruction that follows the instructions related to 18 U.S.C. § 1465.

"Minor" is defined in the Pattern Instruction for 18 U.S.C. § 2256(1).

"Sexually explicit conduct" is defined in the Pattern Instruction for 18 U.S.C. § 2256(2)(B).

In *United States v. X-Citement Video*, 513 U.S. 64, 77-78 (1994), the United States Supreme Court held that the "knowingly" requirement in Section 2252A extends to the minority status of the person depicted in the image and the fact that the image depicted sexually explicit conduct. *See also United States v. Malik*, 385 F.3d 758, 760 (7th Cir. 2004); *United States v. Rogers*, 474 Fed. App'x 463, 476-77 (7th Cir. 2012).

CURRENT INSTRUCTION

18 U.S.C. § 2252A(a)(3)(A) REPRODUCTION OF CHILD PORNOGRAPHY FOR DISTRIBUTION – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] reproduction of child pornography for distribution. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly reproduced [the material identified in the indictment];

2. [The material identified in the indictment] is child pornography;

3. ~~The defendant knew that one or more persons depicted in [the material identified in the indictment] was under the age of eighteen years; and~~

4. ~~The defendant intended to distribute [the material identified in the indictment] by [mailing it] [shipping it in or affecting interstate or foreign commerce] [transporting it in or affecting interstate or foreign commerce].~~

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

"Child pornography" is defined in the Pattern Instruction for 18 U.S.C.§ 2256(8).

"Interstate/foreign commerce" is defined in a pattern instruction that follows the instructions related to 18 U.S.C. § 1465.

PROPOSED REVISION

18 U.S.C. § 2252A(a)(4)(A) SALE OR POSSESSION WITH INTENT TO SELL OF CHILD PORNOGRAPHY IN U.S. TERRITORY – ELEMENTS

[changes to instruction and comment]

[The indictment charges the defendant[s] with; Count[s] of the indictment charge[s] the defendant[s] with] [sale of][possession with intent to sell] child pornography. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly [sold][possessed with intent to sell] [the material identified in the indictment];

2. [the material identified in the indictment] is child pornography;

3. The defendant knew both that the material depicted one or more minors and that the minor[s] were engaged in sexually explicit conduct; and

4. The [sale][possession with intent to sell] occurred [in the special maritime and territorial jurisdiction of the United States] [on land or in a building owned by, leased to or under the control of the United States government][in Indian country].

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

"Child pornography" is defined in the Pattern Instruction for 18 U.S.C.§ 2256(8).

"Minor" is defined in the Pattern Instruction for 18 U.S.C. § 2256(1).

"Sexually explicit conduct" is defined in the Pattern Instruction for 18 U.S.C. § 2256(2)(B).

In *United States v. X-Citement Video*, 513 U.S. 64, 77-78 (1994), the United

States Supreme Court held that the "knowingly" requirement in Section 2252A extends to the minority status of the person depicted in the image and the fact that the image depicted sexually explicit conduct. *See also United States v. Malik*, 385 F.3d 758, 760 (7th Cir. 2004); *United States v. Rogers*, 474 Fed. App'x 463, 476-77 (7th Cir. 2012).

CURRENT INSTRUCTION

18 U.S.C. § 2252A(a)(4)(A) SALE OR POSSESSION WITH INTENT TO SELL OF CHILD PORNOGRAPHY IN U.S. TERRITORY – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [sale of] [possession with intent to sell] child pornography. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly [sold] [possessed with intent to sell] [the material identified in the indictment];

2. [the material identified in the indictment] is child pornography;

3. ~~The defendant knew that one or more persons depicted in [the material identified in the indictment] was under the age of eighteen years; and~~

4. The [sale] [possession with intent to sell] occurred [in the special maritime and territorial jurisdiction of the United States] [on land or in a building owned by, leased to or under the control of the United States government] [in Indian country].

