THE WILLIAM J. BAUER PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT

(2023 Ed.)

Prepared by

The Committee on Federal Criminal Jury Instructions

of the Seventh Circuit

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for the Seventh Circuit
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Chambers of
Amy J. St. Eve
United States Circuit Judge

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January 4, 2023

The Honorable Diane S. Sykes
Chief Judge
United States Court of Appeals
for the Seventh Circuit
219 South Dearborn Street
Chicago, IL 60604

Re: *Pattern Criminal Jury Instructions – 2022 Revisions*

Dear Chief Judge Sykes:

The Committee on Federal Criminal Jury Instructions of the Seventh Circuit is pleased to submit to the Judicial Council of the Seventh Circuit its 2022 revisions to the pattern instructions. These revised instructions are the product of more than a year of work by the judges, prosecutors, defense attorneys, and academics who served on the Committee. The Committee submits these instructions for the Judicial Council's authorization to publish them for use in connection with criminal trials in the district courts in this Circuit.

The proposed revisions/additions include the following instructions:

- 18 U.S.C. § 201(b)(1)(A) – Giving a Bribe – Elements (changes to instruction and comment)
- 18 U.S.C. § 201(b)(2)(A) – Accepting a Bribe – Elements (new instruction)
- 18 U.S.C. § 666(a)(1)(B) – Accepting a Bribe (changes to instruction and comment)
- 18 U.S.C. § 666(a)(2) – Paying a Bribe (changes to instruction and comment)
- 18 U.S.C. § 981(a)(1)(A) – Forfeiture Instruction (changes to instruction and comment)
- 18 U.S.C. § 982(a)(1) – Forfeiture Instruction (changes to instruction and

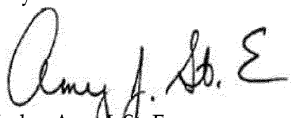
comment)

- 18 U.S.C. § 982(a)(2) – Forfeiture Instruction (change to instruction)
- 18 U.S.C. § 982(a)(3) – Forfeiture Instruction (changes to instruction and comment)
- 18 U.S.C. § 982(a)(4) – Forfeiture Instruction (changes to instruction and comment)
- 18 U.S.C. § 982(a)(5) – Forfeiture Instruction (changes to instruction and comment)
- 18 U.S.C. § 982(a)(6) – Forfeiture Instruction (changes to instruction and comment)
- 18 U.S.C. § 982(a)(7) – Forfeiture Instruction (changes to instruction and comment)
- 18 U.S.C. § 982(a)(8) – Forfeiture Instruction (change to instruction)
- 21 U.S.C. § 853 – Drug Forfeiture – Elements (changes to instruction and comment)

We recognize, of course, that neither the Council nor the Court of Appeals can approve in advance the use of any of these instructions in a particular case. It is enough that they are approved in principle.

Sincerely,

The Committee on Federal Criminal
Jury Instructions of the Seventh Circuit



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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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CHIEF JUDGE

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March 6, 2023

Honorable Amy J. St. Eve
United States Court of Appeals
for the Seventh Circuit
Everett McKinley Dirksen
United States Courthouse
219 South Dearborn Street, Room 2688A
Chicago, IL 60604

Re: Revisions to Pattern Criminal Jury Instructions

Dear Judge St. Eve:

Thank you for your January 4 letter on behalf of the Criminal Jury Instructions Committee transmitting the revisions to the pattern criminal jury instructions. Circuit Executive Sarah Schrup submitted the revisions to the Judicial Council requesting authorization for publication.

As you noted in your letter, the Council cannot and does not approve pattern jury instructions for use in any particular case. The Council has, however, reviewed the revisions and authorizes the committee to publish them as resources in connection with criminal trials in the district courts of the circuit. This authorization shall not be construed as adjudicative approval of the content of the instructions, which must await case-by-case review by the courts.

The Council extends its thanks and appreciation to you and the members of your committee for your hard work in creating, curating, and updating these instructions. We know the pattern instructions are an important resource in the administration of criminal justice in our circuit.

Sincerely,

Diane S. Sykes

Diane S. Sykes
Chief Judge

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CRIMINAL INSTRUCTIONS

INTRODUCTION

To: Judges and Criminal Law Practitioners of the U.S. District Courts of the Seventh Circuit

From: The Committee on Federal Criminal Jury Instructions of the Seventh Circuit

The Committee on Federal Criminal Jury Instructions of the Seventh Circuit presents the 2023 edition of the *William J. Bauer Pattern Criminal Jury Instructions of the Seventh Circuit*. These instructions are intended to be used in connection with criminal jury trials in the District Courts of the Seventh Circuit. This edition represents a substantial review and updating of the 2020 bound volume, as well as the 2022 digital update. The changes in and additions to this edition reflect comments from the bench and bar, as well as a thorough review of developments in case law – particularly, though not exclusively, coming from the Supreme Court and the Seventh Circuit. It includes both revisions of prior instructions and several new instructions covering issues and offenses for which judges and lawyers practicing criminal law in our Circuit have expressed a need, as well as substantial updates to the research reflected in the Committee Comments.

These instructions and their accompanying commentary have been approved in principle by the Judicial Council of the Seventh Circuit. This means that, although they have not been approved for use in any specific case, the Council has authorized their publication as an aid to judges and lawyers practicing criminal law in the District Courts of this Circuit. See *United States v. Edwards*, 869 F.3d 490, 496-97 (7th Cir. 2017).

As in prior editions, the instructions are presented in three sections. The first section is a set of pattern preliminary instructions to be used at the outset of a criminal trial. The second section, entitled "General Instructions," incudes instructions generally applicable to the trial process, as well as instructions addressing common legal theories of liability (such as conspiracy and aid and abetting) and certain defense theories (including affir-

mative defenses). The final (and much larger) section, entitled "Statutory Instructions," contains instructions related to specific statutory provisions located in Title 18 and in other parts of the United States Code where criminal statutes are found. This section is organized in order of statutory cite.

In producing this edition, whether drafting new instructions or revising existing ones, the Committee has continued to try to use plain language intelligible to lay jurors and to reduce the use of legalisms. This effort reflects the experience conveyed by comments we received from Committee members and other criminal practitioners and judges, as well as some academic study of the effectiveness of specific language with lay people. We have also continued to try to use only as many words as necessary in order to keep instructions as simple and cleanly worded as possible, although there are still a few instances in which adding a clarifying word or a defining or explanatory phrase makes an instruction clearer. In some cases the Committee has therefore continued to follow the advice offered in *United States v. Hill*, 252 F.3d 919, 923 (7th Cir. 2001), that some instructions work better when they give the jury the reasons underlying their admonition.

It is the Committee's intent that juries be instructed as much as is necessary, but not more so. In producing the 2023 edition the Committee has remained mindful of the need to avoid giving juries instructions about issues that are unnecessary to their deliberations, as well as the need to avoid making simple concepts unnecessarily complex. Some instructions, such as those explaining important preliminary or structural issues or setting forth the elements of an offense, will always be necessary, and some complex terms or concepts will require the giving of definitional instructions we have included. But we continue to note the Court's advice in *Hill* that "[u]nless it is necessary to give an instruction, it is necessary not to give it, so that the important instructions stand out and are remembered." 252 F.3d at 923; see also *United States v. Blitch*, 773 F.3d 837, 847 (7th Cir. 2014) (same); *United States v. McKnight*, 665 F.3d 786, 794 (7th Cir. 2011) (same); cf. *United States v. McKnight*, 671 F.3d 664, 665 (7th Cir. 2012) (Posner, J., joined by Kanne and Williams, J.J., dissenting from denial of rehearing *en banc*; "[G]ratuitous instructions confuse, and should not be given.").

While judges should not hesitate to instruct a jury on any issue it should know about to decide the case, we thus recommend against giving instructions that are not needed for that purpose. In particular, we advise against giving an instruction just because

a judge sees no reason not to give it (or just because it is included in this book), in order to avoid diluting the impact of necessary instructions and potentially injecting superfluous issues into the jury's deliberations. As *Hill* pointed out, a set of pattern instructions "offers model instructions for occasions when they are appropriate but does not identify those occasions." 252 F.3d at 923; see also *Edwards*, 869 F.3d at 497. Trial judges should always have an affirmative and case-specific reason for giving *any* jury instruction, whether it is a pattern instruction or otherwise.

We continue to commend the Committee Comments to the users of these instructions. They reflect a great deal of research and drafting effort on the part of the Committee's members, and they continue to be a valuable source of authority and general advice regarding when an instruction might or might not be given, as well as on the broad state of the law on the issue the instruction addresses. That said, the Comments are not intended to be authoritative in and of themselves, especially as to whether an instruction should be given in any particular case. Whether an instruction is appropriate for a given case is always a case-specific decision, and the Committee did not have any specific case solely in mind when drafting or commenting on a pattern instruction. Rather, the principal value of the Comments, aside from explaining the views of the Committee in offering an instruction or wording it in a particular way, is their citations of cases, which we hope will serve as useful and time-saving starting points, but not substitutes, for judges' and lawyers' own research and analysis on whether the relevant instruction is right for the case they are trying.

We also address several technical points. Regarding the gender of personal pronouns, the Committee has followed the form of the last several editions and avoided as cumbersome supposedly gender-neutral forms such as "he/she" or "him/her." With no chauvinism intended, the Committee generally uses masculine pronouns, but judges using these instructions should of course feel free to use any pronoun forms appropriate for the particular case before them. Each pattern instruction has a title included for the convenience of the judges and lawyers who will use them, but these titles were not drafted for jurors, and we recommend against including them in the instructions actually given to juries. As the Committee has for some time, we continue to recommend against reading the texts of statutes to juries. In several places we also continue to advise against instructing the jury on certain issues, including defining reasonable doubt. In addition, the Committee

continues to recommend that juries receive a copy or copies of the instructions for use during their deliberations.

The instructions we offer are pattern instructions, but judges are free to adapt or revise them as they think necessary in each case. In particular, the Committee continues to suggest, in a number of places, that judges adapt pattern instructions very specifically to the cases before them. See *Edwards*, 869 F.3d at 497 ("Pattern instructions are not intended to be used mechanically and uncritically. Trial judges routinely decide to use different language tailored more closely to the particular cases before them."). This advice takes several forms. For example, we suggest in connection with several instructions that the judge describe for jurors the particular "limited purpose" for admitting certain evidence addressed in the instruction. Another example of the need to specifically customize instructions might involve defining the state of mind in a case that requires the Government to prove that a defendant acted "willfully," which will often require consideration and incorporation of the required state of mind as set forth in the particular statute at issue. See *United States v. Dobek*, 789 F.3d 698, 702 (7th Cir. 2015) (Bauer, J., concurring).

The Committee is pleased to present the 2023 edition of the *William J. Bauer Pattern Criminal Jury Instructions of the Seventh Circuit*. We hope that they will be of material assistance to the judges and lawyers who practice criminal law in our Circuit.

CRIMINAL INSTRUCTIONS

The Committee on Federal Criminal
Jury Instructions of the
Seventh Circuit

Judge William J. Bauer
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PRELIMINARY INSTRUCTIONS—FOR USE AT THE BEGINNING OF TRIAL

FUNCTIONS OF COURT AND JURY

Ladies and gentlemen: You are now the jury in this case. I would like to take a few minutes to describe your duties as jurors and to give you instructions concerning the case.

As the judge in this case, one of my duties is to decide all questions of law and procedure. In these preliminary instructions, during the trial, and at the end of the trial, I will instruct you on the rules of law that you must follow in making your decision. The instructions that I give you at the end of the trial will be more detailed than the instructions I am giving you now. [Each of you will have a copy of the instructions that I give you at the end of the case.]

You have two duties as jurors. Your first duty is to decide the facts from the evidence that you see and hear in court. Your second duty is to take the law as I give it to you, apply it to the facts, and decide if the government has proved the defendant[s] guilty beyond a reasonable doubt [and whether the defendant has proved [insert defense] by a preponderance of the evidence; by clear and convincing evidence].

You must perform these duties fairly and impartially. Do not let sympathy, prejudice, fear, or public opinion influence you. [In addition, do not let any person's race, color, religion, national ancestry, or gender influence you.]

[You must give [name of corporate entity defendant] the same fair consideration that you would give to an individual.]

You should not take anything I say or do during the trial as indicating what I think of the evidence or what I think your verdict should be.

THE CHARGE

The charge[s] against the defendant[s] [is; are] in a document called an [indictment; information]. [You will have a copy of the [indictment; information] during your deliberations.]

The [indictment; information] in this case charges that the defendant[s] committed the crime[s] of [fill in short description of charged offenses]. The defendant[s] [has; have] pleaded not guilty to the charge[s].

The [indictment; information] is simply the formal way of telling the defendant[s] what crime[s] [he is; they are] accused of committing. It is not evidence that the defendant[s] [is; are] guilty. It does not even raise a suspicion of guilt.

PRESUMPTION OF INNOCENCE/BURDEN OF PROOF

[The; Each] defendant is presumed innocent of [each and every one of] the charge[s]. This presumption continues throughout the case. It is not overcome unless, from all the evidence in the case, you are convinced beyond a reasonable doubt that the [defendant; particular defendant you are considering] is guilty as charged.

The government has the burden of proving [the; each] defendant's guilt beyond a reasonable doubt. This burden of proof stays with the government throughout the case.

[The; A] defendant is never required to prove his innocence. He is not required to produce any evidence at all.

Alternative to paragraphs 2–3, to be used when affirmative defense is raised on which defendant has burden of proof:

The government has the burden of proving every element of the crime[s] charged beyond a reasonable doubt. This burden of proof stays with the government throughout the case. [The; A] defendant is never required to prove his innocence. He is not required to produce any evidence at all.

However, the defendant has the burden of proving the defense of [identify defense, *e.g.* duress, insanity] by [a preponderance of the evidence; clear and convincing evidence].

THE EVIDENCE

You may consider only the evidence that you see and hear in court. You may not consider anything you may see or hear outside of court, including anything from the newspaper, television, radio, the Internet, or any other source.

The evidence includes only what the witnesses say when they are testifying under oath[,] [and] the exhibits that I allow into evidence[,] [and] any facts to which the parties [agree; stipulate]. [A stipulation is an agreement that [certain facts are true [or] that a witness would have given certain testimony].]

Nothing else is evidence. Any statements and arguments that the lawyers make are not evidence. If what a lawyer says is different from the evidence as you hear or see it, the evidence is what counts. The lawyers' questions and objections likewise are not evidence.

A lawyer has a duty to object if he thinks a question or evidence is improper. When an objection is made, I will be required to rule on the objection. If I sustain an objection to a question a lawyer asks, you must not speculate on what the answer might have been. If I strike testimony or an exhibit from the record, or tell you to disregard something, you must not consider it.

Pay close attention to the evidence as it is being presented. During your deliberations, you will have any exhibits that I allow into evidence, but you will not have a transcript of the testimony. You will have to make your decision based on what you recall of the evidence.

TESTIMONY PRESENTED THROUGH INTERPRETER

[Language(s) other than English] may be used during the trial. When that happens, you should consider only the evidence provided through the official interpreter. Although some of you may know [language(s) used], it is important for all jurors to consider the same evidence. For this reason, you must base your decision on the evidence presented in the English translation.

DIRECT AND CIRCUMSTANTIAL EVIDENCE

You may have heard the terms "direct evidence" and "circumstantial evidence." Direct evidence is evidence that directly proves a fact. Circumstantial evidence is evidence that indirectly proves a fact.

[For example, direct evidence that it was raining outside is testimony by a witness that it was raining. Indirect evidence that it was raining outside is the observation of someone entering a room carrying a wet umbrella.]

You are to consider both direct and circumstantial evidence. The law does not say that one is better than the other. It is up to you to decide how much weight to give to any evidence, whether direct or circumstantial.

CONSIDERING THE EVIDENCE

Give the evidence whatever weight you believe it deserves. Use your common sense in weighing the evidence, and consider the evidence in light of your own everyday experience.

People sometimes look at one fact and conclude from it that another fact exists. This is called an inference. You are allowed to make reasonable inferences, so long as they are based on the evidence.

CREDIBILITY OF WITNESSES

Part of your job as jurors will be to decide how believable each witness was, and how much weight to give each witness's testimony. I will give you additional instructions about this at the end of the trial.

NUMBER OF WITNESSES

Do not make any decisions by simply counting the number of witnesses who testified about a certain point.

What is important is how believable the witnesses are and how much weight you think their testimony deserves.

JUROR NOTE-TAKING

You will be permitted to take notes during the trial. If you take notes, you may use them during deliberations to help you remember what happened during the trial. You should use your notes only as aids to your memory. The notes are not evidence. All of you should rely on your independent recollection of the evidence, and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any more weight than the memory or impressions of each juror.

JUROR CONDUCT

Before we begin the trial, I want to discuss several rules of conduct that you must follow as jurors.

First, you should keep an open mind throughout the trial. Do not make up your mind about what your verdict should be until after the trial is over, you have received my final instructions on the law, and you and your fellow jurors have discussed the evidence.

Second, your verdict in this case must be based exclusively on the law as I give it to you and the evidence that is presented in court during the trial. For this reason, and to ensure fairness to both sides in this case, you must obey the following rules. These rules apply both when you are here in court and when you are not in court. They apply until after you have returned your verdict in the case.

1. You must not discuss the case, the issues in the case, or anyone who is involved in the case, among yourselves until you go to the jury room to deliberate after the trial is completed.

2. You must not communicate with anyone else about this case, the issues in the case, or anyone who is involved in the case, until after you have returned your verdict.

3. When you are not in the courtroom, you must not allow anyone to communicate with you or give you any information about the case, the issues in the case, or about anyone who is involved in the case. If someone tries to communicate with you about the case, the issues in the case, or someone who is involved in the case, or if you overhear or learn any information about the case, the issues in the case, or someone involved in the case when you are not in the courtroom, you must report this to me promptly.

4. You may tell your family and your employer that you are serving on a jury, so that you can explain that you have to be in court. However, you must not communicate with them about the case, the issues in the case, or anyone who is involved in the case until after you have returned your verdict.

5. All of the information that you will need to decide the case will be presented here in court. You may not look up, obtain, or consider information from any outside source.

There are two reasons for these rules. First, it would not be fair to the parties in the case for you to consider outside information or communicate information about the case to others. Second, outside information may be incorrect or misleading.

When I say that you may not obtain or consider any information from outside sources, and may not communicate with anyone about the case, the issues in the case, or those involved in the case, I am referring to any and all means by which people communicate or obtain information. This includes, for example, face to face conversations; looking things up; doing research; reading, watching, or listening to reports in the news media; and any communication using any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Android, Blackberry or similar device, computer, the Internet, text messaging, chat rooms, blogs, social networking websites like Facebook, YouTube, Twitter, Instagram, SnapChat[, or] LinkedIn [or] [list additional sites or technologies as appropriate], or any other form of communication at all. If you hear, see, or receive any information about the case by these or any other means, you must report that to me immediately.

CONDUCT OF THE TRIAL

We are now ready to begin the trial. The trial will proceed in the following manner:

First, each side's attorney[s] may make an opening statement. An opening statement is not evidence. Rather, it is a summary of what each side's attorney[s] expect the evidence will show.

After the opening statements, you will hear the evidence.

After the evidence has been presented, the attorneys will make closing arguments, and I will instruct you on the law that applies to the case.

After that, you will go to the jury room to deliberate on your verdict.

GENERAL INSTRUCTIONS

1.01 FUNCTIONS OF COURT AND JURY

Members of the jury, I will now instruct you on the law that you must follow in deciding this case. [I will also give [each of] you a copy of these instructions to use in the jury room.] [Each of you has a copy of these instructions to use in the jury room.] You must follow all of my instructions about the law, even if you disagree with them. This includes the instructions I gave you before the trial, any instructions I gave you during the trial, and the instructions I am giving you now.

As jurors, you have two duties. Your first duty is to decide the facts from the evidence that you saw and heard here in court. This is your job, not my job or anyone else's job.

Your second duty is to take the law as I give it to you, apply it to the facts, and decide if the government has proved the defendant[s] guilty beyond a reasonable doubt [and whether the defendant has proved [insert defense] by a preponderance of the evidence; by clear and convincing evidence].

You must perform these duties fairly and impartially. Do not let sympathy, prejudice, fear, or public opinion influence you. [In addition, do not let any person's race, color, religion, national ancestry, or gender influence you.]

[You must give [name of corporate/entity defendant] the same fair consideration that you would give to an individual.]

You must not take anything I said or did during

the trial as indicating that I have an opinion about the evidence or about what I think your verdict should be.

1.02 THE CHARGE

The charge[s] against the defendant[s] [is; are] in a document called an indictment [information]. [You will have a copy of the indictment during your deliberations.]

The indictment [information] in this case charges that the defendant[s] committed the crime[s] of [name charged offenses]. The defendant[s] [has; have] pled not guilty to the charge[s].

The indictment [information] is simply the formal way of telling the defendant[s] what crime[s] [he is; they are] accused of committing. It is not evidence that the defendant[s] [is; are] guilty. It does not even raise a suspicion of guilt.

Committee Comment

This instruction is necessary because, as stated in *United States v. Garcia*, 562 F.2d 411, 417 (7th Cir. 1977), "[i]n almost any criminal case . . . the fact of the indictment has some emphasis. To the degree an uninstructed jury considers the matter, there is a real possibility that a charge leveled by a grand jury composed of its peers will weigh in the petit jury's balance on the side of guilt." Instruction on this subject is particularly important when the court permits the jury to take the indictment with it during deliberations. 2A C. Wright, N. King, S. Klein & P. Henning, *Federal Practice and Procedure, Criminal* § 486 (2009). When the jury is given the indictment—as is common practice—the "[f]ailure to instruct the jury to the effect that the indictment is not to be considered evidence of the guilt of the accused constitutes error." *United States v. Smith*, 419 F.3d 521, 530–31 (6th Cir. 2005) (internal quotation marks omitted).

If the court provides the jury with the indictment, references to the grand jury and its determination should be redacted from the copy tendered to the jury. In appropriate circumstances, references to defendants not on trial should be removed. References in indictments to uncharged individuals, *e.g.*, Individual A, who are identified in the public record by the evidence at trial, may be replaced by their proper names. Where a defendant on trial is charged only in some counts of a multi-count indictment, the court may consider renumbering the counts in which that defendant is

charged for ease of reference by the jury. Any final judgment should, of course, relate to the counts as numbered in the actual charging instrument.

1.03 PRESUMPTION OF INNOCENCE/BURDEN OF PROOF

[The; Each] defendant is presumed innocent of [each and every one of] the charge[s]. This presumption continues throughout the case, including during your deliberations. It is not overcome unless, from all the evidence in the case, you are convinced beyond a reasonable doubt that the [defendant; particular defendant you are considering] is guilty as charged.

The government has the burden of proving [the; each] defendant's guilt beyond a reasonable doubt. This burden of proof stays with the government throughout the case.

[The; A] defendant is never required to prove his innocence. He is not required to produce any evidence at all.

Alternative to paragraphs 2 and 3 to be used when an affirmative defense is raised on which the defendant has the burden of proof:

The government has the burden of proving every element of the crime[s] charged beyond a reasonable doubt. This burden of proof stays with the government throughout the case. [The; A] defendant is never required to prove his innocence. He is not required to produce any evidence at all.

However, the defendant has the burden of proving the defense of [identify defense, *e.g.*, duress, insanity] by [a preponderance of the evidence; clear and convincing evidence].

Committee Comment

Whether or not it is constitutionally required, compare *Taylor v. Kentucky*, 436 U.S. 478 (1978) (failure to give instruction on the presumption of innocence is reversible error) with *Kentucky v.*

Wharton, 441 U.S. 786 (1979) (instruction is not constitutionally required in every case), it is well established that juries in federal criminal trials should be instructed on both the presumption of innocence, see*, e.g*, *United States v. Covarrubias*, 65 F.3d 1362, 1369 (7th Cir. 1995) ("Juries in federal criminal trials are instructed that the defendant is presumed innocent."); *United States v. DeJohn*, 638 F.2d 1048, 1057–59 (7th Cir. 1981) (instruction recommended, but a long and confusing instruction may do more harm than good), and the government's burden to prove guilt beyond a reasonable doubt. *Coffin v. United States*, 156 U.S. 432, 452–61 (1895); *United States v. Nelson*, 498 F.2d 1247 (5th Cir. 1974); *McDonald v. United States*, 284 F.2d 232 (D.C. Cir. 1960). The cases are legion in which the Seventh Circuit has considered an instruction along these lines as curing potential error resulting from, for example, allegedly improper argument. See, *e.g., United States v. Clark*, 535 F.3d 571, 581 (7th Cir. 2008).

The alternative paragraphs are to be used when the defendant is asserting an affirmative defense on which he bears the burden of proof.

1.04 DEFINITION OF REASONABLE DOUBT

[No instruction.]

Committee Comment

The Seventh Circuit has repeatedly held that it is inappropriate for the trial judge to attempt to define "reasonable doubt" for the jury. See, *e.g.*, *United States v. Hatfield*, 591 F.3d 945, 949 (7th Cir. 2010); *United States v. Bruce*, 109 F.3d 323, 329 (7th Cir. 1997); *United States v. Glass*, 846 F.2d 386, 387 (7th Cir. 1988). As the court said in *Glass*,

> This case illustrates all too well that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." *Holland v. United States*, 348 U.S. 121, 140 (1954). And that is precisely why this circuit's criminal jury instructions forbid them. See Federal Criminal Instructions of the Seventh Circuit 2.07 (1980). "Reasonable doubt" must speak for itself. Jurors know what is "reasonable" and are quite familiar with the meaning of "doubt." Judges' and lawyers' attempts to inject other amorphous catch-phrases into the "reasonable doubt" standard, such as "matter of the highest importance," only muddy the water. This jury attested to that. It is, therefore, inappropriate for judges to give an instruction defining "reasonable doubt," and it is equally inappropriate for trial counsel to provide their own definition. See, *e.g., United States v. Dominguez*, 835 F.2d 694, 701 (7th Cir. 1987). Trial counsel may argue that the government has the burden of proving the defendant's guilt "beyond a reasonable doubt," but *they may not attempt to define "reasonable doubt."*

846 F.2d at 386 (emphasis in original).

1.05 DEFINITION OF CRIME CHARGED

[No instruction.]

Committee Comment

It was once common practice to quote the language of the pertinent statute in the instructions to the jury. The Committee recommends against this practice and has drafted no instruction on this point. The purpose of the "elements" instructions is to provide the jury with the requirements for proving the defendant's guilt, in direct language comprehensible to lay jurors. Quoting from the statute would, in most situations, undercut the pattern instructions' goal of simplicity and comprehensibility.

1.06 DEFINITION OF FELONY/MISDEMEANOR

Committee Comment

The Committee does not consider it necessary to have a general instruction defining the terms "felony" or "misdemeanor" because those terms are not used elsewhere in the instructions, and the determination of whether a crime is a felony or misdemeanor is a question of law.

1.07 BILL OF PARTICULARS

[No instruction.]

Committee Comment

The Committee does not consider it necessary to give an instruction concerning the content or effect of a bill of particulars. The admissibility of evidence in light of a bill of particulars is a question of law for the court.

2.01 THE EVIDENCE

You must make your decision based only on the evidence that you saw and heard here in court. Do not consider anything you may have seen or heard outside of court, including anything from the newspaper, television, radio, the Internet, social media, text messages, e-mails, or any other source.

The evidence includes only what the witnesses said when they were testifying under oath[,] [and] the exhibits that I allowed into evidence[,] [and] the stipulations that the lawyers agreed to. A [stipulation] is an agreement that [certain facts are true] [or] [that a witness would have given certain testimony].

[In addition, you may recall that I took [judicial] notice of certain facts that may be considered as matters of common knowledge. You may accept those facts as proved, but you are not required to do so.]

Nothing else is evidence. The lawyers' statements and arguments are not evidence. If what a lawyer said is different from the evidence as you remember it, the evidence is what counts. The lawyers' questions and objections likewise are not evidence.

A lawyer has a duty to object if he thinks a question is improper. If I sustained objections to questions the lawyers asked, you must not speculate on what the answers might have been.

If, during the trial, I struck testimony or exhibits from the record, or told you to disregard something, you must not consider it.

Committee Comment

Extraneous influence. This instruction is consistent with the one approved by the Seventh Circuit in *United States v. Xiong*, 262 F.3d 672, 676 (7th Cir. 2001). The Seventh Circuit has also defined

the minimum measures a trial judge must take when confronted with evidence of prejudicial publicity prior to or during trial. When apprised in a general fashion of the existence of damaging publicity, the trial judge should "strongly and repeatedly [admonish] the jury throughout the trial not to read or listen to any news coverage of the case." *Margoles v. United States*, 407 F.2d 727, 733 (7th Cir. 1969). When the publishing or broadcast of specific items of inadmissible evidence is brought to the trial court's attention, the court must investigate further to determine juror exposure:

> Thus, the procedure required by this circuit where prejudicial publicity is brought to the court's attention during a trial is that the court must ascertain if any jurors who had been exposed to such publicity had read or heard the same. Such jurors who respond affirmatively must then be examined, individually and outside the presence of the other jurors, to determine the effect of the publicity.

Id. at 735. A court faced with a post-verdict question of extraneous prejudicial information is obligated to follow this same procedure. *United States v. Bashawi*, 272 F.3d 458, 463 (7th Cir. 2001).

Judicial notice. Fed. R. Evid. 201(g) requires the court in a criminal case to "instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed."

2.02 CONSIDERING THE EVIDENCE

Give the evidence whatever weight you decide it deserves. Use your common sense in weighing the evidence, and consider the evidence in light of your own everyday experience.

People sometimes look at one fact and conclude from it that another fact exists. This is called an inference. You are allowed to make reasonable inferences, so long as they are based on the evidence.

Committee Comment

The Seventh Circuit has held that an instruction to the jury to use their common sense and reflect on their everyday experience "does not . . . invite a jury member to consider the evidence in light of personally-held . . . stereotypes or prejudices." *United States v. Jones*, 808 F.2d 561, 568 (7th Cir. 1986).

2.03 DIRECT AND CIRCUMSTANTIAL EVIDENCE

You may have heard the terms "direct evidence" and "circumstantial evidence." Direct evidence is evidence that directly proves a fact. Circumstantial evidence is evidence that indirectly proves a fact.

You are to consider both direct and circumstantial evidence. The law does not say that one is better than the other. It is up to you to decide how much weight to give to any evidence, whether direct or circumstantial.

Committee Comment

The phrase "circumstantial evidence" is addressed here because of its use in common parlance and the likelihood that jurors may have heard the term outside the courtroom.

The committee did not include examples in the standard instruction, though it does not rule out their use in a given case (and it has included one as an option in the preliminary instructions). If used, however, caution is required. One often-used illustration is the following: "An example of direct evidence that it was raining would be testimony from a witness who said she was outside and saw it raining. An example of circumstantial evidence that it was raining would be testimony that a witness observed someone carrying a wet umbrella." Examples of this sort may be too simplistic to illustrate the definitions in a given case, and they omit the fact that more than one conclusion may be drawn from circumstantial evidence (in the example, the wet umbrella might mean that the person walked under a lawn sprinkler).

If asked to give examples, the court should consider these points and should also consider whether it is more appropriate to leave the matter for attorney argument.

2.04 NUMBER OF WITNESSES

Do not make any decisions simply by counting the number of witnesses who testified about a certain point.

[You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a larger number. You need not accept the testimony of the larger number of witnesses.]

What is important is how truthful and accurate the witnesses were and how much weight you think their testimony deserves.

Committee Comment

The bracketed paragraph should not be given when the defendant does not call any witnesses or when the defendant objects.

2.05 DEFENDANT'S DECISION NOT TO TESTIFY OR PRESENT EVIDENCE

A defendant has an absolute right not to testify [or present evidence]. You may not consider in any way the fact that [the; a] defendant did not testify [or present evidence]. You should not even discuss it in your deliberations.

Committee Comment

No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum. *Carter v. Kentucky*, 450 U.S. 288, 303 (1981).

In a multi-defendant trial, this instruction must be given at the request of a non-testifying defendant over the objection of a defendant who testifies. *Bruno v. United States*, 308 U.S. 287 (1939); *United States v. Schroeder*, 433 F.2d 846, 851 (8th Cir. 1970); *United States v. Kelly*, 349 F.2d 720, 768–69 (2d Cir. 1965).

3.01 CREDIBILITY OF WITNESSES

Part of your job as jurors is to decide how believable each witness was, and how much weight to give each witness' testimony [, including that of the defendant]. You may accept all of what a witness says, or part of it, or none of it.

Some factors you may consider include:

- [the age of the witness;]

- the intelligence of the witness;

- the witness' ability and opportunity to see, hear, or know the things the witness testified about;

- the witness' memory;

- the witness' demeanor;

- whether the witness had any bias, prejudice, or other reason to lie or slant the testimony;

- the truthfulness and accuracy of the witness' testimony in light of the other evidence presented; and

- inconsistent [or consistent] statements or conduct by the witness.

Committee Comment

The bracketed portion of the instruction relating to testimony by the defendant should be given only if the defendant has testified.

The portion of the instruction relating to age should be given only when a very elderly or very young witness has testified.

The bracketed language "or consistent" should not be used un-

less a consistent statement is admitted.

3.02 ATTORNEY INTERVIEWING WITNESS

It is proper for an attorney to interview any witness in preparation for trial.

Committee Comment

The court should give this instruction only if there has been testimony regarding interviews of witnesses.

"As the trial judge explained to the jury, 'it is perfectly proper for a lawyer to interview a witness in preparation for trial,' and an attorney who does not question, rehearse and prepare his witnesses before trial is not properly prepared for trial." *United States v. Torres*, 809 F.2d 429, 439–40 (7th Cir. 1987).

3.03 PRIOR INCONSISTENT STATEMENTS

You have heard evidence that before the trial, [a] witness[es] made [a] statement[s] that may be inconsistent with [his; their] testimony here in court. You may consider an inconsistent statement made before the trial [only] to help you decide how believable a witness' testimony was here in court. [If an earlier statement was made under oath, then you can also consider the earlier statement as evidence of the truth of whatever the witness said in the earlier statement.]

Committee Comment

See, *e.g., United States v. Severson*, 49 F.3d 268, 272 (7th Cir. 1995) (prior inconsistent statement not given under oath is admissible only for purposes of impeachment); *United States v. Dietrich*, 854 F.2d 1056, 1061 (7th Cir. 1988) (same); Fed. R. Evid. 801(d)(1)(A) (inconsistent statement given under oath at trial, hearing or other proceeding, or deposition is not hearsay).

The bracketed word "only" in the second sentence should be included if the prior inconsistent statement is admitted only for purposes of impeachment. See Fed. R. Evid. 801(d)(1).

3.04 PRIOR INCONSISTENT STATEMENT BY DEFENDANT

You have heard evidence that before the trial, [the; a] defendant made [a] statement[s] that may be inconsistent with his testimony here in court. You may consider an inconsistent statement by [the; a] defendant made before the trial to help you decide how believable the defendant's testimony was here in court, and also as evidence of the truth of whatever the defendant said in the earlier statement.

Committee Comment

The court should give this instruction only if a defendant testifies and inconsistent statements by that defendant are admitted that qualify for substantive use under Fed. R. Evid. 801(d)(2)(A). The court may, if appropriate, craft instructions applicable to statements of others attributable to and admitted substantively against a defendant under one of the other subsections of Rule 801(d)(2).

3.05 WITNESSES REQUIRING SPECIAL CAUTION

You have heard testimony from [a witness; witnesses; name(s) of witness(es)] who:

[- [was; were] [promised; received; expected] [a] benefit[s] in return for his [testimony; cooperation with the government];]

[- has [admitted; been convicted of] lying under oath;]

[- has [pled guilty to being; stated that he was] involved in [one; some] of the crime[s] the defendant is charged with committing. [You may not consider his guilty plea as evidence against the defendant.]]

You may give [this witness'; these witnesses'] testimony whatever weight you believe is appropriate, keeping in mind that you must consider that testimony with caution and great care.

Committee Comment

Witness given or promised a benefit: The Supreme Court observed, in *On Lee v. United States*, 343 U.S. 747, 757 (1952), that the use of informers "may raise serious questions of credibility. To the extent that they do, a defendant is entitled to . . . have the issues submitted to the jury with careful instructions." The Court has never specifically articulated what is to be included in these "careful instructions," but in *Hoffa v. United States*, 385 U.S. 293, 311–12 & n.14 (1966), it approved an instruction in which the trial judge told the jury to "[c]onsider . . . any relation each witness may bear to either side of the case . . . All evidence of a witness whose self-interest is shown from either benefits received, detriments suffered, threats or promises made, or any attitude of the witness which might tend to prompt testimony either favorable or unfavorable to the accused should be considered with caution and weighed with care."

Former Seventh Circuit Pattern Criminal Jury Instruction No. 3.13 (1999) included a specific reference to immunity. The Committee has concluded that immunity is a form of benefit that is covered by the more general "benefit" referenced in this instruction.

Witness who has pled guilty: This instruction is recommended for use in trials in which a witness testifies after pleading guilty to an offense arising from the same occurrence for which the defendant is on trial, and the jury learns of the plea. Such evidence may only be used for the purpose of impeachment or to reflect on the credibility of the witness. The instruction is necessary due to the possibility that an uninstructed jury may infer that the witness' guilty plea is indicative of the defendant's guilt. See *United States v. Johnson*, 26 F.3d 669, 677–80 (7th Cir. 1994). At the defendant's request, this instruction should be given immediately after the plea is admitted and repeated at the end of the trial. *Id.;* see also *United States v. Carraway*, 108 F.3d 745, 756 (7th Cir. 1997).

3.06 IMPEACHMENT BY PRIOR CONVICTION

(a)

You may consider evidence that the defendant was convicted of a crime only in deciding the believability of his testimony. [You may not consider it for any other purpose.] [The other conviction[s] [is; are] not evidence of whether the defendant is guilty of [the; any] crime he is charged with in this case.]

(b)

You may consider evidence that a witness was convicted of a crime only in deciding the believability of his testimony. You may not consider it for any other purpose.

Committee Comment

The final sentences of instruction (a) are bracketed to account for cases in which the prior conviction is an element of the offense for which the defendant is on trial.

Some offenses require proof of a prior conviction as an element. *E.g.*, 18 U.S.C. 922(g) and (h). The defendant's commission of another crime may also be admissible to prove motive, opportunity, intent and the like. See Fed. R. Evid. 404(b). In such cases this instruction should not be given. Instead, the jury should be specifically instructed on the purpose for which the evidence may be considered. See Pattern Instruction 3.11.

3.07 CHARACTER EVIDENCE REGARDING WITNESS

You have heard testimony about [name]'s character for [truthfulness; untruthfulness]. You may consider this evidence only in deciding the believability of [name]'s testimony and how much weight to give to it.

Committee Comment

See Fed. R. Evid. 404(a)(2), 404(a)(3), and 608.

3.08 CHARACTER EVIDENCE REGARDING DEFENDANT

You have heard testimony about [the defendant's; defendant [name]'s] [good character; character for [list characteristic, trait or attribute]]. You should consider this testimony together with and in the same way you consider the other evidence.

Committee Comment

See Fed. R. Evid. 404(a)(1). Until 1985, the Seventh Circuit adhered to the idea that when evidence of the defendant's good character was introduced, an instruction was required stating that such evidence "standing alone" could provide a reasonable doubt regarding the defendant's guilt. See *United States v. Donnelly*, 179 F.2d 227, 233 (7th Cir. 1950). This requirement rested on a reading of *Edgington v. United States*, 164 U.S. 361 (1896), and *Michelson v. United States*, 335 U.S. 469 (1948). However, in *United States v. Burke*, 781 F.2d 1234, 1238–42 (7th Cir. 1985), the court abandoned the "standing alone" instruction:

> The "standing alone" instruction conveys to the jury the sense that even if it thinks the prosecution's case compelling, even if it thinks the defendant a liar, if it also concludes that he has a good reputation this may be the "reasonable doubt" of which other instructions speak. A "standing alone" instruction invites attention to a single bit of evidence and suggests to jurors that they analyze this evidence all by itself. No instruction flags any other evidence for this analysis—not eyewitness evidence, not physical evidence, not even confessions. There is no good reason to consider any evidence "standing alone."

Id. at 1239 (emphasis in original).

While *Burke* makes clear that a "standing alone" instruction is never required, the court has said that it may sometimes be permissible, though it has not identified circumstances in which that might be the case. See *United States v. Ross*, 77 F.3d 1525, 1538 (7th Cir. 1996) ("This Court has repeatedly held that such an instruction, while sometimes allowable, is never necessary."); *Burke*, 781 F.2d at 1242 n.5. Several other Circuits also recognize that there may be situations in which the instruction can be used. See *United States v. Pujana-Mena*, 949 F.2d 24, 27–32 (2d Cir. 1991); *United States v. Winter*, 663 F.2d 1120, 1147–49 (1st Cir. 1981); *United States v. Spangler*, 838 F.2d 85, 87–88 (3d Cir. 1988); *United States v. Foley*, 598 F.2d 1323, 1336–37 (4th Cir. 1979).

3.09 STATEMENT BY DEFENDANT

You have [heard testimony; received evidence] that [the defendant; defendant [name]] made a statement to [name of person or agency]. You must decide whether [the defendant; defendant [name]] actually made the statement and, if so, how much weight to give to the statement. In making these decisions, you should consider all of the evidence, including the defendant's personal characteristics and circumstances under which the statement may have been made.

[You may not consider the statement of defendant [name] as evidence against [the; any] other defendant.]

Committee Comment

This instruction is intended to apply only to statements made by a defendant to law enforcement. See *United States v. Broeske*, 178 F.3d 887, 889–90 (7th Cir. 1999).

The second paragraph is in brackets because it should not be given in a single-defendant case.

This instruction utilizes the word "statement" in place of words such as "admission" and "confession." In *United States v. Gardner*, 516 F.2d 334, 346 (7th Cir. 1975), the court said that "the word 'statements' is a more neutral description than 'confession', and should be used in its place in future instructions unless the statements can be considered a 'complete and conscious admission of guilt—a strict confession.' " The use of the term "statement" in all such instructions eliminates the need for additional debate or litigation regarding whether a particular statement fits the definition of a "strict confession" under *Gardner*.

The instruction assumes that the trial court has rejected any challenge to the voluntariness of the defendant's statement, following a hearing comporting with the requirements of *Jackson v. Denno*, 378 U.S. 368 (1964), and 18 U.S.C. § 3501. Consequently, reconsideration of the voluntariness issue by the jury is not required. *Lego v. Twomey*, 404 U.S. 477 (1972).

As required by 18 U.S.C. § 3501, the instruction directs the jurors to make a determination as to the weight, if any, to be given to a statement after considering factors having to do with the

defendant's personal characteristics and the conditions under which the statement was made. "Evidence about the manner in which a confession was secured will often be germane to its probative weight, a matter that is exclusively for the jury to assess." *Crane v. Kentucky*, 476 U.S. 683, 688 (1986). It is the Committee's view that the specific factors set forth in 18 U.S.C. § 3501 should not be set forth in the instruction, but, rather, should be left to argument by counsel. Inclusion of all possible subjects of consideration in a general instruction might result in the inclusion of irrelevant factors in many cases, while recitation of only few common factors might cause undue emphasis on those particular factors.

This instruction does not cover vicarious or adoptive admissions or statements made in furtherance of a conspiracy or joint venture.

3.10 DEFENDANT'S SILENCE IN THE FACE OF ACCUSATION

You have heard evidence that [name of person] accused the defendant of [the; a] crime charged in the indictment and that the defendant did not [deny; object to; contradict] the accusation. If you find that the defendant was present and heard and understood the accusation, and that the accusation was made under such circumstances that the defendant would [deny; object to; contradict] it if it were not true, then you may consider whether the defendant's silence was an admission of the truth of the accusation.

Committee Comment

If a defendant is in custody, his silence in the face of an accusatory statement made by a law enforcement official cannot be considered an admission of the truth of the statements. Such evidence should not be received, and as a result, no instruction is necessary to cover the point. See *Doyle v. Ohio*, 426 U.S. 610 (1976). More difficult issues arise, however, when the accusatory statement is not made by a law enforcement official or when the defendant is not in custody. See generally Charles W. Gamble, *The Tacit Admission Rule: Unreliable and Unconstitutional—A Doctrine Ripe For Abandonment*, 14 Ga. L. Rev. 27 (1979) (criticizing admission of such evidence under any circumstances). A defendant's silence in the face of an accusation while not in custody is not subject to the rule of *Doyle*. See *Brecht v. Abrahamson*, 507 U.S. 619 (1993); *United States v. Jumper*, 497 F.3d 699, 704 (7th Cir. 2007); *Greer v. Miller*, 483 U.S. 756, 763–65 (1987).

Under Fed. R. Evid. 801(d)(2)(B), before silence can be considered to be an admission, the court must consider whether the defendant was present and heard and understood the statement and had an opportunity to deny it but did not do so. See*, e.g., United States v. Ward*, 377 F.3d 671, 675 (7th Cir. 2004).

3.11 EVIDENCE OF OTHER ACTS BY DEFENDANT

You have heard [testimony; evidence] that the defendant committed acts other than the ones charged in the indictment. Before using this evidence, you must decide whether it is more likely than not that the defendant took the actions that are not charged in the indictment. If you decide that he did, then you may consider that evidence to help you decide [describe with particularity the purpose for which other act evidence was admitted, *e.g.* the defendant's intent to distribute narcotics, absence of mistake in dealing with the alleged victim, etc.]. You may not consider this evidence for any other purpose. To be more specific, you may not use the evidence to conclude that, because the defendant committed an act in the past, he is more likely to have committed the crime[s] charged in the indictment. The reason is that the defendant is not on trial for these other acts. Rather, he is only on trial for [list charges alleged in the indictment]. The government has the burden to prove beyond a reasonable doubt the elements of the crime[s] charged in the indictment. This burden cannot be met with an inference that the defendant is a person whose past acts suggest bad character or a willingness or tendency to commit crimes.

Committee Comment

See Fed. R. Evid. 404(b) (admissibility of other act evidence for limited purposes); see, *e.g., United States v. Perkins*, 548 F.3d 510, 514 (7th Cir. 2008) (jury must find that the defendant committed the act in question). Other act evidence may be admitted to show, among other things, predisposition, motive, opportunity, intent, preparation, plan, knowledge, identity, presence, or absence of mistake or accident.

This instruction may also be given during the trial at the time the evidence is introduced provided that the court has first consulted with defense counsel about whether the defense wants a limiting instruction. *United States v. Gomez*, 763 F.3d 845, 860 (7th Cir. 2014) (*en banc*).

"When given, the limiting instruction should be customized to the case rather than boilerplate." *Id*. In other words, the judge should, to the extent feasible, identify the other-act evidence in question and describe with particularity the issue(s) on which it has been admitted, as more fully discussed in the remainder of this Comment. The judge should take care to describe the evidence in a neutral fashion and to avoid giving it additional weight. In addition, the judge should consult counsel about whether and when to give a limiting instruction; the Seventh Circuit has "caution[ed] against judicial freelancing in this area." *Id*. In some situations, the defense may prefer "to let the evidence come in without the added emphasis of a limiting instruction," and if so the judge should not preempt this. *Id*.; see also *United States v. Lawson*, 776 F.3d 519, 522 (7th Cir. 2015) ("[T]he choice whether to give a limiting instruction rests with the defense, which may decide that the less said about the evidence the better.").

In *United States v. Miller*, 673 F.3d 688 (7th Cir. 2012), the court counseled against "leaving juries to decode for themselves how they may properly consider admissible bad acts evidence" and encouraged trial judges to include "a case-specific explanation of the permissible inference—with the requisite care not to affirmatively credit that inference." 673 F.3d at 702 n.1. This instruction contemplates that the trial judge will do exactly that, inserting into the bracket in the third sentence a description of the issue(s) on which the other-act evidence has been admitted. This will help focus the jury on the fact that the identified purpose for consideration of the evidence is the sole purpose for which it may consider the evidence. As counseled in *Miller*, the description of the basis for which the other-act evidence is offered should be as focused as reasonably possible under the circumstances, and where possible, courts should avoid using overly general language. *Miller* indicates that a general instruction along the lines that other-act evidence may be considered "on the questions of knowledge and intent" may be unduly vague and may invite the jury to consider the evidence for impermissible purposes. See *id.* The cautionary language at the end of the instruction is included for the same reasons and to avoid misuse of "other act" evidence. See, *e.g.*, Sixth Circuit Criminal Instruction 7.13; Eighth Circuit Criminal Instructions 2.08 & 2.09.

In *United States v. Gomez*, 763 F.3d 845 (7th Cir. 2014) (*en banc*), the court abandoned the four-part test for admissibility under Rule 404(b), originally set forth in *United States v. Zapata*, 871 F.2d 616, 620 (7th Cir. 1989). Gomez adopted "a more straightforward rules-based approach," which is summarized as follows:

> [T]o overcome an opponent's objection to the introduction

> of other-act evidence, the proponent of the evidence must first establish that the other act is relevant to a specific purpose other than the person's character or propensity to behave in a certain way. See Fed. R. Evid. 401, 402, 404(b). Other-act evidence need not be excluded whenever a propensity inference can be drawn. But its relevance to "another purpose" must be established through a chain of reasoning that does not rely on the forbidden inference that the person has a certain character and acted in accordance with that character on the occasion charged in the case. If the proponent can make this initial showing, the district court must in every case assess whether the probative value of the other-act evidence is substantially outweighed by the risk of unfair prejudice and may exclude the evidence under Rule 403 if the risk is too great. The court's Rule 403 balancing should take account of the extent to which the non-propensity fact for which the evidence is offered actually is at issue in the case.

Id. at 853, 860.

Gomez also counseled against keeping the jury in the dark about the rationale for the rule against propensity inferences and suggested that jurors should be explicitly told why they must not use the other-act evidence to infer that the defendant has a certain "character" and acted "in character" in the present case. *Id*. at 861. This instruction does just that, while also reminding the jury that the government bears the burden of proving every element of the specific crime charged beyond a reasonable doubt.

In *United States v. Morgan*, 929 F.3d 411 (7th Cir. 2019), the jury instructions did not include the specific directives from the pattern jury instructions that were designed to inform the jury to avoid using the evidence as propensity or character evidence. The court found that omission to be an error, albeit one that the defense waived. The court counseled that jurors should be told directly that they must not use the other-act evidence to infer that the defendant has a certain character and acted in character in the present case because it does not follow from the defendant's past acts that he committed the particular crime charged in the case.

This instruction does not apply to evidence admitted pursuant to Fed. R. Evid. 413 or 414, under which a prior act of sexual assault or child molestation by the defendant may be considered for "its bearing on any matter to which it is relevant." If evidence was admitted pursuant to Rules 413 or 414, this instruction should be modified to exempt that evidence from its limitations, and a separate instruction should be given to address the Rule 413 or 414 evidence.

3.12 IDENTIFICATION TESTIMONY

You have heard testimony of an identification of a person. Identification testimony is an expression of the witness's belief or impression. In evaluating this testimony, you should consider the opportunity the witness had to observe the person at the time [of the offense] and to make a reliable identification later. You should also consider the circumstances under which the witness later made the identification.

The government must prove beyond a reasonable doubt that the defendant is the person who committed the crime that is charged.

Committee Comment

In *Perry v. New Hampshire*, 565 U.S. 228 (2012), the Supreme Court acknowledged the possibility of eyewitness misidentification but held that trial courts are not required to make a preliminary determination of the admissibility of an identification unless suggestive circumstances exist that are the result of law enforcement conduct. In doing so, the Court observed that "the jury, not the judge, traditionally determines the reliability of evidence." *id.* at 245. The Court also relied on the protections provided by "[e]yewitness-specific jury instructions, which many federal and state courts have adopted, [which] likewise warn the jury to take care in appraising identification evidence," *id.* at 246, n. 7 (collecting pattern instruction cites, including Seventh Circuit Pattern Criminal Jury Instruction 3.08 (1999)), as well as the requirement that the Government prove the defendant's guilt beyond a reasonable doubt, *id.* at 247.

A specific instruction on witness identification must be given when identification is at issue. *United States v. Hall*, 165 F.3d 1095, 1007 (7th Cir. 1999) (citing *United States v. Anderson*, 739 F.2d 1254, 1257–58 (7th Cir. 1984)). This instruction, derived from the instruction recommended in *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972), cautions the jury to weigh carefully the circumstances surrounding the identification before reaching a conclusion. See *United States v. Crotteau*, 218 F.3d 826, 833 (7th Cir. 2000) (approving earlier version of this instruction).

It has long been the practice in this Circuit to leave to argument the factors that may bear on the accuracy of an eyewitness identification. The Committee notes, however, that there has been

some support expressed for judicial instruction on such points. See *Hall*, 165 F.3d at 1120 (Easterbrook, J., concurring). A judge may consider whether it is appropriate in a given case to supplement this instruction by identifying a specific factor or factors for the jury's consideration.

The phrase "of the offense" in the first paragraph is bracketed because identification testimony does not always involve an eyewitness to the offense itself.

A court may, but is not required to, admit expert testimony regarding the reliability of eyewitness testimony. See *United States v. Carter*, 410 F.3d 942, 950 (7th Cir. 2005).

3.13 OPINION TESTIMONY

You have heard a witness, namely, [name of witness], who gave opinions and testimony about [certain subject(s); specify the subject(s), if possible]. You do not have to accept this witness's [opinions; testimony]. You should judge this witness's opinions and testimony the same way you judge the testimony of any other witness. In deciding how much weight to give to these opinions and testimony, you should consider the witness's qualifications, how he reached his [opinions; conclusions], and the factors I have described for determining the believability of testimony.

Committee Comment

Plural forms should be used if more than one opinion witness testifies.

The term "expert" and the prior pattern instruction's reference to witnesses with "special knowledge or skill" have been omitted to avoid the perception that the court credits the testimony of such a witness or the witness's qualifications.

Some jurisdictions do not offer a standard instruction on expert testimony. The Illinois Pattern Jury Instructions recommend that no instruction be given on this subject, beyond the instruction regarding believability of witnesses generally. See IPI Criminal 3.18 (2020). Similarly, the Indiana Pattern Jury Instructions do not include a specific instruction on the subject. The general instruction relating to the jury's role in determining the weight and credibility of witnesses is thought to be sufficient in the courts of those States. Nevertheless, the danger that an expert's testimony will be given undue weight by the jury does exist. See *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972) (noting the influence of expert testimony in prosecutions in which the defendant's sanity is an issue); *United States v. Gold*, 661 F. Supp. 1127, 1129–30 (D.D.C. 1987) (same). The Committee believes that it is appropriate to give the jury a specific instruction that an expert's opinion should be evaluated along with all other evidence.

If the court wishes to give an instruction concerning the jury's consideration of lay opinion testimony, this instruction may be adapted for that purpose by eliminating the reference to "the witness's qualifications" as a factor to be considered.

3.13(a) DUAL-CAPACITY WITNESS TESTIMONY

You have heard a witness, namely, [name of witness], who gave two kinds of testimony. First, the witness gave testimony regarding matters that he testified he saw or heard, specifically [add description]. Second, the witness gave opinion[s] and testimony based on his training and experience [add description]. The witness's training and experience does not make his testimony regarding what he saw or heard any more reliable than that of any other witness.

Part of your job as jurors is to decide how believable this witness was, and how much weight to give his testimony. You may accept all of what the witness said, or part of it, or none of it. You should judge this witness's testimony the same way you judge the testimony of any other witness, with one addition. In judging this witness's testimony and opinions about [expert subject], in deciding how much weight to give to these opinions and testimony, you should also consider the witness's qualifications, and how he reached his [opinions; conclusions].

Committee Comment

In *United States v. Jett*, 908 F.3d 252 (7th Cir. 2018), the court counseled that a pattern instruction was needed to deal with dual-capacity witness testimony that "better informs the jury of its task—to weigh expert testimony and lay testimony separately under their respective standards." *Id.* at 269. The court suggested that the way to avoid juror confusion was to have the dual-capacity witness give his lay testimony and his expert testimony separately. In addition, in describing how to handle the expert testimony of a dual-capacity case agent, *Jett* counseled:

> When the expert portion of the case agent's testimony begins, the district judge should allow the government to lay its foundation and establish the agent's qualifications. After it does, the district judge should instruct the jury that the testimony it is about to hear is the witness's opinion based on training and experience, not firsthand knowledge, and that it is for the jury to determine how much weight, if any, to give that opinion.

Id. at 269–270.

United States v. Thomas, No. 19-2129, slip op. at 7 (7th Cir. 2020), indicates that the logic in *Jett* applies to all dual-capacity witnesses (e.g., an engineer who testifies about his firsthand involvement in designing a product as well as his expert opinion about a competitor's design). Thus, the party presenting a dual-capacity witness should be required to divide the witness's testimony into two sections (firsthand as opposed to knowledge based on training or experience) and explain the difference. The two kinds of testimony may be offered at different points in the trial, or consecutively. If offered consecutively, the court should allow cross-examination at the conclusion of each segment.

The Committee recommends that this instruction also be given at the time of the witness's testimony, as a cautionary instruction.

3.14 RECORDED CONVERSATIONS/ TRANSCRIPTS

You have [heard [a] recorded conversation[s]; seen [a] video recording[s]]. This is proper evidence that you should consider together with and in the same way you consider the other evidence.

[You were also given transcripts of the conversation[s] [on the video recording[s]] to help you follow the recording[s] as you listened to [it; them]. The recording[s] are the evidence of what was said and who said it. The transcripts are not evidence. If you noticed any differences between what you heard in a conversation and what you read in the transcripts, your understanding of the recording is what matters. In other words, you must rely on what you heard, not what you read. And if you could not hear or understand certain parts of a recording, you must ignore the transcripts as far as those parts are concerned. [You may consider a person's actions, facial expressions, and lip movements that you are able to observe on a video recording to help you determine what was said and who said it.]]

[I am providing you with the recording[s] and a device with instructions on its use. It is up to you to decide whether to listen to [the; a] recording during your deliberations. You may, if you wish, rely on your recollections of what you heard during the trial.]

[If, during your deliberations, you wish to have another opportunity to view [a; any] transcript[s][as you listen to a recording], send a written message to the [marshal; court security officer], and I will provide you with the transcript[s].]

Committee Comment

The word "proper" is used in the first paragraph to avoid jury speculation regarding the propriety of recording conversations or

introducing them into evidence. See *United States v. McGee*, 612 F.3d 627, 630 (7th Cir. 2010). It should be noted, however, that in *United States v. Cunningham*, 462 F.3d 708, 712–15 (7th Cir. 2006), the court concluded that it was error to admit evidence regarding the process of court approval for interception of wire communications.

The second paragraph of the instruction, concerning the use of transcripts, is in brackets because in some cases it is stipulated or undisputed that the transcripts are accurate. In such cases, there is no need to instruct the jury that the transcripts may be used only for limited purposes.

The fourth paragraph of the instruction is bracketed because some judges may prefer to allow the jury to take all of the transcripts along with the exhibits admitted in evidence. No particular practice is recommended in this regard.

3.15 FOREIGN LANGUAGE RECORDINGS/ ENGLISH TRANSCRIPTS

During the trial, [list name of language] language recordings were admitted in evidence. You were also given English transcripts of those recordings so you could consider the contents of the recordings. It is up to you to decide whether a transcript is accurate, in whole or in part. You may consider the translator's knowledge, training, and experience, the nature of the conversation, and the reasonableness of the translation in light of all the evidence in the case. You may not rely on any knowledge you may have of the [name] language. Rather, your consideration of the transcripts should be based on the evidence introduced in the trial.

[You may consider a person's actions, facial expressions, and lip movements that you are able to observe on a video recording to help you determine what was said and who said it.]

Committee Comment

This instruction is not required if the parties stipulate to the accuracy of the translation of a non-English-language recording.

3.16 SUMMARIES RECEIVED IN EVIDENCE

Certain [summaries; charts] were admitted in evidence. [You may use those [summaries; charts] as evidence [even though the underlying [documents; evidence] are not here].]

[The accuracy of the [summaries; charts] has been challenged. [The underlying [documents; evidence] [has; have] also been admitted so that you may determine whether the [summaries; charts] are accurate.]]

[It is up to you to decide how much weight to give to the [summaries; charts].

Committee Comment

See Fed. R. Evid. 1006. For an undisputed summary, only the first two sentences should be given. For a disputed summary, the entire instruction should be given, except for the second sentence of the first paragraph.

In *United States v. White*, 737 F.3d 1121 (7th Cir. 2013), the court provided an overview of summary exhibits offered and admitted pursuant to Rule 1006, and distinguished such exhibits from demonstrative summaries offered pursuant to Fed. R. Evid. 611(a), which are addressed in pattern instruction 3.17, *infra*. A party may introduce information by means of a summary exhibit under Rule 1006 to prove the content of voluminous documents that cannot be conveniently examined by the court. If admitted this way, then the summary itself is admissible evidence, in part because the party is not obligated to introduce the underlying documents themselves. Because a Rule 1006 summary is intended to substitute for the voluminous documents, the exhibit must accurately summarize those documents. It must not misrepresent their contents or make arguments about the inferences the jury should draw from them. *White*, 737 F.3d at 1135.

3.17 DEMONSTRATIVE SUMMARIES/CHARTS NOT RECEIVED IN EVIDENCE

Certain [summaries; charts] were shown to you to help explain other evidence that was admitted. [Specifically identify the demonstrative exhibit, if appropriate]. These [summaries; charts] are not themselves evidence or proof of any facts [, so you will not have these particular [summaries; charts] during your deliberations]. [If they do not correctly reflect the facts shown by the evidence, you should disregard the [summaries; charts] and determine the facts from the underlying evidence.]

Committee Comment

The last sentence should only be given if there is a dispute about whether a particular demonstrative exhibit is accurate.

The Committee suggests that this instruction as given should identify the demonstrative exhibit(s) by name, and not just by number. In addition, the court may wish to give this instruction during trial when the demonstrative exhibit is used, so that the jurors are made aware that they will not have the exhibit available during deliberations.

In *United States v. White*, 737 F.3d 1121 (7th Cir. 2013), the court provided an overview of demonstrative exhibits offered as "pedagogical summaries" that may be allowed under Fed. R. Evid. 611(a), which gives the court "control over the mode . . . [of] presenting evidence." The court distinguished such exhibits from summaries admitted into evidence under Fed. R. Evid. 1006. Pedagogical summaries are meant to facilitate the presentation of evidence already in the record and thus are not themselves admissible evidence. Instead, such summaries are meant to aid the jury in its understanding of evidence that has been admitted and thus may be more slanted in presenting information than a summary admitted under Rule 1006. Allowing such an exhibit is within the district court's discretion, but when the court allows an exhibit of this sort, it should instruct the jury that the exhibit is not evidence and is meant only aid the jury in its evaluation of other evidence. *White*, 737 F.3d at 1135.

3.18 JUROR NOTE-TAKING

If you have taken notes during the trial, you may use them during deliberations to help you remember what happened during the trial. You should use your notes only as aids to your memory. The notes are not evidence. All of you should rely on your independent recollection of the evidence, and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any more weight than the memory or impressions of each juror.

Committee Comment

This instruction is adapted from Seventh Circuit Pattern Civil Jury Instruction 1.07.

3.19 GOVERNMENT INVESTIGATIVE TECHNIQUES

You have heard evidence obtained from the government's use of [undercover agents; informants; deceptive investigative techniques]. The government is permitted to use these techniques. You should consider evidence obtained this way together with and in the same way you consider the other evidence.

Committee Comment

In *United States v. McKnight*, 665 F.3d 786, 790–95 (7th Cir. 2011), the court did not find the giving of an instruction that addressed similar issues to be prejudicial or an abuse of discretion in that case. However, the court expressed concern about the dangers of giving such an instruction in a case in which the defense raises no issues at the trial regarding the propriety of deceptive investigative techniques. See also *United States v. McKnight*, 671 F.3d 664 (7th Cir. 2012) (Posner, J., joined by Kanne, J. and Williams, J., dissenting from denial of rehearing *en banc*). Although the *McKnight* panel did not expressly approve the language of the instruction given in that case, the Committee has drafted one.

The instruction is worded so that it minimizes the appearance of a judicial imprimatur on particular techniques. Nevertheless, this possibility will exist if the trial judge gives any instruction on this issue. See *McKnight*, 665 F.3d at 794 ("There is . . . a possibility that singling out this aspect of the case might be interpreted by the jurors as at least indirect approval of the effectiveness of the Government's management of the investigation."). For this reason, this instruction need not and should not be given as a matter of course in every case involving undercover or deceptive investigative techniques. Rather, it is intended for use only in the rare case in which questioning or argument, or a statement during jury selection, or some other circumstance arising or existing during trial suggests the impropriety of such techniques.

When nothing like that occurs, raising the issue in an instruction is likely to distract the jury from other instructions that address matters that actually are at issue. See, *e.g., United States v. Hill*, 252 F.3d 919, 923 (7th Cir. 2001) ("Unless it is necessary to give an instruction, it is necessary not to give it, so that the important instructions stand out and are remembered."), cited in *McKnight*, 665 F.3d at 794. If such an instruction is given, it is important for the trial judge to explain the reasons for doing so in

the record. *Id*. at 794. See also *McKnight*, 671 F.3d at 668–669 (7th Cir. 2012).

Additional reasons to exercise caution in giving this instruction are to avoid undercutting appropriate argument that a witness's deceptive act may be considered in assessing the witness's credibility, see, *e.g.*, Fed. R. Evid. 608(b), and to avoid conflict with other instructions, such as those that advise the jury to consider all of the surrounding circumstances (which may include deception) in assessing a defendant's confession or identification testimony. See Instructions 3.09 & 3.12.

In addition, in a case in which an entrapment instruction is given and this instruction (3.19) is requested, consideration should be given to rewording this instruction so that it does not implicitly modify or undercut the entrapment instruction. See Instructions 6.04 & 6.05.

4.01 BURDEN OF PROOF—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ___ of the indictment charge[s] the defendant[s] with] [name of offense]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [fill in number of elements] following elements beyond a reasonable doubt:

1.

and

2.

and

3.

4. [Addressing any issues raised by an affirmative defense on which the government bears the burden of proof, *e.g.*, entrapment.]

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 one or more 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].

4.02 BURDEN OF PROOF IN CASE INVOLVING INSANITY DEFENSE—ELEMENTS

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

1.

and

2.

and

3.

If you find from your consideration of all the evidence that the government has failed to prove one or more 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].

If, on the other hand, 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], unless you decide that the defendant is not guilty by reason of insanity.

If the defendant has proved the defense of insanity by clear and convincing evidence [as to the charge you are considering], then you should find the defendant not guilty [of that charge] by reason of insanity. Clear and convincing evidence is not as high a burden as proof beyond a reasonable doubt.

[Insert definition of insanity from Pattern Instruction 6.02.]

Committee Comment

This instruction is parallel to the general elements instruction. The Seventh Circuit has not had occasion to define "clear and convincing" evidence as that term is used in the insanity statute. The court has stated in another context, however, that " 'highly probable' . . . is the Supreme Court's definition of . . . 'clear and convincing evidence.' " *United States v. Boos*, 329 F.3d 907, 911 (7th Cir. 2003) (citing *Colorado v. New Mexico*, 467 U.S. 310 (1984)). The contrast with the requirement of proof beyond a reasonable doubt is taken from Sixth Circuit Instruction 6.04 and is used so that the jury is aware of the different level of proof required.

4.03 BURDEN OF PROOF IN CASE INVOLVING COERCION DEFENSE—ELEMENTS

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

1.

and

2.

and

3.

If you find from your consideration of all the evidence that the government has failed to prove one or more 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].

If, on the other hand, 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], unless the defendant has proven the defense of coercion. If the defendant has proven that it is more likely than not that he was coerced, then you should find the defendant not guilty [of that charge].

[Insert definition of coercion from Pattern Instruction 6.08]

Committee Comment

The defendant bears the burden of proving a coercion defense. *Dixon v. United States*, 548 U.S. 1 (2006).

The "preponderance of the evidence" definition is adapted from that offered in the Seventh Circuit Pattern Civil Jury Instructions.

4.04 UNANIMITY ON SPECIFIC ACTS

Count[s] __ charge[s] the defendant with [fill in description of multiple acts, *e.g.*, making more than one false statement]. The government is not required to prove that the defendant made every one of the [fill in shorthand description, *e.g.*, false statements] alleged in [Count __; the particular Count you are considering]. However, the government is required to prove that the defendant made at least one of the [fill in shorthand description, *e.g.*, false statements] that is alleged in [Count __; the particular Count]. To find that the government has proven this, you must agree unanimously on which particular [shorthand description, *e.g.*, false statements] the defendant made, as well as all of the other elements of the crime charged.

[For example[, on Count __], if some of you were to find that the government has proved beyond a reasonable doubt that the defendant [fill in description of one of the particular acts charged, *e.g.*, made a false statement regarding his taxable income], and the rest of you were to find that the government has proved beyond a reasonable doubt that the defendant [fill in description of a different particular act charged, *e.g.*, made a false statement about the number of exemptions to which he was entitled], then there would be no unanimous agreement on which [shorthand description, *e.g.*, false statement] the government has proved. On the other hand, if all of you were to find that the government has proved beyond a reasonable doubt that the defendant [fill in description of one of the particular acts charged, *e.g.*, made a false statement regarding his taxable income], then there would be a unanimous agreement on which [shorthand description, *e.g.*, false statement] the government proved.]

Committee Comment

This instruction may apply when the government alleges in a

single count that the defendant violated the law in more than one way. The law in this regard has developed significantly in recent years. When *Richardson v. United States*, 526 U.S. 813 (1999), and *Schad v. Arizona*, 501 U.S. 624, 631–32 (1991) (plurality opinion), are read together, it appears that unanimity is required when the government alleges more than one possibility for an element of the crime (*e.g.*, a false statement charge in which the government charges that the defendant made one or more of three alleged false statements), but not when the government contends that the defendant committed an element of the crime using one or more of several possible means (*e.g.*, an armed robbery charge in which the government charges that the defendant committed a robbery using a knife, or a gun, or both). *Richardson*, 513 U.S. at 817.

The element/means distinction is not always clear. Some guidance has been provided by the Seventh Circuit's post-*Richardson* cases. See*, e.g., United States v. Griggs*, 569 F.3d 341, 344 (7th Cir. 2009), which gives as examples of when a jury must be unanimous on particular acts in situations in which a single count charges multiple perjurious statements, multiple objects of a single conspiracy, and multiple predicate acts of an alleged continuing criminal enterprise. By analogy, false statement-type charges (including false tax return charges) that allege multiple false statements in a single count and RICO charges listing a series of predicate acts likely require a unanimity instruction, though there is no definitive post-*Richardson* guidance from the Seventh Circuit on charges of that sort. See also *United States v. Mannava*, 565 F.3d 412, 415–16 (7th Cir. 2009) (conviction under 18 U.S.C. § 2422(b), which makes it a crime to induce a minor to engage in sexual activity for which a person can be charged with a criminal offense, requires unanimity regarding underlying state criminal offense involved); *United States v. Davis*, 471 F.3d 783, 791 (7th Cir. 2006) (if fraud charge alleges multiple schemes, unanimity regarding the particular scheme is required). On the other hand, a jury need not be unanimous on which overt act the defendants committed in furtherance of a charged conspiracy. *Griggs*, 569 F.3d at 343–44. In addition, the Seventh Circuit has held that specific unanimity is not required when multiple false statements are alleged as part of a scheme to defraud. See *United States v. Daniel*, 749 F.3d 608, 613–14 (7th Cir. 2014) ("the fraudulent representations or omissions committed by [defendant] . . . were merely the means he used to commit an element of the crime."). In certain cases, where the evidence (and the strength of the evidence) on false statements or omissions is different enough that the jury might well split, it might be appropriate to instruct the jury that there need not be unanimity on the particular representation or omission.

If used, this instruction should be given in sequence to accompany the "elements" and definitional instructions for the par-

ticular count(s) to which it applies. If the instruction applies to some counts but not others, the trial judge should include language in the instruction identifying the counts to which the instruction applies. The example provided in the second paragraph is optional and, if given, should be adapted to the particular case.

4.05 DATE OF CRIME CHARGED

The indictment charges that [the crime[s]; insert other description] happened "on or about" [date]. The government must prove that the crime[s] happened reasonably close to the date[s]. The government is not required to prove that the crime[s] happened on [the; those] exact date[s].

Committee Comment

This instruction is unnecessary in the average case in which no discrepancy exists between the date charged in the indictment and the date suggested by the evidence at trial.

If there is such a discrepancy, this instruction may be given if the date suggested by the evidence falls within the applicable statute of limitations. See *Ledbetter v. United States*, 170 U.S. 606, 612 (1898); *United States v. Leibowitz*, 857 F.2d 373, 378 (7th Cir. 1988). Use of the phrase "on or about" in the indictment makes a date reasonably near the date in the indictment sufficient, and only a material variance will cause the government's case to fail. *Leibowitz*, 857 F.2d at 378.

There are two possible exceptions to this rule: (a) when the date charged is an essential element of the offense and the defendant was misled by such date in preparing a defense, see, *e.g., United States v. Bourque*, 541 F.2d 290, 293–96 (1st Cir. 1976); *United States v. Cina*, 699 F.2d 853, 859 (7th Cir. 1983); or (b) when the defendant asserts an alibi defense for the specific date(s) charged, see *Leibowitz,* 857 F.2d at 378–79.

4.06 SEPARATE CONSIDERATION—ONE DEFENDANT CHARGED WITH MULTIPLE CRIMES

[The; Certain] defendant[s] [has; have] been accused of more than one crime. The number of charges is not evidence of guilt and should not influence your decision.

You must consider each charge [and the evidence concerning each charge] separately. Your decision on one charge, whether it is guilty or not guilty, should not influence your decision on any other charge.

Committee Comment

The bracketed language addressing "evidence concerning each charge" should be given only when there is evidence that was admitted only with respect to a particular charge or charges.

4.07 SEPARATE CONSIDERATION—MULTIPLE DEFENDANTS CHARGED WITH SAME OR MULTIPLE CRIMES

Even though the defendants are being tried together, you must consider each defendant [and the evidence concerning that defendant] separately. Your decision concerning one defendant, whether it is guilty or not guilty, should not influence your decision concerning any other defendant.

Committee Comment

The bracketed language addressing "evidence concerning that defendant" should be given only when there is evidence that was admitted only with respect to less than all of the defendants.

4.08 PUNISHMENT

In deciding your verdict, you should not consider the possible punishment for the defendant[s] [who [is; are] on trial]. If you decide that the government has proved [the; a] defendant guilty beyond a reasonable doubt, then it will be my job to decide on the appropriate punishment.

Committee Comment

This instruction is optional. It is commonly requested by the government in certain districts within the Circuit and is given by some, but not all, judges. The Committee has included it so that there is some standardization. The most common argument against giving an instruction in the way it is now commonly given, *i.e.*, "you should not consider the issue of punishment," is that it tends to denigrate the burden of proof and to undermine the seriousness of the jury's task. The rewording of the commonly-given instruction that is proposed here will go at least part of the way toward eliminating the risk that this will occur. The wording is adapted from Sixth Circuit Instruction 8.05.

In a case in which the jury has heard evidence suggesting the range of sentences the defendant may face—for example, when a cooperating witness charged with the same offenses testifies and is cross examined on the sentence he faced absent a cooperation agreement—the trial judge may wish to consider modifying this instruction so that it does not suggest that it is inappropriate for the jury to consider the possible punishment the witness faced.

4.09 ATTEMPT

A person attempts to commit [identify offense, *e.g.*, bank robbery] if he (1) knowingly takes a substantial step toward committing [describe the offense], (2) with the intent to commit [describe the offense]. The substantial step must be an act that strongly corroborates that the defendant intended to carry out the [the crime; describe the offense].

Committee Comment

See generally *United States v. Sanchez*, 615 F.3d 836, 844–45 (7th Cir. 2010); *United States v. Barnes*, 230 F.3d 311, 315 (7th Cir. 2000); *United States v. Rovetuso*, 768 F.2d 809, 822 (7th Cir. 1985). The definition of "substantial step" is included because the term is difficult to understand without explanation.

In *United States v. Gladish*, 536 F.3d 646 (7th Cir. 2008), the court concluded that explicitly sexual Internet chatter combined with the defendant sending the purported minor a video of himself masturbating did not amount to a "substantial step" as required to convict the defendant of attempting to induce the minor to engage in sexual activity. The court stated that "[t]he requirement of proving a substantial step serves to distinguish people who pose real threats from those who are all hot air." *Id.* at 650; see also *United States v. Zawada*, 552 F.3d 531 (7th Cir. 2008) (planning for meeting with minor and discussion about setting up a meeting sufficient to constitute substantial step under plain error review); *United States v. Davey*, 550 F.3d 653 (7th Cir. 2008) (affirming denial of motion to withdraw guilty plea; substantial step toward completion of substantive offense demonstrated by planning a meeting with purported minor, travel across state lines to achieve meeting, and telephone contact with purported minor upon arrival for further planning); *Doe v. City of Lafayette*, 377 F.3d 757, 783 (7th Cir. 2004) (merely thinking sexual thoughts about children does not constitute substantial step towards sexual abuse).

As the Seventh Circuit noted in *Sanchez*, the line between mere preparation and a substantial step is "inherently fact specific." *Sanchez*, 615 F.3d at 844. The Committee has not proposed a bright-line rule because none exists. The trial judge must, of course, assess whether there is evidence that, consistent with the law, would permit a finding of guilt.

Many Seventh Circuit cases say that a "substantial step" is "something more than mere preparation, but less than the last act

necessary before the actual commission of the substantive crime." See, *e.g., Sanchez*, 615 F.3d at 844 (internal quotation marks omitted); *United States v. Barnes*, 230 F.3d 311, 315 (7th Cir. 2000). The Committee did not include this language in the pattern jury instruction because it did not appear to provide clear guidance to jurors. As the Seventh Circuit observed in *Sanchez*, "there is no easy way to separate mere preparation from a substantial step." 615 F.3d at 844.

Some pattern instructions include an "attempt" alternative. See, *e.g.*, Instruction for 18 U.S.C. § 2113(a) (bank robbery, infra p. 522, 525). When a court instructs on an attempt offense where the pattern instruction does not include an attempt alternative, the court should modify the pattern instruction for the offense to incorporate the element of attempt and then should give the definition of attempt in Instruction 4.09 either separately or in the body of the elements instruction. For example, for a charge of attempted possession with intent to distribute cocaine under 21 U.S.C. § 841(a)(1), the court should instruct as follows (eliminating the bold type, of course):

> The indictment charges defendant with **attempting to possess** cocaine with intent to distribute. 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. The defendant knowingly **attempted to possess** cocaine; and
>
> 2. The defendant intended to distribute the substance to another person; and
>
> 3. The defendant knew the substance was some kind of a controlled substance. The government is not required to prove that the defendant knew the substance was cocaine.
>
> If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.
>
> 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, then you should find the defendant not guilty.
>
> **(separate instruction)**
>
> A person attempts to possess a controlled substance if he (1) knowingly takes a substantial step toward possessing the

controlled substance, (2) with the intent to possess the controlled substance. The substantial step must be an act that strongly corroborates that the defendant intended to carry out the crime.

4.10 DEFINITION OF KNOWINGLY

A person acts "knowingly" if he realizes what he is doing and is aware of the nature of his conduct, and does not act through ignorance, mistake, or accident. [In deciding whether the defendant acted knowingly, you may consider all of the evidence, including what the defendant did or said.]

[You may find that the defendant acted knowingly if you find beyond a reasonable doubt that he believed it was highly probable that [state fact as to which knowledge is in question, *e.g.*, "drugs were in the suitcase," or "the financial statement was false,"] and that he took deliberate action to avoid learning that fact. You may not find that the defendant acted knowingly if he was merely mistaken or careless in not discovering the truth, or if he failed to make an effort to discover the truth.]

Committee Comment

The Seventh Circuit has approved the definition of "knowledge" given in the first paragraph of this instruction. *United States v. Graham*, 431 F.3d 585, 590 (7th Cir. 2005).

The second paragraph, commonly referred to as an "ostrich" instruction, will not be appropriate in every case in which knowledge is an issue. Such an instruction is appropriate "where (1) the defendant claims a lack of guilty knowledge, and (2) the government has presented evidence sufficient for a jury to conclude that the defendant deliberately avoided learning the truth." *United States v. Carani*, 492 F.3d 867, 873 (7th Cir. 2007) (citing *United States v. Carrillo*, 435 F.3d 767, 780 (7th Cir. 2006)). Deliberate avoidance is more than mere negligence and more than recklessness. *United States v. Tantchev*, 916 F.3d 645, 653 (7th Cir. 2019) (citing *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011)). "The purpose of the ostrich instruction is to inform the jury that a person may not escape criminal liability by pleading ignorance if he knows or strongly suspects he is involved in criminal dealings but deliberately avoids learning more exact information about the nature or extent of those dealings." *Carrillo*, 435 F.3d at 780 (internal quotation marks and citation omitted). "[E]vidence merely supporting a finding of negligence[,] that a rea-

sonable person would have been strongly suspicious, or that a defendant should have been aware of criminal knowledge, does not support an inference that a particular defendant was deliberately ignorant." *Carrillo*, 435 F.3d at 781; *United States v. Stone*, 987 F.2d 469, 472 (7th Cir. 1993) (explaining that it is improper to use an ostrich instruction "to convict [a defendant] on the basis of what [he] should have known").

Accordingly, an ostrich instruction is inappropriate when the government's evidence leaves the jury with a "binary choice"—the defendant had actual knowledge, or he lacked knowledge. See *United States v. Craig*, 178 F.3d 891, 898 (7th Cir. 1999); *United States v. Giovanetti*, 919 F.2d 1223, 1228 (7th Cir. 1990). "If the evidence against the defendant points solely to direct knowledge of the criminal venture, it would be error to give the [ostrich] instruction." *United States v. Caliendo*, 910 F.2d 429, 435 (7th Cir. 1990) (internal quotation marks and citation omitted). As the Seventh Circuit stated in *United States v. Macias*, 786 F.3d 1060 (7th Cir. 2015):

> An ostrich instruction should not be given unless there is evidence that the defendant engaged in behavior that could reasonably be interpreted as having been intended to shield him from confirmation of his suspicion that he was involved in criminal activity. As the Supreme Court put it in *Global– Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011), the defendant must not only "believe that there is a high probability that a fact exists" but also "must take deliberate actions to avoid learning of that fact" (emphasis added). In *United States v. Salinas*, 763 F.3d 869, 880–81 (7th Cir. 2014), we noted that although *Global–Tech* was a civil case, several courts of appeal have deemed its definition of willful blindness applicable to criminal cases. It is quite similar to our analysis of ostrich instructions in *United States v. Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1990)[.]

4.11 DEFINITION OF WILLFULLY

(No Instruction)

Committee Comment

The Committee has not proposed a general definition of willfulness because the definition of the term is statute-specific. The pattern elements instructions for offenses requiring proof of willfulness include the necessary definitional instructions.

4.12 SPECIFIC INTENT/GENERAL INTENT

(No Instruction)

Committee Comment

The Committee recommends avoiding instructions that distinguish between "specific intent" and "general intent." Instead, the trial judge should give instructions that define the precise mental state required by the particular offense charged. Distinctions between "specific intent" and "general intent" more than likely confuse rather than enlighten juries. See *United States v. Bailey*, 444 U.S. 394, 398–413 (1980); see also *Liparota v. United States*, 471 U.S. 419, 433 n.16 (1985) (suggesting that jury instructions should "eschew use of difficult legal concepts like 'specific intent' and 'general intent.' ").

4.13 DEFINITION OF POSSESSION

A person possesses an object if he knowingly has the ability and intention to exercise control over the object, either directly or through others. [A person may possess an object even if he is not in physical contact with it [and even if he does not own it].]

[More than one person may possess an object. If two or more persons share possession, that is called "joint" possession. If only one person possesses the object, that is called "sole" possession. The term "possess" in these instructions includes both joint and sole possession.]

Committee Comment

The instruction provides a definition of "constructive" possession. See, *e.g., United States v. Harris*, 325 F.3d 865, 870 (7th Cir. 2003); *United States v. Folks*, 236 F.3d 384, 389 (7th Cir. 2001). There is no need to use the term "constructive" in the jury instructions, as it would introduce an element of confusion. It is better simply to provide the definition without using the legal term.

Constructive possession represents a distinct theory of liability from that of possession based on co-conspirator liability, and the two theories have different elements. See *United States v. Mokol*, 646 F.3d 479, 486–87 (7th Cir. 2011).

The second (bracketed) paragraph should be used only in a case in which there is evidence of possession by more than one person. *See generally United States v. Rainone*, 816 F.3d 490, 494 (7th Cir. 2016).

4.14 POSSESSION OF RECENTLY STOLEN PROPERTY

If you find that the defendant was in possession of property that recently had been stolen, you may infer that he knew it was stolen. You are not required to make this inference.

The term "recently" has no fixed meaning. The more time that has passed since the property was stolen, the more doubtful an inference of the defendant's knowledge becomes.

Committee Comment

See *Barnes v. United States*, 412 U.S. 837, 843 (1973); *United States v. Tantchev*, 916 F.3d 645, 655 (7th Cir. 2019); *United States v. Woody*, 55 F.3d 1257, 1265 (7th Cir. 1995). These cases hold that an inference of knowledge from possession of recently stolen property is legally appropriate. The current version of the instruction modifies the previous version to alter language that arguably suggested that the defendant is under an obligation to explain his possession of recently stolen property.

5.01 RESPONSIBILITY

A person who [orders; authorizes; [or] in some other way is responsible for] the criminal acts of another person may be found guilty whether or not the other person [is; has been] found guilty.

Committee Comment

This instruction has a relatively narrow application. When Congress enacted the Sherman Act, it was concerned that juries would hesitate to convict lower level employees who actually had violated the law but had done so at the direction of their superiors, so it added the verbs "authorized" and "ordered" into the Act to clarify its intent that the superiors also were personally liable. See *United States v. Wise*, 370 U.S. 405, 413 (1962). This instruction reassures jurors that if they acquit a lower level employee, they are not obliged to acquit his superior who ordered the conduct.

5.02 PERSONAL RESPONSIBILITY OF CORPORATE AGENT

A person who acts on behalf of a [corporation; partnership; other entity] also is personally responsible for what he does or causes someone else to do. However, a person is not responsible for the conduct of others performed on behalf of a corporation merely because that person is an officer, employee, or other agent of a corporation.

Committee Comment

A corporate agent through whose act, default or omission the corporation committed a crime is himself guilty of that crime. This principle applies regardless of whether the crime requires consciousness of wrongdoing and it applies not only to those corporate agents who themselves committed the criminal act, but also to those who by virtue of their managerial positions or their similar relation to the actor could be deemed responsible for its commission. See, *e.g., United States v. Park*, 421 U.S. 658, 670 (1975) (clean warehouse case). "Two fundamental principles are thoroughly settled. One is that neither in the civil nor the criminal law can an officer protect himself behind a corporation where he is the actual, present, and efficient actor; and the second is that all parties active in promoting a misdemeanor, whether agents or not, are principals." *United States v. Wise*, 370 U.S. 405, 410 (1962). Implicit in these principles is the notion that criminal culpability attaches because of the agent's act, default or omission, not simply and solely because of the officer's position in the corporation.

5.03 ENTITY RESPONSIBILITY—ENTITY DEFENDANT—AGENCY

[Name of entity] is a [corporation; other type of entity]. A [corporation; other type of entity] may be found guilty of an offense. A [corporation; other type of entity] acts only through its agents and employees, that is, people authorized or employed to act for the [corporation; other type of entity].

[The indictment charges [name of entity] with; Count ___ of the indictment is a charge of] [name of offense]. In order for you to find [name of entity] guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the offense charged was committed by an agent or employee of [name of entity]; and

Second, in committing the offense, the agent[s] or employee[s] intended, at least in part, to benefit [name of entity]; and

Third, the agent[s] or employee[s] acted within [his/their] authority.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

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

An act is within the authority of an agent or employee if it concerns a matter that [name of entity] generally entrusted to that agent or employee. [Name of

entity] need not have actually authorized or directed the particular act.

If an agent or employee was acting within his authority, then [name of entity] is not relieved of its responsibility just because the act was illegal, or was contrary to [name of entity]'s instructions, or was against [name of entity]'s general policies. However, you may consider the fact that [name of entity] had policies and instructions and how carefully it tried to enforce them when you determine whether [name of entity]'s agent[s] or employee[s] was acting with the intent to benefit [name of entity] or was acting within his authority.

Committee Comment

This instruction adopts the position of the majority of the Courts of Appeals that have considered the question of the responsibility of a corporation for the criminal conduct of its agents. The majority view is that unless the criminal statute explicitly provides otherwise, a corporation is vicariously criminally liable for the crimes committed by its agents acting within the scope of their employment—that is, within their actual or apparent authority and on behalf of the corporation.

In non-regulatory cases, however, intent to benefit the corporation is treated as a separate element. See, *e.g.*, *United States v. One Parcel of Land Located at 7326 Highway 45 N., Three Lakes*, 965 F.2d 311, 316 (7th Cir. 1992), in which the court held that agents are outside the scope of their employment when not acting at least in part for the benefit of the corporation, implying that the intent to benefit is an element of corporate responsibility. See also *United States v. Barrett*, 51 F.3d 86, 89 (7th Cir. 1995) ("common sense dictates that when an employee acts to the detriment of his employer and in violation of the law, his actions normally will be deemed to fall outside the scope of his employment and thus will not be imputed to his employer."); cf. *Doe v. R.R.Donnelley & Sons Co.*, 42 F.3d 439, 446 (7th Cir. 1994) (sexual harassment case in which the Seventh Circuit noted that "[k]nowledge of the agent is imputed to the corporate principal only if the agent receives the knowledge while acting within the scope of the agent's authority and when the knowledge concerns a matter within the scope of that authority"); *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 321 (7th Cir. 1992) (same).

In *United States v. LaGrou Distribution Sys., Inc.*, 466 F.3d 585 (7th Cir. 2006), the corporate defendant was convicted of felonies related to the knowing and intentional unsanitary storage of meat and poultry. The trial court used Pattern Instructions 5.02–5.03 and added this to its definition of "knowingly":

> A corporation acts through its agents . . . and "knows" through its agents . . . To distinguish knowledge belonging exclusively to an agent from knowledge belonging to the corporate principal, courts rely on certain presumptions. Where a corporate agent obtains knowledge while acting in the scope of agency, he presumably reports that knowledge to this corporate principal so the court imputes such knowledge to a corporation.

The Seventh Circuit deemed this an accurate summary of the law in cases where "knowingly" was the required level of *mens rea*, as distinguished from *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), in which "corruptly" was the corporate *mens rea* required to convict. *LaGrou Distribution Sys.*, 466 F.3d at 592. (In *Arthur Andersen*, the Supreme Court observed that the charging statute, 18 U.S.C. § 1512(b)(2)(A), required proof that the defendant "knowingly . . . corruptly persuaded" another person "with intent to cause" that person to withhold documents from an official proceeding. *Arthur Andersen*, 544 U.S. at 704–05. To act with this intent, defendants must be "persuaders conscious of their wrongdoing." *Id.* at 706.)

In *Pugh v. Tribune Co.*, 521 F.3d 686 (7th Cir. 2008), a civil securities fraud case involving inflation of circulation figures, the court reaffirmed the principle underlying the pattern instruction:

> A corporation may be held liable for statements by employees who have apparent authority to make them. Accordingly, the corporate scienter inquiry must focus on the state of mind of the individual corporate official or officials who make or issue the statement (or order or approve it or its making or issuance, or who furnish information or language for the inclusion therein, or the like) rather than generally to the collective knowledge of all the corporation's officers and employees acquired in the course of their employment.

521 F.3d at 697 (citations and internal quotation marks omitted).

In *United States v. Ladish Malting Co.*, 135 F.3d 484 (7th Cir. 1998), the court held that corporations are deemed to have knowledge if the knowledge is possessed by persons with authority to do something about what they know, regardless of their title within the company (*i.e.*, it is not necessary for a "supervisor" to know

about a safety hazard if a member of the company's safety committee knew about it). *Id.* at 492–93. The court also held that corporations are not entitled to a "forgetfulness" instruction because corporations *qua* corporations don't forget things. *Id.* at 492. The court reaffirmed these principles in *United States v. L.E. Myers Co.*, 562 F.3d 845, 853–55 (7th Cir. 2009).

In *United States v. One Parcel of Land*, a drug forfeiture case, the court in dicta summarized these agency principles: a corporation knows what its agents know when they are acting for the benefit of the corporation; but a corporation is not imputed to know what its employees are doing when they act outside of the scope of their agency and are not acting for or in behalf of the corporation. 965 F.2d at 316–17; see also *id.* at 322 (Posner, J., dissenting).

5.04 ENTITY RESPONSIBILITY—ENTITY DEFENDANT—AGENCY RATIFICATION

If you find that an agent's act was outside his authority, then you must consider whether the corporation later approved the act. An act is approved if, after it is performed, another agent of the corporation, with the authority to perform or authorize the act and with the intent to benefit the corporation, either expressly approves the act or engages in conduct that is consistent with approving the act. A corporation is legally responsible for any act or omission approved by its agents.

Committee Comment

This instruction is patterned on ordinary agency principles of *post hoc* ratification. Note, however, that the Supreme Court declined to require corporate ratification for liability to attach in a civil antitrust case, finding that "a ratification rule would have anticompetitive effects, directly contrary to the purposes of the antitrust laws." *American Society of Mechanical Engineers, Inc. v. Hydrolevel*, 456 U.S. 556, 573 (1982).

5.05 JOINT VENTURE

An offense may be committed by more than one person. A defendant's guilt may be established without proof that the defendant personally performed every act constituting the crime charged.

5.06 AIDING AND ABETTING/ACTING THROUGH ANOTHER

(a)

Any person who knowingly [aids; counsels; commands; induces; or procures] the commission of an offense may be found guilty of that offense if he knowingly participated in the criminal activity and tried to make it succeed.

(b)

If a defendant knowingly causes the acts of another, then the defendant is responsible for those acts as though he personally committed them.

Committee Comment

See *Rosemond v. United States*, 572 U.S. 65 (2014); *United States v. Irwin*, 149 F.3d 565, 571–73 (7th Cir. 1998). In prosecutions under 18 U.S.C. § 924(c), the Supreme Court held in *Rosemond* that the affirmative act requirement is satisfied if the act is one in furtherance of *either* the underlying violent crime of drug trafficking offense or the firearms offense. However, with respect to intent, the defendant must be shown to have intended to facilitate an *armed* commission of the underlying offense.

5.06(A) AIDING AND ABETTING

A person may be found guilty of an offense by knowingly [aiding; counseling; commanding; inducing; or procuring] the commission of the offense if he knowingly participated in the criminal activity and tried to make it succeed.

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

1. The crime of _____ was committed, as set forth on page ____ of these instructions.

2. The defendant participated in the criminal activity and tried to make it succeed.

3. The defendant did so knowingly.

Committee Comment

See Rosemond v. United States, 572 U.S. 65 (2014); *United States v. Anderson*, 988 F.3d 420, 424-25 (7th Cir. 2021); *United States v. Irwin*, 149 F.3d 565, 571–73 (7th Cir. 1998). In prosecutions under 18 U.S.C. § 924(c), the Supreme Court held in *Rosemond* that the affirmative act requirement is satisfied if the act is one in furtherance of either the underlying violent crime of drug trafficking offense or the firearms offense. However, with respect to intent, the defendant must be shown to have intended to facilitate an armed commission of the underlying offense.

If the underlying offense is not charged elsewhere in the instructions, its elements should be incorporated into this instruction. In *United States v. Freed*, 921 F.3d 716 (7th Cir. 2019), the Seventh Circuit was indirectly critical of the previous version of this instruction when it noted that it "did not explicitly explain an underlying crime was required to support an aiding and abetting conviction" but rather only "implied" as much. *See id.* at 721. By adding this to the previous version of this instruction, we are adopting the approach taken by most other circuits. *See, e.g.,* Third Circuit Criminal Jury Instruction 7.02; Sixth Circuit Criminal Jury Instruction 4.0; Eighth Circuit Criminal Jury Instruction 5.01.

5.06(B) ACTING THROUGH ANOTHER

If a defendant willfully causes another person to commit an act, which if committed by the defendant would be a crime, then the defendant is responsible under the law even though he did not personally commit the act.

[The court should now give a modified version of the elements instruction for the offense to indicate that the defendant "willfully caused" any acts he is not alleged to have personally committed, and requiring that defendant has the requisite mental state for the crime charged. See the Committee Comment for an example.]

[The government need not prove that the person who committed [the charged offense/act(s)] did so intending to commit a crime. That person may be [a law enforcement agent; an innocent intermediary]. But the government must prove beyond a reasonable doubt that the defendant intended to commit the charged crime.]