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

"Child pornography" is defined in the Pattern Instruction for 18 U.S.C.§ 2256(8).

PROPOSED REVISION

18 U.S.C. § 2252A(a)(4)(B) SALE OR POSSESSION WITH INTENT TO SELL OF CHILD PORNOGRAPHY IN INTERSTATE OR FOREIGN COMMERCE – ELEMENTS

[changes to instruction and comment]

[The indictment charges the defendant[s] with; Count[s] of the indictment charge[s] the defendant[s] with] [sale of][possession with intent to sell] child pornography. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly [sold][possessed with intent to sell] [the material identified in the indictment]; and

2. [the material identified in the indictment] is child pornography; and

3. The defendant knew both that the material depicted one or more minors and that the minor[s] were engaged in sexually explicit conduct; and]

4. The material identified in the indictment] has been [mailed][shipped][transported] [using a means or facility of interstate or foreign commerce [produced using materials that have been mailed, shipped or transported in a manner affecting interstate or foreign commerce].

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

"Child pornography" is defined in the Pattern Instruction for 18 U.S.C.§ 2256(8).

"Interstate/foreign commerce" is defined in a pattern instruction that follows the instructions related to 18 U.S.C. § 1465.

"Minor" is defined in the Pattern Instruction for 18 U.S.C. § 2256(1).

"Sexually explicit conduct" is defined in the Pattern Instruction for 18 U.S.C. § 2256(2)(B).

In *United States v. X-Citement Video*, 513 U.S. 64, 77-78 (1994), the United States Supreme Court held that the "knowingly" requirement in Section 2252A extends to the minority status of the person depicted in the image and the fact that the image depicted sexually explicit conduct. *See also United States v. Malik*, 385 F.3d 758, 760 (7th Cir. 2004); *United States v. Rogers*, 474 Fed. App'x 463, 476-77 (7th Cir. 2012).

CURRENT INSTRUCTION

18 U.S.C. § 2252A(a)(4)(B) SALE OR POSSESSION WITH INTENT TO SELL OF CHILD PORNOGRAPHY IN INTERSTATE OR FOREIGN COMMERCE – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [sale of] [possession with intent to sell] child pornography. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly [sold] [possessed with intent to sell] [the material identified in the indictment]; and

2. [the material identified in the indictment] is child pornography; and

~~3. The defendant knew that one or more persons depicted in [the material identified in the indictment] was under the age of eighteen years; and~~

~~4. The material identified in the indictment] has been [mailed] [shipped in interstate or foreign commerce] [transported in interstate or foreign commerce] [produced using materials that have been mailed, shipped or transported in a manner affecting interstate or foreign commerce].~~

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

"Child pornography" is defined in the Pattern Instruction for 18 U.S.C.§ 2256(8).

"Interstate/foreign commerce" is defined in a pattern instruction that follows the instructions related to 18 U.S.C. § 1465.

PROPOSED REVISION

18 U.S.C. § 2252A(a)(5)(A) POSSESSION OF OR ACCESS WITH INTENT TO VIEW CHILD PORNOGRAPHY IN U.S. TERRITORY – ELEMENTS

[changes to instruction and comment]

[The indictment charges the defendant[s] with; Count[s] of the indictment charge[s] the defendant[s] with] [possession of][accessing with intent to view] child pornography. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly [possessed][accessed with intent to view] [the material identified in the indictment]; and

2. [The material identified in the indictment] is child pornography; and

3. The defendant knew both that the material depicted one or more minors and that the minor[s] were engaged in sexually explicit conduct; and

4. The [sale][possession with intent to sell] occurred [in the special maritime and territorial jurisdiction of the United States] [on land or in a building owned by, leased to or under the control of the United States government][in Indian country].

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

"Child pornography" is defined in the Pattern Instruction for 18 U.S.C.§ 2256(8).

"Minor" is defined in the Pattern Instruction for 18 U.S.C. § 2256(1).