[A defendant who causes the commission of a crime may be convicted of committing the crime even though the person who he caused to commit the criminal act(s) did not himself violate the law because he did not intend to commit a crime.]

Committee Comment

This instruction is based on 18 U.S.C. § 2(b), which provides that "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal." It has been modified from the previous version, for reasons discussed in this Comment.

First, in *United States v. Freed*, 921 F.3d 716 (7th Cir. 2019), the court concluded that the previous version of the instruction, which imposed responsibility if the defendant "knowingly" caused the acts of another, was "obviously problematic" because § 2(b) uses the term "willfully," not knowingly. In addressing this issue,

the Committee has elected to use the statutory term "willfully" in the first sentence of the instruction. This is how the Third and Sixth Circuits handle it. *See* Third Circuit Criminal Jury Instruction 7.05; Sixth Circuit Criminal Jury Instruction 4.01(A).

A problem with this approach is that "willfully" is a term that has variable meanings, and the Seventh Circuit has not defined "willfully" under § 2(b). Jurors may also have different understandings of this term, and trial judges may get questions from deliberating juries asking for a definition. In the absence of guidance from the Seventh Circuit, the Committee takes no position at this point regarding the correct definition.

The Committee notes that the Eighth Circuit adopts the phrase "voluntarily and intentionally" as the definition of willfully. See Eighth Circuit Criminal Jury Instruction 5.02, "Notes on Use." See also *United States v. Gabriel*, 125 F.3d 89, 101 (2d Cir. 1997) ("The most natural interpretation of section 2(b) is that a defendant with the mental state necessary to violate the underlying section is guilty of violating that section if he intentionally causes another to commit the requisite act." (emphasis omitted)).

Second, the previous version of the instruction did not address the interplay between § 2(b) and the *mens rea* requirement for the underlying offense, another point the Seventh Circuit has yet to address. However, in *Freed*, the court noted its concern with preventing a situation where "the jury believed they could convict [the defendant] for a *mens rea* other than the one described by the district court in detailing the requirements of each substantive offense." *Freed*, 921 F.3d at 722. This is consistent with the law in other circuits, in which it is clear that § 2(b) requires proof that the defendant had the *mens rea* required for the underlying offense. See, *e.g.*, *United States v. Gumbs*, 283 F.3d 128, 135 (3d Cir. 2002).

The Committee has addressed the second issue by setting up this instruction as an add-on to the elements instruction for the underlying offense. This is the approach taken by the Eighth Circuit, *see* Eighth Circuit Criminal Jury Instruction 5.02, the key difference being that unlike that circuit, we are proposing prefatory language (the first sentence of the proposed pattern instruction) that would precede the listing of the elements of the crime.

By way of example, in a prosecution for transferring a firearm to a convicted felon under 18 U.S.C. § 922(d) and § 2(b), the elements instruction would be modified as follows:

> 1. The defendant willfully caused [actor] to transfer a firearm;

2. The individual to whom the firearm was transferred was a felon;

3. The defendant knew or had reasonable cause to believe that the individual was a felon.

As a second example, in a prosecution for passing counterfeit money, 18 U.S.C. § 472, the elements would be modified as follows:

1. The defendant willfully caused [actor] to pass counterfeited United States currency;

2. The defendant knew at the time that the United States Currency was counterfeited; and

3. The defendant did so with the intent to defraud.

Lastly, the final bracketed paragraph of the proposed instruction is included to address cases in which, for example, the "actor" was a law enforcement officer or agent and thus not capable of committing the offense. See, *e.g.*, *United States v. Ubaldo*, 859 F.3d 690 (9th Cir. 2017).

On a more general note, though not addressed in *Freed*, the Committee has separated this instruction from the "aiding and abetting" instruction, Instruction 5.06(A), which comes from 18 U.S.C. § 2(a). Over the years, the previous version of the § 2(b) instruction has tended to become a ubiquitous "agency"-type instruction given in many cases in which § 2(b) does not appropriately come into play. It should be remembered that § 2(b) is not a general agency statute but rather is focused on causing another to commit a *criminal act*.

5.07 PRESENCE/ACTIVITY/ASSOCIATION

(a)

A defendant's presence at the scene of a crime and knowledge that a crime is being committed is not sufficient by itself to establish the defendant's guilt.

(b)

If a defendant performed acts that advanced the crime but had no knowledge that the crime was being committed or was about to be committed, those acts are not sufficient by themselves to establish the defendant's guilt.

(c)

A defendant's association with persons involved in a [crime; criminal scheme] is not sufficient by itself to prove his [participation in the crime] [or] [membership in the criminal scheme].

Committee Comment

Only the particular subpart(s) that apply in the particular case should be given.

"Mere presence" instruction (subpart (a)). It is the Committee's position that the presence instruction should be used in a limited fashion. If there is no evidence other than a defendant's mere presence at the scene of the crime, then presumably that defendant's motion for a directed verdict or judgment of acquittal would be granted by the trial judge. However, there may be some cases where a defendant is present and takes some action which is the subject of conflicting testimony. In those situations, the Committee believes that a presence instruction may be appropriate.

Instruction (a) restates traditional law. See *United States v. Jones*, 950 F.2d 1309, 1313 (7th Cir. 1991); *United States v. Moya-Gomez*, 860 F.2d 706, 759 (7th Cir. 1988); see also, *United States v. Valenzuela*, 596 F.2d 824, 830–31 (9th Cir. 1979); *United States v. Garguilo*, 310 F.2d 249, 253 (2d Cir. 1962). It omits the

word "mere," commonly used to modify "presence." The omission is due to the Committee's belief that "mere" is unnecessary and, in some situations, misleading or argumentative.

Instruction (a) is most typically given in conspiracy cases, such as *United States v. Williams*, 798 F.2d 1024, 1028–29 (7th Cir. 1996); *United States v. Boykins*, 9 F.3d 1278, 1287–88 (7th Cir. 1993); *United States v. Townsend*, 924 F.2d 1385, 1393–94 (7th Cir. 1991); *United States v. Atterson*, 926 F.2d 649, 655–56 (7th Cir. 1991); *United States v. Quintana*, 508 F.2d 867, 880 (7th Cir. 1975); and in aiding and abetting cases, such as *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949).

Instruction (a) may be given where a defendant charged with a substantive crime such as assault alleges that although he was present at the scene of the crime, he did not do it.

Acts that advance criminal activity (subpart (b)). Instruction (b) has been given by judges in this Circuit for many years. It stems from cases such as *United States v. Ramirez*, 574 F.3d 869, 883 (7th Cir. 2009); see also, *United States v. Carrillo*, 269 F.3d 761, 770 (7th Cir. 2001); *United States v. Windom*, 19 F.3d 1190 (7th Cir. 1994); *United States v. Benz*, 740 F.2d 903, 910–11 (11th Cir. 1984); *Dennis v. United States*, 302 F.2d 5, 12–13 (10th Cir. 1962).

Like Instruction (a), Instruction (b) may be given where a defendant charged with a substantive crime, such as assault or possession of narcotics, alleges that although he was present at the scene of the crime, he was not a participant in the criminal activity.

If a defendant is charged with conspiracy on the basis of furnishing supplies or services to someone engaged in a criminal conspiracy, an additional instruction may be necessary. The Seventh Circuit has determined that a defendant who furnishes supplies or services to someone engaged in a conspiracy is not guilty of conspiracy even though the supply of goods or services may have furthered the object of a conspiracy if the defendant had no knowledge of the conspiracy. See *United States v. Manjarrez*, 258 F.3d 618, 626–27 (7th Cir. 2001).

"Mere association" instruction (subpart (c)). Subpart (c) mirrors an instruction that is included as part of Instruction 5.10 concerning membership in a conspiracy. Because the concept that association with someone involved in a crime is not enough by itself to establish criminal responsibility is not confined to conspiracy cases, however, a more generalized version of the instruction is

included here.

5.08(A) CONSPIRACY—OVERT ACT REQUIRED

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

1. The conspiracy as charged in Count [__] existed;

2. The defendant knowingly became a member of the conspiracy with an intent to advance the conspiracy; and

3. One of the conspirators committed an overt act in an effort to advance [the; a] goal[s] of the conspiracy [on or before _____].

An overt act is any act done to carry out [the; a] goal[s] of the conspiracy. The government is not required to prove all of the overt acts charged in the indictment. [The overt act may itself be a lawful act.]

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

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, then you should find the defendant not guilty.

Committee Comment

(a)

Usage of 5.08(A) vs. 5.08(B). Instructions 5.08(A) and 5.08(B) are alternative instructions. Instruction 5.08(A) should be used if the particular conspiracy charge requires proof of an overt act.

Instruction 5.08(B) should be used if the conspiracy charge does not require proof of an overt act.

The definition of "overt act" in the last paragraph of Instruction 5.08(A) is taken from the general conspiracy statute, 18 U.S.C. § 371 ("any act to effect the object of the conspiracy"). See also *United States v. Hickok*, 77 F.3d 992, 1005–06 (7th Cir. 1996) (affirming the action of the trial court in defining "overt act" pursuant to 18 U.S.C. § 371 in response to a question from the jury).

(b)

Additional explanatory instructions to be given with this instruction and with Instruction 5.08(B). The Seventh Circuit has cautioned trial judges to provide juries adequate guidance on the nuances of conspiracy law. See *United States v. Tolliver*, 454 F.3d 660, 668 n.5 (7th Cir. 2006); *United States v. Stotts*, 323 F.3d 520, 522 (7th Cir. 2003). These points are covered by Instructions 5.09, 5.10, and, in appropriate circumstances, 5.10(A) and 5.10(B). The Committee recommends that the trial judge give those instructions in addition to 5.08(A) or (B), making deletions only when it is clear that the jury has heard no evidence on the point covered by the material to be deleted.

(c)

Supplemental instruction regarding proof of existence of conspiracy. In some cases, it may be appropriate to provide the jury with a further definition of how existence of a conspiracy is proved. In such cases, the Committee recommends that the following additional instruction be provided:

> To prove that a conspiracy existed, the government must prove beyond a reasonable doubt that the defendant had an agreement or mutual understanding with at least one other person to [fill in description of the substantive offense, *e.g.*, distribute heroin].

(d)

Unanimity regarding overt act. Recent Seventh Circuit authority indicates that there is no requirement that the jury agree unanimously on which particular overt act was committed in furtherance of the conspiracy. *United States v. Griggs*, 569 F.3d 341, 344 (7th Cir. 2009). There may, however, be some conflicting authority on this point. See *United States v. Matthews*, 505 F.3d 698, 709–10 (7th Cir. 2007) ("[I]f either party had requested a unanimity instruction or special verdict form on the overt acts, una-

nimity would not have been an issue in this case. Counsel should seriously consider making such requests in the future.").

(e)

Unanimity regarding object of multiple-object conspiracy. When the indictment charges a multiple-object conspiracy, an instruction may be required regarding the need for jury unanimity regarding the particular object(s) proven. See Instruction 4.04 and its commentary, as well as *Griggs*, 569 F.3d at 344, which uses a multiple-object conspiracy as an example of a situation in which the jury must be unanimous as to particulars of an indictment. See also *United States v. Hughes*, 310 F.3d 557, 560–61 (7th Cir. 2002). In such a case, this instruction should be supplemented accordingly.

(f)

Interaction with statute of limitations. Proof that a conspiracy continued into the period of limitations and that an overt act in furtherance of the conspiracy was performed within that period is an element of the offense of conspiracy under 18 U.S.C. § 371. See, *e.g.*, *Grunewald v. United States*, 353 U.S. 391, 396–97 (1957) ("where substantiation of a conspiracy charge requires proof of an overt act, it must be shown both that the conspiracy still subsisted [within the limitations period] . . . and that at least one overt act in furtherance of the conspiratorial agreement was performed within the period"); *United States v. Curley*, 55 F.3d 254, 257 (7th Cir. 1995); *United States v. Read*, 658 F.2d 1225, 1232–33 (7th Cir. 1981); *United States v. Greichunos*, 572 F. Supp. 220, 226 (N.D. Ill. 1983) (defendant was entitled to new trial because jury instruction on conspiracy failed to inform the jury that the government had to show an overt act committed in furtherance of the conspiracy within the five years preceding the indictment).

5.08(B) CONSPIRACY—NO OVERT ACT REQUIRED

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

1. The conspiracy as charged in [Count __] existed; and

2. The defendant knowingly became a member of the conspiracy with an intent to advance the conspiracy.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

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, then you should find the defendant not guilty.

Committee Comment

(a)

Usage of 5.08(B) vs. 5.08(A). Instruction 5.08(B) should be used if the particular conspiracy charge does not require proof of an overt act. Instruction 5.08(B) will most often be used in drug conspiracy cases under 21 U.S.C. § 846, see *United States v. Corson*, 579 F.3d 804, 810 (7th Cir. 2009); *United States v. Shabani*, 513 U.S. 10, 11 (1994), although there are other statutes that do not require proof of an overt act, see, *e.g., Whitfield v. United States*, 543 U.S. 209 (2005) (money laundering conspiracy); *United States v. Salinas*, 522 U.S. 52 (1997) (RICO); *Singer v. United States*, 323 U.S. 338, 340 (1945) (Selective Service Act); *Nash v. United States*, 229 U.S. 373 (1913) (antitrust conspiracy). See also *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007) (government conceded that the overt act requirement applied to an attempt to reenter the

United States illegally, but successfully defended the indictment's failure to allege a specific overt act on grounds that the attempt described in the indictment implicitly described an overt act).

Incorporation of comments to Instruction 5.08(A). When Instruction 5.08(B) is used, counsel and the court should consult the Committee Comment to Instruction 5.08(A), which includes a number of points that also apply to conspiracy charges in which no overt act is required.

5.09 CONSPIRACY—DEFINITION OF CONSPIRACY

A "conspiracy" is an express or implied agreement between two or more persons to commit a crime. A conspiracy may be proven even if its goal[s] [was; were] not accomplished.

In deciding whether the charged conspiracy existed, you may consider all of the circumstances, including the words and acts of each of the alleged participants.

Committee Comment

(a)

Usage. This definitional instruction should be given in conjunction with Instruction 5.08(A) or (B).

(b)

Consideration of co-conspirator declarations. Under *United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1978), the trial judge must determine preliminarily whether statements by a co-conspirator of the defendant will be admissible at trial under Federal Rule of Evidence 801(d)(2)(e). In making this determination the judge must decide "if it is more likely than not that the declarant and the defendant were members of a conspiracy when the hearsay statement was made, and that the statement was in furtherance of the conspiracy . . ." *Id*. at 1143 (quoting *United States v. Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977)); see also *United States v. Hoover*, 246 F.3d 1054, 1060 (7th Cir. 2001). If the trial judge determines the statements are admissible, the jury may consider them as it considers all other evidence. See *United States v. Wesson*, 33 F.3d 788, 796 (7th Cir. 1994); *United States v. Cox*, 923 F.2d 519, 526 (7th Cir. 1991).

Under *Santiago*, the government must make a preliminary offer of evidence to show that: 1) a conspiracy existed; 2) the defendant and declarant were members of the conspiracy; and 3) the statements sought to be admitted were made during and in furtherance of the conspiracy. *Santiago*, 582 F.2d at 1134–35; see also, *e.g., United States v. Alviar*, 573 F.3d 526, 540 (7th Cir. 2009). According to *Bourjaily v. United States*, 483 U.S. 171, 176–81 (1987), the court can consider the statements in question (the statements seeking to be admitted) to determine whether the three

Santiago criteria have been met. Seventh Circuit cases construing *Bourjaily* have held that properly admitted hearsay, including statements admitted under the co-conspirator exception to the hearsay rule (Fed. R. Evid. 801(d)(2)(E)), may be used to prove what another person did or said that may demonstrate their membership in the conspiracy. *United States v. Loscalzo*, 18 F.3d 374, 383 (7th Cir. 1994) ("[W]hile only the defendant's acts or statements could be used to prove that defendant's membership in a conspiracy, evidence of the defendant's acts or statements may be provided by the statements of co-conspirators."); *United States v. Martinez de Ortiz*, 907 F.2d 629, 633 (7th Cir. 1990) (*en banc*).

Based on these cases, the Committee recommends that this instruction be given in conjunction with the conspiracy "elements" instruction in appropriate cases. The Seventh Circuit has strongly recommended that "trial judges give the instruction in appropriate cases, such as where the evidence that the defendant committed the crime of conspiracy is based largely on the declarations of coconspirators." *United States v. Stotts*, 323 F.3d 520, 522 (7th Cir. 2003) (citing *Martinez de Ortiz*, 907 F.2d at 635). In this context, the Seventh Circuit has further noted that it has repeatedly "cautioned trial judges to provide sufficient guidance to juries on the nuanced principles of conspiracy." *Stotts,* 323 F.3d at 522 (listing cases).

5.10 CONSPIRACY—MEMBERSHIP IN CONSPIRACY

To be a member of a conspiracy, [the; a] defendant does not need to join it at the beginning, and he does not need to know all of the other members or all of the means by which the illegal goal[s] of the conspiracy [was; were] to be accomplished. The government must prove beyond a reasonable doubt that the defendant [you are considering] was aware of the illegal goal[s] of the conspiracy and knowingly joined the conspiracy.

[A defendant is not a member of a conspiracy just because he knew and/or associated with people who were involved in a conspiracy, knew there was a conspiracy, and/or was present during conspiratorial discussions.]

[The conspiracy must include at least one member other than the defendant who, at the time, was not [a government agent; a law enforcement officer; an informant].]

In deciding whether [the; a] defendant joined the charged conspiracy, you must base your decision only on what [that; the] defendant did or said. To determine what [that; the] defendant did or said, you may consider [that; the] defendant's own words or acts. You may also use the words or acts of other persons to help you decide what the defendant did or said.

Committee Comment

(a)

Consideration of co-conspirator declarations. See Committee Comment (b) to Instruction 5.09 for a discussion of the consideration of co-conspirator statements, *United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1978), and *Bourjaily v. United States*, 483 U.S. 171, 176–81 (1987).

(b)

Authority. A defendant does not need to join a conspiracy at its beginning, know all of its members, or know all of the means by which the goal of the conspiracy was to be accomplished in order to be a member of the conspiracy. *United States v. James*, 540 F.3d 702, 708 (7th Cir. 2008); *United States v. Bolivar*, 532 F.3d 599, 603–04 (7th Cir. 2008). The Seventh Circuit has made clear, however, that the defendant's mere knowledge of or association with other members of the conspiracy is insufficient to prove membership in the conspiracy. *United States v. Useni*, 516 F.3d 634, 646 (7th Cir. 2008). See also Pattern Instruction 5.07 and its commentary.

"The government must prove that the defendant conspired with at least one true co-conspirator. In other words, a conspiracy cannot be established between one criminally-minded individual and a government agent or informer." *United States v. Spagnola*, 632 F.3d 981, 986 (7th Cir. 2011) (internal quotation marks and citation omitted). The bracketed paragraph concerning this point should not be given, of course, if a government agent was an actual co-conspirator.

The Seventh Circuit has held that this instruction "[a]ccurately state[s] the government's burden of proof on [a] conspiracy charge." *United States v. Brown*, 865 F.3d 566, 572 (7th Cir. 2017).

5.10(A) BUYER/SELLER RELATIONSHIP

A conspiracy requires more than just a buyer-seller relationship between the defendant and another person. In addition, a buyer and seller of [name of drug] do not enter into a conspiracy to [distribute [name of drug]; possess [name of drug] with intent to distribute] simply because the buyer resells the [name of drug] to others, even if the seller knows that the buyer intends to resell the [name of drug]. The government must prove that the buyer and seller had the joint criminal objective of further distributing [name of drug] to others.

Committee Comment

This instruction should be used only in cases in "where the jury could rationally find, from the evidence presented, that the defendant merely bought or sold drugs but did not engage in a conspiracy." *United States v. Cruse*, 805 F.3d 795, 814 (7th Cir. 2015) (internal quotation marks omitted).

A routine buyer-seller relationship, without more, does not equate to conspiracy. *United States v. Johnson*, 592 F.3d 749 (7th Cir. 2010); *United States v. Colon*, 549 F.3d 565, 567 (7th Cir. 2008). This issue may arise in drug conspiracy cases. In *Colon*, the Seventh Circuit reversed the conspiracy conviction of a purchaser of cocaine because there was no evidence that the buyer and seller had engaged in a joint criminal objective to distribute drugs. *Id.* at 569–70 (citing *Direct Sales Co. v. United States*, 319 U.S. 703, 713 (1943) (distinguishing between conspiracy and a mere buyer-seller relationship)); see also *United States v. Kincannon*, 567 F.3d 893, 897 (7th Cir. 2009) (regular and repeated purchases of narcotics on standardized terms, even in distribution quantities, does not make a buyer and seller into conspirators); *United States v. Lechuga*, 994 F.2d 346, 47 (7th Cir. 1993) (*en banc*) (drug conspiracy conviction cannot be sustained by evidence of only large quantities of controlled substances being bought or sold).

In *Colon*, the Seventh Circuit was critical of the previously-adopted pattern instruction on this point, which included a list of factors to be considered. The Committee has elected to simplify the instruction so that it provides a definition, leaving to argument of counsel the weight to be given to factors shown or not shown by the evidence.

Some cases have suggested that particular combinations of

factors permit an inference of conspiracy. See, *e.g.*, *United States v. Vallar*, 635 F.3d. 271 (7th Cir. 2011) (repeated purchases on credit, combined with standardized way of doing business and evidence that purchaser paid seller only after reselling the drugs); *United States v. Kincannon*, 567 F.3d 893 (7th Cir. 2009). But the cases appear to reflect that particular factors do not always point in the same direction. See *United States v. Nunez*, 673 F.3d 661, 665 and 666 (7th Cir. 2012) ("Sales on credit and returns for refunds are normal incidents of buyer-seller relationships," but they can in some situations be " 'plus' factors" indicative of conspiracy). The Committee considered and rejected the possibility of drafting an instruction that would zero in on particular factors, out of concern that this would run afoul of *Colon* and due to the risk that the instruction might be viewed by jurors as effectively directing a verdict.

In *United States v. Brown*, 726 F.3d 993 (7th Cir. 2013), the court generally endorsed the approach taken by this pattern instruction, see *id*. at 1001, but held that the district court did not abuse its discretion in providing further guidance regarding the types of evidence that might tend to establish a conspiracy. *Id*. at 1003–04. Following the decision in *Brown*, the Committee considered making further changes to the pattern instruction but decided not to do so, largely due to the "infinite varieties" of conspiratorial agreements that may exist. *Id*. at 1001. In addition, the court in *Brown* reaffirmed its rejection of the "list of factors" approach disapproved in *Colon*. *Id*. at 999.

For the reasons cited in this Comment, and due to "the immense challenge of trying to craft a jury instruction that captures [the Seventh Circuit's] case law on buyer-seller relationships," *Brown*, 726 F.3d at 1002, judges should proceed with caution before adopting jury instructions that identify particular factors as pointing in one direction or another.

The Seventh Circuit has rejected the view that this instruction is never appropriate when the defendant denies selling drugs, as inconsistent defenses are permissible. *See Cruse*, 805 F.3d at 815 (citing *Mathews v. United States*, 485 U.S. 58, 63–64 (1988)).

5.10(B) SINGLE CONSPIRACY VS. MULTIPLE CONSPIRACIES

Count __ charges that there was a single conspiracy. The defendant contends that [there was more than one conspiracy; other defense contention].

If you find that there was more than one conspiracy and that the defendant was a member of one or more of those conspiracies, then you may find the defendant guilty on Count __ only if the [conspiracy; conspiracies] of which the defendant was a member was a part of the conspiracy charged in Count __.

The government is not required to prove the exact conspiracy charged in the indictment, so long as it proves that the defendant was a member of a smaller conspiracy contained within the charged conspiracy.

Committee Comment

The previous pattern instructions did not include a standard "multiple conspiracy" instruction. Because such an instruction is often requested, the Committee believed it would be beneficial to provide a standardized version.

This instruction is appropriate only "when the evidence presented at trial could tend to prove the existence of several distinct conspiracies." *United States v. Mims*, 92 F.3d 461, 467 (7th Cir. 1996). A defendant is not entitled to this instruction if the evidence at trial shows only one, uninterrupted conspiracy. *United States v. Ogle*, 425 F.3d 471, 472 (7th Cir. 2005). One example of a case in which a multiple conspiracy instruction may be necessary is a case in which "a defendant is a low-level player in a major drug-selling enterprise and evidence has been presented at trial concerning a wide range of the enterprise's activities." *Mims*, 92 F.3d at 467; see also *United States v. Westmoreland*, 122 F.3d 431, 434 (7th Cir. 1997). Another example is a case involving a "hub-and-spokes" conspiracy in which a defendant serves as a hub connected to each of his co-conspirators by a spoke. To prove the existence of a single conspiracy, a rim must connect the spokes together; otherwise the conspiracy is not one, but many. *United States v. Avila*, 557 F.3d 809, 814 (7th Cir. 2009).

Regarding the third paragraph, see *United States v. Campos*,

541 F.3d 735, 743–45 (7th Cir. 2008).

5.11 CONSPIRATOR'S LIABILITY FOR SUBSTANTIVE CRIMES COMMITTED BY CO-CONSPIRATORS WHERE CONSPIRACY CHARGED—ELEMENTS

Count[s] __ of the indictment charge[s] defendant[s] [name[s] of defendant[s]] with [a] crime[s] that the indictment alleges [was; were] committed by [another; other] member[s] of the conspiracy. In order for you to find [the; a] defendant[s] guilty of [this; these] charge[s], the government must prove each of the following [four] elements beyond a reasonable doubt:

1. The defendant [is guilty of the charge of conspiracy as alleged in Count __; was a member of the conspiracy [alleged in Count __] when the crime was committed];

2. [Another member; Other members] of the same conspiracy committed the crime charged in Count __] during the time that the defendant was also a member of the conspiracy;

3. The other conspirator[s] committed the crime charged in Count __ to advance the goals of the conspiracy; and

4. It was reasonably foreseeable to the defendant that other conspirators would commit the crime charged in Count __ in order to advance the goals of the conspiracy. The government is not required to prove that the defendant actually knew about the crime charged in Count __ or that the defendant actually realized that this type of crime would be committed as part of the conspiracy.

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 [as to that charge].

Committee Comment

See *United States v. Wantuch*, 525 F.3d 505, 518–20 (7th Cir. 2008); see also *United States v. Villagrana*, 5 F.3d 1048, 1052 (7th Cir. 1993); *United States v. Kimmons*, 917 F.2d 1011, 1017 (7th Cir. 1990); see also *United States v. Chairez*, 33 F.3d 823 (7th Cir. 1994); *United States v. Redwine*, 715 F.2d 315, 322 (7th Cir. 1983); *Pinkerton v. United States*, 328 U.S. 640, 647–48 (1946) (co-conspirator vicariously liable under *Pinkerton* despite claim that he did not know or suspect the presence of a gun in the vehicle).

The Seventh Circuit has emphasized that, for a *Pinkerton* instruction to be adequate, it must "advise the jury that the government bears the burden of proving all elements of the [*Pinkerton*] doctrine beyond a reasonable doubt." *United States v. Stott*, 245 F.3d 890, 908 (7th Cir. 2001), citing *United States v. Sandoval-Curiel*, 50 F.3d 1389, 1394–95 (7th Cir. 1995); see also *United States v. Elizondo*, 920 F.2d 1308, 1317 (7th Cir. 1990). One of the elements that must be proved beyond a reasonable doubt in order to hold a defendant liable for his co-conspirator's crimes is that the crimes must have been committed in furtherance of the conspiracy. *Stott*, 245 F.3d at 908–09.

If the government pursues alternative theories of direct responsibility and *Pinkerton* responsibility, the trial judge should explain in this instruction that it is offered as an alternate basis for liability on the particular charge(s).

5.12 CONSPIRATOR'S LIABILITY FOR SUBSTANTIVE CRIMES COMMITTED BY CO-CONSPIRATORS; CONSPIRACY NOT CHARGED IN THE INDICTMENT—ELEMENTS

Count[s] __ of the indictment charge[s] defendant[s] [name[s] of defendant[s]] with [a] crime[s] that the indictment alleges [was; were] committed by [another; other] member[s] of the conspiracy. In order for you to find [the; a] defendant[s] guilty of [this; these] charge[s], the government must prove each of the following [four] elements beyond a reasonable doubt:

1. The defendant knowingly joined a conspiracy. A conspiracy is an agreement between two or more persons to commit a crime;

2. [Another member; Other members] of the same conspiracy committed the crime charged in Count __ during the time that the defendant was also a member of the conspiracy;

3. The other conspirator[s] committed the crime charged in Count __ to advance the goals of the conspiracy; and

4. It was reasonably foreseeable to the defendant that the other conspirator[s] would commit the crime charged in Count __ in order to advance the goals of the conspiracy. The government is not required to prove that the defendant actually knew about the crime charged in Count __ or that the defendant actually realized that this type of crime would be committed as part of the conspiracy.

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 [as to that charge].

Committee Comment

The Committee regards this instruction as one rarely given. When it is given the court should also give Instructions 5.09 and 5.10.

See *United States v. Haynes*, 582 F.3d 686, 707 (7th Cir. 2009); *United States v. Rawlings*, 341 F.3d 657, 660 (7th Cir. 2003); see also *United States v. Chairez*, 33 F.3d 823 (7th Cir. 1994) (co-conspirator vicariously liable under *Pinkerton* despite his claim that he did not know or suspect the presence of a gun in the vehicle); *United States v. Villagrana*, 5 F.3d 1048, 1052 (7th Cir. 1993); *United States v. Redwine*, 715 F.2d 315, 322 (7th Cir. 1983); *United States v. Kimmons*, 917 F.2d 1011, 1017 (7th Cir. 1990); *Pinkerton v. United States*, 328 U.S. 640, 647–48 (1946).

If the government pursues alternative theories of direct responsibility and *Pinkerton* responsibility, the trial judge should explain in this instruction that it is offered as an alternate basis for liability on the particular charge(s).

5.13 CONSPIRACY—WITHDRAWAL

If you find that the government has proved all of the elements in Count[s] __ of the indictment as to [the; a] defendant[s] [name] even though the crime[s] charged in [that; those] Count[s] were committed by others, you should then consider whether [he; they] withdrew from the conspiracy prior to the time [that; those] crime[s] [was; were] committed.

[The; A] defendant is not responsible for the crime[s] charged in Count __, if, before the commission of [that; those] crime[s], he took some affirmative act in an attempt to defeat or disavow the goal[s] of the conspiracy, such as:

(a) [completely undermining his earlier acts in support of the commission of the crime[s] so that these acts no longer could support or assist the commission of the crime[s]], or

(b) [alerting the proper law enforcement authorities in time to give them the opportunity to stop the crime[s]], or

(c) [performing an affirmative act that is inconsistent with the goal[s] of the conspiracy in a way that the co-conspirators are reasonably likely to know about it before they carry through with additional acts of the conspiracy], or

(d) [making a genuine effort to prevent the commission of the crime[s]], or

(e) [communicating to each of his co-conspirators that he has abandoned the conspiracy and its goal[s]].

Merely ceasing active participation in the conspiracy is not sufficient to show withdrawal.

[The; A] defendant has the burden of proving that it is more likely than not that he withdrew from the conspiracy.

Committee Comment

The present instruction should be given, when applicable, only when the court has given Instruction 5.11 or Instruction 5.12, the instructions that embody *Pinkerton*-based criminal responsibility. The present instruction applies only in the *Pinkerton* context, in other words, when the government seeks to impose criminal liability upon a defendant for a substantive offense committed by other members of the conspiracy of which the defendant is claimed to have been a member. See *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 463–65 (1978). The question of withdrawal as a defense to a charge of conspiracy is covered by Instructions 5.14(A) and 5.14(B).

In *U.S. Gypsum*, the Supreme Court held that an unnecessarily confining instruction on the issue of withdrawal from a conspiracy constituted reversible error. 438 U.S. at 463–65. Thus, when a defendant requests that specific actions introduced at trial which are inconsistent with the object of the conspiracy be included in the withdrawal instruction, the court should instruct the jury accordingly.

The Supreme Court held in *Smith v. United States*, 133 S. Ct. 714 (2013), that a defendant bears the burden of proving withdrawal from a conspiracy. This decision abrogated a line of Seventh Circuit cases, including *United States v. Morales*, 655 F.3d 608, 640 (7th Cir. 2011), *United States v. Starnes*, 14 F.3d 1207, 1210–11 (7th Cir. 1994), and *United States v. Read*, 658 F.2d 1225, 1236 (7th Cir. 1981).

"[S]imply ending one's involvement in [a] conspiracy, even voluntarily, is not enough to constitute withdrawal." Rather, "additional action aimed at defeating or disavowing the objectives of the conspiracy" is required. *United States v. Nagelvoort*, 856 F.3d 1117, 1129 (7th Cir. 2017).

Regarding subsection (e) of the instruction ("communicating to each of his co-conspirators that he has abandoned the conspiracy and its goals"), the Seventh Circuit has repeatedly announced in dicta this manner of demonstrating withdrawal from a conspiracy. See*, e.g., United States v. Vaughn*, 433 F.3d 917, 922 (7th Cir. 2006) ("Withdrawal requires an affirmative act to either defeat or disavow the purposes of the conspiracy, such as making a full

confession to the authorities or communicating to co-conspirators that one has abandoned the enterprise.") (internal citation omitted); *United States v. Sax*, 39 F.3d 1380, 1386 (7th Cir. 1994) ("Withdrawal requires an affirmative act on the part of the conspirator; he must either make a full confession to the authorities, or communicate to each of his coconspirators that he abandoned the conspiracy and its goals."), citing *United States v. DePriest*, 6 F.3d 1201, 1206 (7th Cir. 1993). The Committee, however, has found no case defining or applying this section of the instruction.

5.14(A) CONSPIRACY—WITHDRAWAL—STATUTE OF LIMITATIONS—ELEMENTS

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

1.

and

2.

and

3.

If 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].

If, on the other hand, you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty [of that charge], unless you also find that the defendant has proved that it is more likely than not that he withdrew from the conspiracy more than five years before the return of the indictment in this case. A defendant who has so proved should be found not guilty.

Committee Comment

This instruction should be followed immediately by Instruction 5.14(B).

The Supreme Court held in *Smith v. United States*, 568 U.S.

106 (2013), that a defendant bears the burden of proving withdrawal from a conspiracy. This decision abrogated a line of Seventh Circuit cases, including *United States v. Morales*, 655 F.3d 608, 640 (7th Cir. 2011), *United States v. Starnes*, 14 F.3d 1207, 1210–11 (7th Cir. 1994), and *United States v. Read*, 658 F.2d 1225, 1236 (7th Cir. 1981).

5.14(B) CONSPIRACY—WITHDRAWAL—STATUTE OF LIMITATIONS

[The defendant[s]; defendant[s] name[s]] cannot be found guilty of the conspiracy charge if [he; they] withdrew from the conspiracy more than five years before the indictment was returned. The indictment in this case was returned on [date of indictment]. Thus, [the defendant[s]; defendant[s] name[s]] must prove that it is more likely than not that [he; they] withdrew from the conspiracy prior to [date five years prior to date of indictment].

In order to withdraw, [the; a] defendant must have taken some affirmative act in an attempt to defeat or disavow the goal[s] of the conspiracy, such as:

(a) [completely undermining his earlier acts in support of the commission of the crime so that these acts no longer could support or assist the commission of the crime], or

(b) [alerting the proper law enforcement authorities in time to give them the opportunity to stop the crime or crimes], or

(c) [performing an affirmative act that is inconsistent with the goal[s] of the conspiracy in a way that the co-conspirators are reasonably likely to know about it before they carry through with additional acts of the conspiracy], or

(d) [making a genuine effort to prevent the commission of the crime], or

(e) [communicating to each of his co-conspirators that he has abandoned the conspiracy and its goals].

Merely ceasing active participation in the conspiracy is not sufficient to show withdrawal.

Committee Comment

This instruction should be used in conjunction with Instruction 5.14(A).

Withdrawal as a defense to conspiracy. Withdrawal from a conspiracy is only effective prospectively; it is not a defense to a conspiracy count directed at the period prior to withdrawal. *United States v. Dallas*, 229 F.3d 105, 110–11 (7th Cir. 2000). On the other hand, withdrawal from a conspiracy outside the statute of limitations is a defense because it negates an element of the offense; namely, membership in the conspiracy within the statute of limitations. *United States v. Read*, 658 F.2d 1225 (7th Cir. 1981).

What constitutes withdrawal from a conspiracy. "[S]imply ending one's involvement in [a] conspiracy, even voluntarily, is not enough to constitute withdrawal." Rather, "additional action aimed at defeating or disavowing the objectives of the conspiracy" is required. *United States v. Nagelvoort*, 856 F.3d 1117, 1129 (7th Cir. 2017); see also *United States v. Julian*, 427 F.3d 471 (7th Cir. 2005).

Factors to be considered. In *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 463–65 (1978), the Supreme Court held that an instruction unnecessarily limiting the type of actions that may constitute withdrawal from a conspiracy is reversible error. Thus, this instruction should be tailored to the specific actions introduced by the defendant at trial that are inconsistent with the object of the conspiracy. With regard to subsection (e) of the instruction ("communicating to each of his co-conspirators that he has abandoned the conspiracy and its goals"), the Seventh Circuit has repeatedly endorsed in *dicta* this manner of demonstrating withdrawal from a conspiracy. See*, e.g., United States v. Vaughn*, 433 F.3d 917, 922 (7th Cir. 2006) ("Withdrawal requires an affirmative act to either defeat or disavow the purposes of the conspiracy, such as making a full confession to the authorities or communicating to co-conspirators that one has abandoned the enterprise.") (internal citation omitted); *United States v. Sax*, 39 F.3d 1380, 1386 (7th Cir. 1994) ("Withdrawal requires an affirmative act on the part of the conspirator; he must either make a full confession to the authorities, or communicate to each of his coconspirators that he abandoned the conspiracy and its goals."), citing *United States v. DePriest*, 6 F.3d 1201, 1206 (7th Cir. 1993). The Committee, however, has found no case defining or applying this section of the instruction.

6.01 SELF DEFENSE/DEFENSE OF OTHERS

A person may use force when he reasonably believes that force is necessary to defend [himself; another person] against the imminent use of unlawful force. [A person may use force that is intended or likely to cause death or great bodily harm only if he reasonably believes that force is necessary to prevent death or great bodily harm to [himself; someone else].]

Committee Comment

As with any affirmative defense, a defendant is entitled to a self-defense instruction only if he presents sufficient evidence to require its submission to the jury. *United States v. Sahakian*, 453 F.3d 905, 909 (7th Cir. 2006); *United States v. Ebert*, 294 F.3d 896, 899 (7th Cir. 2002). This includes evidence that there were no reasonable legal alternatives to the use of force, such as retreat or similar steps to avoid injury. *Sahakian*, 453 F.3d at 909; *United States v. Tokash*, 282 F.3d 962, 969 (7th Cir. 2002). These notions are captured in the imminence and necessity requirements of the self-defense instruction. The Seventh Circuit has stated, however, that "the defense is reserved for extraordinary circumstances which require nothing less than immediate emergency." *Sahakian*, 452 F.3d at 910 (citation omitted).

In *United States v. Talbott*, 78 F.3d 1183, 1185–86 (7th Cir. 1996) (*per curiam*), the Seventh Circuit concluded that the trial judge had erred in instructing the jury that the defendant charged with being a felon in possession of a firearm had the burden of proving self-defense.

It is unclear whether *Talbott* remains good law. In *Dixon v. United States*, 548 U.S. 1 (2006), the Supreme Court held that there is no constitutional requirement that the government disprove beyond a reasonable doubt an affirmative defense that controverts an element of an offense. Rather, the allocation of the burden of proof on defenses is a matter of statute, or in the absence of a statute, common law. When a federal crime is at issue, courts are to presume that Congress intended to follow established common law rules regarding the allocation of the burden of proof on defenses. When a state crime is at issue (as it is, for example, under the Assimilated Crimes Act, 18 U.S.C. § 13), the allocation of the burden of proof is a matter of state law. At least one Circuit has held, since *Dixon*, that when self-defense is asserted in a federal felon-in-possession case, the defendant has the burden of proving self-defense by a preponderance of the evidence. *United*

States v. Leahy, 473 F.3d 401, 405–08 (1st Cir. 2007). In addition, the Seventh Circuit has recognized that the Supreme Court's decision in *Dixon* applies beyond the duress defense at issue in that case. *United States v. Jumah*, 493 F.3d 868, 873 n.2 (7th Cir. 2007) ("Although the facts of *Dixon* . . ., related to the affirmative defense of duress, it is clear that the Court's holding was not limited to this defense. The Court cited our decision in *Talbott* as an exemplar of cases in conflict with the decision of the Fifth Circuit . . . *Talbott* itself did not involve the affirmative defense of duress. Rather, the defense raised in *Talbott* was self-defense.") (citation omitted). Because the Seventh Circuit has not yet determined which side bears the burden of proving self defense under any particular federal statutes, the Committee takes no position on the current state of the law in that regard. *See United States v. Waldman*, 835 F.3d 751, 756 n.2 (7th Cir. 2016) (acknowledging the issue but declining to decide it).

This instruction will require modification in cases involving assault by a prisoner against a prison employee under 18 U.S.C. § 111, which prohibits assaults or resistance against federal officers engaged in official duties. The Seventh Circuit concluded in *Waldman*, 835 F.3d at 755, that an inmate may act in self-defense only "if he reasonably fears imminent use of sadistic and malicious force by a prison official for the very purpose of causing him harm." In such a case, the Committee suggests the following revision of the first sentence of the instruction:

> A prison inmate may use force against a prison employee when he reasonably fears the imminent use of sadistic and malicious force by the prison employee for the purpose of causing him harm.

6.02 INSANITY

You must find the defendant not guilty by reason of insanity if you find that he has proven by clear and convincing evidence that at the time he committed the offense, he had a severe mental disease or defect that rendered him unable to appreciate the nature and quality of what he was doing, or that rendered him unable to appreciate that what he was doing was wrong [that is, contrary to public morality and contrary to law].

[If you find the defendant not guilty by reason of insanity, then the court will commit the defendant to a suitable facility until the court finds that he is eligible to be released.]

Committee Comment

18 U.S.C. § 17 establishes the parameters of the defense of insanity, as well as the burden of proof. The issue of legal insanity is to be decided by the trier of fact. Fed. R. Evid. 704(b). Under 18 U.S.C. § 4242(b), the court must provide the jury with a special verdict form that allows a verdict of "not guilty only by reason of insanity."

Section 17 does not define what it means for a defendant to "understand that what he was doing was wrong." In *United States v. Ewing*, 494 F.3d 607, 618 (7th Cir. 2007), the court held that the term still carries the same meaning as that set forth in *M'Naghten's Case*, 8 Eng. Rep. 718 (1843), that is, one that is based upon objective societal standards of morality. Defining "wrongfulness" as "contrary to law" is too narrow, while defining it as "subjective personal morality" is too broad. *Ewing*, 494 F.3d at 618. The court cautioned, however, that not every case involving an insanity defense requires the court to instruct the jury on the distinction between moral and legal wrongfulness. *Id*. at 621–22. Therefore, the court should use the bracketed language in the first paragraph of the instruction only when the evidence warrants it. *Id*. at 622.

If a defendant is found not guilty only by reason of insanity, the district court must commit him to a suitable facility until he is found eligible for release under the statutory scheme. 18 U.S.C. § 4243(a). The court may instruct the jury on this automatic commitment requirement, but should only do so to counteract inaccurate or misleading information presented to the jury during

trial. *Shannon v. United States*, 512 U.S. 579 (1994); *United States v. Diekhoff*, 535 F.3d 611, 620–21 (7th Cir. 2008); *United States v. Waagner*, 319 F.3d 962, 966 (7th Cir. 2003).

6.03 DEFENDANT'S PRESENCE

You have heard evidence that the defendant was not present at the time and place where the government alleges he committed the offense charged in Count __. The government must prove beyond a reasonable doubt that the defendant was present at the time and place of the offense.

Committee Comment

The "alibi" instruction has been re-titled because of widespread negative connotations associated with the word "alibi." The Committee recommends that courts that do provide juries with instruction headings use the new title rather than the former title.

This defense is based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime charged. *United States v. White*, 443 F.3d 582, 587 (7th Cir. 2006). The court should provide this instruction only when it presents an actual defense to the crime charged. For example, a defendant does not necessarily have to be present at the scene to aid and abet a crime. See *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 190–92 (2007).

Although this instruction might seem unnecessary in light of the government's obligation in every case to prove that the defendant actually is the person who committed the charged crime, it still is considered a theory of defense, and the court should provide a presence instruction if it has some support in the evidence. *White*, 443 F.3d at 587.

6.04 ENTRAPMENT—ELEMENTS

The government has the burden of proving that the defendant was not entrapped by [identify the actor[s]: *e.g.*, government agent, informant, law enforcement officer]. The government must prove beyond a reasonable doubt either:

1. [A] [government agent[s]; informant[s]; [or] law enforcement officer[s]] did not induce the defendant to commit the offense; or

2. The defendant was predisposed to commit the offense before he had contact with [government agent[s]; informant[s]; law enforcement officer[s]].

I will define what I mean by the terms "induce" and "predisposed."

Committee Comment

See *United States v. Mayfield*, 771 F.3d 417, 439–40 (7th Cir. 2014) (*en banc*).

6.05 ENTRAPMENT—DEFINITIONS OF TERMS

Definition of "induce":

[A] [government agent[s]; informant[s]; law enforcement officer[s]] "induce[s]" a defendant to commit a crime: (1) if [the] [agent[s]; informant[s]; [and/or] officer[s]] solicit[s] the defendant to commit the crime, and (2) does something in addition that could influence a person to commit a crime that the person would not commit if left to his own devices. This other conduct may consist of [repeated attempts at persuasion; fraudulent representations; threats; coercive tactics; harassment; promises of reward beyond what is inherent in the usual commission of the crime; pleas based on need, sympathy, or friendship; [insert specific other conduct at issue;] [or] [any [other] conduct that creates a risk that a person who would not commit the crime if left to his own devices will do so in response to the efforts of the [agent[s]; informant[s]; officer[s]].

[If the [agent[s]; informant[s]; officer[s]] merely initiated contact with the defendant; merely solicited the crime; or merely furnished an opportunity to commit the crime on customary terms, then the [agent[s]; informant[s]; officer[s]] did not induce the defendant to commit the crime.]

Definition of "predisposed":

A defendant is "predisposed" to commit the charged crime if, before he was approached by [a] [government agent[s]; informant[s]; law enforcement officer[s]], he was ready and willing to commit the crime and likely would have committed it without the intervention of the [agent[s]; informant[s]; officer[s]], or he wanted to commit the crime but had not yet found the means.

Predisposition requires more than a mere desire, urge, or inclination to engage in the charged crime.

Rather, it concerns the likelihood that the defendant would have committed the crime if [the] [agent[s]; informant[s]; officer[s]] had not approached him.

In deciding whether the government has met its burden of proving that the defendant was predisposed to commit the crime, you may consider the defendant's character [, or] reputation [, or] criminal history]; whether the government initially suggested the criminal activity; whether the defendant engaged in the criminal activity for profit; whether the defendant showed a reluctance to commit the crime that was overcome by persuasion by the [agent[s]; informant[s]; officer[s]]; and the nature of the inducement or persuasion that was used.

Committee Comment

See *United States v. Mayfield*, 771 F.3d 417, 434–36 (7th Cir. 2014) (*en banc*); *United States v. McGill*, 754 F.3d 452 (7th Cir. 2014) (reversing conviction for failure to give entrapment instruction). See also *Jacobson v. United States*, 503 U.S. 540 (1992) (predisposition must exist prior to the government's attempts to persuade the defendant to commit the crime). Regarding predisposition, the *en banc* court emphasized in Mayfield that the relevant inquiry is the defendant's predisposition to commit the charged crime, not just any crime. *Mayfield*, 771 F.3d at 438. In addition, "although the defendant's criminal history is relevant to the question of his predisposition, it's not dispositive." *Id*. (emphasis in original).

Entrapment is, generally speaking, a question for the jury, not the court. *Id*. at 439. "[T]he defendant is entitled to a jury instruction on the defense 'whenever there is sufficient evidence from which a reasonable jury could find entrapment.' " *Id*. at 440. "[T]o obtain a jury instruction and shift the burden of disproving entrapment to the government, the defendant must proffer evidence on both elements of the defense. But this initial burden of production is not great. An entrapment instruction is warranted if the defendant proffers some evidence that the government induced him to commit the crime and he was not predisposed to commit it. *Id*. (internal quotation marks and citations omitted).