"Sexually explicit conduct" is defined in the Pattern Instruction for 18 U.S.C. § 2256(2)(B).

In *United States v. X-Citement Video*, 513 U.S. 64, 77-78 (1994), the United

States Supreme Court held that the "knowingly" requirement in Section 2252A extends to the minority status of the person depicted in the image and the fact that the image depicted sexually explicit conduct. *See also United States v. Malik*, 385 F.3d 758, 760 (7th Cir. 2004); *United States v. Rogers*, 474 Fed. App'x 463, 476-77 (7th Cir. 2012).

CURRENT INSTRUCTION

18 U.S.C. § 2252A(a)(5)(A) POSSESSION OF OR ACCESS WITH INTENT TO VIEW CHILD PORNOGRAPHY IN U.S. TERRITORY – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [possession of] [accessing with intent to view] child pornography. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly [possessed] [accessed with intent to view] [the material identified in the indictment]; and

2. [The material identified in the indictment] is child pornography; and

~~3. The defendant knew that one or more persons depicted in [the material identified in the indictment] was under the age of eighteen years; and~~

4. The [sale] [possession with intent to sell] occurred [in the special maritime and territorial jurisdiction of the United States] [on land or in a building owned by, leased to or under the control of the United States government] [in Indian country].

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

"Child pornography" is defined in the Pattern Instruction for 18 U.S.C.§ 2256(8).

PROPOSED REVISION

18 U.S.C. § 2252A(a)(5)(B) POSSESSION OF OR ACCESS WITH INTENT TO VIEW CHILD PORNOGRAPHY IN INTERSTATE COMMERCE – ELEMENTS

[changes to instruction and comment]

[The indictment charges the defendant[s] with; Count[s] of the indictment charge[s] the defendant[s] with] [possession of][accessing with intent to view] child pornography. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly [possessed][accessed with intent to view] [the material identified in the indictment]; and

2. [The material identified in the indictment] is child pornography; and

3. The defendant knew both that the material depicted one or more minors and that the minor[s] were engaged in sexually explicit conduct; and

4. [The material identified in the indictment] has been [mailed][shipped] [transported][using a means or facility of interstate or foreign commerce] [produced using materials that have been mailed, shipped or transported in a manner affecting interstate or foreign commerce]].

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

"Child pornography" is defined in the Pattern Instruction for 18 U.S.C.§ 2256(8).

"Interstate/foreign commerce" is defined in a pattern instruction that follows the instructions related to 18 U.S.C. § 1465.

"Minor" is defined in the Pattern Instruction for 18 U.S.C. § 2256(1).

"Sexually explicit conduct" is defined in the Pattern Instruction for 18 U.S.C. § 2256(2)(B).

In *United States v. X-Citement Video*, 513 U.S. 64, 77-78 (1994), the United States Supreme Court held that the "knowingly" requirement in Section 2252A extends to the minority status of the person depicted in the image and the fact that the image depicted sexually explicit conduct. *See also United States v. Malik*, 385 F.3d 758, 760 (7th Cir. 2004); *United States v. Rogers*, 474 Fed. App'x 463, 476-77 (7th Cir. 2012).

CURRENT INSTRUCTION

18 U.S.C. § 2252A(a)(5)(B) POSSESSION OF OR ACCESS WITH INTENT TO VIEW CHILD PORNOGRAPHY IN INTERSTATE COMMERCE – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [possession of] [accessing with intent to view] child pornography. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly [possessed] [accessed with intent to view] [the material identified in the indictment]; and

2. [The material identified in the indictment] is child pornography; and

~~3. The defendant knew that one or more persons depicted in [the material identified in the indictment] was under the age of eighteen years; and~~

~~4. The material identified in the indictment] has been [mailed] [shipped in interstate or foreign commerce] [transported in interstate or foreign commerce] [produced using materials that have been mailed, shipped or transported in a manner affecting interstate or foreign commerce]].~~

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

"Child pornography" is defined in the Pattern Instruction for 18 U.S.C.§ 2256(8).