Mayfield also addressed the question of whether the trial court

may, before trial, preclude the defendant from asserting an entrapment defense. The court stated:

> Though this practice is permissible, it carries an increased risk that the court will be tempted to balance the defendant's evidence against the government's, invading the province of the jury. In ruling on a pretrial motion to preclude the entrapment defense, the court must accept the defendant's proffered evidence as true and not weigh the government's evidence against it. This important point is sometimes obscured, subtly raising the bar for presenting entrapment evidence at trial.
>
> . . . The two elements of the entrapment inquiry are not equally amenable to resolution before trial. Predisposition rarely will be susceptible to resolution as a matter of law. Predisposition, as we've defined it, refers to the likelihood that the defendant would have committed the crime without the government's intervention, or actively wanted to but hadn't yet found the means. This probabilistic question is quintessentially factual; it's hard to imagine how a particular person could be deemed "likely" to do something as a matter of law. The inducement inquiry, on the other hand, may be more appropriate for pretrial resolution; if the evidence shows that the government did nothing more than solicit the crime on standard terms, then the entrapment defense will be unavailable as a matter of law.

Id. at 440–41.

The instruction's list of the types of actions that may constitute inducement includes "fraudulent representations," as the Seventh Circuit ruled in *Mayfield*. The court has not yet, however, definitively defined what types of fraudulent representations may qualify as the type of inducement giving rise to entrapment, as opposed to legitimate undercover investigation tactics. For this proposition, the court cited *United States v. Burkley*, 591 F.2d 903, 913 (D.C. Cir. 1978), which in turn notes that "not all fraudulent representations constitute inducement" and provides examples of some types that the D.C. Circuit believed would not qualify. *Id*. at n.18 (internal quotation marks omitted). The court may, of course, consider whether the evidence warrants making specific reference to "fraudulent representations" or whether some other factor listed in the instruction covers the type of inducement at issue (*e.g.*, a fake stash of drugs might be better characterized as a "promise of reward," a false suggestion of a gang reprisal might be better characterized as a "coercive tactic," etc.).

In addition, in a case in which an entrapment instruction is

given and Instruction 3.19 (Government Investigative Techniques) is requested, consideration should be given to whether Instruction 3.19 should be reworded so that it does not implicitly modify or undercut the entrapment instruction.

Regarding predisposition, if evidence of the defendant's character or criminal history is introduced, the court should consider giving a limiting instruction confining the use of the evidence to determination of predisposition and precluding its use for other purposes.

6.06 RELIANCE ON PUBLIC AUTHORITY

[The defendant[s]; defendant[s] name[s]] contend[s] that [he; they] acted in reliance on public authority. A defendant who commits an offense in reliance on public authority does not act [knowingly; insert other level of intent required for conviction] and should be found not guilty.

To be found not guilty based on reliance on public authority, [the; a] defendant must prove that each of the following [three] things are more likely true than not true:

1. An [agent; representative; official; name] of the [United States] government [requested; directed; authorized] the defendant to engage in the conduct charged against the defendant in Count[s] __; and

2. This [agent; representative; official; name] had the actual authority to grant authorization for the defendant to engage in this conduct; and

3. In engaging in this conduct, the defendant reasonably relied on the [agent's; representative's; official's; name] authorization. In deciding this, you should consider all of the relevant circumstances, including the identity of the government official, what that official said to the defendant, and how closely the defendant followed any instructions the official gave.

Committee Comment

The defendant bears the burden of proving the defense of reliance on public authority by a preponderance of the evidence. *United States v. Jumah*, 493 F.3d 868, 875 (7th Cir. 2007). This defense is closely related to the defense of entrapment by estoppel. Although the court in *Jumah* questions the meaningfulness of the difference between the two, it offers this distinction: in the case of a public authority defense, the defendant, acting at the request of a government official, engages in conduct that the defendant knows to be otherwise illegal, while in the case of a defense of entrapment by

estoppel, the defendant does not believe that his conduct constitutes a crime, based on the statements of a government official. *Id*. at 874 n.4; see also *United States v. Strahan*, 565 F.3d 1047, 1051 (7th Cir. 2009) ("the public-authority defense requires reasonable reliance by a defendant on a public official's directive to engage in behavior that the defendant knows to be illegal"); *United States v. Baker*, 438 F.3d 749, 753 (7th Cir. 2006). The instruction is worded to require that the official had the actual authority to authorize the conduct. The Seventh Circuit has not definitively decided, however, whether the actual authority is required or whether, as with the defense of entrapment by estoppel, apparent authority suffices. See *Baker*, 438 F.3d at 754. The Committee takes no position on whether actual authority is required. See also Fed. R. Crim. P. 12.3(a)(1).

6.07 ENTRAPMENT BY ESTOPPEL

[The defendant[s]; defendant[s] name[s]] contend[s] that [he; they] engaged in the conduct charged against [him; them] in Count[s] __ in reasonable reliance on [name the government agent]'s assurance that this conduct was lawful. A defendant who commits an offense in reasonable reliance on such an official assurance does not act [knowingly; insert other level of intent required for conviction] and should be found not guilty.

In order to be found not guilty for this reason, [the; a] defendant must prove the following [three] things are more likely true than not true:

1. An official of the United States government, with actual or apparent authority over the matter, told the defendant that his conduct would be lawful; and

2. The defendant actually relied on what this official told him in taking this action; and

3. The defendant's reliance on what the official told him was reasonable. In deciding this, you should consider all of the relevant circumstances, including the identity of the government official, what that official said to the defendant, and how closely the defendant followed any instructions the official gave.

Committee Comment

The defense of entrapment by estoppel is closely related to the defense of reliance on public authority. See Committee Comment to Instruction 6.06. The defendant has the burden to prove estoppel by a preponderance of the evidence. A federal official's apparent authority to authorize the defendant's conduct can support this defense; actual authority is not required. *United States v. Baker*, 438 F.3d 749, 754 (7th Cir. 2006).

The defense does not apply when the defendant claims to have been misled by a state or local official into committing a federal crime. *Id*. at 755. Entrapment by estoppel is a narrow defense

requiring that the government actively misled the defendant and that the defendant actually and reasonably relied on the representations by the government official or agent. *Id*. at 755–56.

6.08 COERCION/DURESS

[The defendant[s]; defendant[s] name[s]] contend[s] that even if the government has proved that [he; they] committed the offense [in Count(s) [in count(s) __], [he; they] did so because [he; they] [was; were] coerced. A person who is coerced into committing an offense should be found not guilty of that offense.

To establish that he was coerced, [the; a] defendant must prove that both of the following things are more likely true than not true:

1. He reasonably feared that [identify person or group] would immediately kill or seriously injure [him; specified third person] if he did not commit the offense; and

2. He had no reasonable opportunity to refuse to commit the offense and avoid the threatened harm.

Committee Comment

The defendant bears the burden of proving the defense of coercion by a preponderance of the evidence. *United States v. Dixon*, 548 U.S. 1, 15 (2006). To be entitled to a coercion instruction, the defendant must make a sufficient evidentiary showing. If the defendant had a reasonable alternative to violating the law, then the defense does not apply. A defendant's fear of death or serious injury is generally insufficient without more; there must be evidence that the threatened harm was present, immediate, or impending. If the defendant committed a continuing crime (such as conspiracy), he must have ceased committing the crime as soon as the claimed duress lost its coercive force. *United States v. Sawyer*, 558 F.3d 705, 710–11 (7th Cir. 2009).

6.09(A) 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 applies 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).

6.09(B) DIMINISHED CAPACITY

You have heard evidence that the defendant may have had [name 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 applies 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).

6.10 GOOD FAITH—FRAUD/FALSE STATEMENTS/MISREPRESENTATIONS

If [the; a] defendant acted in good faith, then he lacked the [insert element of crime at issue, *e.g.*, intent to defraud; willfulness] required to prove the offense[s] of [identify the offenses] charged in Count[s] ___. A defendant acted in good faith if, at the time, he honestly believed the [truthfulness; validity; insert other specific term] that the government has charged as being [false; fraudulent; insert term used in charge].

A defendant does not have to prove his good faith. Rather, the government must prove beyond a reasonable doubt that the defendant acted [insert element of crime at issue, *e.g.*, intent to defraud; willfully] as charged in Count[s] ___.

[A defendant's honest and genuine belief that he will be able to perform what he promised is not a defense to fraud if the defendant also knowingly made false and fraudulent representations.]

Committee Comment

The Seventh Circuit has questioned whether a good faith instruction provides any useful information beyond that contained in the pattern instruction defining "knowledge." See *United States v. Prude*, 489 F.3d 873, 882 (7th Cir. 2007); *United States v. Mutuc*, 349 F.3d 930, 935–36 (7th Cir. 2003). For this reason, as a general rule, this instruction should not be used in cases in which the government is required only to prove that the defendant acted "knowingly." Rather, it should be used in cases in which the government must prove some form of "specific intent," such as intent to defraud or willfulness.

The third paragraph of the instruction should be given only when warranted by the evidence. As the court observed in *United States v. Caputo*, 517 F.3d 935, 942 (7th Cir. 2008), "[a] person who tells a material lie to a federal agency can't say 'yes, but I thought it would all work out to the good' or some such thing. Intentional deceit on a material issue is a crime, whether or not the defendant thought that he had a good excuse for trying to

deceive the federal agency or the potential customers." See also *United States v. Radziszewski*, 474 F.3d 480, 485–86 (7th Cir. 2007). Indeed, in this situation, it is arguable that no good faith instruction should be given at all. *Caputo*, 517 F.3d at 942.

6.11 GOOD FAITH—TAX AND OTHER TECHNICAL STATUTE CASES

A person does not act willfully if he believes in good faith that he is acting within the law, or that his actions comply with the law. Therefore, if the defendant actually believed that what he was doing was in accord with the [tax; currency structuring; other technical statute] laws, then he did not willfully [evade taxes; fail to file tax returns; make a false statement on a tax return; other charged offense]. This is so even if the defendant's belief was not objectively reasonable, as long as he held the belief in good faith. However, you may consider the reasonableness of the defendant's belief, together with all the other evidence in the case, in determining whether the defendant held that belief in good faith.

Committee Comment

When a defendant is accused of violating a complex and technical statute, such as a criminal tax statute, the term "willfully" has been construed to require proof that the defendant acted with knowledge that his conduct violated a legal duty. *Ratzlaf v. United States*, 510 U.S. 135, 144–46 (1994); *Cheek v. United States*, 498 U.S. 192, 201 (1991); *United States v. Wheeler*, 540 F.3d 683, 689 (7th Cir. 2008); *United States v. Murphy*, 469 F.3d 1130, 1138 (7th Cir. 2006).

6.12 RELIANCE ON ADVICE OF COUNSEL

If [the; a] defendant relied in good faith on the advice of an attorney that his conduct was lawful, then he lacked the [insert element of crime at issue, *e.g.*, intent to defraud; willfulness] required to prove the offense[s] of [identify the offenses] charged in Count[s] ___.

The defendant relied in good faith on the advice of counsel if:

1. Before taking action, he in good faith sought the advice of an attorney whom he considered competent to advise him on the matter; and

2. He consulted this attorney for the purpose of securing advice on the lawfulness of his possible future conduct; and

3. He made a full and accurate report to his attorney of all material facts that he knew; and

4. He then acted strictly in accordance with the advice of this attorney.

[You may consider the reasonableness of the advice provided by the attorney when determining whether the defendant acted in good faith.]

The defendant does not have to prove his good faith. Rather, the government must prove beyond a reasonable doubt that the defendant acted [insert intent element of crime at issue, *e.g.*, intent to defraud; willfully] as charged in Count[s] ___.

Committee Comment

See *United States v. Van Allen*, 524 F.3d 814, 823 (7th Cir. 2008); *United States v. Al-Shahin*, 474 F.3d 941, 947 (7th Cir. 2007); *United States v. Urfer*, 287 F.3d 663, 664–65 (7th Cir. 2002).

7.01 JURY DELIBERATIONS

Once you are all in the jury room, the first thing you should do is choose a [foreperson; presiding juror]. The [foreperson; presiding juror] should see to it that your discussions are carried on in an organized way and that everyone has a fair chance to be heard. You may discuss the case only when all jurors are present.

Once you start deliberating, do not communicate about the case or your deliberations with anyone except other members of your jury. You may not communicate with others about the case or your deliberations by any means. This includes oral or written communication, as well as any electronic method of communication, such as [list current technology or services likely to be used, *e.g.*, telephone, cell phone, smart phone, iPhone, Blackberry, computer, text messaging, instant messaging, the Internet, chat rooms, blogs, websites, or services like Facebook, LinkedIn, YouTube, Instagram, Snapchat, Twitter], or any other method of communication.

If you need to communicate with me while you are deliberating, send a note through the [Marshal; court security officer]. The note should be signed by the [foreperson; presiding juror], or by one or more members of the jury. To have a complete record of this trial, it is important that you do not communicate with me except by a written note. I may have to talk to the lawyers about your message, so it may take me some time to get back to you. You may continue your deliberations while you wait for my answer. [Please be advised that transcripts of trial testimony are not available to you. You must rely on your collective memory of the testimony.]

If you send me a message, do not include the breakdown of any votes you may have conducted. In

other words, do not tell me that you are split 6–6, or 8–4, or whatever your vote happens to be.

Committee Comment

See American Bar Ass'n Standards for Criminal Justice, Trial By Jury, Standard 15-4.1(b) ("The court should require a record to be kept of all communications received from a juror or the jury after the jury has been sworn, and he or she should not communicate with a juror or the jury on any aspect of the case itself (as distinguished from matters relating to physical comforts and the like), except after notice to all parties and reasonable opportunity for them to be present."); *id.* Standard 15-4.3(a) ("All communications between the judge and members of the jury panel, from the time of reporting to the courtroom for voir dire until dismissal, should be in writing or on the record in open court. Counsel for each party should be informed of such communication and given the opportunity to be heard.").

"[B]ecause the defendant has a right to be present 'at every trial stage,' Fed. R. Crim. P. 43(a)(2), he must be present during the discussion of jury notes as well." *United States v. Willis*, 523 F.3d 762, 775 (7th Cir. 2008). Thus, when the jury sends the court a note, "the jury's message should [be] answered in open court and . . . [the defendant's] counsel should have . . . an opportunity to be heard before the trial judge respond[s]." *Rogers v. United States*, 422 U.S. 35, 39 (1975), quoted in *Willis*, 523 F.3d at 775.

This rule does not necessarily apply to notes regarding housekeeping matters such as lunch arrangements and the like. See, *e.g.*, *Love v. City of Chicago Bd. of Educ.*, 241 F.3d 564, 572 (7th Cir. 2001), abrogated in part on other grounds, *Spiegla v. Hull*, 371 F.3d 928, 941–42 (7th Cir. 2004). But if a communication regarding scheduling arguably impacts the length of the jury's deliberations, it is error not to disclose the communication to the defendant and counsel. See *United States v. Blackmon*, 839 F.2d 900, 915 (2d Cir. 1988) (error, but found harmless). The safer and better practice is for the trial judge to disclose and seek comments on all communications to or from the jury. See *DeGrave v. United States*, 820 F.2d 870, 872 (7th Cir. 1987) ("We note that the court's practice of permitting *ex parte* communications with the jury presents problems."); see also *United States v. Widgery*, 778 F.2d 325, 327 (7th Cir. 1985) ("To answer a note without consulting counsel may spoil a perfectly good trial for several reasons—not only because it denies the defendant a procedural right but also because consultation may help the court to cure a general problem in the deliberations before it is too late.").

7.02 VERDICT FORM

[A verdict form has been; Verdict forms have been] prepared for you. You will take [this form; these forms] with you to the jury room.

[Read the verdict form[s].]

When you have reached unanimous agreement, your [foreperson; presiding juror] will fill in, date, and sign the [appropriate] verdict form[s]. [The foreperson; The presiding juror; Each of you] will sign it.

Advise the [Marshal; court security officer] once you have reached a verdict. When you come back to the courtroom, [I; the clerk] will read the verdict[s] aloud.

Committee Comment

The last sentence of the instruction advises jurors that they will not have to read the verdict, a common assumption, to prevent any concern or fear on the part of the presiding juror/foreperson.

7.03 UNANIMITY/DISAGREEMENT AMONG JURORS

The verdict must represent the considered judgment of each juror. Your verdict, whether it is guilty or not guilty, must be unanimous.

You should make every reasonable effort to reach a verdict. In doing so, you should consult with each other, express your own views, and listen to your fellow jurors' opinions. Discuss your differences with an open mind. Do not hesitate to re-examine your own view and change your opinion if you come to believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of evidence just because of the opinions of your fellow jurors or just so that there can be a unanimous verdict.

The twelve of you should give fair and equal consideration to all the evidence. You should deliberate with the goal of reaching an agreement that is consistent with the individual judgment of each juror.

You are impartial judges of the facts. Your sole interest is to determine whether the government has proved its case beyond a reasonable doubt [and whether the defendant has proved [insert defense] by [a preponderance of the evidence; clear and convincing evidence]].

Committee Comment

This instruction is derived from *United States v. Silvern*, 484 F.2d 879 (7th Cir. 1973), with changes only to improve syntax. The final, bracketed sentence is included to cover situations in which the trial court has instructed the jury on an affirmative defense on which the defendant bears the burden of proof, such as coercion or insanity.

There are two situations in which a *Silvern* instruction may be appropriate: (1) the initial charge to the jury and (2) a deadlocked jury. The trial court may give the instruction to a deadlocked jury only if it has given the instruction in the initial

charge. *United States v. Brown*, 634 F.2d 1069, 1070 (7th Cir. 1980) ("A deadlock instruction given along with other instructions before there is a minority of jurors to feel pressured, has less danger of being coercive than a deadlock instruction first given when deadlock occurs."). If, however, the defendant definitively expresses his consent to the *Silvern* instruction, despite its absence from the initial charge, the district court may find waiver and issue the instruction. *United States v. Collins*, 223 F.3d 502, 509 (7th Cir. 2000).

The Seventh Circuit has held that repeating the *Silvern* instruction twice after the initial charge was not an abuse of discretion. *United States v. Sanders*, 962 F.2d 660, 677 (7th Cir. 1992). Before repeating the instruction, however, the judge must first conclude that the jury is deadlocked. *United States v. Willis*, 523 F.3d 762, 775 (7th Cir. 2008). In determining whether the jury is deadlocked, the judge may consider factors such as the length of deliberations compared with the length of the trial and the communication by the jury to the judge. *United States v. Taylor*, 569 F.3d 742, 746 (7th Cir. 2009); *Sanders*, 962 F.2d at 676. There is no requirement, however, that the trial judge repeat the instruction automatically whenever it appears that a jury is deadlocked. The trial judge has the discretion to determine whether repetition of the instruction would help the jury reach a verdict. See *United States v. Medansky*, 486 F.2d 807, 813 n.6 (7th Cir. 1973).

The Seventh Circuit concluded that the previously-approved *Silvern* instruction, which this instruction does not modify substantively, has "no plausible potential for coercing a jury." *United States v. Beverly*, 913 F.2d 337, 352 (7th Cir. 1990). If a variation on the approved instruction is given, "[t]he relevant inquiry, under *Silvern*, . . . is whether the court's communications pressured the jury to surrender their honest opinions for the mere purpose of returning a verdict." *Sanders*, 962 F.2d at 676 (citations omitted). Use of the approved instruction as the exclusive instruction of this type is highly recommended to avoid inadvertently coercive substitutes and to head off argument about reversible error.

STATUTORY INSTRUCTIONS

7 U.S.C. § 2024(b) UNAUTHORIZED ACQUISITION OF FOOD STAMPS—ELEMENTS

[The indictment charges defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] unauthorized acquisition of [food stamps; LINK card benefits; insert terminology used in particular State]. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. The defendant acquired more than $100 worth of [food stamps; LINK card benefits; other appropriate terminology] in a way that was contrary to law; and

2. The defendant knew that his acquisition of the [food stamps; LINK card benefits; other terminology] was contrary to law.

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 Comments

This statute covers offenses other than unauthorized acquisition, but that is its most common application. The statutory requirement of "knowledge" requires proof that the defendant knew

he was acquiring the benefits in a way that was unauthorized by statute or regulation. *United States v. Liparota*, 471 U.S. 419, 433 (1985).

7 U.S.C. § 2024(b) DEFINITION OF "CONTRARY TO LAW"

The law allows [food stamps; LINK card benefits; other appropriate terminology] to be exchanged only for eligible food, and not for cash.

Committee Comments

See 7 C.F.R. § 278.2(a). The applicable regulations identify a number of ways in which a person might acquire food stamp benefits in a manner that is "contrary to law." Exchange of the benefits for cash is the most common application of the criminal statute.

8 U.S.C. § 1324a(a)(1)(A) UNLAWFUL EMPLOYMENT—ELEMENTS

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

1. The defendant [hired; recruited; referred for a fee] [person named in the indictment] for employment in the United States;

2. [person named in the indictment] was an alien; and

3. The defendant knew [person named in the indictment] was not authorized to undertake the employment.

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

An alien is authorized to work in the United States if the alien is a lawfully admitted permanent resident or if documentation or endorsement of authorization to work has been issued to the alien by the Attorney General. 8 U.S.C. § 1324a(h)(1) and (3). The documentation or endorsement of authorization must conspicuously state any limitations as to time period or type of employment. 8 U.S.C. § 1324a(h)(1).

An "alien" is a person who is not a citizen or national of the United States. See 8 U.S.C. § 1101(a)(3). A "national of the United States" is a citizen of the United States or a non-citizen of the United States who owes permanent allegiance to the United States. See 8 U.S.C. § 1101(a)(22)(B). "Permanent allegiance" is the obligation of fidelity and obedience an individual owes to the government under which he lives, or to his sovereign in return for the protection he receives until, by some open and distinct act, he renounces his government and becomes a citizen of another government or sovereign. *Carlisle v. United States*, 83 U.S. 147, 154–55 (1872).

Prosecution is not barred by prior or future official action which may have authorized the alien to be in the United States. Thus, it is the alien status at the time of the alleged offense that is at issue.

Section 1324 of Title 8 of the United States Code provides for a defense against violation of 8 U.S.C. § 1324a(a)(1)(A) where the defendant establishes good faith compliance with the requirements of the provisions of 8 U.S.C. § 1324a(b) "in respect to the hiring, recruiting or referral for employment of an alien." When such a defense is raised, additional instruction will be required.

8 U.S.C. § 1324(a)(1)(A)(i) BRINGING ALIEN TO THE UNITED STATES OTHER THAN AT DESIGNATED PLACE—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] bringing an alien into the United States other than the place designated for entry. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant [brought; attempted to bring] [person named in the indictment] into the United States; and

2. [person named in the indictment] was an alien; and

3. The defendant knew [person named in the indictment] was an alien; and

4. The [entry; attempted entry] into the United States was [made; attempted] at a place other than a designated port of entry:

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

An "alien" is a person who is not a citizen or national of the

United States. 8 U.S.C. § 1101(a)(3). A "national of the United States" is a citizen of the United States or a non-citizen of the United States who owes permanent allegiance to the United States. 8 U.S.C. § 1101(a)(22)(B). "Permanent allegiance" is the obligation of fidelity and obedience an individual owes to the government under which he lives, or to his sovereign in return for the protection he receives until, by some open and distinct act, he renounces his government and becomes a citizen of another government or sovereign. *Carlisle v. United States*, 83 U.S. 147, 154–55 (1872).

Prosecution is not barred by prior or future official action which may have authorized the alien to be in the United States. Thus, it is the alien status at the time of the alleged offense that is at issue.

Section 1182 of Title 8 of the United States Code lists aliens who are excluded from the United States. An alien who falls within one of the excluded categories is not lawfully entitled to enter or reside in the United States. See *United States v. Bunker*, 532 F.2d 1262 (9th Cir. 1976).

A "designated port of entry" as defined by 8 C.F.R. § 100.4 is a place chosen by the Department of Homeland Security whereby an alien arriving by vessel, by land, or by any means of travel other than aircraft may enter the United States. The designation of such a port of entry may be withdrawn whenever, in the judgment of the Commissioner of the Bureau of Customs and Border Protection, such action is warranted. See 8 C.F.R. § 100.4. The ports are listed according to location by districts and are designated either Class A, B, or C. Class A means that the port is a designated port of entry for all aliens. *Id*. Class B means that the port is a designated port of entry for aliens who at the time of applying for admission are lawfully in possession of valid Permanent Resident Cards or valid non-resident aliens' border-crossing identification cards or are admissible without documents under the documentary waivers. *Id*. Class C means that the port is a designated port of entry only for aliens who are arriving in the United States as crewmen as that term is defined in 8 C.F.R. § 101(a)(10) of the Immigration and Nationality Act with respect to vessels. 8 C.F.R. § 100.4.

The Ninth, Tenth and Eleventh Circuits require proof of intent to break the law as a fifth element of violation of 8 U.S.C. § 1324(a)(1)(A). See *United States v. Nguyen*, 73 F.3d 887, 894 (9th Cir. 1995); *United States v. Zayas-Morales*, 685 F.2d 1272, 1275 (11th Cir. 1982); see also *United States v. Blair*, 54 F.3d 639, 642–43 (10th Cir. 1995) (required intent is to commit a crime, but not necessarily the specific crime charged). The Fifth Circuit has declined to require proof of intent to violate immigration law in

similar context. *United States v. Teresa De Jesus-Batres*, 410 F.3d 154, 162 (5th Cir. 2005). There are no reported cases in the Seventh Circuit addressing this issue, and the Committee expresses no opinion on it.

8 U.S.C. § 1324(a)(1)(A)(ii) ALIEN TRANSPORTATION—ELEMENTS

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

1. [person named in the indictment] was an alien; and

2. [person named in the indictment] [came to; entered; remained in] the United States in violation of the law; and

3. The defendant knew [person named in the indictment] was not lawfully in the United States; and

4. The defendant knowingly [transported; moved; attempted to transport; attempted to move] within the United States; and

5. The defendant's [transportation; movement; attempted transportation; attempted movement] of [person named in the indictment] was in furtherance of [person named in the indictment's] violation of the law.

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

An "alien" is a person who is not a citizen or national of the United States. 8 U.S.C. § 1101(a)(3). A "national of the United States" is a citizen of the United States or a non-citizen of the United States who owes permanent allegiance to the United States. 8 U.S.C. § 1101(a)(22)(B). "Permanent allegiance" is the obligation of fidelity and obedience an individual owes to the government under which he lives, or to his sovereign in return for the protection he receives until, by some open and distinct act, he renounces his government and becomes a citizen of another government or sovereign. *Carlisle v. United States*, 83 U.S. 147, 154–55 (1872).

Prosecution is not barred by prior or future official action which may have authorized the alien to be in the United States. Thus, it is the alien status at the time of the alleged offense that is at issue.

Section 1182 of Title 8 of the United States Code lists aliens who are excluded from the United States. An alien who falls within one of the excluded categories is not lawfully entitled to enter or reside in the United States. See *United States v. Bunker*, 532 F.2d 1262 (9th Cir. 1976).

The Ninth, Tenth and Eleventh Circuits require proof of intent to break the law as a fifth element of violation of 8 U.S.C. § 1324(a)(1)(A). See *United States v. Nguyen*, 73 F.3d 887, 894 (9th Cir. 1995); *United States v. Zayas-Morales*, 685 F.2d 1272, 1275 (11th Cir. 1982); see also *United States v. Blair*, 54 F.3d 639, 642–43 (10th Cir. 1995) (intent to commit a crime required not necessarily the specific crime charged). The Fifth Circuit has declined to interject an element of intent to violate immigration law to justify conviction in similar context. *United States v. Teresa De Jesus-Batres*, 410 F.3d 154, 162 (5th Cir. 2005). There are no reported cases in the Seventh Circuit addressing this issue, and the Committee expresses no opinion on it.

The government may proceed on a theory that the defendant acted with "reckless disregarded" rather than actual knowledge. "Reckless disregard" is not defined in Title, 8 United States Code. The Seventh Circuit has not defined the term. Nor is there a consensus in definition among the other circuits.

Ninth Circuit Instruction 9.2, entitled *Alien—Illegal Transportation*, instructs in its comments: "Pending further statutory or case law guidance, the trial judge must decide whether to define 'reckless disregard' as deliberate ignorance, as traditional recklessness, or not at all. The legislative history of 8 U.S.C. § 1324 refers

to 'willful blindness,' which raises the question of whether the 'reckless disregard" in the statute is intended to mean deliberate ignorance. 1986 U.S. Code Cong. and Admin. News, p. 5649, 5669–70, House Report No. 99-682(i). . . ."

The Tenth and Eleventh Circuits have adopted a "deliberate indifference" standard requiring the jury to look to whether there was "deliberate indifference to facts which, if considered and weighed in a reasonable manner, indicate the highest probability that the alleged aliens were in fact aliens and were in the United States unlawfully." *United States v. Zlatogur*, 271 F.3d 1025, 1029 (11th Cir. 2001); *United States v. Uresti-Hernandez*, 968 F.2d 1042, 1046 (10th Cir. 1992).

In *United States v. Guerra-Garcia*, 336 F.3d 19, 25–26 (1st Cir. 2003), the First Circuit applied the willful blindness standard: "A Defendant may be found to have recklessly disregarded a fact if the Defendant had actual knowledge of a fact or if you find that the Defendant deliberately closed his eyes to a fact that otherwise would have been obvious to him."

8 U.S.C. § 1324(a)(1)(A)(iii) CONCEALING OR HARBORING ALIENS—ELEMENTS

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

1. The defendant [concealed; harbored; shielded from detection; attempted to conceal; attempted to harbor; attempted to shield from detection] [person named in the indictment]; and

2. [person named in the indictment] was an alien; and

3. [person named in the indictment] [came to; entered; remained in] the United States in violation of the law; and

4. The defendant [knew] [person named in the indictment] was not lawfully in the United States.

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 *United States v. Ye*, 588 F.3d 411 (7th Cir. 2009), the Seventh Circuit defined "shield from detection" as "to protect from

or to ward off discovery." (citations omitted). *Id*. at 415. The Court further found no error in the lower court's broad definition of "shielding" as "the use of any means to prevent the detection of illegal aliens in the United States by the Government." (citations omitted). *Ibid.* Noting that the statute does "not limit the types of conduct that can constitute shielding from detection," the Seventh Circuit rejected the Second, Third, Fifth and Eighth Circuit position that violation of 8 U.S.C. § 1324(a)(1)(A) requires "conduct that 'tends substantially to facilitate' an alien's evasion of discovery." *Ye*, 588 F.3d at 415–16, citing *United States v. Ozcelik*, 527 F.3d 88, 100 (3d Cir. 2008); *United States v. Tipton*, 518 F.3d 591, 595 (8th Cir. 2008); *United States v. Teresa De Jesus-Batres*, 410 F.3d 154, 160 (5th Cir. 2005); *United States v. Kim*, 193 F.3d 567, 574 (2d Cir. 1999). The Seventh Circuit concluded: "Whether that conduct 'tends substantially' to assist an alien is irrelevant, for [8 U.S.C. § 1324(a)(1)(A)(iii)] requires no quantum or degree of assistance." *Ye*, 588 F.3d at 416.

An "alien" is a person who is not a citizen or national of the United States. See 8 U.S.C. § 1101(a)(3). A "national of the United States" is a citizen of the United States or a non-citizen of the United States who owes permanent allegiance to the United States. See 8 U.S.C. § 1101(a)(22)(B). "Permanent allegiance" is the obligation of fidelity and obedience an individual owes to the government under which he lives, or to his sovereign in return for the protection he receives until, by some open and distinct act, he renounces his government and becomes a citizen of another government or sovereign. *Carlisle v. United States*, 83 U.S. 147, 154–55 (1872).

Prosecution is not barred by prior or future official action which may have authorized the alien to be in the United States. Thus, it is the alien status at the time of the alleged offense that is at issue.

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The Ninth, Tenth and Eleventh Circuits require proof of intent to break the law as a fifth element of violation of 8 U.S.C. § 1324(a)(1)(A). See *United States v. Nguyen*, 73 F.3d 887, 894 (9th Cir. 1995); *United States v. Zayas-Morales*, 685 F.2d 1272, 1275 (11th Cir. 1982); see also *United States v. Blair*, 54 F.3d 639, 642–43 (10th Cir. 1995) (intent to commit a crime required not necessarily the specific crime charged). The Fifth Circuit has declined to interject an element of intent to violate immigration law to justify conviction in similar context. *United States v. Teresa*

De Jesus-Batres, 410 F.3d 154, 162 (5th Cir. 2005). There are no reported cases in the Seventh Circuit addressing this issue, and the Committee expresses no opinion on it.

The government may proceed on a theory that the defendant acted with "reckless disregarded" rather than actual knowledge. "Reckless disregard" is not defined in Title, 8 United States Code. The Seventh Circuit has not defined the term. Nor is there a consensus in definition among the other circuits.

Ninth Circuit Instruction 9.2, entitled *Alien—Illegal Transportation*, instructs in its comments: "Pending further statutory or case law guidance, the trial judge must decide whether to define 'reckless disregard' as deliberate ignorance, as traditional recklessness, or not at all. The legislative history of 8 U.S.C. § 1324 refers to 'willful blindness,' which raises the question of whether the 'reckless disregard' in the statute is intended to mean deliberate ignorance. 1986 U.S. Code Cong. and Admin. News, p. 5649, 5669–70, House Report No. 99-682(i) . . .."

The Tenth and Eleventh Circuits have adopted a "deliberate indifference" standard requiring the jury to look to whether there was "deliberate indifference to facts which, if considered and weighed in a reasonable manner, indicate the highest probability that the alleged aliens were in fact aliens and were in the United States unlawfully." *United States v. Zlatogur*, 271 F.3d 1025, 1029 (11th Cir. 2001); *United States v. Uresti-Hernandez*, 968 F.2d 1042, 1046 (10th Cir. 1992).

In *United States v. Guerra-Garcia*, 336 F.3d 19, 25–26 (1st Cir. 2003), the First Circuit applied the willful blindness standard: "A Defendant may be found to have recklessly disregarded a fact if the Defendant had actual knowledge of a fact or if you find that the Defendant deliberately closed his eyes to a fact that otherwise would have been obvious to him."

8 U.S.C. § 1324(a)(1)(A)(iv) ENCOURAGING ILLEGAL ENTRY—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] encouraging illegal entry by an alien. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant [encouraged; induced] [person named in the indictment] to [come to; enter; reside in] the United States; and

2. [person named in the indictment] was an alien; and

3. The defendant [knew] [person named in the indictment's] [coming to; entry into; residence in] the United States would be in violation of the law.

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. Fuji, 301 F.3d 535, 540 (7th Cir. 2002) (proof that defendant knowingly helped or advised is sufficient to establish the defendant "encouraged or induced."); *United States v. He*, 245 F.3d 954, 959 (7th Cir. 2001) (approving jury instruction equating knowingly helped or advised with "encouraged").

An "alien" is a person who is not a citizen or national of the

United States. See 8 U.S.C. § 1101(a)(3). A "national of the United States" is a citizen of the United States or a non-citizen of the United States who owes permanent allegiance to the United States. See 8 U.S.C. § 1101(a)(22)(B). "Permanent allegiance" is the obligation of fidelity and obedience an individual owes to the government under which he lives, or to his sovereign in return for the protection he receives until, by some open and distinct act, he renounces his government and becomes a citizen of another government or sovereign. *Carlisle v. United States*, 83 U.S. 147, 154–55 (1872).

Prosecution is not barred by prior or future official action which may have authorized the alien to be in the United States. Thus, it is the alien status at the time of the alleged offense that is at issue.

The government may proceed on a theory that the defendant acted with "reckless disregard" rather than actual knowledge. "Reckless disregard" is not defined in Title, 8 United States Code. The Seventh Circuit has not defined the term. Nor is there a consensus in definition among the other circuits.

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The Tenth and Eleventh Circuits have adopted a "deliberate indifference" standard requiring the jury to look to whether there was "deliberate indifference to facts which, if considered and weighed in a reasonable manner, indicate the highest probability that the alleged aliens were in fact aliens and were in the United States unlawfully." *United States v. Zlatogur*, 271 F.3d 1025, 1029 (11th Cir. 2001); *United States v. Uresti-Hernandez*, 968 F.2d 1042, 1046 (10th Cir. 1992).

In *United States v. Guerra-Garcia*, 336 F.3d 19, 25–26 (1st Cir. 2003), the First Circuit applied the willful blindness standard: "A Defendant may be found to have recklessly disregarded a fact if the Defendant had actual knowledge of a fact or if you find that the Defendant deliberately closed his eyes to a fact that otherwise would have been obvious to him."

8 U.S.C. § 1324(a)(2)(B)(ii) BRINGING ALIEN INTO UNITED STATES FOR COMMERCIAL ADVANTAGE OR PRIVATE FINANCIAL GAIN—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] bringing an alien into the United States for the purpose of [commercial advantage; private financial gain]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant [brought; attempted to bring] [person named in the indictment] into the United States; and

2. [person named in the indictment] was an alien; and

3. The defendant [knew] [person named in the indictment] was an alien who had not received prior official authorization [come to; enter; reside in] the United States; and,

4. The defendant brought [person named in the indictment] into the United States for the purpose of [commercial advantage; private financial gain].

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

An "alien" is a person who is not a citizen or national of the United States. See 8 U.S.C. § 1101(a)(3). A "national of the United States" is a citizen of the United States or a non-citizen of the United States who owes permanent allegiance to the United States. See 8 U.S.C. § 1101(a)(22)(B). "Permanent allegiance" is the obligation of fidelity and obedience an individual owes to the government under which he lives, or to his sovereign in return for the protection he receives until, by some open and distinct act, he renounces his government and becomes a citizen of another government or sovereign. *Carlisle v. United States*, 83 U.S. 147, 154–55 (1872).

Prosecution is not barred by prior or future official action which may have authorized the alien to be in the United States. Thus, it is the alien status at the time of the alleged offense that is at issue.

The government may proceed on a theory that the defendant acted with "reckless disregard" rather than actual knowledge. "Reckless disregard" is not defined in Title, 8 United States Code. The Seventh Circuit has not defined the term. Nor is there a consensus in definition among the other circuits.

Ninth Circuit Instruction 9.2 entitled *Alien—Illegal Transportation*, instructs in its comments: "Pending further statutory or case law guidance, the trial judge must decide whether to define 'reckless disregard' as deliberate ignorance, as traditional recklessness, or not at all. The legislative history of 8 U.S.C. § 1324 refers to 'willful blindness,' which raises the question of whether the 'reckless disregard" in the statute is intended to mean deliberate ignorance. 1986 U.S. Code Cong. and Admin. News, p. 5649, 5669–70, House Report No. 99-682(i) . . .

The Tenth and Eleventh Circuits have adopted a "deliberate indifference" standard requiring the jury to look to whether there was "deliberate indifference to facts which, if considered and weighed in a reasonable manner, indicate the highest probability that the alleged aliens were in fact aliens and were in the United States unlawfully." *United States v. Zlatogur*, 271 F.3d 1025, 1029 (11th Cir. 2001); *United States v. Uresti-Hernandez*, 968 F.2d 1042, 1046 (10th Cir. 1992).

In *United States v. Guerra-Garcia*, 336 F.3d 19, 25–26 (1st Cir. 2003), the First Circuit applied the willful blindness standard: "A Defendant may be found to have recklessly disregarded a fact if the Defendant had actual knowledge of a fact or if you find that the Defendant deliberately closed his eyes to a fact that otherwise would have been obvious to him."

The discrepancy in wages between a documented and undocumented worker is sufficient to show "private financial gain" to an employer. See *United States v. Li*, 615 F.3d 752, 756 (7th Cir. 2010) (that employer did not pay undocumented worker state mandated minimum wage shows financial gain to the employer); *United States v. Calimlim*, 538 F.3d 706, 715 (7th Cir. 2008) ("significantly lower price" paid to an undocumented housekeeper sufficient to show private financial gain).

8 U.S.C. § 1324(a)(2)(B)(iii) BRINGING ALIEN INTO UNITED STATES WITHOUT IMMEDIATE PRESENTATION AT DESIGNATED PORT OF ENTRY—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] bringing an alien into the United States without immediate presentation of the alien to an appropriate immigration official at a designated port of entry. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant [brought; attempted to bring] [person named in the indictment] into the United States; and

2. The defendant [person named in the indictment] was an alien; and

3. The defendant [knew] [person named in the indictment] had not received prior official authorization [come to; enter; reside in] the United States; and

4. The defendant did not immediately bring and present [person named in the indictment] to an appropriate immigration official at a designated port of entry.

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

An "alien" is a person who is not a citizen or national of the United States. See 8 U.S.C. § 1101(a)(3). A "national of the United States" is a citizen of the United States or a non-citizen of the United States who owes permanent allegiance to the United States. See 8 U.S.C. § 1101(a)(22)(B). "Permanent allegiance" is the obligation of fidelity and obedience an individual owes to the government under which he lives, or to his sovereign in return for the protection he receives until, by some open and distinct act, he renounces his government and becomes a citizen of another government or sovereign. *Carlisle v. United States*, 83 U.S. 147, 154–55 (1872).

Prosecution is not barred by prior or future official action which may have authorized the alien to be in the United States. Thus, it is the alien status at the time of the alleged offense that is at issue.

A "designated port of entry" as defined by 8 C.F.R. § 100.4 is a place chosen by the Department of Homeland Security whereby an alien arriving by vessel, by land, or by any means of travel other than aircraft may enter the United States. The designation of such a port of entry may be withdrawn whenever, in the judgment of the Commissioner of the Bureau of Customs and Border Protection, such action is warranted. See 8 C.F.R. § 100.4. The ports are listed according to location by districts and are designated either Class A, B, or C. Class A means that the port is a designated port of entry for all aliens. *Id*. Class B means that the port is a designated port of entry for aliens who at the time of applying for admission are lawfully in possession of valid Permanent Resident Cards or valid non-resident aliens' border-crossing identification cards or are admissible without documents under the documentary waivers. *Id*. Class C means that the port is a designated port of entry only for aliens who are arriving in the United States as crewmen as that term is defined in 8 C.F.R. § 101(a)(10) of the Immigration and Nationality Act with respect to vessels. 8 C.F.R. § 100.4.

The government may proceed on a theory that the defendant acted with "reckless disregard" rather than actual knowledge. "Reckless disregard" is not defined in Title, 8 United States Code. The Seventh Circuit has not defined the term. Nor is there a consensus in definition among the other circuits.

Ninth Circuit Instruction 9.2, entitled *Alien—Illegal Transpor-*

tation, instructs in its comments: "Pending further statutory or case law guidance, the trial judge must decide whether to define 'reckless disregard' as deliberate ignorance, as traditional recklessness, or not at all. The legislative history of 8 U.S.C. § 1324 refers to 'willful blindness,' which raises the question of whether the 'reckless disregard" in the statute is intended to mean deliberate ignorance. 1986 U.S. Code Cong. and Admin. News, p. 5649, 5669–70, House Report No. 99-682(i) . . ."

The Tenth and Eleventh Circuits have adopted a "deliberate indifference" standard requiring the jury to look to whether there was "deliberate indifference to facts which, if considered and weighed in a reasonable manner, indicate the highest probability that the alleged aliens were in fact aliens and were in the United States unlawfully." *United States v. Zlatogur*, 271 F.3d 1025, 1029 (11th Cir. 2001); *United States v. Uresti-Hernandez*, 968 F.2d 1042, 1046 (10th Cir. 1992).

In *United States v. Guerra-Garcia*, 336 F.3d 19, 25–26 (1st Cir. 2003), the First Circuit applied the willful blindness standard: "A Defendant may be found to have recklessly disregarded a fact if the Defendant had actual knowledge of a fact or if you find that the Defendant deliberately closed his eyes to a fact that otherwise would have been obvious to him."

8 U.S.C. § 1325(a)(1) ILLEGAL ENTRY—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] entering the United States at a time and place other than as designated. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant was an alien; and

2. The defendant knowingly [entered; attempted to enter] the United States; and

3. The defendant [entered; attempted to enter] at a place other than a designated port of entry.

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

An "alien" is a person who is not a citizen or national of the United States. See 8 U.S.C. § 1101(a)(3). A "national of the United States" is a citizen of the United States or a non-citizen of the United States who owes permanent allegiance to the United States. See 8 U.S.C. § 1101(a)(22)(B). "Permanent allegiance" is the obligation of fidelity and obedience an individual owes to the government under which he lives, or to his sovereign in return for the protection he receives until, by some open and distinct act, he renounces his government and becomes a citizen of another government or sovereign. *Carlisle v. United States*, 83 U.S. 147, 154–55 (1872).

Prosecution is not barred by prior or future official action which may have authorized the alien to be in the United States. Thus, it is the alien status at the time of the alleged offense that is at issue.

Section 1182 of Title 8 of the United States Code lists aliens who are excluded from the United States. An alien who falls within one of the excluded categories is not lawfully entitled to enter or reside in the United States. See *United States v. Bunker*, 532 F.2d 1262 (9th Cir. 1976).

A "designated port of entry" as defined by 8 C.F.R. § 100.4 is a place chosen by the Department of Homeland Security whereby an alien arriving by vessel, by land, or by any means of travel other than aircraft may enter the United States. The designation of such a port of entry may be withdrawn whenever, in the judgment of the Commissioner of the Bureau of Customs and Border Protection, such action is warranted. See 8 C.F.R. § 100.4. The ports are listed according to location by districts and are designated either Class A, B, or C. Class A means that the port is a designated port of entry for all aliens. *Id*. Class B means that the port is a designated port of entry for aliens who at the time of applying for admission are lawfully in possession of valid Permanent Resident Cards or valid non-resident aliens' border-crossing identification cards or are admissible without documents under the documentary waivers. *Id*. Class C means that the port is a designated port of entry only for aliens who are arriving in the United States as crewmen as that term is defined in 8 C.F.R. § 101(a)(10) of the Immigration and Nationality Act with respect to vessels. 8 C.F.R. § 100.4.

8 U.S.C. § 1325(a)(2) ELUDING EXAMINATION OR INSPECTION—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] eluding [examination; inspection] by immigration officers. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. The defendant was an alien; and

2. The defendant knowingly eluded [examination; inspection] by immigration officers.

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

An "alien" is a person who is not a citizen or national of the United States. See 8 U.S.C. § 1101(a)(3). A "national of the United States" is a citizen of the United States or a non-citizen of the United States who owes permanent allegiance to the United States. See 8 U.S.C. § 1101(a)(22)(B). "Permanent allegiance" is the obligation of fidelity and obedience an individual owes to the government under which he lives, or to his sovereign in return for the protection he receives until, by some open and distinct act, he renounces his government and becomes a citizen of another government or sovereign. *Carlisle v. United States*, 83 U.S. 147, 154–55 (1872).

Prosecution is not barred by prior or future official action which may have authorized the alien to be in the United States. Thus, it is the alien status at the time of the alleged offense that is at issue.

Noting that it was unable to locate any legislative history shedding light on the term "eluding" as used in 8 U.S.C. § 1325(a)(2), the Ninth Circuit in *United States v. Oscar*, 496 F.2d 492, 494 (9th Cir. 1974), drawing on a dictionary definition, concluded that elude means to "avoid, escape detection by, or evade."

8 U.S.C. § 1325(a)(3) ENTRY BY FALSE OR MISLEADING REPRESENTATION—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] entry by [willfully false or misleading representation; willful concealment of a material fact]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant was an alien; and

2. The defendant [entered; attempted to enter] the United States; and

3. The defendant [made a [false; misleading] representation] [concealed a material fact] for the purpose of gaining entry; and

4. The defendant [acted willfully, that is, he] deliberately and voluntarily [made [the; a] representation; concealed a material fact].

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

An "alien" is a person who is not a citizen or national of the United States. See 8 U.S.C. § 1101(a)(3). A "national of the United States" is a citizen of the United States or a non-citizen of the

United States who owes permanent allegiance to the United States. See 8 U.S.C. § 1101(a)(22)(B). "Permanent allegiance" is the obligation of fidelity and obedience an individual owes to the government under which he lives, or to his sovereign in return for the protection he receives until, by some open and distinct act, he renounces his government and becomes a citizen of another government or sovereign. *Carlisle v. United States*, 83 U.S. 147, 154–55 (1872).

Prosecution for illegal entry under the statute is not barred by prior or future official action which may have authorized the alien to be in the United States. Thus, it is the alien status at the time of bringing that is at issue.

Willfulness is defined within the instruction. "Willfully" as used in the statute means "that the misrepresentation was deliberate and voluntary." See *Chow Bing Kew v. United States*, 248 F.2d 466, 469 (9th Cir. 1957); see also *Hernandez-Robledo v. INS*, 777 F.2d 536, 539 (9th Cir. 1985) (determining that willfully, as used in 8 U.S.C. § 1182(a)(19), false representation of citizenship, requires proof that the misrepresentation was deliberate and voluntary); *Espinoza-Espinoza v. INS*, 554 F.2d 921, 925 (9th Cir. 1977) (finding that willfully, as used in 8 U.S.C. § 1182(a)(19), requires proof that "the misrepresentation was voluntarily and deliberately made") (quoting *Chow Bing Kew*, 248 F.2d at 469); *Anderson v. Cornejo*, 284 F. Supp. 2d 1008, 1035 (N.D. Ill. 2003) (willful and wanton conduct described as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property.").

The statute does not define "material." The Committee recommends that "material" be defined consistently with Pattern Instruction 18 U.S.C. § 1546(a).

8 U.S.C. § 1325(c) MARRIAGE FRAUD—ELEMENTS

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

1. The defendant knowingly entered into a marriage with [the person named in the indictment]; and

2. The defendant entered the marriage for the purpose of evading an immigration law; and

3. The defendant knew or had reason to know his conduct was unlawful.

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 validity of the marriage is immaterial. *Lutwak v. United States*, 344 U.S. 604, 611 (1953).

In *United States v. Darif*, 446 F.3d 701 (7th Cir. 2006), the Seventh Circuit rejected the defendant's position that evidence of intent to establish a life with his spouse could negate the offense of marriage fraud. *Id*. at 709–10. The Court thereby suggested that the element of evading immigration law need not be the sole basis for the marriage to still be considered fraudulent under the statute.

See also *United States v. Ui Islam*, 418 F.3d 1125, 1128, fn. 3 and fn. 5 (10th Cir. 2005) (inquiry as to whether couple intended to make a life together may be relevant to intent to evade immigration laws but not dispositive). But cf. *United States v. Orellana-Blanco*, 294 F.3d 1143, 1151 (9th Cir. 2002) (defendant's desire to obtain a green card did not render marriage a sham where there was an intent "to establish a life together.").

8 U.S.C. § 1326(a) DEPORTED ALIEN FOUND IN UNITED STATES—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] being an alien found in the United States after having been deported. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant was an alien; and

2. The defendant had previously [been denied admission; been excluded; been deported; been removed; departed the United States while an order of [exclusion; deportation; removal] from the United States was outstanding]; and

3. The defendant [knowingly reentered; attempted to reenter; was found to be voluntarily in] the United States; and

4. The defendant had not received the express consent to apply for readmission to the United States.

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

An "alien" is a person who is not a citizen or national of the

United States. See 8 U.S.C. § 1101(a)(3). A "national of the United States" is a citizen of the United States or a non-citizen of the United States who owes permanent allegiance to the United States. See 8 U.S.C. § 1101(a)(22)(B). "Permanent allegiance" is the obligation of fidelity and obedience an individual owes to the government under which he lives, or to his sovereign in return for the protection he receives until, by some open and distinct act, he renounces his government and becomes a citizen of another government or sovereign. *Carlisle v. United States*, 83 U.S. 147, 154–55 (1872).

In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Supreme Court held that in a prosecution for illegal reentry after deportation in violation of 8 U.S.C. § 1326(a), the existence of a prior aggravated felony conviction need not be alleged or proven because the prior conviction constitutes a sentencing enhancement pursuant to 8 U.S.C. § 1326(b)(2).

8 U.S.C. § 1546(a) USE, POSSESSION OF IMMIGRATION DOCUMENT PROCURED BY FRAUD—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] fraudulent [use; possession] of an immigration document. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly [used; attempted to use; possessed; obtained; accepted; received] [document described in the indictment]; and

2. [Document described in the indictment] is an [immigrant; nonimmigrant] [visa; permit; border crossing card; alien registration receipt card; other document] prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States; and

3. The defendant knew the document [was forged; was counterfeited; was altered; was falsely made; was procured by means of any false claim or statement; had been [procured by fraud; unlawfully obtained]].

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

Use this instruction with respect to a crime charged under 18 U.S.C. § 1546(a), in the second part of the first paragraph. Specifically:

> Whoever knowingly. . .utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained.

If the charge in the indictment relies on a document that falls into the category of "other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States," noted as "other identified document" in the second element, the document should be specifically described to the jury in the instruction.

18 U.S.C. § 3 ACCESSORY AFTER THE FACT

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] being an accessory after the fact to [identify the underlying federal offense]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. [Name of offender] had committed the crime of [identify underlying federal crime] as defined in the next instruction; and

2. The defendant knew that [name of offender] had committed the crime of [identify underlying crime]; and

3. The defendant assisted [name of offender] in some way; and

4. The defendant did so with the intent to [obstruct; prevent] [name of offender] from being [arrested; prosecuted; punished].

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 one or more 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

See *United States v. Dixon*, 819 F.3d 310, 323 (7th Cir. 2016);

United States v. Irwin, 149 F.3d 565, 571 (7th Cir. 1998); *United States v. Osborn*, 120 F.3d 59, 63 (7th Cir. 1997).

18 U.S.C. § 111(a) ASSAULTING A FEDERAL OFFICER—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ____ of the indictment charge[s] the defendant[s] with] forcibly [assaulting; resisting; opposing; impeding; intimidating; interfering with] a federal officer [while engaged in; on account of] the performance of official duties. In order for you to find [the; a] defendant guilty of this charge, the government must prove the following elements beyond a reasonable doubt:

1. The defendant forcibly [assaulted; resisted; opposed; impeded; intimidated; interfered with;] [name of federal officer]; and

2. The defendant did so while [name of federal officer] [was engaged in; on account of] the federal officer's official duties[.] [; and]

[3. The defendant's acts involved [physical contact with the federal officer; the intent to commit another 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

Section 111 has been interpreted as creating three separate

offenses: 1) misdemeanor simple assault under § 111(a); 2) felony assault under § 111(a) involving physical contact or intent to commit another felony; and 3) felony assault using a deadly or dangerous weapon or inflicting bodily injury under § 111(b). *United States v. Vallery*, 437 F.3d 626, 630 (7th Cir. 2006).

This instruction is for use when the defendant has been charged with the offense set out in 18 U.S.C. § 111(a). The third element is to be used only when the charge is a felony, which requires actual physical contact or the intent to commit another felony.

When the crime is charged under the enhanced penalty provisions of 18 U.S.C. § 111(b), use the instruction for Assaulting a Federal Officer Employee With a Deadly or Dangerous Weapon or Inflicting Bodily Injury.

The defendant does not need to know the victim is a federal officer. *United States v. Feola*, 420 U.S. 671, 684-86 (1975); *United States v. Woody*, 55 F.3d 1257, 1265-66 (7th Cir. 1995). At the same time, if self-defense is raised, knowledge of the official capacity of the victim may be an element necessary for conviction. *Feola*, 420 U.S. at 686 ("The statute does require a criminal intent, and there may well be circumstances in which ignorance of the official status of the person assaulted or resisted negates the very existence of *mens rea*.").

18 U.S.C. § 111 is not a specific intent crime and only requires that the defendant act with knowledge of his conduct. *United States v. Graham*, 431 F.3d 585, 588-590 (7th Cir. 2005).

18 U.S.C. §§ 111(a) & 111(b) DEFINITION OF "ASSAULT"

"Assault" means to intentionally inflict, attempt to inflict, or threaten to inflict bodily injury upon another person with the apparent and present ability to cause such injury that creates in the victim a reasonable fear or apprehension of bodily harm. An assault may be committed without actually touching, striking, or injuring the other person.

Committee Comment

Section 111 does not define "assault." The definition provided in the instruction is the same as the pattern instruction for "assault" as used in the bank robbery statute, 18 U.S.C. § 2113(d). See, *e.g.*, *United States v. Vallery*, 437 F.3d 626, 631 (7th Cir. 2006); *United States v. Smith*, 103 F.3d 600, 605 (7th Cir. 1996); *United States v. Woody*, 55 F.3d 1257, 1265–66 (7th Cir. 1995); *United States v. Rizzo*, 409 F.2d 400, 402-03 (7th Cir. 1969).

18 U.S.C. §§ 111(a) & 111(b) DEFINITION OF "FORCIBLY"

"Forcibly" means by use of force. Physical force is sufficient but actual physical contact is not required. A person [also] acts forcibly if he [threatens; attempts to inflict] bodily harm upon another, with the present ability to inflict bodily harm.

Committee Comment

Section 111 does not define "forcibly." The definition provided in the instruction is similar to Eighth Circuit Model Criminal Jury Instruction 6.18.111 (2017). The element of force may be satisfied by proof of actual physical contact or by proof of "such a threat or display of physical aggression toward the officer as to inspire fear of pain, bodily harm, or death." *United States v. Street*, 66 F.3d 969, 977 (8th Cir. 1995). Direct contact is not required so long as the conduct places the officer in fear for his life or safety. *Id.*; see also *United States v. Bullock*, 970 F.3d 210, 215 (3d Cir. 2020) ("A defendant who acts 'forcibly' using a deadly or dangerous weapon under § 111(b) must have used force by making physical contact with the federal employee, or at least threatened the employee, with an object that, as used, is capable of causing great bodily harm.") (quoting *United States v. Taylor*, 848 F.3d 476, 494 (1st Cir. 2017)); Fifth Circuit Pattern Criminal Instruction 2.07 (2019) ("The term 'forcible assault' means any intentional attempt or threat to inflict injury upon someone else when a defendant has the apparent present ability to do so. This includes any intentional display of force that would cause a reasonable person to expect immediate bodily harm, regardless of whether the victim was injured or the threat or attempt was actually carried out.").

18 U.S.C. § 111(b) ASSAULTING A FEDERAL OFFICER USING A DEADLY OR DANGEROUS WEAPON OR INFLICTING BODILY INJURY—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ____ of the indictment charge[s] the defendant[s] with] forcibly [assaulting] [resisting] [opposing] [impeding] [intimidating] [interfering with] a federal officer [while engaged in] [on account of] the performance of official duties. In order for you to find [the; a] defendant guilty of this charge, the government must prove the following elements beyond a reasonable doubt:

1. The defendant forcibly [assaulted; resisted; opposed; impeded; intimidated; interfered with] [name of federal officer]; and

2. The defendant did so while [name of federal officer] [was engaged in] [on account of] his official duties; and

3. The defendant [used a deadly or dangerous weapon] [inflicted bodily injury].

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

Section 111 has been interpreted as creating three separate

offenses: 1) misdemeanor simple assault under § 111(a); 2) felony assault under § 111(a) involving physical contact or intent to commit another felony; and 3) felony assault using a deadly or dangerous weapon or inflicting bodily injury under § 111(b). *United States v. Vallery*, 437 F.3d 626, 630 (7th Cir. 2006).

This instruction is for use when the defendant has been charged with the offense set out in 18 U.S.C. § 111(b).

The defendant does not need to know the victim is a federal officer. *United States v. Feola*, 420 U.S. 671, 684–86 (1975); *United States v. Woody*, 55 F.3d 1257, 1265–66 (7th Cir. 1995). At the same time, if self-defense is raised, knowledge of the official capacity of the victim may be an element necessary for conviction. *Feola*, 420 U.S. at 686 ("The statute does require a criminal intent, and there may well be circumstances in which ignorance of the official status of the person assaulted or resisted negates the very existence of *mens rea*.").

18 U.S.C. § 111 is not a specific intent crime and only requires that the defendant act with knowledge of his conduct. *United States v. Graham*, 431 F.3d 585, 588–590 (7th Cir. 2005).

18 U.S.C. § 111(b) DEFINITION OF "BODILY INJURY"

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

Committee Comment

Section 111 does not define the term "bodily injury." The definition provided in the instruction is the same as the pattern instruction regarding that term as used in the deprivation of rights under color of law statute, 18 U.S.C. 242, which is taken from several other statutes in Title 18 that use that term. See 18 U.S.C. §§ 831(f)(5); 1365(h)(4); 1515(a)(5); and 1864(d)(2). See *United States v. Bailey*, 405 F.3d 102, 111 (1st Cir. 2005); *United States v. Myers*, 972 F.2d 1566, 1572 (11th Cir. 1992); see also *United States v. DiSantis*, 565 F.3d 354, 362 (7th Cir. 2009) (citing *Bailey* and *Myers* with approval); Fifth Circuit Pattern Criminal Instruction 2.07 (2019); Eleventh Circuit Pattern Criminal Instruction O1.2 (2020).

18 U.S.C. § 111(b) DEFINITION OF "DEADLY OR DANGEROUS WEAPON"

A "deadly or dangerous weapon" 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 deadly or dangerous weapon if it, or the manner in which it is used, would cause fear in the average person.

Committee Comment

Section 111 does not define "deadly or dangerous weapon." The definition provided in the instruction is the same as the pattern instruction for "dangerous weapon or device" as used in the bank robbery statute, 18 U.S.C. § 2113(d).

In *United States v. Loman*, 551 F.2d 164, 169 (7th Cir. 1977), the Seventh Circuit, in finding a walking stick as used constituted a dangerous weapon under 18 U.S.C. § 111, explained that "[n]ot the object's latent capability alone, but that, coupled with the manner of its use, is determinative." As the Fourth Circuit concluded in *United States v. Murphy*, 35 F.3d 143, 147 (4th Cir. 1994), many objects, "even those seemingly innocuous, may constitute dangerous weapons," including a garden rake, shoes, and a wine bottle. See also U.S. Sentencing Guidelines Manual § 1B1.1 cmt. n.1 (2018).

In *United States v. Gometz*, 879 F.2d 256, 259 (7th Cir. 1989), the Seventh Circuit rejected the defendant's argument that a defective zip gun was not a dangerous weapon within the meaning of 18 U.S.C. § 111. In so doing, the Court found that the Supreme Court's logic in *McLaughlin v. United States*, 476 U.S. 16 (1986), which held an unloaded gun to be a dangerous weapon under 18 U.S.C. § 2113, applied to § 111 as well. "In particular we believe that Congress, in enacting § 111, could reasonably presume that a zip gun is an inherently dangerous object and meant to proscribe all assaults with this object irrespective of the particular zip gun's capability to inflict injury. Moreover, a zip gun, like an ordinary gun, instills fear in the average citizen and creates an immediate danger that a violent reaction will ensue." *Gometz*, 879 F.2d at 259; see also Eleventh Circuit Pattern Criminal Instruction O1.1 (2020).

18 U.S.C. § 115(a)(1)(B) DEFINITION OF "THREATEN"

To "threaten" means to [make a statement; take action] that a reasonable person would foresee would be interpreted by those to whom the maker directs the [statement; action] as a serious expression of an intention to inflict bodily harm upon or take the life of another.

Committee Comment

The Seventh Circuit focuses on the objective viewpoint of the person making the threat. See *United States v. Saunders*, 166 F.3d 907, 912–13 (7th Cir. 1999); *United States v. Pacione*, 950 F.2d 1348, 1355 (7th Cir. 1991). However, the Seventh Circuit also "treats as relevant evidence both the victim's response to a statement and the victim's belief that it was a threat. . .." *Saunders*, 166 F.3d at 913.

The government need not prove that the defendant actually intended to carry out the threat or had the actual ability to carry out the threat. *Saunders*, 166 F.3d at 914.

The defendant "must have intended to communicate a threat to an official, but the communication can be through a third person and the threat need not actually reach the victim." *United States v. Rendelman*, 495 Fed. Appx 727, 732 (7th Cir. 2012).

"True threat" is defined in the Pattern Instruction for "Definition of True Threat."

18 U.S.C. § 115(a)(1)(B) THREATENING A UNITED STATES OFFICIAL, UNITED STATES JUDGE, OR FEDERAL LAW ENFORCEMENT OFFICER—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ____ of the indictment charge[s] the defendant[s] with] threatening to [assault; kidnap; murder] a[n] [United States official; United States judge; Federal law enforcement officer; [officer; employee] of [the United States; any agency in any branch of the United States Government]] while such [officer; employee] is engaged in or on account of the performance of official duties]; any person assisting an [officer; employee] in the performance of official duties] [with intent to [impede; intimidate; interfere with] such [official; judge; law enforcement officer; officer; employee; person assisting an [officer; employee]] [while engaged in the performance of official duties;]] [with intent to retaliate against such [official; judge; law enforcement officer] on account of the performance of official duties]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant threatened to [assault; kidnap; murder] an individual; and

2. The individual was a[n] [United States official; United States judge; Federal law enforcement officer; officer; employee; person assisting an officer or employee] of [the United States; any agency in any branch of the United States Government]]; and

3. The defendant intended to [[impede; intimidate; interfere with] such [official; judge; law enforcement officer; officer; employee; person assisting an officer or employee]; while the [official; judge; law enforcement officer; officer; employee] was engaged in the performance of official duties]];

OR

3. The defendant intended to [retaliate against the [official; judge; law enforcement officer; officer; employee] on account of the performance of 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

This instruction is for use when the defendant has been charged with the offense set out in 18 U.S.C. § 115(a)(1)(B).

"United States official" is defined in Pattern Instruction 18 U.S.C. § 115(c)(4).

"United States judge" is defined in Pattern Instruction 18 U.S.C. § 115(c)(3).

"Federal law enforcement officer" is defined in Pattern Instruction 18 U.S.C. § 115(c)(1).

"Assault" is defined in Pattern Instruction 18 U.S.C. § 2113(d).

"Intimidation" is defined in Pattern Instruction 18 U.S.C. § 2113(a). The First Circuit affirmed the use of an instruction defining "intimidate" in the context of 18 U.S.C. § 115 as "to make timid or fearful, to inspire or affect with fear, to frighten, deter, or overawe." *United States v. Stefanik*, 674 F.3d 71, 76 (1st Cir. 2012).

18 U.S.C. § 115(c)(1) DEFINITION OF "FEDERAL LAW ENFORCEMENT OFFICER"

Any officer, agent, or employee of the United States authorized by law or by a Government agency to engage in or supervise the prevention, detection, investigation, or prosecution of any violation of Federal criminal law is a "Federal law enforcement officer."

18 U.S.C. § 115(c)(3) DEFINITION OF "UNITED STATES JUDGE"

Any judicial officer of the United States, including a justice of the Supreme Court and a United States magistrate judge, is a "United States judge."

18 U.S.C. § 115(c)(4) DEFINITION OF "UNITED STATES OFFICIAL"

[The President; The President-elect; The Vice President; The Vice President-elect; A member of Congress; A member-elect of Congress; A member of the executive branch who is the head of [the Department of State; the Department of the Treasury; the Department of Defense; the Department of Justice; the Department of the Interior; the Department of Agriculture; the Department of Commerce; the Department of Labor; the Department of Health and Human Services; the Department of Housing and Urban Development; the Department of Transportation; the Department of Energy; the Department of Education; the Department of Veterans Affairs; the Department of Homeland Security]; The Director of the Central Intelligence Agency] is a "United States official."

18 U.S.C. § 152(1) CONCEALMENT OF PROPERTY—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] concealment of property belonging to the estate of a debtor in a bankruptcy proceeding. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. There was a bankruptcy proceeding; and

2. [Identify property or assets] belonged to the bankrupt estate; and

3. The defendant knowingly concealed [identify property or assets] from [creditors; custodian; trustee; marshal; United States Trustee; other person charged with control or custody of such property]; and

4. The defendant acted [fraudulently, that is,] with the intent to deceive [any creditor; the trustee; the bankruptcy judge].

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 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

With regard to the fourth element, the statute uses the term "fraudulently," but the instruction substitutes the definition "with

intent to deceive" because it is simpler than using the statutory term and then defining it. See *United States v. Gellene*, 182 F.3d 578, 586 (7th Cir. 1999) (concerning the term "fraudulently" as used in section 152(3)); *United States v. Lerch*, 996 F.2d 158, 161 (7th Cir. 1993) (same); see also *United States v. Sabbeth*, 262 F.3d 207, 217 (2d Cir. 2001).

The defendant need not be the debtor in bankruptcy to be convicted under section 152. *United States v. Ross*, 77 F.3d 1525, 1548 (7th Cir. 1996).

18 U.S.C. § 152(1) DEFINITION OF "CONCEALMENT"

A person "conceals" [property; an asset] if he hides, secretes, fraudulently transfers, or destroys the [property; asset], or if he takes action to prevent discovery of the [property; asset], or if he withholds information or knowledge required by law to be made known. Since the offense of concealment is a continuing one, the acts of concealing may have begun before as well as after the bankruptcy proceeding began.

The government is not required to prove that the concealment was successful.

[The government is also not required to prove that a demand was made to the defendant for the [property; asset].]

Committee Comment

"Concealment" includes not only hiding an asset, but also withholding information and taking action to prevent the discovery of an asset. See*, e.g., United States v. Turner*, 725 F.2d 1154, 1157 (8th Cir. 1984); *Burchinal v. United States*, 342 F.2d 982, 985 (10th Cir. 1965);

Concealment need not be successful. See *United States v. Cherek*, 734 F.2d 1248, 1254 (7th Cir. 1984).

18 U.S.C. § 152(2) & (3) FALSE OATH, FALSE DECLARATION UNDER PENALTY OF PERJURY—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] making [a false oath; a false account; a false declaration under penalty of perjury] in a bankruptcy proceeding. In order for you to find [the; a] the government must prove each of the [five] following elements beyond a reasonable doubt:

1. There was a bankruptcy proceeding; and

2. The defendant made [an oath; account; declaration; certification; verification; statement under penalty of perjury] in relation to the bankruptcy proceeding; and

3. The [oath; account; declaration; certification; verification; statement under penalty of perjury] related to some material matter; and

4. The [oath; account; declaration; certification; verification; statement under penalty of perjury] was false; and

5. The defendant made the [oath; account; declaration; certification; verification; statement under penalty of perjury] knowingly and with the intent to deceive [any creditor; the trustee; the bankruptcy judge].

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 consider-

ation of all the evidence that the government has failed to prove any 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

A material omission of information the debtor has a duty to disclose may qualify as a false declaration under section 152. See *United States v. Ellis*, 50 F.3d 419, 423–25 (7th Cir. 1995). In a case involving omissions, this instruction should be modified appropriately.

18 U.S.C. § 152(2) & (3) FALSE DECLARATION UNDER PENALTY OF PERJURY—DEFINITION OF MATERIALITY

A material matter is one that is capable of influencing the court, the trustee, or any creditor.

[The government is not required to prove that the statement actually influenced the court, the trustee, or a creditor.]

[The government is [also] not required to prove that creditors were harmed by the false statement.]

18 U.S.C. § 152(4) PRESENTING OR USING A FALSE CLAIM—ELEMENTS

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

1. There was a bankruptcy proceeding; and

2. The defendant [personally; by agent; by proxy; by attorney as agent, proxy or attorney] [presented; used] a claim for proof against the estate of a debtor; and

3. The claim was false; and

4. The defendant knew the claim was false; and

5. The defendant presented the claim [fraudulently, that is] with the intent to deceive [any creditor; the trustee; the bankruptcy judge].

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 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].

18 U.S.C. § 152(6) BRIBERY—ELEMENTS

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

1. There was a bankruptcy proceeding; and

2. The defendant knowingly [gave; offered; received; attempted to obtain] [money; property; remuneration; compensation; reward; advantage, or promise thereof] for [acting; failing to act] in such bankruptcy proceeding; and

3. Third, the defendant acted [fraudulently, that is] with the intent to deceive [any creditor; the trustee; the bankruptcy judge].

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 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].

18 U.S.C. § 152(7) CONCEALMENT OR TRANSFER OF ASSETS IN CONTEMPLATION OF BANKRUPTCY OR WITH INTENT TO DEFEAT THE PROVISIONS OF THE BANKRUPTCY LAW—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [concealment; transfer] of property belonging to the estate of a debtor [in contemplation of bankruptcy; with intent to defeat the provisions of the bankruptcy law]. In order for you to find [the; a] defendant guilty of this charge, the government must prove the [four] following elements beyond a reasonable doubt:

1. [There was a bankruptcy proceeding; [Defendant; name of business; name of corporation] contemplated a bankruptcy proceeding]; and

2. [In contemplation of the bankruptcy proceeding; With intent to defeat the provisions of the bankruptcy law], the defendant transferred or concealed [identify the property], which belonged or would belong to the bankrupt estate; and

3. The defendant knowingly [concealed; transferred] the property; and

4. The defendant acted [fraudulently, that is,] with the intent to deceive [any creditor; the trustee; the bankruptcy judge].

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 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

With regard to the fourth element, the statute uses the term "fraudulently," but the instruction substitutes the definition "with intent to deceive" because it is simpler than using the statutory term and then defining it. See *United States v. Gellene*, 182 F.3d 578, 586 (7th Cir. 1999) (concerning the term "fraudulently" as used in section 152(3)); *United States v. Lerch*, 996 F.2d 158, 161 (7th Cir. 1993) (same); see also *United States v. Sabbeth*, 262 F.3d 207, 217 (2d Cir. 2001).

The defendant need not be the debtor in bankruptcy to be convicted under section 152. *United States v. Ross*, 77 F.3d 1525, 1548 (7th Cir. 1996).

18 U.S.C. § 152(7) DEFINITION OF "IN CONTEMPLATION OF A BANKRUPTCY PROCEEDING"

A person acts "in contemplation of a bankruptcy proceeding" if he acts in expectation of, or planning for, the future probability of a bankruptcy proceeding.

18 U.S.C. § 152(7) DEFINITION OF "TRANSFER"

"Transfer" of property includes every manner of disposing of or parting with property or an interest in property, whether directly or indirect, and whether absolutely or conditionally.

18 U.S.C. § 152(8) DESTRUCTION OF RECORDS; FALSE ENTRIES—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [concealment of records; destruction of records; making a false entry in a document] relating to the property or the affairs of a debtor [in contemplation of bankruptcy; after filing a case in bankruptcy]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. A bankruptcy proceeding [was contemplated; existed]; and

2. The defendant knowingly [concealed; destroyed; mutilated; falsified; made a false entry in] document[s]; and

3. The document[s] affected or related to the property or affairs of the debtor; and

4. The defendant acted [fraudulently, that is] with the intent to deceive [any creditor; the trustee; the bankruptcy judge].

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 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].

18 U.S.C. § 152(9) WITHHOLDING RECORDS—ELEMENTS

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

1. There was a bankruptcy proceeding; and

2. The defendant knowingly withheld [recorded information; books; documents; records; papers] from [the custodian; the trustee; the marshal; an officer of the court; a United States Trustee] entitled to its possession; and

3. The [recorded information; books; documents; records; papers] related to the property or financial affairs of the debtor; and

4. The defendant acted [fraudulently, that is] with the intent to deceive [any creditor; the trustee; the bankruptcy judge].

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 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].

18 U.S.C. § 201 INTENT TO INFLUENCE

The government does not need to prove that the [public official; defendant] had the power to or did perform the act for which he [was promised; was given; received; agreed to receive] something of value. It is sufficient if the matter was one that was before him in his official capacity.

[The government also does not need to prove that the defendant in fact intended to be influenced. It is sufficient if the defendant knew that the thing of value was offered with the intent to influence official action.]

Committee Comment

See *United States v. Peleti*, 576 F.3d 377, 382 (7th Cir. 2009), citing *United v. Myers*, 692 F.2d 823, 841–42 (2d Cir. 1982) (noting that " 'being influenced' does not describe the [recipient's] true intent, it describes the intention he conveys to the briber in exchange for the bribe" and holding that an official commits bribery if he gives "false promises of assistance to people he believed were offering him money to influence his official actions.").

18 U.S.C. § 201 DEFINITION OF "OFFICIAL ACT"

An "official act" is a decision or action on[, or an agreement to make a decision or take action on,] a specific [question; matter; cause; suit; proceeding; controversy], which [is pending] [or] [at any time may be pending] [or] [may by law be brought] before a 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); controversy(ies)] at issue [is; are] [describe in specific and focused terms].

[A public official makes a decision or takes action on a [question; matter; cause; suit; proceeding; 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.]

[A public official does not make a decision or take action on a [question; matter; cause; suit; proceeding; controversy] if he does no more than set up a meeting, host an event, or call another public 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. The Committee notes, however, that the Supreme Court has acknowledged that these types of acts may be relevant to whether there was an agreement to take an official act. *Id.* That is not to say 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 and fifth paragraphs, if given, should be tailored to the particular case, depending on the government's and defense's respective theories.

18 U.S.C. § 201(b)(1)(A) GIVING A BRIBE—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] _____ of the indictment charge[s] the defendant[s] with] giving a bribe. 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 directly or indirectly [promised, gave, offered] something of value to a public official; and

2. The defendant acted with intent to influence an official act; and

3. The defendant acted corruptly.

A person acts corruptly when that person acts with the intent that something of value is given, offered, or promised to influence the public official in the performance of any official act.

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

An "offer" under § 201 need not constitute an "offer" in the sense of what would otherwise be a binding contractual offer. *United States v. Synowiec*, 333 F.3d 786, 789 (7th Cir. 2003) ("The require-

ment that a defendant expresses 'an ability and desire to pay a bribe' in order to satisfy the bribery statute is a less demanding requirement that what the civil law requires for an enforceable offer.").

As explained in the Committee Comment for § 201 Accepting a Bribe— Elements, the Seventh Circuit has explicitly equated the definition of "corruptly" under 18 U.S.C. § 666 with the same term in 18 U.S.C. § 201. *United States v. Hawkins*, 777 F.3d 880, 882 (7th Cir. 2015) ("This court has used the same definition of 'corruptly' in a prosecution under 18 U.S.C. § 201." (citing *United States v. Peleti*, 576 F.3d 377, 382 (7th Cir.2009)). The Committee thus proposes the same definition here as set forth for § 666(a)(1)(B) Accepting a Bribe. For further discussion, see the Committee Comment for that section.

In a case involving campaign contributions as the alleged thing of value, the parties and the court should consider whether to give an additional instruction explaining the lawfulness of contributions and distinguishing them from illegal bribes or illegal gratuities. See the Instruction and Committee Comment for 18 U.S.C. § 1951 Definition of Color of Official Right.

18 U.S.C. § 201(b)(2)(A) ACCEPTING A BRIBE—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] _____ of the indictment charge[s] the defendant[s] with] [demanding; seeking; receiving; accepting; or agreeing to receive or accept] a bribe. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. The defendant was a public official; and

2. The defendant directly or indirectly [demanded; sought; received; accepted; or agreed to receive or accept] something of value in return for being influenced in the performance of any official act; and

3. The defendant did so corruptly.

A person acts corruptly when that person acts with the understanding that something of value is to be offered or given to influence [him/her] in the performance of any official act.

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 definition of "corruptly" derives from two cases: a § 201 case, *United States v. Peleti*, 576 F.3d 377, 382 (7th Cir. 2009); and

a § 666 case, *United States v. Hawkins*, 777 F.3d 880, 882 (7th Cir. 2015), which approvingly discusses *Peleti*. In *Peleti*, the public official argued that he did not actually intend t1o commit the official act for which he had been paid. 576 F.3d at 382. In discussing the definition of corruptly, the Seventh Circuit explained:

> An officer can act corruptly without intending to be influenced; the officer need only "solicit or receive the money on the representation that the money is for the purpose of influencing his performance of some official act."

Id. (quoting *United States v. Arroyo*, 581 F.2d 649, 657 (7th Cir. 1978)). The public official "knew, when he accepted the money, that [the bribe payer] gave Peleti the money for the purposes of influencing Peleti's official actions." *Id*. That was enough to act "corruptly." *See id*.

Peleti was approvingly discussed in a § 666 case that discussed the definition of "corruptly" interchangeably with § 201. *Hawkins*, 777 F.3d at 882. In Hawkins, the Seventh Circuit approved the district court's definition of corruptly: the official acts corruptly when the official takes the payment "with the understanding that something of value is to be offered or given to reward or influence him in connection with his official duties." Id. at 882. The opinion explicitly equated the approved definition under § 666 with the § 201 definition from *Peleti*. *Hawkins*, 777 F.3d at 882 ("This court has used the same definition of 'corruptly' in a prosecution under 18 U.S.C. § 201.") (citing *United States v. Peleti*, 576 F.3d 377, 382 (7th Cir.2009)).

With regard to the definition of "corruptly," in cases involving an undercover agent or a cooperator, jurors might be confused if they are asked to determine whether a defendant understood the intent to influence or to reward when the undercover or cooperator of course did not *in fact* have the intent to influence or to reward. In those cases, some courts might prefer "with the belief" as a more appropriate term than "with the understanding." The term "believes" is used in explaining attempt offenses for which "the defendant's conduct should be measured according to the circumstances as he *believes* them to be, rather than the circumstances as they may have existed in fact." See *United States v. Williams*, 553 U.S. 285, 300 (2008) (quoting ALI, Model Penal Code § 5.01, Comment at 307, governing attempts) (emphasis added).

In a case involving campaign contributions as the alleged thing of value, the parties and the court should consider whether to give an additional instruction explaining the lawfulness of contribu-

tions and distinguishing them from illegal bribes or illegal gratuities. See the instruction and Committee Comment for 18 U.S.C. § 1951 Definition of Color of Official Right.

18 U.S.C. § 241 CONSPIRACY AGAINST CIVIL RIGHTS—ELEMENTS

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

1. The conspiracy to [injure; oppress; threaten; intimidate] one or more persons as charged in Count __ existed; and

2. The defendant knowingly became a member of the conspiracy with an intent to further the conspiracy; and

3. The defendant intended to deprive [name(s) of alleged victim(s)] of the free exercise or enjoyment of [his; their] right to [describe the right], which is secured by the [[Constitution] [and] [laws]] of the United States. The government is not required to prove that the defendant knew this right was secured by the [[Constitution] [and] [laws]] of the United States; and

4. One or more of the intended victims was present in a [State; Territory; District] of the United States.

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 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

See *United States v. Guest*, 383 U.S. 745, 760 (1966) (specific intent to interfere with federal right is required); *Screws v. United States*, 325 U.S. 91, 103, 106–07 (1945) (same, but defendant need not be "thinking in constitutional terms"); *United States v. Bradley*, 196 F.3d 762, 769–70 (7th Cir. 1999) (approving an instruction including the language, "The defendant need not have known that these rights were secured by the Constitution or the laws of the United States."). A conspiracy under § 241 does not require proof of an overt act. See *United States v. Colvin*, 353 F.3d 569, 576 (7th Cir. 2003) (*en banc*).

See also Pattern Instructions 18 U.S.C. § 242 and accompanying commentary.

Depending on the particular right at issue, the court may be required to instruct the jury that at least one conspirator acted "under color of law." *Guest*, 383 U.S. at 755–56 (state action required for violation of Equal Protection Clause but not for right to travel); Fifth Circuit Pattern Instruction 2.17.

In a case in which the indictment charges that a victim died as the result of the conspiracy, the government must prove that fact beyond a reasonable doubt, because it increases the maximum penalty for the charge. See 18 U.S.C. § 241 (increasing maximum term to life imprisonment if death results); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). If death is charged, the instruction regarding "Death" and an accompanying special interrogatory should be used.

Section 241 likewise provides for enhanced penalties if "the acts committed in violation of this section . . . include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill." If the indictment includes such allegations, the instruction regarding "Death" should be adapted accordingly.

18 U.S.C. § 241 DEFINITION OF CONSTITUTIONAL RIGHTS

The right[s] to [description of constitutional or statutory right at issue, *e.g.*, the right to be free from the use of unreasonable force by a law enforcement officer][is; are] right[s] secured by the [Constitution; laws] of the United States.

Committee Comment

Further definition of the right in question may be required. If, for example, the right at issue is the right to be free from the use of unreasonable force, an instruction defining reasonable/unreasonable force may be required. The Seventh Circuit pattern civil instructions include descriptions of many of the constitutional rights most commonly at issue in prosecutions under § 241. See, *e.g.*, Seventh Circuit Pattern Civil Jury Instruction 7.06 (defining reasonable force). See generally *United States v. Brown*, 250 F.3d 580, 586–87 (7th Cir. 2001) (approving, in a prosecution under 18 U.S.C. § 242, an instruction regarding unreasonable force that was derived from civil cases).

18 U.S.C. § 241 DEATH

If you find the defendant guilty as charged in [Count[s] __ of] the indictment, you must then determine whether the government has proven that [name of victim] died as a result of the conspiracy charged [in Count[s] __].

To prove that [name of victim] died as a result of the defendants' conspiracy, the government must prove beyond a reasonable doubt that [name of victim] would not have died if not for the conduct of one or more of the [defendants; coconspirators] in furtherance of the conspiracy. It is not enough to prove that the [defendant's; coconspirator's] conduct merely contributed to [name of victim's] death.

[The government is not required to prove that the [defendant; coconspirators] intended to cause [name of victim]'s death.]

You will see on the verdict form a question concerning this issue. You should consider that question only if you have found that the government has proven the defendant guilty as charged in [Count[s] __ of] the indictment.

If you find that the government has proven beyond a reasonable doubt that [name of victim] died as a result of the conspiracy charged in [Count[s] __ of] the indictment, then you should answer that question "Yes."

If you find that the government has not proven beyond a reasonable doubt that [name of victim] died as a result of the conspiracy charged in [Count[s] __ of] the indictment, then you should answer that question "No."

Committee Comment

This instruction should be used in cases in which the indict-

ment charges that a victim died as the result of the conspiracy. If the victim dies as the result of the conspiracy, the maximum penalty is increased. For this reason, the government is required to prove the death beyond a reasonable doubt. See 18 U.S.C. § 241 (increasing maximum term to life imprisonment if death results); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Because a person who engages in a conspiracy to violate civil rights violates the law even if no death results, however, the appropriate way to instruct in a case in which the victim's death is at issue is by way of a separate instruction concerning that issue, combined with a special interrogatory on the verdict form, as is done in cases in which narcotics quantity is at issue.

In *United States v. Burrage*, 571 U.S. 204 (2014), the Court held that the "death results" enhancement in drug cases ordinarily requires the government to prove that the victim would have lived but for the unlawfully distributed drugs. In adopting the "but-for" causation standard, the Court emphasized that the "language Congress enacted requires death to 'result from' use of the unlawfully distributed drug, not from a combination of factors to which drug use merely contributed." *Id.* at 216. Thus, "at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. s. 841(b)(1)(C) unless such use is a but-for cause of the death or injury." *Id.* at 218–19.

In *Perrone v. United States*, 889 F.3d 898 (7th Cir. 2018), the Seventh Circuit elaborated on the meaning of "but for" causation in the context of an overdose death:

> This dispute is about causation, so we will begin by clearly stating what "but for" causation requires. It does not require proof that the distributed drug was present in an amount sufficient to kill on its own. The Court explained in *Burrage* that death can "result[ ] from" a particular drug when it is the proverbial "straw that broke the camel's back." 134 S. Ct. at 888. As the Court put it: "if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived." *Id.* Here, then, the fact that other substances in [the victim's] bloodstream played a part in her death does not defeat the government's claim that her death resulted from the cocaine Perrone gave her. A jury could have found him guilty of causing her death if it concluded beyond a reasonable doubt that Perrone's cocaine pushed her over the edge.

Id. at 906.

Although the Seventh Circuit has not yet considered whether "but-for" causation is required to prove the "death results" enhancement under 18 U.S.C. § 241 or § 242, the "death results from" language in those statutes mirrors the "death results from" language in 21 U.S.C. 841(b) and warrants similar treatment.

It is an open question in this Circuit whether strict "but-for" causation is required if the government proves that the defendant's conduct was an independently sufficient cause of the victim's death. See *Perrone*, 889 F.3d at 906. In *Perrone*, the Seventh Circuit indicated that "strict 'but-for' causation might not be required when " 'multiple sufficient causes independently, but concurrently, produce a result,' " but declined to decide the issue. *Id.*

The Seventh Circuit has held that the government does not have to prove proximate causation (that the death was a reasonably foreseeable result of the drug offense) to establish the "death results" enhancement for drug distribution. *United States v. Harden*, 893 F.3d 434, 447–49 (7th Cir. 2018). The other eight circuits to address this issue in the drug offense context are in agreement. See, e.g., *United States v. Jeffries*, 958 F.3d 517, 520 (6th Cir. 2020) (citing cases). *Burrage* granted certiorari on whether the jury must find that the victim's death by drug overdose was a foreseeable result of the defendant's drug-trafficking offense, but declined to reach that issue. At least pre-*Burrage*, several circuits had adopted proximate cause as the causation standard for "death results" prosecutions under 18 U.S.C. §§ 241 and 242. See *United States v. Harris*, 701 F.2d 1095, 1101 (4th Cir. 1983) (holding that the "if death results" under § 241 requires proof that the death is foreseeable and naturally results from violating the statute); see also *United States v. Martinez*, 588 F.3d 301, 317–19 (6th Cir. 2009) (applying proximate cause in a "death results" health care fraud prosecution).

In cases where the death may have resulted from the actions of coconspirators rather than the defendant himself, the court may need to tailor the instructions to ensure that the jury makes the findings necessary to hold the defendant liable for the death. See *United States v. Walker*, 721 F.3d 828, 833–36 (7th Cir. 2013), vacated on other grounds, 572 U.S. 1111 (2014) (recognizing that "the scope of a defendant's relevant conduct for determining sentencing liability may be narrower than the scope of criminal liability"); *United States v. Hamm*, 952 F.3d 728 (6th Cir. 2020) (holding that the death-or-injury enhancement "applies only to defendants who were part of the distribution chain that placed the drugs into the hands of the overdose victim" and that "*Pinkerton* liability could only apply to the substantive offense, not the sentencing enhancement").

Section 241 likewise provides for enhanced penalties if "the acts committed in violation of this section . . . include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill." If the indictment includes such allegations, this instruction should be adapted accordingly.

18 U.S.C. § 242 DEPRIVATION OF RIGHTS UNDER COLOR OF LAW—ELEMENTS

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

1. The defendant was acting under color of law; and

2. The defendant deprived [name of victim] of his right to [name of right], which is secured or protected by the [[Constitution] [and] [laws]] of the United States; and

3. The defendant acted willfully, meaning he intentionally deprived [name of victim] of this right. The government is not required to prove that the defendant knew this right was secured by the [[Constitution] [and] [laws]] of the United States; and

4. [Name of victim] was present in [name of State, Territory, or District of the United States].

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 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

See also Pattern Instructions for 18 U.S.C. § 241 and accompanying commentary.

Prior to 1994, § 242 applied only to deprivations of the rights of "inhabitants of" a state, territory, or district of the United States. In *United States v. Maravilla*, 907 F.2d 216 (1st Cir. 1990), the court overturned the convictions of two customs agents for killing an alien who was briefly present in the United States. The rationale was that such a person did not qualify as an "inhabitant" for purposes of 18 U.S.C. 242. In 1994, the statute was amended to make it apply to deprivations of the rights of "persons in" a state, territory, or district of the United States, rather than just "inhabitants of" such places.

In a case in which the indictment charges that the victim died as a result of the defendant's conduct, the separate "Death" instruction provided for cases under 18 U.S.C. § 241 should be used and adapted to the case, along with a special interrogatory as discussed in the commentary to that instruction.

Section 242 also provides for an enhanced maximum penalty if the defendant's acts caused bodily injury to the victim. If that is charged, the separate instruction regarding bodily injury should be used, along with a special interrogatory on the verdict form.

18 U.S.C. § 242 DEPRIVATION OF RIGHTS UNDER COLOR OF LAW—DEFINITION OF INTENTIONALLY

Committee Comment

In *United States v. Proano*, 912 F.3d 431, 442–43 (7th Cir. 2019), the Seventh Circuit approved the inclusion of a jury instruction defining "intentionally" for alleged violations of § 242, to help guide juries on the required *mens rea*. The approved instruction in that case, which involved an alleged unreasonable or excessive use of force by a police officer, is recited in the next jury instruction, for use in excessive force cases.

Accordingly, a jury instruction defining "intentionally" should be included for all cases involving alleged violations of § 242, but the Committee does not propose specific language for different types of charged act(s), apart from excessive force claims, as recited in the next jury instruction. Rather, this instruction will need to be tailored to reflect the charged act(s) of each particular case. Notably, in *Proano*, 912 F.3d at 442-43, the Seventh Circuit pointed out that, although there is no one definition of "willfulness" (corresponding to the elements instruction for § 242 charges: "3. The defendant acted willfully, meaning he intentionally deprived the victim of this right. . .."), the District Court's instructions in *Proano* tracked how most legal authorities define that term, particularly given the District Court's inclusion of the word "knowing." Therefore, the term "knowing" should be included in any tailored instruction.

18 U.S.C. § 242 DEPRIVATION OF RIGHTS UNDER COLOR OF LAW—DEFINITION OF INTENTIONALLY—FOR USE IN EXCESSIVE FORCE CASES

The defendant acted intentionally if he knew the force he used was more than what a reasonable [officer or other type of person acting under color of law] would have used under the circumstances.

Committee Comment

In *United States v. Proano*, 912 F.3d 431, 442–43 (7th Cir. 2019), which involved an alleged unreasonable or excessive use of force by a police officer, the Seventh Circuit approved including this definition of "intentionally" for alleged violations of § 242, to help guide juries on the required *mens rea*.

In *Proano*, the Seventh Circuit recognized that an officer's training may be relevant to help prove or disprove that an officer acted willfully. *Id*. at 438–41. If the court admits such evidence, a limiting instruction is recommended before the parties offer a department's policy or an officer's training into evidence, as well as at the close of evidence. *Id*. at 440, n. 4. The Seventh Circuit approved of the following instruction in *Proano*:

> You have heard evidence about training the defendant received relating to the use of deadly force. You should not consider this training when you decide whether the defendant's use of force was reasonable or unreasonable. But you may consider the training when you decide what the defendant intended at the time he acted.

Id. at 440.

18 U.S.C. § 242 DEFINITION OF CONSTITUTIONAL RIGHTS

The right[s] to [description of constitutional or statutory right at issue, *e.g.*, the right to be free from the use of unreasonable force by a law enforcement officer] [is; are] [a] right[s] secured by the [Constitution; laws] of the United States.

Committee Comment

Further definition of the right in question may be required. If, for example, the right at issue is the right to be free from the use of unreasonable force, an instruction defining reasonable/unreasonable force may be required. The Seventh Circuit pattern civil instructions include descriptions of many of the constitutional rights most commonly at issue in prosecutions under § 242. See, *e.g.*, Seventh Circuit Pattern Civil Jury Instruction 7.06 (defining reasonable force). See generally *United States v. Brown*, 250 F.3d 580, 586–87 (7th Cir. 2001) (approving an instruction regarding unreasonable force that was derived from civil cases).

18 U.S.C. § 242 DEFINITION OF "COLOR OF LAW"

A person acts under "color of law" when he acts in his official capacity or purports or claims to act in his official capacity. Action under color of law includes the abuse or misuse of the power possessed by the defendant by virtue of his [office; official position].

[A defendant who is not [an officer; a government employee/official] acts under color of law when he knowingly participates in joint activity with a [state; local] [officer; official]].

Committee Comment

See, *e.g., United States v. Hoffman*, 498 F.2d 879, 881 (7th Cir. 1974); *United States v. Price*, 383 U.S. 787, 794 & n.7 (1966) ("Color of law" under § 242 has same definition as under 42 U.S.C. § 1983; "[p]rivate persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute."); *Monroe v. Pape*, 365 U.S. 167, 184 (1961) (Under § 1983, "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law.").

18 U.S.C. § 242 DEATH

Committee Comment

If the indictment charges that the victim died as a result of unlawful conduct, the "Death" instruction for 18 U.S.C. § 241 should be adapted, and a special interrogatory should be used, as described in the commentary to that instruction.

18 U.S.C. § 242 DEFINITION OF "BODILY INJURY"

If you find the defendant guilty as charged in [Count[s] __ of] the indictment, you must then determine whether the government has proven that [name of victim] suffered a bodily injury as a result of the defendant's acts charged [in Count[s] __].

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

You will see on the verdict form a question concerning this issue. You should consider that question only if you have found that the government has proven the defendant guilty as charged in [Count[s] __ of] the indictment.

If you find that the government has proven beyond a reasonable doubt that [name of victim] suffered bodily injury as a result of the defendant's acts as charged in [Count[s] __ of] the indictment, then you should answer that question "Yes."