"Interstate/foreign commerce" is defined in a pattern instruction that follows the instructions related to 18 U.S.C. § 1465.

PROPOSED REVISION

18 U.S.C. §§ 2252A(a)(6)(A), (B) AND (C) PROVIDING CHILD PORNOGRAPHY TO A MINOR – ELEMENTS

[changes to instruction and comment]

[The indictment charges the defendant[s] with; Count[s] of the indictment charge[s] the defendant[s] with] [distributing] [offering] [sending] [providing] child pornography to a minor. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [five] following elements beyond a reasonable doubt:

1. The defendant knowingly [distributed][offered][sent][provided] [the material identified in the indictment] to [the person identified in the indictment]; and

2. [The material identified in the indictment] is child pornography; and

3. The defendant knew both that the material depicted one or more minors and that the minor[s] were engaged in sexually explicit conduct; and

4. [The person identified in the indictment] had not attained the age of eighteen years; and

5. [The material identified in the indictment] has been:

   (a) [mailed] [shipped in interstate or foreign commerce] [transported in interstate or foreign commerce] [shipped or transported in a manner affecting interstate or foreign commerce]; or

   (b) produced using materials that have been [mailed] [shipped in interstate or foreign commerce] [transported in interstate or foreign commerce] [shipped or transported in a manner affecting interstate or foreign commerce]; or

   (c) which [distribution] [offer] [sending] [provision] was accomplished [using the mails] [by any means or facility of interstate or foreign commerce].

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that

the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

In giving this instruction the court should choose which of the alternatives presented under element 5 are applicable to the case.

"Child pornography" is defined in the Pattern Instruction for 18 U.S.C.§ 2256(8).

"Interstate/foreign commerce" is defined in a pattern instruction that follows the instructions related to 18 U.S.C. § 1465.

"Minor" is defined in the Pattern Instruction for 18 U.S.C. § 2256(1).

"Sexually explicit conduct" is defined in the Pattern Instruction for 18 U.S.C. § 2256(2)(B).

In *United States v. X-Citement Video*, 513 U.S. 64, 77-78 (1994), the United States Supreme Court held that the "knowingly" requirement in Section 2252A extends to the minority status of the person depicted in the image and the fact that the image depicted sexually explicit conduct. *See also United States v. Malik*, 385 F.3d 758, 760 (7th Cir. 2004); *United States v. Rogers*, 474 Fed. App'x 463, 476-77 (7th Cir. 2012).

CURRENT INSTRUCTION

18 U.S.C. §§ 2252A(a)(6)(A), (B) AND (C) PROVIDING CHILD PORNOGRAPHY TO A MINOR – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [distributing] [offering] [sending] [providing] child pornography to a minor. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [five] following elements beyond a reasonable doubt:

1. The defendant knowingly [distributed] [offered] [sent] [provided] [the material identified in the indictment] to [the person identified in the indictment]; and

2. [The material identified in the indictment] is child pornography; and

3. ~~The defendant knew that one or more persons depicted in [the material identified in the indictment] was under the age of eighteen years; and~~

4. [The person identified in the indictment] had not attained the age of eighteen years; and

5. [The material identified in the indictment] has been:

   (a) [mailed] [shipped in interstate or foreign commerce] [transported in interstate or foreign commerce] [shipped or transported in a manner affecting interstate or foreign commerce]; or

   (b) produced using materials that have been [mailed] [shipped in interstate or foreign commerce] [transported in interstate or foreign commerce] [shipped or transported in a manner affecting interstate or foreign commerce]; or

   (c) which [distribution] [offer] [sending] [provision] was accomplished [using the mails] [by any means or facility of interstate or foreign commerce].

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a

reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

In giving this instruction the court should choose which of the alternatives presented under element 5 are applicable to the case.