If you find that the government has not proven beyond a reasonable doubt that [name of victim] suffered bodily injury as a result of the defendant's acts as charged in [Count(s) [Count[s] __ of] of] the indictment, then you should answer that question "No."

Committee Comment

Section 242 provides for an enhanced statutory maximum if, among other things, "bodily injury results from the acts committed" in violation of the statute. For this reason, the government is required to prove the death beyond a reasonable doubt. See *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Because, however, a person who deprives another of civil rights violates the law even if no

bodily injury results, the appropriate way to instruct in a case in which bodily injury is charged is by way of a separate instruction concerning that issue, combined with a special interrogatory on the verdict form, as is done in cases in which narcotics quantity is at issue.

Section 242 does not define the term "bodily injury." The definition provided in the instruction is taken from several other statutes in Title 18 that use that term. See 18 U.S.C. §§ 831(f)(5); 1365(h)(4); 1515(a)(5); and 1864(d)(2). See *United States v. Bailey*, 405 F.3d 102, 111 (1st Cir. 2005); *United States v. Myers*, 972 F.2d 1566, 1572 (11th Cir. 1992); see also *United States v. DiSantis*, 565 F.3d 354, 362 (7th Cir. 2009) (citing *Bailey* and *Myers* with approval).

Section 242 likewise provides for enhanced penalties "if the acts committed in violation of this section . . . include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill." If the indictment includes such allegations, this instruction should be adapted accordingly.

18 U.S.C. § 286 CONSPIRACY TO DEFRAUD THE GOVERNMENT WITH RESPECT TO CLAIMS—ELEMENTS

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

1. There was a conspiracy to obtain [payment; allowance; aid in obtaining payment; aid in obtaining allowance] of a [false; fictitious; fraudulent] claim against [the United States; a department or agency of the United States] as charged in Count[s] __; and

2. The defendant knowingly became a member of the conspiracy with an intent to advance the conspiracy; and

3. The defendant knew that the claim was [false; fictitious; fraudulent]; and

4. The defendant acted with the intent to defraud.

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 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

There is a split of authority regarding whether § 286 requires proof of an overt act. Compare *United States v. Gupta*, 463 F.3d 1182, 1194 (11th Cir. 2006) (overt act required), with *United States v. Saybolt*, 577 F.3d 195, 202 (3d Cir. 2009) (overt act not required) and *United States v. Dedman*, 527 F.3d 577, 594 n.7 (6th Cir. 2008) (overt act not required). In *Salinas v. United States*, 522 U.S. 52, 63 (1997), the Supreme Court held that there is no overt act requirement under the RICO conspiracy statute because "[t]here is no requirement of some overt act or specific act in the statute before us, unlike the general conspiracy provision"). The Committee has not included an overt act requirement in the Pattern Instruction.

There is authority requiring proof of materiality under section 286. See *United States v. Saybolt*, 577 F.3d 195, 202–04 (3d Cir. 2009) (distinguishing section 286 from section 287 in this regard). This derives from the fact that the statute requires a conspiracy "to defraud," which in turn implicitly requires materiality. See *Neder v. United States*, 527 U.S. 1, 22 (1999) ("the common law could not have conceived of 'fraud' without proof of materiality"). The Seventh Circuit has not yet addressed this issue. If the court determines that materiality is an element of the offense, the instruction should be modified accordingly.

If a court gives this instruction, it should also give an instruction defining "intent to defraud," which can be borrowed from the instructions for mail and wire fraud, 18 U.S.C. §§ 1341 & 1343.

18 U.S.C. § 287 FALSE, FICTITIOUS, OR FRAUDULENT CLAIMS—ELEMENTS

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

1. The defendant [made; presented] a claim against [the United States; a department or agency of the United States]; and

2. The claim was [false; fictitious; fraudulent]; and

3. The defendant knew the claim was [false; fictitious; fraudulent] [.] [; and]

4. [The defendant acted with the intent to defraud.]

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 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 required to prove that the defendant knew the claim was false. *United States v. Catton*, 89 F.3d 387, 392 (7th Cir. 1996).

The weight of appellate authority is that proof of materiality

is not required under section 287, at least when the claim is alleged to be "false" or "fictitious" rather than "fraudulent." See*, e.g.*, *United States v. Saybolt*, 577 F.3d 195, 199–201 (3d Cir. 2009); *United States v. Logan*, 250 F.3d 350, 358 (6th Cir. 2001); *United States v. Upton*, 91 F.3d 677, 684–85 (5th Cir. 1996). If the claim is alleged to be "fraudulent," then materiality is required. *Saybolt*, 577 F.3d at 199–01 (citing *Neder v. United States*, 527 U.S. 1, 22 (1999) ("the common law could not have conceived of 'fraud' without proof of materiality")). The Seventh Circuit has not yet addressed this issue.

The fourth element (intent to defraud) is bracketed because it is unsettled in this Circuit whether proof of intent to defraud is required under section 287. In *United States v. Nazon*, 940 F.2d 255 (7th Cir. 1991), the jury was instructed that it must find that the defendant submitted his claim with an intent to defraud. On appeal, the defendant objected to the district court's failure to define the phrase intent to defraud for the jury. Although the Seventh Circuit held that the failure to define intent to defraud was not plain error, it assumed that the jury was required to find intent to defraud. *Id*. at 260. In *United States v. Haddon*, 927 F.2d 942 (7th Cir. 1991), the court said that a jury instruction that required the government to prove intent to defraud on a section 287 charge "accurately presented the jury with the fundamental questions bearing upon the defendant's guilt or innocence" and concluded that "the requisite intent to defraud was present." *Id*. at 951.

In *Catton*, the court considered whether a trial judge had erred in failing to instruct a jury that the government had to prove willfulness to convict under section 287. The court equated willfulness with intent to defraud. *Catton*, 89 F.3d at 392. It noted that *Nazon* and *Haddon* assumed that intent to defraud is required. *Id*. The court concluded, however, that "It is implicit in the filing of a knowingly false claim that the claimant intends to defraud the government, and hence unnecessary to charge willfulness separately." *Id*. In an unpublished decision, *United States v. Strong*, 114 F.3d 1192, 1997 WL 269359, at *2 (7th Cir. May 20, 1997) (unpublished), the court concluded that intent to defraud is not required under section 287 and read its decision in Catton as so concluding.

A separate unresolved question exists as to whether the government must prove that the defendant knew the false claim would be presented to the United States or whether that point is a jurisdictional fact which need not be presented to the jury. The case law is silent. The issue turns on whether the requirement is more like the requirement in *United States v. X-Citement Video,*

Inc., 513 U.S. 64 (1994) (charge of knowingly transporting visual depictions of minors engaging in sexually explicit conduct in violation of 18 U.S.C. § 2252 requires proof that defendant knew depiction was of a minor) or more like *United States v. Feola*, 420 U.S. 671 (1975) (charge of conspiracy to assault a federal officer in violation of 18 U.S.C. § 111 does not require proof that defendant knew person was federal officer.).

18 U.S.C. § 401 CRIMINAL CONTEMPT

Committee Comment

The Committee has not drafted an instruction for § 401 because so few jury trials occur in cases that charge it. This is because judges may, and often do, decide in advance of trial whether, upon conviction, they will impose a sentence of six months or less; where the sentence to be imposed is less than six months, a jury trial is not required. See generally *Frank v. United States*, 395 U.S. 147, 148–50 (1969) ("Congress, perhaps in recognition of the scope of criminal contempt, has authorized courts to impose penalties but has not placed any specific limits on their discretion; it has not categorized contempts as 'serious' or 'petty.' 18 U.S.C. §§ 401, 402. Accordingly, this Court has held that in prosecutions for criminal contempt where no maximum penalty is authorized, the severity of the penalty actually imposed is the best indication of the seriousness of the particular offense.") (footnotes omitted); see also *Bloom v. Illinois*, 391 U.S. 194, 198 (1968) ("criminal contempt is a petty offense unless the punishment makes it a serious one"); *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966); *United States v. Seale*, 461 F.2d 345, 352 (7th Cir. 1972) ("If the penalty actually imposed [for criminal contempt] exceeds six months' imprisonment, the maximum sentence for a 'petty offense' under 18 U.S.C. § 1, the contempt is serious, and a jury trial must be afforded.").

For information about the elements required for conviction under 18 U.S.C. § 401(1), see *United States v. Seale*, 461 F.2d 345 (7th Cir. 1972); for 18 U.S.C. § 401(3), see *In re Betts*, 927 F.2d 983, 986 (7th Cir. 1991), rev'd on other grounds, *Betts v. United States*, 10 F.3d 1278 (7th Cir. 1993). For a general discussion of 18 U.S.C. 401(2), see *Cammer v. United States*, 350 U.S. 399, 405–06 (1956).

18 U.S.C. § 402 CRIMINAL CONTEMPT

Committee Comment

The Committee has not drafted an instruction for § 402 because so few jury trials occur in cases that charge it. Although a jury trial is mandated for § 402 offenses (when the act or omission giving rise to the contempt charge also is itself a criminal offense) under 18 U.S.C. § 3691, the exceptions enumerated in § 3691 have the practical effect of sharply limiting the number of jury trials under § 402. The Committee therefore believes that a pattern instruction for § 402 is unnecessary.

For judicial interpretations of 18 U.S.C. §§ 402 and 3691, see *United States v. Pyle*, 518 F. Supp. 139, 145–56 (E.D. Pa. 1981), aff'd, 722 F.2d 736 (3d Cir. 1983); *United States v. Wright*, 516 F. Supp. 1113 (E.D. Pa. 1981).

18 U.S.C. § 471 FALSELY MAKING, FORGING, COUNTERFEITING, OR ALTERING A SECURITY OR OBLIGATION—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [falsely making; forging; counterfeiting; altering] a [name specific security or obligation of the United States involved]. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. The defendant [falsely made; forged; counterfeited; altered] a [name specific security or obligation of the United States involved]; and

2. The defendant did so with the intent to defraud.

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

Whether a specific security or obligation is an obligation or security of the United States is a question of law and is to be decided by the trial court. See 18 U.S.C. § 8; *United States v. Anzalone*, 626 F.2d 239 (2d Cir. 1980). Thus, the jury need not make a finding that the security or obligation at issue is that of the United States. The Committee recommends that the court instruct the jury as to the specific security or obligation involved, for example, U.S. currency.

For a definition of "intent to defraud" see the pattern instruc-

tion regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343.

18 U.S.C. § 472 UTTERING COUNTERFEIT OBLIGATIONS OR SECURITIES—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [passing; uttering; publishing; selling; bringing into the United States; possessing; concealing] a [falsely made; forged; counterfeited; altered] [name specific security or obligation of the United States involved]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant [passed; uttered; published; sold; brought into the United States; possessed; concealed] a [falsely made; forged; counterfeited; altered] [name specific security or obligation of the United States involved]; and

2. The defendant knew at the time that the [name specific security or obligation involved] was [falsely made; forged; counterfeited; altered]; and

3. The defendant did so with the intent to defraud.

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

Section 472 includes attempting to pass, utter, publish, or sell

counterfeit obligations. When attempt is charged, Pattern Instruction 4.09, which defines attempt, should be given.

Whether a specific security or obligation is an obligation or security of the United States is a question of law and is to be decided by the trial court. See 18 U.S.C. § 8; *United States v. Anzalone*, 626 F.2d 239 (2d Cir. 1980). Thus, the jury need not make a finding that the security or obligation at issue is that of the United States. The Committee recommends that the court instruct the jury as to the specific security or obligation involved, for example, U.S. currency.

For a definition of "intent to defraud" see the pattern instruction regarding that term as used in connection with the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343.

18 U.S.C. § 473 DEALING IN COUNTERFEIT OBLIGATIONS OR SECURITIES—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [buying; selling; exchanging; transferring; receiving; delivering] a [false; forged; counterfeited; altered] [name specific security or obligation of the United States involved]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant [bought; sold; exchanged; transferred; received; delivered] a [false; forged; counterfeited; altered] [name specific security or obligation of the United States involved]; and

2. The defendant knew at the time that the [name specific security or obligation] was [false; forged; counterfeit; altered]; and

3. The defendant did so with the intent that the [name specific security or obligation] be [passed; published; used] as true and genuine.

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].

18 U.S.C. § 495 FALSELY MAKING, FORGING, COUNTERFEITING, OR ALTERING A DOCUMENT—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ___ of the indictment charge[s] the defendant[s] with] [making; forging; counterfeiting; altering] a document. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant [falsely made; forged; counterfeited; altered] the [document described in the indictment]; and

2. The defendant did so for the purpose of [obtaining money; enabling [name] to obtain money] from the United States; and

3. The defendant knew the claim was [false; fraudulent].

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 is for use when the defendant has been charged with the offense set out in the first paragraph of 18 U.S.C. § 495.

It is recommended that the description of the document

contained in the indictment be included where indicated at the end of the first element.

In *United States v. Bates*, 522 U.S. 23 (1997), the Supreme Court declined to read a requirement of proof of an intent to defraud into 20 U.S.C. § 1097(a), which statute prohibits the knowing and willful misapplication of student loan funds. In refusing to read the intent element into the statute, the Court did not lay down a blanket rule. Instead, it considered a number of factors, including the plain language of the statute, the fact that other subsections of the same statute included the intent to defraud language, and the history of the statute.

The Seventh Circuit has not yet determined whether an intent to defraud requirement should be read into § 495 in light of the Supreme Court's decision in *Bates*. The key to the analysis will be whether there is an historical basis for requiring an intent to defraud. This analysis is particularly suited to the adversary process. See, for example, the Seventh Circuit's decision in *United States v. Bates*, 852 F.2d 212 (7th Cir. 1988), where the court held, in a case unrelated to the more recent Supreme Court case of the same name, that an intent to defraud requirement should be read into 18 U.S.C. § 656, prohibiting the willful misapplication of bank funds and its decision in *United States v. Ranum*, 96 F.3d 1020 (7th Cir. 1996) (predating the Supreme Court's decision in *Bates*) where the court held that an intent to defraud requirement should not be read into 18 U.S.C. § 1097(a), prohibiting the making of false statements to obtain student loan funds.

Because this question is an interpretive question of first impression, the Committee believes it is more appropriate to leave to the courts the initial determination of whether intent to defraud is an element under § 495.

18 U.S.C. § 495 UTTERING OR PUBLISHING A FALSE DOCUMENT—ELEMENTS

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

1. The defendant offered a document; and

2. When the defendant did so, he falsely represented in some way or manner that the document was genuine; and

3. When the defendant did so, the document was [false; forged; counterfeited; altered] in that [describe specific allegation]; and

4. When the defendant did so, he knew that the document was [false; forged; counterfeited; altered]; and

5. The defendant did so with the intent to defraud the United States.

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 is for use when the defendant has been charged with the offense set out in the second paragraph of 18 U.S.C. § 495.

For a definition of "intent to defraud" see the pattern instruction regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343.

18 U.S.C. § 495 PRESENTING A FALSE DOCUMENT—ELEMENTS

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

1. The defendant [transmitted; presented] the [document] to [name], who was an officer of the United States, or at any office of the United States; and

2. The document was [transmitted; presented] in support of or in relation to any account or claim; and

3. When the defendant [transmitted; presented] the [document], it was [false; forged; counterfeited; altered] in that [describe specific allegation]; and

4. When the defendant [transmitted; presented] the [document], the defendant knew it was [false; forged; counterfeited; altered]; and

5. When the defendant [transmitted; presented] the [document], he did so with the intent to defraud the United States.

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 is for use when the defendant has been charged with the offense set out in the third paragraph of 18 U.S.C. § 495.

For a definition of "intent to defraud" see the pattern instruction regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343.

18 U.S.C. § 500 FALSELY MAKING, FORGING, COUNTERFEITING, ENGRAVING, OR PRINTING A MONEY ORDER—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [falsely making; forging; counterfeiting; engraving; printing] a money order. 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. The defendant [falsely made; forged; counterfeited; engraved; printed] a document; and

2. The document was an imitation of, or purported to be, a [blank money order; money order issued by or under the direction of the United States Postal Service]; and

3. The defendant made the document with the intent to defraud.

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 is for use when the defendant has been charged with the offense set out in the first paragraph of 18 U.S.C. § 500.

For a definition of "intent to defraud" see the pattern instruc-

tion regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343.

18 U.S.C. § 500 FORGING OR COUNTERFEITING A SIGNATURE OR INITIALS OF ANY PERSON AUTHORIZED TO ISSUE A MONEY ORDER, POSTAL NOTE, OR BLANK—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [forging; counterfeiting] the signature or initials of any person authorized to issue money orders upon or to any [money order; postal note; blank] provided or issued by or under the direction of the [United States Postal Service; post office department or corporation of any foreign country], which was payable in the United States. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three; four] following elements beyond a reasonable doubt:

1. The defendant [forged; counterfeited] the [signature; initials] of [name]; and

2. [Name] was authorized to issue money orders; and

3. The defendant [forged; counterfeited] the [signature; initials] on a [money order; postal note; blank] provided or issued by or under the direction of the [United States Postal Service; post office department or corporation of any foreign country] which was payable in the United States[.] [; and]

[4. The defendant acted with the intent to defraud.]

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 is for use when the defendant has been charged with the offense set out in the first part of the second paragraph of 18 U.S.C. § 500, regarding forgery and counterfeiting of the signature or initials of any person authorized to issue money orders.

In *United States v. Bates*, 522 U.S. 23 (1997), the Supreme Court declined to read a requirement of proof of an intent to defraud into 20 U.S.C. § 1097(a), which statute prohibits the knowing and willful misapplication of student loan funds. In refusing to read the intent element into the statute, the Court did not lay down a blanket rule. Instead, it considered a number of factors, including the plain language of the statute, the fact that other subsections of the same statute included the intent to defraud language, and the history of the statute.

The Seventh Circuit has not yet determined whether an intent to defraud requirement should be read into § 500 in light of the Supreme Court's decision in *Bates*. The key to the analysis will be whether there is an historical basis for requiring an intent to defraud. This analysis is particularly suited to the adversary process. See, for example, the Seventh Circuit's decision in *United States v. Bates*, 852 F.2d 212 (7th Cir. 1988), where the court held, in a case unrelated to the more recent Supreme Court case of the same name, that an intent to defraud requirement should be read into 18 U.S.C. § 656, prohibiting the willful misapplication of bank funds and its decision in *United States v. Ranum*, 96 F.3d 1020 (7th Cir. 1996) (predating the Supreme Court's decision in Bates), where the court held that an intent to defraud requirement should not be read into 18 U.S.C. § 1097(a), prohibiting the making of false statements to obtain student loan funds.

Because this question is an interpretive question of first impression, the Committee believes it is more appropriate to leave to the courts the initial determination of whether intent to defraud is an element in § 500.

If intent to defraud is an element, the court should add the bracketed language. For a definition of "intent to defraud" see the

pattern instruction regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343.

18 U.S.C. § 500 FORGING OR COUNTERFEITING A SIGNATURE OR ENDORSEMENT ON A MONEY ORDER, POSTAL NOTE, OR BLANK—ELEMENTS

[The indictment charges defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [forging; counterfeiting] any material [signature; endorsement] on a [money order; postal note; blank] provided or issued by or under the direction of the [United States Postal Service; post office department or corporation of any foreign country], which was payable in the United States. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [two; three] following elements:

1. The defendant [forged; counterfeited] any material [signature; endorsement]; and

2. The defendant did so on a [money order; postal note; blank] provided or issued by or under the direction of the [United States Postal Service; post office department or corporation of any foreign country] which was payable in the United States[.] [; and]

[3. The defendant acted with the intent to defraud.]

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 is for use when the defendant has been charged with the offense set out in the second part of the second paragraph of 18 U.S.C. § 500, regarding forgery and counterfeiting of any material signature or endorsement on a money order, postal note, or blank provided or issued by or under the direction of the U.S. Postal Service or post office department or corporation of any foreign country.

In *United States v. Bates*, 522 U.S. 23 (1997), the Supreme Court declined to read a requirement of proof of an intent to defraud into 20 U.S.C. § 1097(a), which statute prohibits the knowing and willful misapplication of student loan funds. In refusing to read the intent element into the statute, the Court did not lay down a blanket rule. Instead, it considered a number of factors, including the plain language of the statute, the fact that other subsections of the same statute included the intent to defraud language, and the history of the statute.

The Seventh Circuit has not yet determined whether an intent to defraud requirement should be read into § 500 in light of the Supreme Court's decision in *Bates*. The key to the analysis will be whether there is an historical basis for requiring an intent to defraud. This analysis is particularly suited to the adversary process. See, for example, the Seventh Circuit's decision in *United States v. Bates*, 852 F.2d 212 (7th Cir. 1988), where the court held, in a case unrelated to the more recent Supreme Court case of the same name, that an intent to defraud requirement should be read into 18 U.S.C. § 656, prohibiting the willful misapplication of bank funds and its decision in *United States v. Ranum*, 96 F.3d 1020 (7th Cir. 1996) (predating the Supreme Court's decision in Bates), where the court held that an intent to defraud requirement should not be read into 18 U.S.C. § 1097(a), prohibiting the making of false statements to obtain student loan funds.

Because this question is an interpretive question of first impression, the Committee believes it is more appropriate to leave to the courts the initial determination of whether intent to defraud is an element in § 500.

If intent to defraud is an element, the court should add the bracketed language. For a definition of "intent to defraud" see the pattern instruction regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343.

18 U.S.C. § 500 FORGING OR COUNTERFEITING A SIGNATURE ON A RECEIPT OR CERTIFICATE OF IDENTIFICATION—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [forging; counterfeiting] a signature to any receipt or certificate of identification of a [money order; postal note]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [two; three] following elements beyond a reasonable doubt:

1. The defendant [forged; counterfeited] a material signature; and

2. The signature was on a receipt or certificate of identification of a [money order; postal note; blank] provided or issued by or under the direction of the [United States Postal Service; post office department or corporation of any foreign country] which was payable in the United States[.] [; and]

[3. The defendant acted with the intent to defraud.]

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 is for use when the defendant has been charged with the offense set out in the third part of the second paragraph of 18 U.S.C. § 500, regarding forgery and counterfeiting of any material signature to any receipt or certificate of identification of a money order, postal note, or blank provided or issued by or under the direction of the U.S. Postal Service or post office department or corporation of any foreign country.

In *United States v. Bates*, 522 U.S. 23 (1997), the Supreme Court declined to read a requirement of proof of an intent to defraud into 20 U.S.C. § 1097(a), which statute prohibits the knowing and willful misapplication of student loan funds. In refusing to read the intent element into the statute, the Court did not lay down a blanket rule. Instead, it considered a number of factors, including the plain language of the statute, the fact that other subsections of the same statute included the intent to defraud language, and the history of the statute.

The Seventh Circuit has not yet determined whether an intent to defraud requirement should be read into § 500 in light of the Supreme Court's decision in *Bates*. The key to the analysis will be whether there is an historical basis for requiring an intent to defraud. This analysis is particularly suited to the adversary process. See, for example, the Seventh Circuit's decision in *United States v. Bates*, 852 F.2d 212 (7th Cir. 1988), where the court held, in a case unrelated to the more recent Supreme Court case of the same name, that an intent to defraud requirement should be read into 18 U.S.C. § 656, prohibiting the willful misapplication of bank funds and its decision in *United States v. Ranum*, 96 F.3d 1020 (7th Cir. 1996) (predating the Supreme Court's decision in *Bates*), where the court held that an intent to defraud requirement should not be read into 18 U.S.C. § 1097(a), prohibiting the making of false statements to obtain student loan funds.

Because this question is an interpretive question of first impression, the Committee believes it is more appropriate to leave to the courts the initial determination of whether intent to defraud is an element in § 500.

If intent to defraud is an element, the court should add the bracketed language. For a definition for "intent to defraud" see the pattern instruction regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343.

18 U.S.C. § 500 FALSELY ALTERING A MONEY ORDER OR POSTAL NOTE—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] falsely altering a [money order; postal note]. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. The defendant falsely altered a [money order; postal note; blank] provided or issued by or under the direction of the [United States Postal Service; post office department or corporation of any foreign country] which was payable in the United States; and

2. The alteration was material.

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 is for use when the defendant has been charged with the offense set out in the third paragraph of 18 U.S.C. § 500.

18 U.S.C. § 500 PASSING, UTTERING, OR PUBLISHING FORGED OR ALTERED MONEY ORDERS OR POSTAL NOTES—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [passing; uttering; publishing] [attempting to pass; attempting to utter; attempting to publish] a forged or altered [money order; postal note]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [five] following elements beyond a reasonable doubt:

1. The defendant [passed; uttered; published] [attempted to pass; attempted to utter; attempted to publish] a [money order; postal note]; and

2. He falsely represented in some way or manner that the [money order; postal note] was genuine; and

3. The [money order; postal note] was forged or materially altered; and

4. He knew that any material [initials; signature; stamp impression; endorsement] thereon was [false; forged; counterfeited] or a material alteration on the [money order; postal note] was falsely made; and

5. The defendant did so with the intent to defraud the United States.

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 is for use when the defendant has been charged with the offense set out in the fourth paragraph of 18 U.S.C. § 500.

For a definition of "intent to defraud" see the pattern instruction regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343.

18 U.S.C. § 500 FRAUDULENTLY ISSUING A MONEY ORDER OR POSTAL NOTE—ELEMENTS

[The indictment charges the defendant[s] with; Counts[s] __ of the indictment charge[s] the defendant[s] with] fraudulently issuing a [money order; postal note]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant issued a [money order; postal note] without having previously received or paid the full amount of money payable on the [order; note]; and

2. He did so for the purpose of [obtaining or receiving money; enabling another person to obtain or receive money] from the United States or its agents or employees; and

3. That he did so with the intent to defraud the United States.

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 is for use when the defendant has been charged with the offense set out in the fifth paragraph of 18 U.S.C. § 500.

For a definition of "intent to defraud" see the pattern instruc-

tion regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343.

18 U.S.C. § 500 THEFT OF A MONEY ORDER—ELEMENTS

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

1. The defendant [embezzled; stole; converted to his own use or the use of another; converted or disposed of without authority] a blank money order form provided under the authority of the United States Postal Service; and

2. The defendant did so with the intent to deprive the owner of the use or benefit of the document.

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 is for use when the defendant has been charged with the offense set out in the sixth paragraph of 18 U.S.C. § 500.

18 U.S.C. § 500 RECEIPT OR POSSESSION OF A STOLEN MONEY ORDER—ELEMENTS

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

1. The defendant [received; possessed] a blank money order form provided under the authority of the United States Postal Service; and

2. The defendant did so with the intent to convert it to [his own use or gain; the use or gain of another]; and

3. The defendant knew the document had been [embezzled; stolen; converted].

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 is for use when the defendant has been charged with the offense set out in the seventh paragraph of 18 U.S.C. § 500.

18 U.S.C. § 500 FALSE PRESENTMENT OF A MONEY ORDER OR POSTAL NOTE—ELEMENTS

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

1. The defendant [transmitted; presented; caused to be transmitted or presented] a [money order; postal note]; and

2. The defendant knew that the [money order; postal note] contained any forged or counterfeited [signature; initials; stamped impression]; or, [contained any material alteration which was unlawfully made; was unlawfully issued without previous payment of the amount required to have been paid upon issue; was stamped without lawful authority]; and

3. The defendant [transmitted; presented] the document with the intent to defraud the United States, the Postal Service, or any 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 is for use when the defendant has been

charged with the offense set out in the eighth paragraph of 18 U.S.C. § 500.

For a definition of "intent to defraud" see the pattern instruction regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343.

18 U.S.C. § 500 THEFT OR RECEIPT OF A MONEY ORDER MACHINE OR INSTRUMENT—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] theft or receipt of a [postal money order machine; stamp specifically designed to be used in preparing or filling out the blanks on postal money order forms; tool specifically designed to be used in preparing or filling out the blanks on postal money order forms; instrument specifically designed to be used in preparing or filling out the blanks on postal money order forms]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [two; three] following elements:

1. The defendant [stole; received; possessed; disposed of; attempted to dispose of] [item]; and

2. The [item] was a [postal money order machine; stamp specifically designed to be used in preparing or filling out the blanks on postal money order forms; tool specifically designed to be used in preparing or filling out the blanks on postal money order forms; instrument specifically designed to be used in preparing or filling out the blanks on postal money order forms] [.] [; and]

[3. The defendant [received; possessed; disposed of; attempted to dispose of] [item] with the intent to defraud or without being lawfully authorized by the United States Postal Service.]

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 is for use when the defendant has been charged with the offense set out in the ninth paragraph of 18 U.S.C. § 500. When the defendant is charged with stealing the item, this instruction should include only the first two elements.

For a definition of "intent to defraud" see the pattern instruction regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343.

18 U.S.C. § 500 DEFINITION OF "MATERIAL"

A signature, endorsement, initials, or stamp impression is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of the [person; decision-making body] to whom it was addressed. The government is not required to prove that the statement actually influenced [person; decision-making body].

Committee Comment

This instruction was adapted from the pattern instruction defining material under the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343.

18 U.S.C. § 500 DEFINITION OF "MATERIAL ALTERATION"

An alteration of a [money order; postal note; initials; signature; stamp impression; endorsement] is material if it had the effect of influencing the action of the recipient or was capable of or had a natural tendency to influence.

Committee Comment

This instruction was adapted from the pattern instruction defining materiality as used in the general false statement statute, 18 U.S.C. § 1001.

18 U.S.C. § 511 ALTERING OR REMOVING VEHICLE IDENTIFICATION NUMBERS

Committee Comment

Because this statute is rarely used, the Committee has not drafted a corresponding pattern instruction. For cases discussing the statute generally, see *United States v. Chorman*, 901 F.2d 102, 110 (4th Cir. 1990) (interpreting "knowingly" to mean "knowing action"); *United States v. Podell*, 869 F.2d 328, 332 (7th Cir. 1989) (discussing appropriate unit of prosecution under statute); *United States v. Enochs*, 857 F.2d 491, 492–93 (8th Cir. 1988) (discussing intent element of statute).

18 U.S.C. § 542 ENTRY OF GOODS BY MEANS OF FALSE STATEMENTS—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] entering goods into commerce by means of a false statement. In order for you to find the defendant guilty of this charge, the government must prove each of the [three; four] following elements beyond a reasonable doubt:

1. [Goods named in indictment] [was; were] imported; and

2. The defendant [entered; introduced; attempted to enter; attempted to introduce] [goods named in indictment] into the commerce of the United States; and

3. The defendant did so by means of a [fraudulent; false] [invoice; declaration; affidavit; letter; paper; practice] [written; verbal statement], which he [[knew; had reason to believe] was [fraudulent; false; without reasonable cause to believe to be true]]; and

[4. The [invoice; declaration; affidavit; letter; paper; statement; practice] was material to the entry of the merchandise.]

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

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

Committee Comment

Title 18 U.S.C. § 542 describes three types of false statements. The first does not contain any express intent requirement—it simply proscribes "fraudulent" or "false" statements—but it has been interpreted as requiring a knowing falsehood. See *United States v. Ven-Fuel, Inc.*, 602 F.2d 747, 753 (5th Cir. 1979). The second and third expressly contain what amounts to a knowledge/reckless disregard intent requirement.

The fourth element (materiality) is bracketed because the Seventh Circuit has not decided whether materiality is an element under 18 U.S.C. § 542. It appears, however, that every other circuit that has considered the issue has ruled that § 542 requires proof of materiality. See*, e.g., United States v. An Antique Platter of Gold*, 184 F.3d 131, 135 (2d Cir. 1999); *United States v. Holmquist*, 36 F.3d 154, 158 (1st Cir. 1990); *United States v. Corcuera-Valor*, 910 F.2d 198, 199 (5th Cir. 1990); *United States v. Bagnall*, 907 F.2d 432, 435 (3d Cir. 1990); *United States v. Teraoka*, 669 F.2d 577, 579 (9th Cir. 1982). Of note is the Supreme Court's decision in *United States v. Wells*, 519 U.S. 482 (1997), to the effect that 18 U.S.C. § 1014, which like § 542 proscribes false statements, does not require proof of materiality. But see also *Neder v. United States*, 527 U.S. 1, 22 (1999) ("the common law could not have conceived of 'fraud' without proof of materiality"). The Committee takes no position on whether the statute requires materiality.

18 U.S.C. § 542 ENTRY OF GOODS BY MEANS OF FALSE STATEMENTS—DEFINITION OF "FRAUDULENT"

A [statement; document; practice] is "fraudulent" if it is [made; conducted; caused to be made; caused to be conducted] with the intent to deceive.

18 U.S.C. § 542 DEFINITION OF "MATERIAL"

[A statement is "material" to the entry of merchandise if it is capable of influencing the actions of [identify agency] in a way that affects or facilitates the entry of the merchandise into the United States. The government is not required to prove that the statement actually influenced [identify agency]].

Committee Comment

The Seventh Circuit has not addressed the issue of whether proof of materiality is required in the context of § 542. The instruction is therefore bracketed. For further discussion about whether proof of materiality is required under § 542, see the commentary to the elements instruction for this statute.

This instruction is derived from materiality instructions that appear elsewhere in the Pattern Instructions, see, *e.g.*, 18 U.S.C. § 1001; 18 U.S.C. § 152; 18 U.S.C. § 500; 18 U.S.C. §§ 1341, 1343, 1344; 18 U.S.C. § 1623; 18 U.S.C. § 7206. This instruction is worded in a way that focuses on the language in section 542. See *United States v. Bagnall*, 907 F.2d 432, 436 (3d Cir. 1990) (citing cases); see also, *United States v. Holmquist*, 36 F.3d 154, 158–60 (1st Cir. 1994).

18 U.S.C. § 542 ENTRY OF GOODS BY MEANS OF FALSE STATEMENTS—DEFINITION OF ENTRY

The process of entering or introducing merchandise into the commerce of the United States does not begin until after the merchandise has arrived in the United States and the importer or owner of the merchandise has begun the acts necessary for him to gain lawful possession of the merchandise. The process is not completed until the payment of all customs duties.

Committee Comment

See *United States v. Mescall*, 215 U.S. 26, 32 (1909); *United States v. Steinfels*, 753 F.2d 373, 377–78 (5th Cir. 1985); *Heike v. United States*, 192 F. 83, 99–100 (2d Cir. 1911).

18 U.S.C. § 542 ENTRY OF GOODS BY MEANS OF FALSE STATEMENTS—DEFINITION OF IMPORTED MERCHANDISE

Committee Comment

Because the meaning of the term imported varies in different contexts, the court must formulate a definition for the term on a case by case basis. See, *e.g.*, *Schiavone-Chase Corp. v. United States*, 553 F.2d 658, 663–64 (Ct. Cl. 1977); *Kee Co. v. United States*, 13 C.C.P.A. 106, 109 (1925).

18 U.S.C. § 542 ENTRY OF GOODS BY MEANS OF FALSE STATEMENTS—UNITED STATES HAS BEEN OR MAY HAVE BEEN DEPRIVED OF ANY LAWFUL DUTIES—ELEMENTS

Committee Comment

The Committee has not drafted an instruction for the second paragraph of § 542 because the few reported cases concerning that paragraph leave its scope unclear. See generally *United States v. Yip*, 930 F.2d 142, 148–50 (2d Cir. 1991).

18 U.S.C. § 641 THEFT OF GOVERNMENT PROPERTY—ELEMENTS

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

1. The [record; money; thing of value] described in the indictment belonged to the United States; and

2. The [record; money; thing of value] had a value that exceeded $1,000; and

3. The defendant [stole; embezzled; knowingly converted] that [record; money; thing of value] to [the defendant's own use; the use of another]; and

OR

[3. The defendant [sold; conveyed; disposed of] that [record; money; thing of value] without authority; and]

4. The defendant did so knowingly with the intent to deprive the owner of the use or benefit of that [record; money; thing of value].

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

Use the alternate third element when appropriate.

Section 641 of Title 18 consolidated theft, embezzlement, and receipt of stolen property previously found in §§ 82, 87, 100, and 101 of Title 18. Section 641 contains a lesser included misdemeanor for violations when the value of the money or property in question does not exceed $1,000. "Value" is specifically defined in the statute.

The Committee has drafted this instruction to be used in felony cases. If the crime charged is a misdemeanor, the second element of this instruction should read: "2. The [record; money; thing of value] had some value." Where there is a real dispute as to whether the value of the property exceeds $1,000, the Committee recommends that two separate instructions be given as opposed to use of a special interrogatory. Note that the value is established at the time of possession rather than at the time of theft. *United States v. Ditata*, 469 F.2d 1270 (7th Cir. 1972); see also *United States v. Brookins*, 52 F.3d 615, 619 (7th Cir. 1995). Furthermore, the statute provides that the value of the property is determined "in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case. . . ." Where a defendant is charged in more than one count and there is a dispute over whether the aggregate value of the property at issue exceeds $1,000, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), requires that the jury determine the aggregate value. Thus, the jury should be given an appropriate instruction.

See *Morissette v. United States*, 342 U.S. 246 (1952), regarding the "intent to deprive element." The government need only prove that the defendant intended to deprive the owner of the use of the money or property; the government need not prove that the defendant knew the money or property belonged to the government. *Morissette*, 342 U.S. at 276; see also *United States v. Howard*, 30 F.3d 871, 875 (7th Cir. 1994). If lack of knowledge is asserted, however, the Committee recommends that the following language be added to the fourth element: "It does not matter whether the defendant knew that the [record; money; thing of value] belonged to the government, only that he know it did not belong to him."

18 U.S.C. § 641 DEFINITION OF "VALUE"

"Value" means face value, market value, [wholesale or retail], or a price actually paid for the item in question, whichever is greater. [Market value is the price someone would be willing to pay for the item to someone else willing to sell it.] [To have value a thing need not be a physical object [, and may be something like [information, labor, etc.], as long as it has economic worth].]

Committee Comment

See 18 U.S.C. § 641; *United States v. Smith*, 489 F.2d 1330 (7th Cir. 1973).

Regarding market value, see *United States v. Brookins*, 52 F.3d 615 (7th Cir. 1995). Regarding intangible property, see *United States v. Howard*, 30 F.3d 871 (7th Cir. 1994). The term "par value" is eliminated because it is covered by the remaining terms. Relevant illustration is encouraged in intangible property cases.

18 U.S.C. § 659 EMBEZZLEMENT OR THEFT OF GOODS FROM INTERSTATE SHIPMENT—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [embezzling; stealing; unlawfully taking, carrying away, or concealing; or by fraud or deception obtaining] goods or chattels [moving as interstate commerce; which are a part of or which constitute an interstate shipment of freight]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant [embezzled; stole; unlawfully took, carried away, or concealed; obtained by fraud or deception] the goods or chattels described in the indictment; and

2. The defendant did so with the intent to convert the goods or chattels to his own use; and

3. The goods or chattels were moving as, or were a part of, [an interstate; a foreign] shipment of property; and

4. The goods or chattels had a value of $1,000 or more.

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

Section 659 describes six distinct offenses; the instructions should be modified as necessary.

The statute contains a lesser included offense where the value of the goods or chattels is less than $1,000. The Committee has drafted the instruction to be used when the value is or exceeds $1,000. If the value charged is less than $1,000, then the fourth element of the instruction should read: "4. The goods or chattels had a value less than $1,000." If the value of the goods or chattels is in issue, the court should give a lesser included offense instruction. In cases in which "value" is in issue, the Committee recommends using the proposed definition of "value" found in the Pattern Instructions for 18 U.S.C. § 641.

18 U.S.C. § 659 POSSESSION OF GOODS STOLEN FROM INTERSTATE SHIPMENT—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] possession of goods or chattels stolen from an interstate shipment. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The goods or chattels described in the indictment were [embezzled; stolen; unlawfully taken, carried away, or concealed; obtained by fraud or deception]; and

2. The defendant possessed the goods or chattels with knowledge that they were [embezzled; stolen; unlawfully taken, carried away, or concealed; obtained by fraud or deception]; and

3. The goods or chattels were moving as, or were a part of, [an interstate; a foreign] shipment of property; and

4. The goods or chattels had a value of $1,000 or more.

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. Zarattini, 552 F.2d 753 (7th Cir. 1977), indicates that intent to convert is not an element under a charge of possession.

The government must prove beyond a reasonable doubt that goods were stolen from an interstate shipment and the person possessing the goods knew they had been stolen. *United States v. Green*, 779 F.2d 1313, 1318 (7th Cir. 1985); *United States v. DeGeratto*, 727 F. Supp. 1254, 1265 (N.D. Ind. 1990).

The statute contains a lesser included offense where the value of the goods or chattels is less than $1,000. The Committee has drafted the instruction to be used when the value is or exceeds $1,000. If the value charged is less than $1,000, then the fourth element of the instruction should read: "4. The goods or chattels had a value less than $1,000." If the value of the goods or chattels is in issue, the court should give a lesser included offense instruction. In cases in which "value" is in issue, the Committee recommends using the proposed definition of "value" found in the Pattern Instructions for 18 U.S.C. § 641.

18 U.S.C. § 666(a)(1)(A) THEFT CONCERNING FEDERALLY FUNDED PROGRAM—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [embezzlement; theft; fraud; conversion; misapplication]. In order for you to find [the; a] defendant[s] 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 [embezzled; stole; obtained by fraud; knowingly and without authority converted to the use of someone other than the rightful owner; intentionally misapplied] some [money; property]; and

3. That the [money; property] was owned by, or was under the care, custody or control of the [organization; government; government agency]; and

4. That the [money; property] had 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.]

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 theft 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 argument is raised.

The statutory term "intentionally misapplies" does not cover mere mistakes. *United States v. Thompson*, 484 F.3d 877, 881 (7th Cir. 2007). Instead, an intentional misapplication is confined to "theft, extortion, bribery, and similarly corrupt acts." *Id.* Authorization or ratification by an organization of an expenditure of funds is important evidence "militating against a finding of intentional misapplication," but is not a defense if "criminal intent is proven." *United States v. De La Cruz*, 469 F.3d 1064, 1068 (7th Cir. 2006).

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

18 U.S.C. § 666(a)(1)(B) BRIBERY CONCERNING FEDERALLY FUNDED PROGRAM—ELEMENTS

[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 [the; a] 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. The defendant [solicited; demanded; accepted; agreed to accept] something of value from another person; and

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

4. This business [transaction; series of transactions] involved something of a value of $5,000 or more; and

5. 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 of-

fered or given to reward or influence him 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 bribery affected the federal funds received by the organization or agency. *Salinas v. United States*, 522 U.S. 52, 56–61 (1997). The jury should be so instructed in the event a contrary argument is raised.

The bracketed definition of "corruptly" set forth above is derived from *United States v. Bonito*, 57 F.3d 167, 171 (2d 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 (2d Cir. 1993).

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

[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 count, the government must prove each of the [five] following elements beyond a reasonable doubt:

1. 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. The defendant [solicited], [demanded], [accepted] [or] [agreed to accept] a thing of value from another person; and

3. The defendant did so corruptly, that is, with the understanding that something of value is to be offered or given to reward or influence [him/her] in connection with [his/her] [organizational; official] duties; and

4. The defendant acted 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

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

6. 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.]

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 count you are considering], then you should find the defendant guilty [of that count].

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 count you are considering], then you should find the defendant not guilty [of that count].

Committee Comment

The definition of the one-year federal-funds period reflects 18 U.S.C. § 666(d)(5). 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 federal-funds element is not a requirement of subject matter jurisdiction. *United States v. Bowling*, 952 F.3d 861, 867 (7th Cir. 2020). Instead, it is an element that goes to the merits. *Id.*

The definition of "corruptly" set forth above is derived from *United States v. Hawkins*, 777 F.3d 880, 882 (7th Cir. 2015) (An agent "act[s] corruptly if they *know* that the payor is trying to get them to do the acts forbidden by the statute, and take the money anyway.") (emphasis in original); see also *United States v. Mullins*, 800 F.3d 866, 870 (7th Cir. 2015) ("An agent acts corruptly when he *understands* that the payment given is a bribe, reward, or gratuity.") (emphasis added).

With regard to the definition of "corruptly," in cases involving an undercover agent or a cooperator, jurors might be confused if they are asked to determine whether a defendant understood the intent to influence or to reward when the undercover or cooperator of course did not *in fact* have the intent to influence or to reward. In those cases, some courts might prefer "with the belief" as a more appropriate term than "with the understanding." The term "believes" is used in explaining attempt offenses for which "the defendant's conduct should be measured according to the circumstances as he *believes* them to be, rather than the circumstances as they may have existed in fact." See *United States v. Williams*, 553 U.S. 285, 300 (2008) (quoting ALI, Model Penal Code § 5.01, Comment at 307, governing attempts) (emphasis added).

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.

Lawyers and judges should consider whether intent to "influence" and intent to "reward" are two separate theories of liability, that is, bribery ("influence") versus gratuity ("reward"). Although Seventh Circuit opinions have stated, in broad terms, that a specific *quid pro quo* is not required under § 666(a), see *United States v. Mullins*, 800 F.3d 866, 871 (7th Cir. 2015); *United States v. Boender*, 649 F.3d 650, 654 (7th Cir. 2011); *United States v. Gee*, 432 F.3d 713, 714 (7th Cir. 2005); *United States v. Agostino*, 132 F.3d 1183, 1190 (7th Cir.1997), those cases involved the government's pursuit of a "reward" theory as well. It is not clear that the Seventh Circuit has directly answered whether a case presenting only an intent to "influence" theory requires a *quid pro quo*.

The reasoning of *United States v. Boender* arguably suggests that there is a difference between "influence" and "reward." *Boender* reaffirmed that § 666(a)(2) does not require a *quid pro quo*, but the opinion examined the federal-employee bribery counterpart, 18 U.S.C. § 201(b), and relied on the distinction between bribes and gratuities:

Whereas § 201(b) makes it a crime to "corruptly give[], offer[]

> or promise[] anything of value to any public official . . . with intent to influence any official act," § 666(a)(2) criminalizes corrupt giving "with intent to influence *or reward*" a state or local official. Further, § 201(b) is complemented by § 201(c), which trades a broader reach—criminalizing any gift given "for or because of any official act performed or to be performed," § 201(c)(1)(A)—for a less severe statutory maximum of two, rather than fifteen, years' imprisonment. Section 666(a)(2) has and needs no such parallel: by its plain text, it already covers both *bribes and rewards*.

Boender, 649 F.3d at 655 (first emphasis in original). In that explanation, the Seventh Circuit appears to emphasize that the intent to "reward" is the add-on that distinguishes § 666(a)(2) from § 201(b) bribery. *Id.* The passage's concluding sentence says that § 666(a)(2) "covers both bribes and rewards." *Id.* Arguably, then, under § 666(a)(2), "intent to influence" covers bribes whereas "intent to reward" covers gratuities. Also, *Boender* relied on the bribery-versus-gratuity distinction drawn by the Supreme Court in interpreting § 201(b) versus § 201(c), 649 F.3d at 655 (citing *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404, 406 (1999)), and § 201(b) uses the same intent to "influence" statutory language as § 666(a).

In dictum, one Circuit arguably has treated the two theories of liability independently, noting that where a defendant is charged with bribery only, the jury instructions should not include the "reward" language. See *United States v. Munchak*, 527 F. App'x 191, 194 (3d Cir. May 31, 2013) ("As [the defendant] was charged with bribery under § 666, the Court's instructions should not have included the 'reward' language."). It is worth noting too that the Statutory Appendix of the Sentencing Guidelines directs § 666 corruption offenses to both Guideline § 2C1.1, which covers bribery, and § 2C1.2, which covers gratuities.

In light of the uncertainty in the case law, the Committee does not take a position on this issue. If the district court decides that there is a distinction between the two forms of intent, then the court should provide separate instructions for them.

In a case involving campaign contributions as the alleged thing of value, the parties and the court should consider whether to give an additional instruction explaining the lawfulness of contributions and distinguishing them from illegal bribes or illegal gratuities. See the instruction and Committee Comment for 18 U.S.C. § 1951 Definition of Color of Official Right.

18 U.S.C. § 666(a)(2) PAYING A BRIBE—ELEMENTS

[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 count, the government must prove each of the [four] following elements beyond a reasonable doubt:

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

2. 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. 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 evi-

dence that the government has proved each of these elements beyond a reasonable doubt [as to the count you are considering], then you should find the defendant guilty [of that count].

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 count you are considering], then you should find the defendant not guilty [of that count].