“Child pornography” is defined in the Pattern Instruction for 18 U.S.C.§ 2256(8).

“Interstate/foreign commerce” is defined in a pattern instruction that follows the instructions related to 18 U.S.C. § 1465.

PROPOSED REVISION

18 U.S.C. § 2252A(a)(7) PRODUCTION WITH INTENT TO DISTRIBUTE AND DISTRIBUTION OF ADAPTED CHILD PORNOGRAPHY – ELEMENT

[changes to instruction and comment]

[The indictment charges the defendant[s] with; Count[s] of the indictment charge[s] the defendant[s] with] [production with the intent to distribute] [distribution] of adapted child pornography. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly [produced with the intent to distribute][distributed] [the material identified in the indictment]; and

2. [The material identified in the indictment] is child pornography [consisting of][including] an adapted or modified depiction of an identifiable minor; and

3. The defendant knew both that the material depicted one or more minors and that the minor[s] were engaged in sexually explicit conduct; and

4. [The material identified in the indictment] has been [produced][distributed] by any means or facility [of] [in] [affecting] interstate or foreign commerce.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

"Child pornography" is defined in the Pattern Instruction for 18 U.S.C.§ 2256(8).

"Interstate/foreign commerce" is defined in a pattern instruction that follows the instructions related to 18 U.S.C. § 1465.

"Identifiable minor" is defined in the Pattern Instruction for 18 U.S.C. § 2256(9).

"Minor" is defined in the Pattern Instruction for 18 U.S.C. § 2256(1).

"Sexually explicit conduct" is defined in the Pattern Instruction for 18 U.S.C. § 2256(2)(B).

In *United States v. X-Citement Video*, 513 U.S. 64, 77-78 (1994), the United States Supreme Court held that the "knowingly" requirement in Section 2252A extends to the minority status of the person depicted in the image and the fact that the image depicted sexually explicit conduct. *See also United States v. Malik*, 385 F.3d 758, 760 (7th Cir. 2004); *United States v. Rogers*, 474 Fed. App'x 463, 476-77 (7th Cir. 2012).

CURRENT INSTRUCTION

18 U.S.C. § 2252A(a)(7) PRODUCTION WITH INTENT TO DISTRIBUTE AND DISTRIBUTION OF ADAPTED CHILD PORNOGRAPHY – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [production with the intent to distribute] [distribution] of adapted child pornography. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly [produced with the intent to distribute] [distributed] [the material identified in the indictment]; and

2. [The material identified in the indictment] is child pornography [consisting of] [including] an adapted or modified depiction of an identifiable minor; and

~~3. The defendant knew that one or more persons depicted in [the material identified in the indictment] was under the age of eighteen years; and~~

4. [The material identified in the indictment] has been [produced] [distributed] by any means [in] [affecting] interstate or foreign commerce.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

“Child pornography” is defined in the Pattern Instruction for 18 U.S.C.§ 2256(8).

“Interstate/foreign commerce” is defined in a pattern instruction that follows the instructions related to 18 U.S.C. § 1465.

“Identifiable minor” is defined in the Pattern Instruction for 18 U.S.C. § 2256(9).

PROPOSED REVISION

18 U.S.C. § 2422(b) ENTICEMENT OF A MINOR – ELEMENTS

[changes to comments only]

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] enticement of a minor. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant used a facility or means of interstate commerce to knowingly [persuade][induce][entice][coerce] [the person identified in the indictment] to engage in [prostitution][sexual activity]; and

2. [The person identified in the indictment] was less than 18 years of age; and

3. The defendant believed [the person identified in the indictment was less than 18 years of age]; and

4. If the sexual activity had occurred, [the defendant] [any other person identified in the indictment] would have committed the criminal offense of ____________________.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

United States v. Berg, No. 09-2498 (7th Cir. 2011), held that the intent required under Section 2422(b) is the intent to persuade, induce or entice someone believed to be a minor to engage in sexual activity. It is not required for the government to prove that the defendant intended to engage in sexual activity with the minor.