Committee Comment

The definition of the one-year federal-funds period reflects 18 U.S.C. § 666(d)(5). 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 federal-funds element is not a requirement of subject matter jurisdiction. *United States v. Bowling*, 952 F.3d 861, 867 (7th Cir. 2020). Instead, it is an element that goes to the merits. *Id.*

The bracketed definition of "corruptly" set forth above is derived from *United States v. Bonito*, 57 F.3d 167, 171 (2nd Cir. 1995) ("person acts corruptly, for example, when he gives or offers to give something of value intending to influence or reward a government agent in connection with his official duties"). Although the Seventh Circuit has defined "corruptly" in cases in which the defendant was a bribe *recipient* (not the bribe payer), *United States v. Hawkins*, 777 F.3d 880, 882 (7th Cir. 2015); *United States v. Mullins*, 800 F.3d 866, 870 (7th Cir. 2015), there is no definitive holding from the Seventh Circuit on the definition as to bribe *payers*. The Committee notes that the definition does not appear to add any requirement beyond the intent requirement in the second element of the Pattern Instruction, but absent a Seventh Circuit holding on the issue, the Committee takes no further position.

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.

Lawyers and judges should consider whether intent to "influence" and intent to "reward" are two separate theories of liability, that is, bribery ("influence") versus gratuity ("reward"). Although Seventh Circuit opinions have stated, in broad terms, that a specific *quid pro quo* is not required under § 666(a), *see United States v. Mullins*, 800 F.3d 866, 871 (7th Cir. 2015); *United States v. Boender*, 649 F.3d 650, 654 (7th Cir. 2011); *United States v. Gee*, 432 F.3d 713, 714 (7th Cir. 2005); *United States v. Agostino*, 132 F.3d 1183, 1190 (7th Cir.1997), those cases involved the government's pursuit of a "reward" theory as well. It is not clear that the Seventh Circuit has directly answered whether a case presenting only an intent to "influence" theory requires a *quid pro quo*.

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> Whereas § 201(b) makes it a crime to "corruptly give[], offer[] or promise[] anything of value to any public official . . . with intent to influence any official act," § 666(a)(2) criminalizes corrupt giving "with intent to influence *or reward*" a state or local official. Further, § 201(b) is complemented by § 201(c), which trades a broader reach—criminalizing any gift given "for or because of any official act performed or to be performed," § 201(c)(1)(A)—for a less severe statutory maximum of two, rather than fifteen, years' imprisonment. Section 666(a)(2) has and needs no such parallel: by its plain text, it already covers both *bribes and rewards*.

Boender, 649 F.3d at 655 (first emphasis in original). In that explanation, the Seventh Circuit appears to emphasize that the

intent to "reward" is the add-on that distinguishes § 666(a)(2) from § 201(b) bribery. *Id.* The passage's concluding sentence says that § 666(a)(2) "covers both bribes and rewards." *Id.* Arguably, then, under § 666(a)(2), "intent to influence" covers bribes whereas "intent to reward" covers gratuities. Also, *Boender* relied on the bribery-versus-gratuity distinction drawn by the Supreme Court in interpreting § 201(b) versus § 201(c), 649 F.3d at 655 (citing *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404, 406 (1999)), and § 201(b) uses the same intent to "influence" statutory language as § 666(a).

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In a case involving campaign contributions as the alleged thing of value, the parties and the court should consider whether to give an additional instruction explaining the lawfulness of contributions and distinguishing them from illegal bribes or illegal gratuities. See the instruction and Committee Comment for 18 U.S.C. § 1951 Definition of Color of Official Right.

18 U.S.C. § 666(c) BONA FIDE COMPENSATION

Bona fide [salary, wages, fees, or other compensation paid; expenses paid or reimbursed], in the usual course of business, [does; do] not qualify as a thing of value [solicited or demanded; given, offered, or agreed to be given] by the defendant.

Committee Comment

Section 666(c) exempts bona fide payments from the reach of the bribery provisions: "This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." 18 U.S.C. § 666(c). This exemption applies only to "the bribe itself," and does not apply to other elements of § 666, such as the element requiring that the business or transaction at issue have a value of at least $5,000. *United States v. Robinson*, 663 F.3d 265, 270 (7th Cir. 2011).

18 U.S.C. § 666 DEFINITION OF "AGENT"

An "agent" is a person who is authorized to act on behalf of an [organization] [government or agency], including an employee, officer, or representative.

Committee Comment

The common law definition of "agent" does not control the statutory definition of "agent." *United States v. Lupton*, 620 F.3d 790, 800 (7th Cir. 2010) ("The statutory definition of 'agent' is an expansive one.").

The defendant must be an agent of the organization from which he unlawfully obtained funds, and the funds must have been unlawfully obtained from the organization when it owned the funds, or had care, custody, or control over the funds. *United States v. Abu-Shawish*, 507 F.3d 550, 555–57 (7th Cir. 2007).

18 U.S.C. § 669(a) HEALTH CARE THEFT OR EMBEZZLEMENT—ELEMENTS

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

1. The defendant [embezzled; stole; otherwise without authority converted to the use of any person other than the rightful owner; intentionally misapplied] any [moneys; funds; securities; premiums; credits; property; assets] of a health care benefit program; and

2. The defendant did so knowingly and willfully; and

3. The [moneys; funds; securities; premiums; credits; property; assets] had a value of more than $100.

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 court should refer to the pattern instruction defining "health care benefit program." The statute uses both "knowingly" and "willfully" to define the *mens rea* element. There is no case that has definitively decided the meaning of "knowingly and will-

fully" in the context of this statute. See *United States v. Wheeler*, 540 F.3d 683 (7th Cir. 2008). Wheeler considered this issue under a plain error standard and concluded that "there is a plausible argument that the use of 'knowingly and willfully' in § 669 may require that a defendant know his conduct was in some way unlawful." In discussing the meaning of willfully under § 669, the *Wheeler* court noted that § 669 does not involve the complex statutory scheme at issue in tax or structuring crimes which require a defendant to violate a known legal duty. However, the *Wheeler* court reasoned that there is also some support for the argument that "willfully" means more than acting intentionally when it is used conjunctively with "knowingly."

Practitioners should also consider the potential application of *United States v. Schaul*, 962 F.3d 917 (7th Cir. 2020). In *Schaul*, the Seventh Circuit held that, in the context of 18 U.S.C. § 1347, "knowingly" and "willfully" have separate meanings and must be proven in the conjunctive. The *Schaul* court also equated "willfully" under § 1347 with an "intent to defraud," which itself was already considered an element of § 1347. *Id.* at 925. The Committee notes, however, that § 669 does not contain an explicit textual reference to an intent to defraud. In the absence of controlling law, litigants might also consider reference to the definition of "willfully" under 18 U.S.C. § 1035 (false statements in healthcare matters), which similarly has no textual reference to "intent to defraud." There, "willfully" is defined as acting "voluntarily and intentionally and with the intent to do something he knows is illegal." See *United States v. Natale*, 719 F.3d 719, 741–42 (7th Cir. 2013).

The Committee advises that if the district court deems "knowingly and willfully" to have the same meaning, then the court should define the two terms in one instruction using the pattern instruction for "knowingly." If the court deems the two terms to have separate meanings, then the court should consider splitting them into separate elements and defining them separately.

This instruction contemplates a felony charge under the statute. If the value of the money or property is $100 or less, the offense constitutes a misdemeanor under 18 U.S.C. § 669(a).

18 U.S.C. § 669(a) DEFINITION OF "HEALTH CARE BENEFIT PROGRAM"

A "health care benefit program" is a [public; private] [plan; contract], affecting commerce, under which any medical benefit, item or service is provided to any individual and includes any individual or entity who is providing a medical benefit, item or service for which payment may be made under the plan or contract.

A health care program affects commerce if the health care program had any impact on the movement of any money, goods, services, or persons from one state to another [or between another country and the United States]. The government need only prove that the health care program itself either engaged in interstate commerce or that its activity affected interstate commerce to some degree. The government need not prove that [the; a] defendant engaged in interstate commerce or that the acts of [the; a] defendant affected interstate commerce.

Committee Comment

"Health care benefit program" is defined in 18 U.S.C. § 24(b). "Affecting commerce" means affecting interstate commerce under 18 U.S.C. § 24(b). See *United States v. Natale*, 719 F.3d 719, 732 n.5 (7th Cir. 2013). The court may also find it appropriate to adapt for health care offenses the RICO Pattern Instruction describing enterprises that engage in interstate commerce or whose activities affect interstate commerce.

18 U.S.C. § 751 ESCAPE—ELEMENTS

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

1. The defendant was in the custody of [name or describe custodial official, institution or agency] pursuant to [describe authority for custody, *e.g.*, judgment of conviction, arrest, court order]; and

2. The defendant knowingly [left; attempted to leave; intentionally failed to return to] that custody without authorization to do so.

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

See *United States v. Bailey*, 444 U.S. 394, 408 (1980); *United States v. Casteneda-Galvan*, 205 F. App'x 437 (7th Cir. 2006) (citing the 1999 Pattern Instruction); *United States v. Richardson*, 687 F.2d 952, 961 (7th Cir. 1982).

Some additional definition of "custody" should be offered in cases where it is minimal or constructive, as opposed to those obvious cases involving arrest, jail or prison.

18 U.S.C. § 842(a)(1) IMPORTING, MANUFACTURING, OR DEALING IN EXPLOSIVE MATERIALS WITHOUT A LICENSE—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] engaging in the business of [importing; manufacturing; dealing in] explosive materials without a license. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. The defendant was an [importer; manufacturer; dealer] of explosive materials; and

2. The defendant did not have a license, issued by the Attorney General, permitting him to act as an [importer; manufacturer; dealer] of explosive materials.

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 terms "importer," "manufacturer," and "dealer" are defined at 18 U.S.C. § 841(g), (h) and (i). The term "explosive materials" is defined at 18 U.S.C. § 841(c).

Caution should be used in giving this instruction when the effect would be to constructively amend the indictment. See *United States v. Haldorson*, 941 F.3d 284, 297–98 (7th Cir. 2019), cert.

denied, 140 S. Ct. 1235, 206 L.Ed. 2d 226 (2020) (No constructive amendment of the indictment in violation of the Fifth Amendment where "[t]he jury instruction was tailored to the specifics of the indictment and did not permit the jury to convict [the defendant] based on non-indicted explosives.").

18 U.S.C. § 842(a)(2) WITHHOLDING INFORMATION, MAKING A FALSE STATEMENT, OR FURNISHING FALSE IDENTIFICATION TO OBTAIN EXPLOSIVE MATERIALS—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [withholding information; making a false written or oral statement; furnishing or exhibiting any false or misrepresented identification], intended or likely to deceive, for the purpose of obtaining [explosive materials; a license; a permit; an exemption; relief from disability]. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. The defendant knowingly [withheld information; made a false written or oral statement; furnished or exhibited any false or misrepresented identification] [from; to] the Attorney General or [his delegate; a licensed importer; manufacturer; dealer in explosive materials]; and

2. In doing so, the defendant intended to or was likely to deceive for the purpose of obtaining [explosive materials; a license; a permit; an exemption; relief from disability].

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 a definition of "knowingly" see Pattern Instruction 4.10.

Caution should be used in giving this instruction when the effect would be to constructively amend the indictment. See *United States v. Haldorson*, 941 F.3d 284, 297–98 (7th Cir. 2019), cert. denied, 140 S. Ct. 1235, 206 L.Ed. 2d 226 (2020) (No constructive amendment of the indictment in violation of the Fifth Amendment where "[t]he jury instruction was tailored to the specifics of the indictment and did not permit the jury to convict [the defendant] based on non-indicted explosives.").

18 U.S.C. § 875(a) TRANSMISSION OF A RANSOM OR REWARD—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ____ of the indictment charge[s] the defendant[s] with] with transmitting a communication containing a demand or request for a ransom or reward for the release of a kidnapped person. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly transmitted a communication; and

2. The communication contained a [demand; request] for a [ransom; reward] for the release of any kidnapped person; and

3. The defendant transmitted the communication [for the purpose of making a [demand; request] for a [ransom; reward]]; [knowing that the communication would be viewed as a [demand; request] for a [ransom; reward]] for the release of any kidnapped person; and

4. The communication was transmitted in [interstate; 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 paragraph 3, the language requiring the defendant to transmit the communication either for the purpose of making a threat or knowing that the communication would be viewed as a threat is based on *Elonis v. United States*, 575 U.S. 723, 740 (2015) ("There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat."). The instruction reflects the purpose or knowledge mental state as the most common prosecution theories, but recklessness remains an open question. *Id.* ("Neither Elonis nor the government has briefed or argued that point and we accordingly decline to address it.").

18 U.S.C. § 875(b) TRANSMISSION OF AN EXTORTIONATE THREAT TO KIDNAP OR INJURE A PERSON—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ____ of the indictment charge[s] the defendant[s] with] charges the defendant with transmitting a communication containing a threat to kidnap or injure a person with the intent to extort money or other thing of value. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly transmitted a communication; and

2. The communication contained a threat to [kidnap] [injure] any person; and

3. The defendant transmitted the communication with the intent to extort [money] [other thing of value] from any [person] [firm] [association] [corporation]; and

4. The communication was transmitted in interstate [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 the third element, the requisite mental state is described as

intent to extort. It should be noted that, in a case addressing Section 875(c) (rather than Section 875(b)), the Supreme Court described the requisite mental state as requiring the defendant to transmit the communication either for the purpose of making a threat or knowing that the communication would be viewed as a threat. *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015) ("There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.").

Other circuit courts of appeal have held that the intent to extort by threat under § 875(b) incorporates the intent required by *Elonis*, that the defendant intended the threat to be taken as a threat. See *United States v. White*, 810 F.3d 212, 223 (4th Cir. 2016) ("In other words, the intent to carry out an unlawful act by use of a threat necessarily subsumes the intent to threaten."); accord *United States v. Killen*, 729 F. App'x 703, 711–12 (11th Cir. 2018) (discussing § 875(d) case). Fifth Circuit Court of Appeals Pattern Jury Instructions (2019), Pattern Instruction 2.39, Note.

18 U.S.C. § 875(c) TRANSMISSION OF A THREAT TO KIDNAP OR INJURE—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ____ of the indictment charge[s] the defendant[s] with] the defendant with transmitting a communication containing a threat to kidnap or injure. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly transmitted a communication; and

2. The communication contained a true threat to [kidnap] [injure] any person; and

3. The defendant transmitted the communication [for the purpose of making a threat] or [knowing the communication would be viewed as a threat]; and

4. The communication was transmitted in interstate [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 the third element, the language requiring the defendant to transmit the communication either for the purpose of making a threat or knowing that the communication would be viewed as a

threat is based on *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015) ("There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat."). The instruction reflects the purpose or knowledge mental state as the most common prosecution theory, but recklessness remains an open question. *Id.* at 2012 ("Neither Elonis nor the Government has briefed or argued that point [whether recklessness suffices], and we accordingly decline to address it.").

The language regarding "true threats" was approved post *Elonis* in *United States v. Khan*, 937 F.3d 1042, 1051 (7th Cir. 2019). Please see the Definition of True Threat and its Committee Comment later in these instructions.

18 U.S.C. § 875(d) TRANSMISSION OF AN EXTORTIONATE THREAT TO PROPERTY OR REPUTATION—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ____ of the indictment charge[s] the defendant[s] with] transmitting a communication containing a threat to reputation with intent to extort money or other thing of value. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly transmitted a communication; and

2. The communication contained a threat [to injure the [property; reputation] of the [addressee; another]] [injure the reputation of a deceased person] [to accuse [the addressee; any other person] of a crime];

3. The defendant transmitted the communication with the intent to extort [money] [thing of value]; and

4. The communication was transmitted in interstate [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 the third element, the mental state is described as intent to extort. It should be noted that, in a case addressing Section 875(c) (rather than Section 875(d)), the Supreme Court described the requisite mental state as requiring the defendant to transmit the communication either for the purpose of making a threat or knowing that the communication would be viewed as a threat is based on *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015) ("There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.").

Other circuit courts of appeal have held that the intent to extort by threat under § 875(b) (which similarly bars extortionate threats as § 875(d) does) incorporates the intent required by *Elonis*, that the defendant intended the threat to be taken as a threat. See *United States v. White*, 810 F.3d 212, 223 (4th Cir. 2016) ("In other words, the intent to carry out an unlawful act by use of a threat necessarily subsumes the intent to threaten."); accord *United States v. Killen*, 729 F. App'x 703, 711–12 (11th Cir. 2018) (discussing § 875(d) case). Fifth Circuit Court of Appeals Pattern Jury Instructions (2019), Pattern Instruction 2.39, Note.

18 U.S.C. § 876(a) MAILING A DEMAND FOR RANSOM OR REWARD—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] mailing a communication containing a demand or request for a ransom or reward for the release of a kidnapped person. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly [deposited] [caused to be delivered] through the United States mail, a communication;

2. The communication contained a [demand; request] for a [ransom; reward] for the release of any kidnapped person; and

3. the defendant transmitted the communication for the purpose of making a [demand; request] for a [ransom; reward] for the release of any kidnapped 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].

18 U.S.C. § 876(b) MAILING AN EXTORTIONATE THREAT TO KIDNAP OR INJURE—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ____ of the indictment charge[s] the defendant[s] with] mailing a communication containing a threat to kidnap or injure a person with the intent to extort money or other thing of value. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly [deposited] [caused to be delivered] through the United States mail, a communication;

2. The communication contained a threat to [kidnap any person] [injure [the person of the addressee; the person of another]]; and

3. the defendant transmitted the communication with the intent to extort [money] [other thing of value] from any 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

In the third element, the requisite mental state is described as intent to extort. It should be noted that, in a case addressing Section 875(c) (rather than Section 875(b)), the Supreme Court

described the requisite mental state as requiring the defendant to transmit the communication either for the purpose of making a threat or knowing that the communication would be viewed as a threat. *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015) ("There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.").

Other circuit courts of appeal have held that the intent to extort by threat under § 875(b) incorporates the intent required by *Elonis*, that the defendant intended the threat to be taken as a threat. See *United States v. White*, 810 F.3d 212, 223 (4th Cir. 2016) ("In other words, the intent to carry out an unlawful act by use of a threat necessarily subsumes the intent to threaten."); accord *United States v. Killen*, 729 F. App'x 703, 711–12 (11th Cir. 2018) (discussing § 875(d) case). Fifth Circuit Court of Appeals Pattern Jury Instructions (2019), Pattern Instruction 2.39, Note.

18 U.S.C. § 876(c) MAILING A THREAT TO KIDNAP OR INJURE—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ____ of the indictment charge[s] the defendant[s] with] mailing a communication containing a threat to kidnap or injure. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly [deposited; caused to be delivered] through the United States mail, a communication; and

2. The communication contained a true threat to [kidnap any person; injure the person of [the addressee; another]]; and

3. The defendant [deposited the communication; caused the communication to be delivered] *either* [for the purpose of making a threat; knowing the communication would be viewed as a threat].

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 the third element, the language requiring the defendant to transmit the communication either for the purpose of making a threat or knowing that the communication would be viewed as a

threat is based on *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015) ("There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat."). The instruction reflects the purpose or knowledge mental state as the most common prosecution theory, but recklessness remains an open question. *Id.* at 2012 ("Neither Elonis nor the Government has briefed or argued that point [whether recklessness suffices], and we accordingly decline to address it.").

The language regarding "true threats" was approved post *Elonis* in *United States v. Khan*, 937 F.3d 1042, 1051 (7th Cir. 2019). Please see the Definition of True Threat and its Committee Comment later in these instructions.

If the Government alleged that the communication was addressed to a United States judge, a Federal law enforcement officer, or an official who is covered by section 1114, that charging language should be specified in the instruction.

18 U.S.C. § 876(d) MAILING AN EXTORTIONATE THREAT TO REPUTATION—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ____ of the indictment charge[s] the defendant[s] with] mailing a communication containing a threat to reputation, with intent to extort money or other thing of value. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly [deposited; caused to be delivered] through the United States mail, a communication; and

2. The communication contained a threat [to injure the [property; reputation of the [addressee; another]] [injure the reputation of a deceased person] [to accuse [the addressee; any other person] of a crime]];

3. The defendant transmitted the communication for the purpose of extorting [money; a thing of value] from any 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

In the third element, the mental state is described as intent to

extort. It should be noted that, in a case addressing Section 875(c) (rather than Section 875(d)), the Supreme Court described the requisite mental state as requiring the defendant to transmit the communication either for the purpose of making a threat or knowing that the communication would be viewed as a threat is based on *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015) ("There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.").

Other circuit courts of appeal have held that the intent to extort by threat under § 875(b) (which similarly bars extortionate threats as § 875(d) does) incorporates the intent required by *Elonis*, that the defendant intended the threat to be taken as a threat. See *United States v. White*, 810 F.3d 212, 223 (4th Cir. 2016) ("In other words, the intent to carry out an unlawful act by use of a threat necessarily subsumes the intent to threaten."); accord *United States v. Killen*, 729 F. App'x 703, 711–12 (11th Cir. 2018) (discussing § 875(d) case). Fifth Circuit Court of Appeals Pattern Jury Instructions (2019), Pattern Instruction 2.39, Note.

If the Government alleged that the communication was addressed to a United States judge, a Federal law enforcement officer, or an official who is covered by section 1114, that charging language must be specified in the instruction.

DEFINITION OF "TRUE THREAT"

A "true threat" is a serious expression of intent to commit unlawful physical violence against another person or a group of people. The communication must be one that a reasonable observer, considering the context and circumstances of the statement, including surrounding communications, would interpret as a true threat.

The government does not have to prove that the defendant actually intended to carry out the threat, or even that the defendant had the capacity to do so. At the same time lack of intent or lack of capacity to carry out the threat can be relevant circumstances in deciding whether a communication is a true threat.

A threat does not need to be communicated directly to its intended victim, or specify a particular victim, or specify when it will be carried out.

A communication is not a true threat if it is merely idle or careless talk, exaggeration, or something said in a joking manner.

[A threat may be conditional, that is, may threaten violence if some condition is not fulfilled. The fact that a communication is conditional, however, can be relevant in deciding whether a communication is a true threat.]

Committee Comment

The definition of true threat is based on *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015) ("There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.").

The language regarding "true threats" was approved post *Elonis* in *United States v. Khan*, 937 F.3d 1042, 1051 (7th Cir.

2019). In *Khan,* the Court, reviewed instructions given when the defendant was charged under 18 U.S.C. 875(c). It held that a "true threat" is "a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *United States v. Parr*, 545 F.3d 491, 497 (7th Cir. 2008) (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)). And "[a]true threat does not require that the speaker intend to carry it out, or even that she have the capacity to do so." *United States v. Dutcher*, 851 F.3d 757, 761 (7th Cir. 2017) (citations omitted); *Khan*, 937 F.3d at 1051.

The instruction on idle or careless talk, exaggeration, or joking is based on *Khan*, 937 F.3d at 1051 ("A communication is not a true threat if it is merely idle or careless talk, exaggeration, or something said in a joking manner.").

The bracketed instruction on conditional threats is based on *United States v. Schneider*, 910 F.2d 1569, 1570 (7th Cir. 1990). *Schneider* explained that many threats are conditional (because the speaker is trying to get the victim to do something or to stop doing something), as in "Your money or your life." *Id.*

DEFINITION OF "INTENT TO EXTORT"

A person acts with an "intent to extort" when he acts with the purpose of obtaining money or something of value from someone who consents because of fear or the wrongful use of actual or threatened force or violence.

18 U.S.C. § 892 EXTORTIONATE EXTENSION OF CREDIT—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] making an extortionate extension of credit. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. The defendant knowingly made an extension of credit to a person, including the [making; extending] of a loan or other thing of value for which repayment is expected[, or the deferring of repayment of a debt][, whether valid or invalid][, whether disputed or acknowledged]; and

2. The defendant and the debtor understood, at the time the extension of credit was made, that delay in making repayment or failure to make repayment could result in the use of violence [or other criminal means] to cause harm to the [person; reputation; property] of anyone.

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

See *United States v. Scotti*, 47 F.3d 1237, 1245 (2d Cir. 1995); *United States v. Natale*, 526 F.2d 1160, 1168 (2d Cir. 1975).

The statute contains a list of possible factors to consider in

determining whether an extension of credit was extortionate (*e.g.* legal enforceability, interest rate); the court should point out any that may be applicable in individual cases.

18 U.S.C. § 892 DEFINITION OF "DEBTOR"

A "debtor" is [a person to whom an extension of credit was made; a person who guarantees repayment or otherwise agrees or attempts to cover any loss to the defendant because of a failure to repay the extension of credit].

18 U.S.C. § 892 DEFINITION OF UNDERSTANDING

The government is not required to prove that, when the extension of credit was made, the defendant and debtor mutually agreed that delay in making repayment or failure to make repayment could result in the use of violence [or other criminal means] to cause harm to the [person; reputation; property] of anyone. The government is required to prove that both the defendant and debtor understood that a threat of violence existed.

Committee Comment

See *United States v. Zizzo*, 120 F.3d 1338, 1353–54 (7th Cir. 1997).

18 U.S.C. § 894 EXTORTIONATE COLLECTION OF DEBT—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] collection of an extension of credit by extortionate means. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

[1. There was a[n] [attempt to collect; collection of] an extension of credit, including [inducing; attempting to induce] in any way the repayment by anyone of a loan or other thing of value for which repayment was expected[, or the deferring of repayment of a debt][, whether valid or invalid][, whether disputed or acknowledged]; and]

OR

[1. A person was punished for the non-repayment of an extension of credit, including a loan or other thing of value for which repayment was expected,[or the deferring of repayment of a debt][, whether valid or invalid][, whether disputed or acknowledged]; and]

2. The [attempt to collect; collection; punishment] involved the use of extortionate means, that is, the[, or [express or implied] threat of the use] of violence [or other criminal means] to cause harm to the [person; reputation; property] of anyone; and

3. The defendant knowingly participated in some way in the use of such extortionate means in that [attempted; collection; punishment].

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

See *United States v. Khilchenko*, 324 F.3d 917, 919–20 (7th Cir. 2003); *United States v. Toulomis*, 771 F.2d 235 (7th Cir. 1985).

18 U.S.C. § 894 DEFINITION OF "EXTORTIONATE MEANS"

A defendant knowingly participates in use of "extortionate means" when he intends by his conduct to instill fear of harm in the debtor. Acts or statements are a threat if they would reasonably induce fear of harm in an ordinary person. A simple demand for money is not a threat. The government is not required to prove that the recipient of a threat actually feared its consequences.

Committee Comment

Although there is no Seventh Circuit case on point, other Circuits have held that the production of actual fear in the recipient is not an element of the offense. See, *e.g.*, *United States v. DiSalvo*, 34 F.3d 1204, 1211 (3d Cir. 1994); *United States v. Polizzi*, 801 F.2d 1543, 1547–48 (9th Cir. 1986); *United States v. Joseph*, 781 F.2d 549, 553 (6th Cir. 1986); *United States v. Natale*, 526 F.2d 1160, 1168 (2d Cir. 1975). This is unlike cases involving charges under 18 U.S.C. § 892 in which the borrower's state of mind is an element. *United States v. Lombardozzi*, 491 F.3d 61, 68–69 (2d Cir. 2007). In a § 894 prosecution, the government must prove that the defendant intended to take actions that would reasonably induce fear in an ordinary person. *Natale*, 526 F.2d at 1168. It is the nature of the actions of the person seeking to collect the indebtedness, not the debtor's mental state, that is the focus of the jury's inquiry. *Polizzi*, 801 F.2d at 1548. When the indictment contains both §§ 892 and 894 offenses, a specific instruction on the distinction in the role of the debtor's mental state may be appropriate.

FORFEITURE—THIRD PARTY INTERESTS

You are to determine only if a defendant's rights, title and interests, if any, in the specified property should be forfeited. You are not called upon to determine whether or not any other person has any right, title or interest in this money or property, or whether or not their interest should be forfeited. This is a matter to be determined by the court in further proceedings, if necessary. You need only determine whether or not the government has proved by a preponderance of the evidence that the defendant's interest in this property, if any, is forfeitable.

18 U.S.C. § 911 REPRESENTATION OF CITIZENSHIP OF UNITED STATES—ELEMENTS

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

1. The defendant claimed to be a citizen of the United States; and

2. The defendant was not a citizen of the United States; and

3. The defendant made the false representation; and

4. The defendant [acted willfully, that is, he] deliberately and voluntarily made the representation.

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 plain language of 18 U.S.C. § 911 does not include a materiality element; nor, does the statute require that the representation be made to a designated category of persons, *i.e.* a government official. Though the Seventh Circuit has not addressed these issues, other circuits have incorporated such requirements into the elements of the offense. In the Ninth Circuit, the govern-

ment must prove three (3) elements under § 911: (1) defendant made a false claim of United States citizenship; (2) the misrepresentation was willful (*i.e.* voluntary and deliberate); and, (3) the representation was conveyed to someone with good reason to inquire into the defendant's citizenship status. *United States v. Karaouni*, 379 F.3d 1139, 1142 (9th Cir. 2004). In addition, some circuits require the "representation of citizenship be made to a person having some right to inquire or adequate reason for ascertaining a defendant's citizenship; it is not to be assumed that so severe a penalty is intended for words spoken as a mere boast or jest or to stop the prying of some busybody." *United States v. Esparza-Ponce*, 193 F.3d 1133, 1138 (9th Cir. 1999); *United States v. Achtner*, 144 F.2d 49, 52 (2d Cir. 1944).

Several circuits have held that a statement from which United States citizenship could be inferred is insufficient evidence to support a conviction under § 911. Defendant's statement to an FBI agent that he was born in New York City, as well as noting that on an employment application, is not enough evidence to support violation § 911. *United States v. Franklin*, 188 F.2d 182, 187–88 (7th Cir. 1951). Yet, answering "I am" to the question "are you a citizen of the United States" by an FBI agent and answering "yes" to employment application question "Citizen of U.S.?" does violate the statute. *Id.*; see also *Smiley v. United States*, 181 F.2d 505, 506–07 (9th Cir. 1950) (§ 911 requires a direct representation of United States citizenship); *United States v. Karaouni*, 379 F.3d 1139, 1144–45 (9th Cir. 2004) (merely checking a box on INS I-9 Employment Eligibility Verification Form next to printed statement: "I attest, under penalty of perjury, that I am . . . [a] citizen or national of the United States" is not a claim of being a United States citizen under § 911); *United States v. Anzalone*, 197 F.2d 714, 715 & 718 (3d Cir. 1952) (signing a Pennsylvania voter certificate that states "I am qualified to vote in this General Election" does not violate § 911).

Willfulness is defined within the instruction. "Willfully" as used in the statute means "that the misrepresentation was deliberate and voluntary." See *Chow Bing Kew v. United States*, 248 F.2d 466, 469 (9th Cir. 1957). See also *Hernandez-Robledo v. INS*, 777 F.2d 536, 539 (9th Cir. 1985) (determining that willfully, as used in 8 U.S.C. § 1182(a)(19), false representation of citizenship, requires proof that the misrepresentation was deliberate and voluntary); *Espinoza-Espinoza v. INS*, 554 F.2d 921, 925 (9th Cir. 1977) (finding that willfully, as used in 8 U.S.C. § 1182(a)(19), requires proof that "the misrepresentation was voluntarily and deliberately made") (quoting *Chow Bing Kew*, 248 F.2d at 469); *Anderson v. Cornejo*, 284 F. Supp. 2d 1008, 1035 (N.D. Ill. 2003) (willful and wanton conduct described as "a course of action which shows an actual or deliberate intention to cause harm or which, if

not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property").

18 U.S.C. § 912 IMPERSONATION OF AN OFFICER OR EMPLOYEE OF THE UNITED STATES

[The indictment charges the defendant[s] with; Count[s]—of the indictment charge[s] the defendant[s] with] falsely assuming or pretending to be a United States officer or employee. In order for you to find [the; a] defendant guilty of this charge, the government must prove [all of] the following elements beyond a reasonable doubt:

1. The defendant falsely impersonated or pretended to be an [officer or employee] acting under the authority of [the United States, or [name of department, agency or officer thereof]]; and

2. The defendant did so knowing that he was not actually an [officer or employee] acting under the authority of [the United States, or [name of department, agency or officer thereof]]; and

3. While doing so, the defendant committed an act, with the intent to cause [the victim] [to do something [he; she] otherwise would not have done; not to do something [he; she] otherwise would have done].

[OR]

[3. While doing so, the defendant [demanded; obtained] [money; a paper; a document; a thing of value].]

If you find from your consideration of all the evidence that the government has proved all 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 instruction regarding the first element may be modified to include the specific agency, department, or officer under which authority the defendant claimed to be acting.

As to the second element, the Seventh Circuit has read into § 912 a scienter requirement that the defendant's falsehoods as to being an officer or employee of the United States be made with "knowledge." *United States v. Wade*, 962 F.3d 1004, 1011 (7th Cir. 2020); *United States v. Bonin*, 932 F.3d 523, 538–39 (7th Cir. 2019), *cert. denied*, 140 S. Ct. 960 (2020). For a definition of "knowingly," *see* Pattern Instruction 4.10.

As to the third element, § 912 creates two separate offenses: "1) the false impersonation of a federal official coupled with an overt act in conformity with the pretense (offense 1); and, 2) the false impersonation of a federal official coupled with the demanding or obtaining of an item of value (offense 2)." *United States v. Kimberlin*, 781 F.2d 1247, 1250 (7th Cir. 1985) (concluding nonetheless that charging both in the same count was duplicitous, but harmless error in that case); see also *United States v. Rippee*, 961 F.2d 677, 678 (7th Cir. 1992). If the defendant is charged with "offense 2," the above bracketed option should be substituted for the third element.

For "offense 1," the Seventh Circuit has concluded that, while it is not essential to have a separate element as to an intent to deceive or defraud, it would be helpful to the jury for the instruction to require intentional action sought to cause the deceived person to follow some course they would not have otherwise, so as to not unconstitutionally abridge protected speech. *Wade*, 962 F.3d at 1009-11, citing *Bonin*, 932 F.3d at 536. This concept has been incorporated into this instruction. Cf. *id.* at 539 (an element telling jurors that the defendant's acts must actually *have caused* someone to change their behavior is not required by the statute).

The Seventh Circuit has rejected challenges to the constitutionality of § 912's "acts-as-such clause" ("offense 1"), and opined that an instruction regarding the First Amendment "on a constitutionally valid statute risk[ed] confusion" and was unnecessary. *Id.* at

533–37, 540.

18 U.S.C. § 922 DEFINITION OF "AMMUNITION"

"Ammunition" means ammunition or cartridge cases, primers, or propellant powder designed for use in any firearm.

18 U.S.C. § 922(a)(6) MAKING A FALSE STATEMENT OR FURNISHING FALSE IDENTIFICATION TO A LICENSED FIREARMS IMPORTER, MANUFACTURER, DEALER, OR COLLECTOR IN CONNECTION WITH THE ACQUISITION OF A FIREARM OR AMMUNITION—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [making a false statement; furnishing or exhibiting false or misrepresented identification] to a licensed firearms [dealer; importer; manufacturer; collector] in connection with the acquisition or attempted acquisition of a [firearm; ammunition]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant [made a false statement; furnished or exhibited false or misrepresented identification] in connection with the [acquisition; attempted acquisition] of [a firearm; ammunition] from a licensed firearms [dealer; importer; manufacturer; collector]; and

2. The defendant did so knowingly; and

3. The [statement; identification] was intended to or likely to deceive the [dealer; importer; manufacturer; collector] with respect to any fact material to the lawfulness of the sale or other disposition of the [firearm; ammunition].

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 a definition of "knowingly" see Pattern Instruction 4.10.

For a definition of "materiality" see Pattern Instruction regarding that term as used in connection with 18 U.S.C. § 500.

18 U.S.C. § 922(d) SALE OR TRANSFER OF A FIREARM OR AMMUNITION TO A PROHIBITED PERSON—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] selling or otherwise transferring [a firearm; ammunition] to a [Prohibited Person]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant [sold; otherwise transferred] [a firearm; ammunition]; and

2. The individual to whom the [firearm; ammunition] was [sold; transferred] was a [Prohibited Person]; and

3. The defendant knew or had reasonable cause to believe that the individual was a [Prohibited 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

The term " 'Prohibited Person' denotes any person prohibited from possessing a firearm under 18 U.S.C. §§ 922[(d) or] (g)." *United States v. Grap*, 403 F.3d 439, 446 (7th Cir. 2005); see also *United States v. Jefferson*, 334 F.3d 670, 675 (7th Cir. 2003); U.S.S.G. § 2K2.1, comment. (n.3). The term is merely used as a placeholder

in this instruction, and a specified class of persons prohibited under § 922(d) should be substituted as applicable. The term "Prohibited Person" includes, but is not limited to: a person under "indictment," as defined by 18 U.S.C. § 921(a)(14); a "fugitive from justice," as defined by § 921(a)(15); an unlawful user of any controlled substance as defined by 21 U.S.C. § 802 and any person addicted to any such controlled substance; as well as any person who has been convicted in any court of a "crime punishable by imprisonment for a term exceeding one year," as defined by § 921(a)(20).

A person who has been convicted in any court of a "misdemeanor crime of domestic violence" is a "Prohibited Person" under the statute. See 18 U.S.C. § 922(d)(9). The term "misdemeanor crime of domestic violence" is defined by 18 U.S.C. § 921(a)(33)(A). However, to convict under § 922(g)(9), does not require proof that a domestic relationship was an element of the underlying misdemeanor offense. See *United States v. Hayes*, 555 U.S. 415, 426 (2009).

For a definition of "knowingly" see Pattern Instruction 4.10.

Instead of the term "transfer" the statute uses the phrase "dispose of." But "dispose of" means "to transfer a firearm so that the recipient acquires possession of the firearm." See *Jefferson*, 334 F.3d at 675. The transfer can be gratuitous, temporary, or both. *Id*. The Committee has used the term "transfer" in place of "dispose of" for ease of understanding by the jury.

18 U.S.C. § 922(d) DEFINITION OF "REASONABLE CAUSE TO BELIEVE"

A person has "reasonable cause to believe" that [name] was a [Prohibited Person] if he knows facts that would cause a reasonable person, knowing the same things, to conclude that [name] was a [Prohibited Person].

Committee Comment

This definition of "reasonable cause to believe" is taken from Eleventh Circuit Pattern Federal Criminal Jury Instructions No. 34.5, as considered in *United States v. Haskins*, 511 F.3d 688, 693 (7th Cir. 2007). While the district court in that case ultimately did not issue such an instruction, the instruction should serve as a strong model for defining this term.

The term "Prohibited Person" is used in this definition in the same way that it is used in the elements instruction for 18 U.S.C. § 922 (d) (*i.e.* as a placeholder) and the Committee Comment associated with that instruction also applies to the use of that term in this definition.

18 U.S.C. § 922(g) DEFINITIONS OF "IN OR AFFECTING COMMERCE" AND "IN INTERSTATE OR FOREIGN COMMERCE"

"In or affecting commerce" and "interstate or foreign commerce" include commerce between any place in a State and any place outside of that State. The terms do not include commerce between places within the same State but through any place outside of that State.

This requirement is satisfied if the firearm traveled in interstate or foreign commerce prior to the defendant's possession of it. A firearm has traveled in interstate or foreign commerce if it has traveled between one state and any other state or country, or across a state or national boundary line. [The government need not prove [how the firearm traveled in interstate commerce; that the firearm's travel was related to the defendant's possession of it; that the defendant knew the firearm had traveled in interstate commerce].]

Committee Comment

This instruction is based in part on 18 U.S.C. § 921(a)(2) which defines "interstate or foreign commerce." The terms "in or affecting commerce" and "in interstate or foreign commerce" are synonymous. *Scarborough v. United States*, 431 U.S. 563, 577 (1977) (interpreting "in or affecting commerce" in § 922(g)'s forerunner, 18 U.S.C. § 1202(a)); *United States v. Lowe*, 860 F.2d 1370, 1374 (7th Cir. 1988) (rejecting contention that "commerce" is separate and distinct from "interstate commerce"). "Movement in interstate commerce is all the Supreme Court requires under the statute." *United States v. Jackson*, 479 F.3d 485, 492 (7th Cir. 2007) (citing *Scarborough*, 431 U.S. at 577; *United States v. Williams*, 410 F.3d 397, 400 (7th Cir. 2005)).

Several cases have discussed the meaning of "in interstate or foreign commerce" in the context of 18 U.S.C. § 922(g). See, *e.g., United States v. Rice*, 520 F.3d 811, 815–17 (7th Cir. 2008) (concluding that the defendant's possession of firearms manufactured outside of the state, in some instances years after the firearms had entered the state, satisfied § 922(g)(1)'s interstate commerce requirement); *United States v. Jackson*, 479 F.3d 485, 492

(7th Cir. 2007) (stating that § 922(g)(1)'s interstate commerce requirement was satisfied where gun was manufactured outside the United States, entered the United States in one state, and then traveled to another state); *United States v. Lewis*, 100 F.3d 49, 52 (7th Cir. 1996) ("A single journey across state lines, however remote from the defendant's possession, is enough to establish . . . a connection to interstate commerce").

18 U.S.C. § 922(g) DEFINITION OF "POSSESSION"

Committee Comment

For a definition of "possession" see Pattern Instruction 4.13.

18 U.S.C. § 922(g)(1) UNLAWFUL SHIPMENT OR TRANSPORTATION OF A FIREARM OR AMMUNITION BY A CONVICTED FELON—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] unlawful [shipment; transportation] of [a firearm; ammunition] by a person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. The defendant knowingly [shipped; transported] [a firearm; ammunition] in interstate or foreign commerce;

2. At the time of the charged act, the defendant had previously been convicted in a court of a crime punishable by imprisonment for a term exceeding one year; and

3. At the time of the [shipment; transport], the defendant knew that he had been convicted of a crime punishable by imprisonment for a term exceeding one year.

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 a definition of "knowingly" see Pattern Instruction 4.10.

This instruction applies to a § 922(g)(1) offense. Instructions are also provided for §§ (g)(3)(unlawful user or addict of a controlled substance) and (g)(5)(alien illegally or unlawfully in the United States). If the defendant is charged under another subsection of § 922(g), the second and third elements should be modified accordingly.

In *Rehaif v. United States*, 139 S.Ct. 2191 (2019), the Supreme Court held that the government must prove that a defendant knew he or she possessed the firearm and knew that he or she belonged to the relevant category of persons barred from possessing a firearm. This knowledge requirement applies to a prosecution under any subsection of § 922(g). See *United States v. Triggs*, 963 F.3d 710 (7th Cir. 2020) (government required to prove defendant knew he had been convicted of a misdemeanor crime of domestic violence); *United States v. Cook*, 970 F.3d 866, 880–81 (7th Cir. 2020) (government required to prove defendant knew he was an unlawful user of marijuana). The government need not show that the defendant knew his status prohibited him from possessing a firearm, simply that he knew he held the status. *United States v. Maez*, 960 F.3d 949, 954–55 (7th Cir. 2020).

18 U.S.C. § 922(g)(1) UNLAWFUL POSSESSION OR RECEIPT OF A FIREARM OR AMMUNITION BY A PROHIBITED PERSON—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] unlawful [possession; receipt] of [a firearm; ammunition] by a person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. The defendant knowingly [possessed; received] [a firearm; ammunition];

2. At the time of the charged act, the defendant had previously been convicted in a court of a crime punishable by imprisonment for a term exceeding one year;

3. At the time of the [possession; receipt], the defendant knew that he had been convicted of a crime punishable by imprisonment for a term exceeding one year; and

4. [[The [firearm; ammunition] had been shipped or transported in interstate or foreign commerce before the defendant received it.]; [The defendant's possession of the [firearm; ammunition] was in or affected 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

For a definition of "knowingly" see Pattern Instruction 4.10.

This instruction applies to a § 922(g)(1) offense. Instructions are also provided for §§ (g)(3) (unlawful user or addict of a controlled substance) and (g)(5) (alien illegally or unlawfully in the United States). If the defendant is charged under another subsection of § 922(g), the second and third elements should be modified accordingly.

In *Rehaif v. United States*, 139 S.Ct. 2191 (2019), the Supreme Court held that the government must prove that a defendant knew he or she possessed the firearm and knew that he or she belonged to the relevant category of persons barred from possessing a firearm. This knowledge requirement applies to a prosecution under any subsection of § 922(g). See *United States v. Triggs*, 963 F.3d 710 (7th Cir. 2020) (government required to prove defendant knew he had been convicted of a misdemeanor crime of domestic violence); *United States v. Cook*, 970 F.3d 866, 880–81 (7th Cir. 2020) (government required to prove defendant knew he was an unlawful user of marijuana). The government need not show that the defendant knew his status prohibited him from possessing a firearm, simply that he knew he held the status. *United States v. Maez*, 960 F.3d 949, 954–55 (7th Cir. 2020).

18 U.S.C. § 922(g)(3) DEFINITION OF "UNLAWFUL USER"

The term "unlawful user of a controlled substance" contemplates the regular and repeated use of a controlled substance in a manner other than as prescribed by a licensed physician. The one time or infrequent use of a controlled substance is not sufficient to establish the defendant as an "unlawful user." Rather, the defendant must have been engaged in use that was sufficiently consistent and prolonged as to constitute a pattern of regular and repeated use of a controlled substance. The government need not show that defendant used a controlled substance at the precise time he [shipped; transported; possessed] a firearm. It must, however, establish that he was engaged in a pattern of regular and repeated use of a controlled substance during a period that reasonably covers the time a firearm was [shipped; transported; possessed].

Committee Comment

The definition of "unlawful user" is taken from Sixth Circuit Pattern Criminal Jury Instructions 12.01, cited in *United States v. Cook*, 970 F.3d 866, 880 (7th Cir. 2020). "Past, regular use would not qualify as ongoing use if it has come to a definitive end before one possesses a gun, for example, and likewise current but isolated use (perhaps only when offered at the occasional social gathering) likewise would not count as regular use." *Id*. at 884. Use must be regular or habitual and contemporaneous with the prohibited act. *Id*. at 879.

18 U.S.C. § 922(g)(3) UNLAWFUL SHIPMENT OR TRANSPORTATION OF A FIREARM OR AMMUNITION BY AN UNLAWFUL USER OR ADDICT OF A CONTROLLED SUBSTANCE—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ____ of the indictment charge[s] the defendant[s] with] unlawful [shipment; transportation] of [a firearm; ammunition] by a person who is an unlawful user of or addicted to a controlled substance. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. The defendant knowingly [shipped; transported] [a firearm; ammunition] in interstate or foreign commerce;

2. At the time of the charged act, the defendant was [an unlawful user of; addicted to] a controlled substance; and

3. At the time of the [shipment; transport], the defendant knew that he was [an unlawful user of; addicted to] a controlled substance.

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 a definition of "knowingly" see Pattern Instruction 4.10.

This instruction applies to a § 922(g)(3) offense. Instructions are also provided for §§ (g)(1)(convicted felon) and (g)(5)(alien illegally or unlawfully in the United States). If the defendant is charged under another subsection of § 922(g), the second and third elements should be modified accordingly.

In *Rehaif v. United States*, 139 S.Ct. 2191 (2019), the Supreme Court held that the government must prove that a defendant knew he or she possessed the firearm and knew that he or she belonged to the relevant category of persons barred from possessing a firearm. This knowledge requirement applies to a prosecution under any subsection of § 922(g). See *United States v. Triggs*, 963 F.3d 710 (7th Cir. 2020) (government required to prove defendant knew he had been convicted of a misdemeanor crime of domestic violence); *United States v. Cook*, 970 F.3d 866, 880-81 (7th Cir. 2020) (government required to prove defendant knew he was an unlawful user of marijuana). The government need not show that the defendant knew his status prohibited him from possessing a firearm, simply that he knew he held the status. *United States v. Maez*, 960 F.3d 949, 954-55 (7th Cir. 2020). However, the defendant must know both that he was using a controlled substance and that his use was "unlawful," inquiries which may be "tricky" or "nuanced." *United States v. Cook*, 970 F.3d 866, 882-83 (7th Cir. 2020). "That [the defendant] *ought* to have known his use was unlawful would not suffice to convict him; he had to *actually know* his use was unlawful. *Id*. at 884 (emphasis in original).

In order to convict, the shipment or transportation of the firearm (or ammunition) must be contemporaneous with an ongoing pattern of drug use. *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010).