The term "sexual activity" is not defined in the state. However, in *United States v. Taylor*, No. 10-2715 (7th Cir. 2011), the Court held that the rule on lenity requires sexual activity to be interpreted as synonymous with "sexual act" insofar as it requires physical contact between two people. Acts that are sexual in nature, but that do not involve that physical contact between two people (*e.g.*, flashing, masturbation) are not covered by the statute. In *United States v.*

McMillan, 744 F.3d 1033 (7th Cir. 2014), the Court held that a state statute making it a crime to knowingly persuade, induce, entice, or coerce person under age of 18 to engage in criminal sexual activity extended to adult-to-adult communications that were designed to persuade minor to commit forbidden acts.

In appropriate cases, "prostitution" may need to be defined. "Prostitution" means knowingly engaging in or offering to engage in a sexual act in exchange for money or other valuable consideration.

If the charged offense is an attempt, the court should also give the instruction defining attempt. See the Pattern Instruction 4.09. In *U.S. v. Cote*, 504 F.3d 682 (7th Cir. 2007), the Court held that a Defendant could be found guilty of using a facility or means of interstate commerce knowingly to attempt to persuade, induce or entice a minor to engage in a sexual act if he believed, albeit mistakenly, that the victim was a minor.

"Minor" is defined in the Pattern Instruction for 18 U.S.C. § 2256(1).

For a definition of "interstate or foreign commerce" see the Pattern Instruction related to 18 U.S.C. § 2315.

The Seventh Circuit has not decided whether unanimity regarding the manner of enticement is required, and the Committee takes no position. See *United States v. Hofus*, 598 F.3d 1171, 1177 (9th Cir. 2010) (unanimity not required). If it is required, see Pattern Instruction 4.04.

CURRENT INSTRUCTION

18 U.S.C. § 2422(b) ENTICEMENT OF A MINOR – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] enticement of a minor. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant used a facility or means of interstate commerce to knowingly [persuade] [induce] [entice] [coerce] [the person identified in the indictment] to engage in [prostitution] [sexual activity]; and

2. [The person identified in the indictment] was less than 18 years of age; and

3. The defendant believed [the person identified in the indictment was less than 18 years of age; and

4. If the sexual activity had occurred, [the defendant] [any other person identified in the indictment] would have committed the criminal offense of ______________________.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

United States v. Berg, No. 09-2498 (7th Cir. 2011), held that the intent required under Section 2422(b) is the intent to persuade, induce or entice someone believed to be a minor to engage in sexual activity. It is not required for the government to prove that the defendant intended to engage in sexual activity with the minor.

The term "sexual activity" is not defined in the state. However, in *United States v. Taylor*, No. 10-2715 (7th Cir. 2011), the Court held that the rule on lenity requires sexual activity to be interpreted as synonymous with "sexual act" insofar as it requires physical contact between two people. Acts that are sexual in nature, but that do not involve that physical contact between two people (*e.g.*, flashing, masturbation) are not covered by the statute.

In appropriate cases, “prostitution” may need to be defined. “Prostitution” means knowingly engaging in or offering to engage in a sexual act in exchange for money or other valuable consideration.

If the charged offense is an attempt, the court should also give the instruction defining attempt. See the Pattern Instruction 4.09.

“Minor” is defined in the Pattern Instruction for 18 U.S.C.§ 2256(1).

For a definition of “interstate or foreign commerce” see the Pattern Instruction related to 18 U.S.C. § 2315.

The Seventh Circuit has not decided whether unanimity regarding the manner of enticement is required, and the Committee takes no position. See *United States v. Hofus*, 598 F.3d 1171, 1177 (9th Cir. 2010) (unanimity not required). If it is required, see Pattern Instruction 4.04.