18 U.S.C. § 922(g)(3) UNLAWFUL POSSESSION OR RECEIPT OF A FIREARM OR AMMUNITION BY AN UNLAWFUL USER OR ADDICT OF A CONTROLLED SUBSTANCE—ELEMENTS

[The indictment charges the defendant[s] with; Count[s]—of the indictment charge[s] the defendant[s] with] unlawful [possession; receipt] of [a firearm; ammunition] by a person who is an unlawful user of or addicted to a controlled substance. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. The defendant knowingly [possessed; received] [a firearm; ammunition];

2. At the time of the charged act, the defendant was [an unlawful user of; addicted to] a controlled substance;

3. At the time of the [possession; receipt], the defendant knew that he was [an unlawful user of; addicted to] a controlled substance; and

4. [[The [firearm; ammunition] had been shipped or transported in interstate or foreign commerce before the defendant received it.]; [The defendant's possession of the [firearm; ammunition] was in or affected 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

For a definition of "knowingly" see Pattern Instruction 4.10.

For a definition of "unlawful user" see the pattern instruction regarding that term as used in the unlawful shipment or transportation instruction, 18 U.S.C. § 922(g)(3).

This instruction applies to a § 922(g)(3) offense. Instructions are also provided for §§ (g)(1)(convicted felon) and (g)(5)(alien illegally or unlawfully in the United States). If the defendant is charged under another subsection of § 922(g), the second and third elements should be modified accordingly.

In *Rehaif v. United States*, 139 S.Ct. 2191 (2019), the Supreme Court held that the government must prove that a defendant knew he or she possessed the firearm and knew that he or she belonged to the relevant category of persons barred from possessing a firearm. This knowledge requirement applies to a prosecution under any subsection of § 922(g). See *United States v. Triggs*, 963 F.3d 710 (7th Cir. 2020) (government required to prove defendant knew he had been convicted of a misdemeanor crime of domestic violence); *United States v. Cook*, 970 F.3d 866, 880-81 (7th Cir. 2020) (government required to prove defendant knew he was an unlawful user of marijuana). The government need not show that the defendant knew his status prohibited him from possessing a firearm, simply that he knew he held the status. *United States v. Maez*, 960 F.3d 949, 954-55 (7th Cir. 2020). However, the defendant must know both that he was using a controlled substance and that his use was "unlawful," inquiries which may be "tricky" or "nuanced." *United States v. Cook*, 970 F.3d 866, 882-83 (7th Cir. 2020). "That [the defendant] *ought* to have known his use was unlawful would not suffice to convict him; he had to *actually know* his use was unlawful. *Id*. at 884 (emphasis in original).

In order to convict, the possession of the firearm (or ammunition) must be contemporaneous with an ongoing pattern of drug use. *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010).

18 U.S.C. § 922(g)(5) DEFINITION OF "ALIEN ILLEGALLY OR UNLAWFULLY IN THE UNITED STATES"

An alien is any person not a citizen or national of the United States. Aliens who are unlawfully in the United States are not in valid immigrant, nonimmigrant, or parole status. This term includes a person who unlawfully entered the United States without inspection and authorization by immigration; who is not an immigrant and whose authorized period of stay has expired or who has violated the terms of admission; who is under an order of deportation, exclusion or removal, or who is under an order to depart the United States voluntarily.

Committee Comment

Alien is defined at 27 CFR § 478.11.

18 U.S.C. § 922(g)(5) UNLAWFUL POSSESSION OR RECEIPT OF A FIREARM OR AMMUNITION BY AN ALIEN ILLEGALLY OR UNLAWFULLY IN THE UNITED STATES—ELEMENTS

[The indictment charges the defendant[s] with; Count[s]—of the indictment charge[s] the defendant[s] with] unlawful [possession; receipt] of [a firearm; ammunition] by an alien illegally or unlawfully in the United States. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. The defendant knowingly [possessed; received] [a firearm; ammunition];

2. At the time of the charged act, the defendant was an alien illegally or unlawfully in the United States;

3. At the time of the [possession; receipt], the defendant knew he was an alien illegally or unlawfully in the United States; and

4. [[The [firearm; ammunition] had been shipped or transported in interstate or foreign commerce before the defendant received it.]; [The defendant's possession of the [firearm; ammunition] was in or affected 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

For a definition of "knowingly" see Pattern Instruction 4.10.

For a definition of "alien illegally or unlawfully in the United States" see the pattern instruction regarding that term as used in the unlawful shipment or transportation instruction, 18 U.S.C. § 922(g)(5).

This instruction applies to a § 922(g)(5) offense. Instructions are also provided for §§ (g)(1)(convicted felon) and (g)(3)(unlawful user or addict of a controlled substance). If the defendant is charged under another subsection of § 922(g), the second and third elements should be modified accordingly.

In *Rehaif v. United States*, 139 S.Ct. 2191 (2019), the Supreme Court held that the government must prove that a defendant knew he or she possessed the firearm and knew that he or she belonged to the relevant category of persons barred from possessing a firearm. This knowledge requirement applies to a prosecution under any subsection of § 922(g). See *United States v. Triggs*, 963 F.3d 710 (7th Cir. 2020) (government required to prove defendant knew he had been convicted of a misdemeanor crime of domestic violence); *United States v. Cook*, 970 F.3d 866, 880-81 (7th Cir. 2020) (government required to prove defendant knew he was an unlawful user of marijuana). The government need not show that the defendant knew his status prohibited him from possessing a firearm, simply that he knew he held the status. *United States v. Maez*, 960 F.3d 949, 954-55 (7th Cir. 2020).

18 U.S.C. § 922(g)(5) UNLAWFUL SHIPMENT OR TRANSPORTATION OF A FIREARM OR AMMUNITION BY AN ALIEN ILLEGALLY OR UNLAWFULLY IN THE UNITED STATES—ELEMENTS

[The indictment charges the defendant[s] with; Count[s]—of the indictment charge[s] the defendant[s] with] unlawful [shipment; transportation] of [a firearm; ammunition] by an alien illegally or unlawfully in the United States. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. The defendant knowingly [shipped; transported] [a firearm; ammunition] in interstate or foreign commerce;

2. At the time of the charged act, the defendant was an alien illegally or unlawfully in the United States; and

3. At the time of the [shipment; transport], the defendant knew he was an alien illegally or unlawfully in the United States.

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 a definition of "knowingly" see Pattern Instruction 4.10.

This instruction applies to a § 922(g)(5) offense. Instructions are also provided for §§ (g)(1)(convicted felon) and (g)(3)(unlawful user or addict of a controlled substance). If the defendant is charged under another subsection of § 922(g), the second and third elements should be modified accordingly.

In *Rehaif v. United States*, 139 S.Ct. 2191 (2019), the Supreme Court held that the government must prove that a defendant knew he or she possessed the firearm and knew that he or she belonged to the relevant category of persons barred from possessing a firearm. This knowledge requirement applies to a prosecution under any subsection of § 922(g). See *United States v. Triggs*, 963 F.3d 710 (7th Cir. 2020) (government required to prove defendant knew he had been convicted of a misdemeanor crime of domestic violence); *United States v. Cook*, 970 F.3d 866, 880-81 (7th Cir. 2020) (government required to prove defendant knew he was an unlawful user of marijuana). The government need not show that the defendant knew his status prohibited him from possessing a firearm, simply that he knew he held the status. *United States v. Maez*, 960 F.3d 949, 954-55 (7th Cir. 2020).

DEFINITION OF "TRUE THREAT"

A "true threat" is a serious expression of intent to commit unlawful physical violence against another person or a group of people. The communication must be one that a reasonable observer, considering the context and circumstances of the statement, including surrounding communications, would interpret as a true threat.

The government does not have to prove that the defendant actually intended to carry out the threat, or even that the defendant had the capacity to do so. At the same time lack of intent or lack of capacity to carry out the threat can be relevant circumstances in deciding whether a communication is a true threat.

A threat does not need to be communicated directly to its intended victim, or specify a particular victim, or specify when it will be carried out.

A communication is not a true threat if it is merely idle or careless talk, exaggeration, or something said in a joking manner.

[A threat may be conditional, that is, may threaten violence if some condition is not fulfilled. The fact that a communication is conditional, however, can be relevant in deciding whether a communication is a true threat.]

Committee Comment

The definition of true threat is based on *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015) ("There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.").

The language regarding "true threats" was approved post *Elonis* in *United States v. Khan*, 937 F.3d 1042, 1051 (7th Cir.

2019). In *Khan,* the Court, reviewed instructions given when the defendant was charged under 18 U.S.C. § 875(c). It held that a "true threat" is "a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *United States v. Parr*, 545 F.3d 491, 497 (7th Cir. 2008) (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)). And "[a]true threat does not require that the speaker intend to carry it out, or even that she have the capacity to do so." *United States v. Dutcher*, 851 F.3d 757, 761 (7th Cir. 2017) (citations omitted); *Khan*, 937 F.3d at 1051.

The instruction on idle or carless talk, exaggeration, or joking is based on *Khan*, 937 F.3d at 1051 ("A communication is not a true threat if it is merely idle or careless talk, exaggeration, or something said in a joking manner.").

The bracketed instruction on conditional threats is based on *United States v. Schneider*, 910 F.2d 1569, 1570 (7th Cir. 1990). *Schneider* explained that many threats are conditional (because the speaker is trying to get the victim to do something or to stop doing something), as in "Your money or your life." *Id.*

DEFINITION OF "INTENT TO EXTORT"

A person acts with an "intent to extort" when he acts with the purpose of obtaining money or something of value from someone who consents because of fear or the wrongful use of actual or threatened force or violence.

18 U.S.C. §§ 922 & 924 DEFINITION OF "FIREARM"

"Firearm" means [any weapon [including a starter gun] which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device]. [The term does not include an antique firearm.]

Committee Comment

This instruction will be unnecessary in the majority of cases where there is no dispute about whether the object in question is a firearm. The Committee recommends that this instruction only be given when appropriate under the facts of the case being tried.

This definition is found at 18 U.S.C. § 921(a)(3). There is no requirement that the gun be operable to be a "firearm" for purposes of 18 U.S.C. § 924(c). See *United States v. Castillo*, 406 F.3d 806, 817 (7th Cir. 2005), *vacated on other grounds*, *Castillo v. United States*, 552 U.S. 1137 (2008). The court should choose the appropriate bracketed description based on the evidence about the object in question introduced at trial.

The portion of the instruction excluding an "antique firearm" should be given only in cases in which evidence is introduced that the object in question could qualify as such pursuant to 18 U.S.C. § 921(a)(16), which is defined in the following Pattern Instruction.

18 U.S.C. §§ 922 & 924 DEFINITION OF "ANTIQUE FIREARM"

"Antique firearm" means:

(A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; or

(B) any replica of any firearm described in subparagraph (A) if such replica

(i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition; or

(ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade; or

(C) any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder, or a black powder substitute, and which cannot use fixed ammunition. For purposes of this subparagraph, the term "antique firearm" shall not include any weapon which incorporates a firearm frame or receiver, any firearm which is converted into a muzzle loading weapon, or any muzzle loading weapon which can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof.

Committee Comment

This definition is found at 18 U.S.C. § 921(a)(16). This definition should be given only in cases in which evidence is introduced that the object in question could qualify as an "antique firearm" pursuant to statute.

18 U.S.C. §§ 922 & 924 BRANDISH/DISCHARGE SPECIAL VERDICT INSTRUCTIONS— DEFINITION OF "BRANDISH"

If you find the defendant guilty of the offense charged in [Count __ of] the indictment, you must then determine whether the government has proven beyond a reasonable doubt that the firearm was [brandished; discharged].

[To "brandish" a firearm means to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.]

You will see on the verdict form a question about this issue. You should consider this question only if you have found that the government has proven the defendant guilty of the offense charged in [Count __ of] the indictment.

If you find that the government has proven beyond a reasonable doubt that the defendant [brandished; discharged] the firearm, then you should answer the question "Yes." If you find that the government has not proven beyond a reasonable doubt that the defendant [brandished; discharged] the firearm, then you should answer the question "No."

Committee Comment

The term "brandish" is defined in 18 U.S.C. § 924(c)(4).

The question of whether the firearm was brandished or discharged must be determined by the jury in for the enhanced mandatory minimum penalties to apply. See *Alleyne v. United States*, 570 U.S. 99 (2013), in which the Supreme Court overruled *Harris v. United States*, 536 U.S. 545 (2002), and held that any fact that increases a mandatory minimum sentence is an "element" of the crime, not a "sentencing factor" that must be submitted to the jury.

See also *Dean v. United States*, 556 U.S. 568 (2009), in which the Supreme Court held that the "discharge" requirement in § 924(c) contains no *mens rea* requirement, and thus applies to both intentional and accidental firings of the gun.

The Committee chose not to suggest a definition of the term "discharge" both because the meaning is self-evident, and because there is no relevant Seventh Circuit precedent. However, if there were a dispute about whether a firearm was discharged in a given case, the court may wish to define the term.

18 U.S.C. § 924(c) DEFINITION OF "USE"

"Use" means the active employment of a firearm. The term is not limited to use as a weapon, and includes brandishing, displaying, bartering, striking with, firing, and attempting to fire a firearm. A defendant's reference to a firearm calculated to bring about a change in the circumstances of the offense constitutes "use" during and in relation to a crime. However, mere possession or storage of a firearm, at or near the site of the crime, drug proceeds or paraphernalia is not enough to constitute use of that firearm.

Committee Comment

See *Bailey v. United States*, 516 U.S. 137, 148–49 (1995). In *Smith v. United States*, 508 U.S. 223, 241 (1993), the Supreme Court held that a person who trades a gun for drugs "uses" it during and in relation to a drug trafficking offense for purposes of § 924(c)(1). But a person who trades drugs for a gun does not "use" the gun within the meaning of § 924(c)(1)(A). *Watson v. United States*, 552 U.S. 74, 83 (2007). Where the defendant displayed a firearm by placing it on the couch next to him as he was cutting cocaine, he "used" the firearm within the meaning of § 924(c). *Buggs v. United States*, 153 F.3d 439, 444 (7th Cir. 1998).

18 U.S.C. § 924(c) DEFINITION OF "CARRY"

A person "carries" a firearm when he knowingly transports it on his person [or in a vehicle or container].

[A person may "carry" a firearm even when it is not immediately accessible because it is in a case or compartment [such as a glove compartment or trunk of a car], even if locked.]

Committee Comment

Muscarello v. United States, 524 U.S. 125, 126–27, 137 (1998). The term "carry" requires a connotation of transportation that occurred during or in relation to the predicate crime. See *Stanback v. United States*, 113 F.3d 651, 657–58 (7th Cir. 1997). "Carrying" a firearm from one room to another is sufficient. See *Buggs v. United States*, 153 F.3d 439, 444 (7th Cir. 1998).

The bracketed language should be used only if supported by evidence in the case on trial.

18 U.S.C. § 924(c) DEFINITION OF "DURING"

"During" means at any point within the offense conduct charged in Count ___ of the indictment.

Committee Comment

The Seventh Circuit has stated that the terms "during" and "in relation to" have separate meanings under § 924(c)(1)(A). *United States v. Young*, 316 F.3d 649, 662 (7th Cir. 2002).

18 U.S.C. § 924(c) DEFINITION OF "IN RELATION TO"

A person [uses; carries] a firearm "in relation to" a crime if there is a connection between the use or carrying of the firearm and the crime of violence or drug trafficking crime. The firearm must have some purpose or effect with respect to the crime; its presence or involvement cannot be the result of accident or coincidence. The firearm must at least facilitate, or have the potential of facilitating, the crime.

Committee Comment

See *Smith v. United States*, 508 U.S. 223, 238 (1993); *United States v. Mancillas*, 183 F.3d 682, 707 (7th Cir. 1999).

The Seventh Circuit has stated that the terms "during" and "in relation to" have separate meanings under § 924(c)(1)(A). *United States v. Young*, 316 F.3d 649, 662 (7th Cir. 2002).

18 U.S.C. § 924(c) DEFINITION OF "IN FURTHERANCE OF"

A person possesses a firearm "in furtherance of" a crime if the firearm furthers, advances, moves forward, promotes or facilitates the crime. The mere presence of a firearm at the scene of a crime is insufficient to establish that the firearm was possessed "in furtherance of" the crime. There must be a connection between the firearm and the crime.

Committee Comment

See *United States v. Huddleston*, 593 F.3d 596, 602 (7th Cir. 2010) ("in furtherance of" prong satisfied where jury could have found that defendant possessed gun to protect himself and his stash and his profits); *United States v. Castillo*, 406 F.3d 806, 814–16 (7th Cir. 2005) (holding evidence was sufficient to establish that defendant possessed shotgun "in furtherance of" underlying drug crime where he strategically placed the shotgun near his cache of drugs to protect himself, his drugs, and his drug trafficking business), *vacated on other grounds*, *Castillo v. United States*, 552 U.S. 1137 (2008).

The Seventh Circuit has acknowledged a non-exhaustive list of factors developed by the Fifth Circuit for use in the determining whether a firearm was possessed "in furtherance of" another crime. The list includes "the type of drug activity that is being conducted, accessibility of the firearm, the type of the weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to drugs or drug profits, and the time and circumstances under which the gun is found." *Castillo*, 406 F.3d at 815 (internal citations omitted); see also *United States v. Seymour*, 519 F.3d 700, 715 (7th Cir. 2008) (applying factors). The Seventh Circuit has advised that "given the fact-intensive nature of the 'in furtherance of' inquiry, the weight, if any, these and other factors should be accorded necessarily will vary from case to case." *Castillo*, 406 F.3d at 815. In *United States v. Johnson*, the Seventh Circuit emphasized that courts should strive for "simple and succinct instructions [which] invite the jury to rely on its own intuition and common sense." *United States v. Johnson*, 916 F.3d 579, 585–86 (7th Cir. 2019). Should the court decide to instruct the jury on factors based on the evidence, some of the factors the court may propose include the type of drug activity that is being conducted; accessibility of the firearm; the type of firearm; whether the firearm is loaded; the proximity of the firearm

to drugs or drug profits; and the time and circumstances under which the gun is found.

18 U.S.C. § 924(c)(1)(A) USING OR CARRYING A FIREARM DURING AND IN RELATION TO A CRIME OF VIOLENCE OR DRUG TRAFFICKING CRIME—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [using; carrying] a firearm during and in relation to a [crime of violence; drug trafficking crime]. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. The defendant committed the crime of [name the specific crime of violence or drug trafficking crime]; and

2. The defendant knowingly [used; carried] a firearm during and in relation to such crime.

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 terms "drug trafficking crime" and "crime of violence" are both defined by statute, 18 U.S.C. § 924(c)(2) and (3), respectively. Whether a particular crime qualifies as such is a determination for the court; accordingly, the Committee recommends that neither term be defined for the jury. Instead, the bracketed portion of the first element of this instruction should list the name of the "drug trafficking crime" or "crime of violence" alleged in the indictment, as determined qualified as such by the court.

The term "knowingly" is defined in Pattern Instruction 4.10.

If the indictment alleged the firearm was "brandished" or "discharged," facts which increase the mandatory minimum penalties under § 924(c), those questions must be submitted to the jury. *Alleyne v. United States*, 570 U.S. 99 (2013). A special verdict instruction is included *infra*.

There is no requirement that the gun be operable to be a "firearm" under 18 U.S.C. § 924(c). See *United States v. Castillo*, 406 F.3d 806, 817 (7th Cir. 2005), *vacated on other grounds*, *Castillo v. United States*, 552 U.S. 1137 (2008).

18 U.S.C. § 924(c)(1)(A) USING OR CARRYING A FIREARM DURING AND IN RELATION TO A CRIME OF VIOLENCE OR DRUG TRAFFICKING CRIME—ACCOUNTABILITY THEORY ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [aiding; counseling; commanding; inducing; procuring] the [use; carrying] of a firearm during and in relation to a [crime of violence; drug trafficking crime]. In order for you to find [the; a] defendant guilty of this charge, the government must prove the following beyond a reasonable doubt:

1. The defendant had advance knowledge that [another participant; name specific person] would [use; carry] a firearm during and relation to [the; a] [name the crime of violence; drug trafficking crime]; and

2. The defendant, having such knowledge, intentionally facilitated the [use; carrying] of the firearm [name the crime of violence; drug trafficking crime].

If you find from your consideration of all the evidence that the government proved both of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove either of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This instruction is based on *United States v. Moore*, 572 F.3d 334, 341 (7th Cir. 2009); *United States v. Andrews*, 442 F.3d 996, 1002 (7th Cir. 2006); *United States v. Daniels*, 370 F.3d 689, 691 (7th Cir. 2004); and *United States v. Taylor*, 226 F.3d 593, 596–97 (7th Cir. 2000). The instruction should be given in addition to the

standard aiding and abetting instruction, Pattern Instruction 5.06(A). See also *Rosemond v. United States*, 572 U.S. 65 (2014), in which the Supreme Court addressed accessory liability in a § 924(c)(1)(A) case. In *Rosemond*, the Court stated: "active participation in a drug sale is sufficient for section 924(c) liability (even if the conduct does not extend to the firearm), so long as the defendant had prior knowledge of the gun's involvement." *Id*. at 82 (emphasis added).

18 U.S.C. § 924(c)(1)(A) POSSESSION OF A FIREARM IN FURTHERANCE OF A CRIME OF VIOLENCE OR DRUG TRAFFICKING CRIME—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] possession of a firearm in furtherance of a [crime of violence; drug trafficking crime]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant committed the crime of [name specific crime of violence or drug trafficking crime]; and

2. The defendant knowingly possessed a firearm; and

3. The defendant's possession of the firearm was in furtherance of the [name specific crime of violence or drug trafficking crime alleged in the indictment].

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 terms "drug trafficking crime" and "crime of violence" are both defined by statute, 18 U.S.C. § 924(c)(2) and (3), respectively. Whether a particular crime qualifies as such is a determination for the court to make; accordingly, the Committee recommends that

neither term be defined for the jury. Instead, the bracketed portion of the first element of this instruction should list the name of the "drug trafficking crime" or "crime of violence" alleged in the indictment, as determined qualified as such by the court.

The term "knowingly" is defined in Pattern Instruction 4.10.

There is no requirement that the gun be operable to be a "firearm" under 18 U.S.C. § 924(c). See *United States v. Castillo*, 406 F.3d 806, 817 (7th Cir. 2005), *vacated on other grounds*, *Castillo v. United States*, 552 U.S. 1137 (2008).

"In furtherance of" is defined in Pattern Instruction 18 U.S.C. § 924(c) Definition of "In Furtherance Of."

18 U.S.C. § 924(c)(1)(A) POSSESSION OF A FIREARM IN FURTHERANCE OF A CRIME OF VIOLENCE OR DRUG TRAFFICKING CRIME—ACCOUNTABILITY THEORY ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [aiding; counseling; commanding; inducing; procuring] the possession of a firearm during and in relation to a [crime of violence; drug trafficking crime]. In order for you to find [the; a] defendant guilty of this charge, the government must prove the following beyond a reasonable doubt:

1. The defendant had advance knowledge that [another participant; name specific person] would possess a firearm during and relation to [the; a] [name the crime of violence; drug trafficking crime]; and,

2. The defendant, having such knowledge, intentionally facilitated the [possession of the firearm] [name the crime of violence; drug trafficking crime].

If you find from your consideration of all the evidence that the government proved both of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove either of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This instruction is based on *Rosemond v. United States*, 572 U.S. 65 (2014). This instruction should be given in addition to the standard aiding and abetting instruction, Pattern Instruction 5.06(A).

18 U.S.C. § 924(c)(1)(A) DEFINITION OF "ADVANCE KNOWLEDGE"

"Advance knowledge" means knowledge at a time the defendant had a realistic opportunity to either attempt to alter the plan or to withdraw from it. It is sufficient if the knowledge is gained in the midst of the underlying crime, as long as the defendant had a realistic opportunity to withdraw but continued to participate in the crime.

Committee Comment

In *Rosemond v. United States*, 572 U.S. 65 (2014), the Supreme Court held that with respect to a charge of aiding and abetting the offense of using a firearm in the commission of a violent crime or drug felony, the government must prove that an unarmed defendant had advance knowledge that his confederate would carry or use a gun. *Rosemond*, 572 U.S. at 78. This means the defendant must have had "knowledge at a time [he] can do something with it—most notably, opt to walk away. *Id*. A person who knows beforehand that his confederate plans to carry a gun meets this requirement. He can "attempt to alter that plan or, if unsuccessful, withdraw from the enterprise," but "deciding instead to go ahead with his role in the venture . . . shows his intent to aid an armed offense." *Id*. By contrast, a defendant who "knows nothing of a gun until it appears at the scene . . . may already have completed his acts of assistance" or "may at that late point have no realistic opportunity to quit the crime." *Id*. In that case, "the defendant has not shown the requisite intent to assist a crime involving a gun." *Id*.

The defendant's advance knowledge does not have to exist before the underlying crime is begun. It is sufficient if the knowledge is gained in the midst of the underlying crime, so long as the defendant continues his or her participation and had a meaningful opportunity to withdraw. *Id*. "[I]f a defendant continues to participate in a crime after a gun was displayed or used by a confederate, the jury can permissibly infer from his failure to object or withdraw that he had such knowledge. In any criminal case, after all, the factfinder can draw inferences about a defendant's intent based on all the facts and circumstances of a crime's commission." *Id*. at 78, n.9. Advance knowledge contemplates that, regardless of when the defendant learned about the presence of the gun, he chose, with full knowledge of the severity of the crime, to participate in it.

What constitutes "a realistic opportunity to withdraw" is an

inherently fact-specific inquiry that will vary from case to case and call upon jurors to use their common sense in interpreting the evidence.

18 U.S.C. § 981(a)(1)(A) FORFEITURE INSTRUCTION

The government seeks to forfeit the following property: [LIST PROPERTY]

In order for you to find that this property is subject to forfeiture, the

government must prove both of the following elements by a preponderance of the evidence:

The property was involved in a transaction or attempted transaction as charged in Count[s] _____ [or is property traceable to such property]; and

If you find from your consideration of all the evidence that the government has proved each of these elements by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

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 by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Although 18 U.S.C. § 981(a)(1)(A) is a civil forfeiture provision, 28 U.S.C. § 2461(c) authorizes its use in a criminal case. *United States v. Venturella*, 585 F.3d 1013, 1016 (7th Cir. 2009); *United States v. Silvious*, 512 F.3d 364, 369 (7th Cir. 2008). Section 981(a)(1)(A) applies where the real or personal property was involved in a transaction or attempted transaction in violation of one or more of these offenses: 1) 18 U.S.C. § 1956, laundering of monetary instruments; 2) 18 U.S.C. § 1957, engaging in monetary

transactions in property derived from specified unlawful activity; or 3) 18 U.S.C. § 1960, unlicensed money transmitting businesses.

Nexus is defined in a separate instruction. Rule 32.2 requires that "the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant." Fed. R. Crim. P. 32.2(4). For the most part, the nexus requirement of the Rule will be met under the statutory requirement of what property is subject to forfeiture. The Committee recognizes that there may be overlap between the statutory requirement and the nexus requirement of the Rule, but the Committee has concluded that this separate instruction is necessary to meet both the statutory and Rule requirements.

The Committee recommends that attorneys consider the possible extension of the reasoning of *Honeycutt v. United States*, 137 S. Ct. 1626, 1632 (2017) to 18 U.S.C. § 981. In *Honeycutt*, the Supreme Court held that under 21 U.S.C. § 853(a)(1) a defendant may not be held "jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." 137 S. Ct. at 1632. In reaching this conclusion, the Court highlighted Section 853(a)'s textual requirement that a defendant "obtain" the proceeds—which evidenced the statute's focus on personal possession or use. 137 S. Ct. at 1632. The Court also highlighted the other provisions in Section 853(a), which similarly address property the defendant personally obtained. For instance, Section 853(a)(2) mandates forfeiture of property used to facilitate the crime, but limits the forfeiture to "the person's property." *Id.* at 1633. Similarly, Section 853(a)(3) requires the forfeiture of property related to continuing criminal enterprises, but requires the defendant to forfeit only "his interest in" the enterprise. *Id*.

The Court's holding in *Honeycutt* applies to Section 853 only, but its reasoning arguably also applies to civil forfeiture statutes such as 18 U.S.C. § 981. Section 981 authorizes *in rem* forfeiture of all proceeds of one or more criminal offenses. *See* 18 U.S.C. § 981(a)(1)(C) (authorizing forfeiture of any property, "which constitutes, or is derived from proceeds traceable" to the enumerated criminal statutes). When § 981 is used in conjunction with 28 U.S.C. § 2461(c) to authorize a criminal forfeiture, however, the resulting *in personam* criminal forfeiture is necessarily limited to the defendant's interest in the proceeds. See *United States v. Gjeli*, 2017 WL 3443691, at *6 (3d Cir. Aug. 11, 2017) (applying *Honeycutt* to 18 U.S.C. § 981(a)(1)(C)); *but see United States v. McIntosh*, 2017 WL 3396429, at *3 (S.D.N.Y. Aug. 8, 2017) (not applying *Honeycutt* to Section 981(a)(1)(C)). In *Honeycutt*, the Supreme Court rejected the government's *Pinkerton* argument, reasoning that Section 853's text and structure did not provide for co-

conspirator forfeiture liability and that joint and several liability is inconsistent with *in personam* criminal forfeiture liability. *Honeycutt*, 137 S. Ct. at 1634–35.

18 U.S.C. § 981(a)(1)(C) FORFEITURE INSTRUCTION—ELEMENTS

The Forfeiture Allegation[s] in the Indictment allege[s] that the following property is subject to forfeiture:

[LIST PROPERTY]

In order to find that this property is subject to forfeiture, the government must prove both of the following elements by a preponderance of the evidence:

1. The property constituted or was derived from proceeds traceable to the offense charged in Count __, [or a conspiracy to commit that offense]; and

2. There is a nexus between the property alleged to be forfeitable and the offense charged in Count[s] ____.

If you find from your consideration of all the evidence that the government has proved each of these elements by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

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 by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Although 18 U.S.C. § 981(a)(1)(C) is a civil forfeiture provision, 28 U.S.C. § 2461(c) authorizes its use in a criminal case.

United States v. Venturella, 585 F.3d 1013, 1016 (7th Cir. 2009); *United States v. Silvious*, 512 F.3d 364, 369 (7th Cir. 2008). Section 981(a)(1)(C) applies where the property constitutes or was derived from proceeds traceable to a violation of, or conspiracy to violate one of the following statutes: 1) 18 U.S.C. § 215, receipt of commissions or gifts for procuring loans, theft; 2) 18 U.S.C. § 471, false obligation of security; 3) 18 U.S.C. § 472, uttering counterfeit obligations or securities; 4) 18 U.S.C. § 473, dealing in counterfeit obligations or securities; 5) 18 U.S.C. § 474, plates, stones, or analog, digital, or electronic images for counterfeiting obligations or securities; 6) 18 U.S.C. § 476, taking impressions of tools used for obligations or securities; 7) 18 U.S.C. § 477, possessing or selling impressions of tools used for obligations or securities; 8) 18 U.S.C. § 478, false foreign obligations or securities; 9) 18 U.S.C. § 479, uttering counterfeit foreign obligations or securities; 10) 18 U.S.C. § 480, possessing counterfeit foreign obligations or securities; 11) 18 U.S.C. § 481, plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities; 12) 18 U.S.C. § 485, false coins or bars; 13) 18 U.S.C. § 486, uttering coins of gold, silver or other metal; 14) 18 U.S.C. § 487, making or possessing counterfeit dies for U.S. coins; 15) 18 U.S.C. § 488, making or possessing counterfeit dies for foreign coins; 16) 18 U.S.C. § 501, counterfeit postage stamps, postage meter stamps, and postal cards; 17) 18 U.S.C. § 502, counterfeit postage and revenue stamps of foreign government; 18) 18 U.S.C. § 510, forging endorsements on Treasury checks or bonds or securities of the United States; 19) 18 U.S.C. § 542 entry of goods by means of false statements; 20) 18 U.S.C. § 545, smuggling goods into the United States; 21) 18 U.S.C. § 656, embezzlement, or misapplication by a bank officer or employee; 22) 18 U.S.C. § 657, embezzlement, or misapplication by a lending, credit or insurance institution officer or employee; 23) 18 U.S.C. § 842, unlawful acts relating to explosive materials; 24) 18 U.S.C. § 844, unlawful importation, manufacture, distribution and storage of explosive materials; 25) 18 U.S.C. § 1005, false entries by a bank officer or employee; 26) 18 U.S.C. § 1006, false entries by officers or employees of federal credit institutions; 27) 18 U.S.C. § 1007, false statements to influence the Federal Deposit Insurance Corporation; 28) 18 U.S.C. § 1014, false statement on loan or credit application; 29) 18 U.S.C. § 1028, fraud and related activity in connection with identification documents, authentication features, and information; 30) 18 U.S.C. § 1029, fraud and related activity in connection with access devices; 31) 18 U.S.C. § 1030, fraud and related activity in connection with computers; 32) 18 U.S.C. § 1032, civil penalties for a violation of 18 U.S.C. § 1033; 33) 18 U.S.C. § 1344, bank fraud; or 34) "specified unlawful activity" as defined in 18 U.S.C. § 1956(c)(7).

The criminal forfeiture statute, 18 U.S.C. § 982, provides for forfeiture in a mail/wire/interstate carrier fraud case only when

the fraud scheme is directed at a financial institution. Section 981(a)(1)(C) does not contain a similar limitation. "[P]roceeds of basic mail fraud" may be forfeitable under § 981(a)(1)(C) as a result of the bridging statute, § 2461(c). *Venturella*, 585 F.3d at 1016. Although the mail/wire/interstate carrier fraud statutes are not expressly listed in § 981(a)(1)(C), forfeiture proceedings in such cases are authorized because "specified unlawful activity" defined in 18 U.S.C. § 1956(c)(7) includes offenses listed in 18 U.S.C. § 1961(1), which, in turn, identifies the general mail/wire/interstate carrier fraud statutes, 18 U.S.C. §§ 1341 & 1343. See *United States v. Black*, 526 F.Supp.2d 870, 876 (N.D. Ill. 2007), aff'd on other grounds, *United States v. Black*, 530 F.3d 596 (7th Cir. 2008), *vacated on other grounds*, *Black v. United States*, 561 U.S. 465 (2010).

The Committee recommends that attorneys consider the possible extension of the reasoning of *Honeycutt v. United States*, 137 S. Ct. 1626, 1632 (2017) to 18 U.S.C. § 981. In *Honeycutt*, the Supreme Court held that under 21 U.S.C. § 853(a)(1) a defendant may not be held "jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." 137 S. Ct. at 1632. In reaching this conclusion, the Court highlighted § 853(a)'s textual requirement that a defendant "obtain" the proceeds—which evidenced the statute's focus on personal possession or use. *Id.* The Court also highlighted the other provisions in § 853(a), which similarly address property the defendant personally obtained. For instance, § 853(a)(2) mandates forfeiture of property used to facilitate the crime, but limits the forfeiture to "the person's property." *Id.* at 1633. Similarly, § 853(a)(3) requires the forfeiture of property related to continuing criminal enterprises, but requires the defendant to forfeit only "his interest in" the enterprise. *Id.*

The Court's holding in *Honeycutt* applies to § 853 only, but its reasoning arguably also applies to civil forfeiture statutes such as 18 U.S.C. § 981. Section 981 authorizes *in rem* forfeiture of all proceeds of one or more criminal offenses. See 18 U.S.C. § 981(a)(1)(C) (authorizing forfeiture of any property, "which constitutes, or is derived from proceeds traceable" to the enumerated criminal statutes). When § 981 is used in conjunction with 28 U.S.C. § 2461(c) to authorize a criminal forfeiture, however, the resulting *in personam* criminal forfeiture is necessarily limited to the defendant's interest in the proceeds. See *United States v. Gjeli*, 867 F.3d 418 (3d Cir. 2017) (applying *Honeycutt* to 18 U.S.C. § 981(a)(1)(C)); but see *United States v. McIntosh*, 2017 WL 3396429, at *3 (S.D.N.Y. Aug. 8, 2017) (not applying *Honeycutt* to Section 981(a)(1)(C)). In *Honeycutt*, the Supreme Court rejected the government's *Pinkerton* argument, reasoning that § 853's text and structure did not provide for co-conspirator forfeiture liability

and that joint and several liability is inconsistent with *in personam* criminal forfeiture liability. *Honeycutt*, 137 S. Ct. at 1634–35.

18 U.S.C. § 981(a)(1)(G)(i–iii) FORFEITURE INSTRUCTION—ELEMENTS

The Forfeiture Allegation[s] in the Indictment allege[s] that the following property is subject to forfeiture:

[LIST ASSET]

In order for you to find that the assets are subject to forfeiture, the government must prove at least one of the [four] following elements by a preponderance of the evidence:

1. The asset belonged to any individual, entity, or organization engaged in planning or perpetrating the offense charged in Count[s] ____; or

2. The asset afforded any persona source of influence over any entity or organization engaged in planning or perpetrating the offense charged in Count[s] __; or

3. The asset was acquired or maintained by any person with the intent and for the purpose of supporting, planning, conducting, or concealing the offense charged in Count[s] __; or

4. The asset was derived from, involved in, or used or intended to be used to commit the offense charged in Count[s] __.

If you find from your consideration of all the evidence that the government has proved at least one of these elements by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any of these elements by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Section 981(a)(1)(G) provides for forfeiture of "assets" rather than "property." Subsections (i) through (iii) provide for the forfeiture of assets in connection with a Federal crime of terrorism against the United States, its citizens or residents, or their property. A Federal crime of terrorism is defined in 18 U.S.C. § 2332b(g)(5).

The Committee recommends that attorneys consider the possible extension of the reasoning of *Honeycutt v. United States*, 137 S. Ct. 1626, 1632 (2017) to 18 U.S.C. § 981. In *Honeycutt*, the Supreme Court held that under 21 U.S.C. § 853(a)(1) a defendant may not be held "jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." 137 S. Ct. at 1632. In reaching this conclusion, the Court highlighted § 853(a)'s textual requirement that a defendant "obtain" the proceeds—which evidenced the statute's focus on personal possession or use. *Id.* The Court also highlighted the other provisions in § 853(a), which similarly address property the defendant personally obtained. For instance, § 853(a)(2) mandates forfeiture of property used to facilitate the crime, but limits the forfeiture to "the person's property." *Id.* at 1633. Similarly, § 853(a)(3) requires the forfeiture of property related to continuing criminal enterprises, but requires the defendant to forfeit only "his interest in" the enterprise. *Id.*

The Court's holding in *Honeycutt* applies to § 853 only, but its reasoning arguably also applies to civil forfeiture statutes such as 18 U.S.C. § 981. Section 981 authorizes *in rem* forfeiture of all proceeds of one or more criminal offenses. See 18 U.S.C. § 981(a)(1)(C) (authorizing forfeiture of any property, "which constitutes, or is derived from proceeds traceable" to the enumerated criminal statutes). When § 981 is used in conjunction with 28 U.S.C. § 2461(c) to authorize a criminal forfeiture, however, the resulting *in personam* criminal forfeiture is necessarily limited to the defendant's interest in the proceeds. See *United States v. Gjeli*, 867 F.3d 418 (3d Cir. 2017) (applying *Honeycutt* to 18 U.S.C. § 981(a)(1)(C)); but see *United States v. McIntosh*, 2017 WL

3396429, at *3 (S.D.N.Y. Aug. 8, 2017) (not applying *Honeycutt* to Section 981(a)(1)(C)). In *Honeycutt*, the Supreme Court rejected the government's *Pinkerton* argument, reasoning that § 853's text and structure did not provide for co-conspirator forfeiture liability and that joint and several liability is inconsistent with *in personam* criminal forfeiture liability. *Honeycutt*, 137 S. Ct. at 1634–35.

18 U.S.C. § 981(a)(1)(G)(iv) FORFEITURE INSTRUCTION—ELEMENTS

The Forfeiture Allegation[s] in the Indictment allege[s] that the following property is subject to forfeiture:

[LIST ASSET]

To establish that the assets are subject to forfeiture, the government must prove that the asset belonged to any individual, entity or organization engaged in planning or perpetrating the offense charged in Count[s] __;

[If the property the government seeks to forfeit is located outside the United States, you must find that an act is furtherance of the planning or perpetration occurred within the United States jurisdiction.]

Committee Comment

Section 981(a)(1)(G)(iv) applies to acts of international terrorism, defined in 18 U.S.C. § 2331.

The Committee recommends that attorneys consider the possible extension of the reasoning of *Honeycutt v. United States*, 137 S. Ct. 1626, 1632 (2017) to 18 U.S.C. § 981. In *Honeycutt*, the Supreme Court held that under 21 U.S.C. § 853(a)(1) a defendant may not be held "jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." 137 S. Ct. at 1632. In reaching this conclusion, the Court highlighted § 853(a)'s textual requirement that a defendant "obtain" the proceeds—which evidenced the statute's focus on personal possession or use. *Id.* The Court also highlighted the other provisions in § 853(a), which similarly address property the defendant personally obtained. For instance, § 853(a)(2) mandates forfeiture of property used to facilitate the crime, but limits the forfeiture to "the person's property." *Id.* at 1633. Similarly, § 853(a)(3) requires the forfeiture of property related to continuing criminal enterprises, but requires the defendant to forfeit only "his interest in" the enterprise. *Id.*

The Court's holding in *Honeycutt* applies to § 853 only, but its reasoning arguably also applies to civil forfeiture statutes such as

18 U.S.C. § 981. Section 981 authorizes *in rem* forfeiture of all proceeds of one or more criminal offenses. *See* 18 U.S.C. § 981(a)(1)(C) (authorizing forfeiture of any property, "which constitutes, or is derived from proceeds traceable" to the enumerated criminal statutes). When § 981 is used in conjunction with 28 U.S.C. § 2461(c) to authorize a criminal forfeiture, however, the resulting *in personam* criminal forfeiture is necessarily limited to the defendant's interest in the proceeds. See *United States v. Gjeli*, 867 F.3d 418 (3d Cir. 2017) (applying *Honeycutt* to 18 U.S.C. § 981(a)(1)(C)); but see *United States v. McIntosh*, 2017 WL 3396429, at *3 (S.D.N.Y. Aug. 8, 2017) (not applying *Honeycutt* to Section 981(a)(1)(C)). In *Honeycutt*, the Supreme Court rejected the government's Pinkerton argument, reasoning that § 853's text and structure did not provide for co-conspirator forfeiture liability and that joint and several liability is inconsistent with *in personam* criminal forfeiture liability. *Honeycutt*, 137 S. Ct. at 1634–35.

18 U.S.C. § 981(a)(1)(H) FORFEITURE INSTRUCTION—ELEMENTS

The Forfeiture Allegation[s] in the Indictment allege[s] that the following property is subject to forfeiture:

[LIST PROPERTY]

In order for you to find that this property is subject to forfeiture, the government must prove both of the following elements by a preponderance of the evidence:

1. The [real; personal] property was involved in a violation or attempted violation, or constituted or was derived from proceeds traceable to a violation of the offense[s] as charged in Count[s] __; and

2. There is a nexus between the property alleged to be forfeitable and the offense[s] charged in Count[s] ——.

If you find from your consideration of all the evidence that the government has proved each of these elements by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

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 by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Section 981(a)(1)(H) applies where the real or personal prop-

erty at issue was involved in a violation or attempted violation, or constituted, or was derived from proceeds traceable to a violation of 18 U.S.C. § 2339C, financing terrorism activities.

The Committee recommends that attorneys consider the possible extension of the reasoning of *Honeycutt v. United States*, 137 S. Ct. 1626, 1632 (2017) to 18 U.S.C. § 981. In *Honeycutt*, the Supreme Court held that under 21 U.S.C. § 853(a)(1) a defendant may not be held "jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." 137 S. Ct. at 1632. In reaching this conclusion, the Court highlighted § 853(a)'s textual requirement that a defendant "obtain" the proceeds—which evidenced the statute's focus on personal possession or use. *Id.* The Court also highlighted the other provisions in § 853(a), which similarly address property the defendant personally obtained. For instance, § 853(a)(2) mandates forfeiture of property used to facilitate the crime, but limits the forfeiture to "the person's property." *Id.* at 1633. Similarly, § 853(a)(3) requires the forfeiture of property related to continuing criminal enterprises, but requires the defendant to forfeit only "his interest in" the enterprise. *Id.*

The Court's holding in *Honeycutt* applies to § 853 only, but its reasoning arguably also applies to civil forfeiture statutes such as 18 U.S.C. § 981. Section 981 authorizes *in rem* forfeiture of all proceeds of one or more criminal offenses. See 18 U.S.C. § 981(a)(1)(C) (authorizing forfeiture of any property, "which constitutes, or is derived from proceeds traceable" to the enumerated criminal statutes). When § 981 is used in conjunction with 28 U.S.C. § 2461(c) to authorize a criminal forfeiture, however, the resulting *in personam* criminal forfeiture is necessarily limited to the defendant's interest in the proceeds. See *United States v. Gjeli*, 867 F.3d 418 (3d Cir. 2017) (applying *Honeycutt* to 18 U.S.C. § 981(a)(1)(C)); but see *United States v. McIntosh*, 2017 WL 3396429, at *3 (S.D.N.Y. Aug. 8, 2017) (not applying *Honeycutt* to Section 981(a)(1)(C)). In *Honeycutt*, the Supreme Court rejected the government's Pinkerton argument, reasoning that § 853's text and structure did not provide for co-conspirator forfeiture liability and that joint and several liability is inconsistent with *in personam* criminal forfeiture liability. *Honeycutt*, 137 S. Ct. at 1634–35.

18 U.S.C. § 981(a)(2) DEFINITION OF "PROCEEDS"

["Proceeds" means property of any kind obtained directly or indirectly, as a result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.]

["Proceeds" means the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services. The defendant has the burden of proof with respect to the issue of direct costs. Direct costs do not include any part of the overhead expenses of the entity providing the goods or services, or any part of the income taxes paid by the entity.]

["Proceeds" subject to forfeiture does not include any loan repayments or debt payments that did not result in any financial loss to the victim.]

Committee Comment

These are the statutory definitions of the word "proceeds" for use in forfeiture proceedings under 18 U.S.C. § 981(a)(1). See 18 U.S.C. § 981(a)(2); see also *United States v. Venturella*, 585 F.3d 1013 (7th Cir. 2009). The definition in the first paragraph applies in cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes. The definition in the second paragraph applies in cases involving lawful goods or lawful services that are sold or provided in an illegal manner. The definition in the third paragraph applies in cases involving fraud in the process of obtaining a loan or extension of credit.

In the context of the money laundering statute, a plurality of the Supreme Court noted that because of the ambiguity of the meaning of proceeds "the 'profits' definition of 'proceeds' is always more defendant-friendly than the 'receipts' definition, the rule of lenity dictates that it should be adopted." *United States v. Santos*, 553 U.S. 507, 514 (2008). The Seventh Circuit has not ruled on whether *Santos* applies in the forfeiture context. The Committee takes no position on the question.

In *United States v. Tedder*, 403 F.3d 836, 842 (7th Cir. 2005),

the Seventh Circuit held that Fed. R. Crim. P. 32.2 only provides a defendant with a jury trial in a forfeiture proceeding on the limited issue of "the nexus between the funds and the crime; Rule 32.2 does not entitle the accused to a jury's decision on the amount of the forfeiture."

18 U.S.C. § 981(a)(2) DEFINITION OF "TRACEABLE TO"

The term "traceable to" means that the acquisition of the property is attributable to the offense[s] charged in Count[s] __, as opposed to [a] source[s] other than [this; these] offenses. If the offense[s] enabled the acquisition of property, you may find the property is "traceable to" the offense.

Committee Comment

The definition in the first paragraph comes from *United States v. Bornfield*, 145 F.3d 1123 (10th Cir. 1998). Issues regarding whether property is "trace-able to" an offense may arise when the funds targeted for forfeiture are in a bank account, or when property is purchased, in whole or part, with funds derived from an offense. *United States v. United States Currency Deposited in Account No. 1115000763247*, 176 F.3d 941, 946 (7th Cir. 1999), noted that "only funds used in or traceable to the illegal activity are subject to forfeiture, and not any commingled legitimate funds used in facilitating the scheme."

Account No. 1115000763247 held that the district court did not err in ordering forfeiture when the criminal offense produced funds that exceeded the amount on deposit in a bank account at the time of the seizure. *United States v. $448,342.85*, 969 F.2d 474, 477 (7th Cir. 1992), found it unnecessary to apply tracing rules when the criminal proceeds exceeded the sums on deposit in a bank account at the time of the seizure. (Both cases involved civil forfeiture proceedings and were decided before the Civil Asset Reform Act of 2000, Pub. L. 106-185, which reallocated the burden of proof in civil forfeiture matters to the government.)

United States v. Banco Cafetero Panama, 797 F.2d 1154, 1158–61 (2nd Cir. 1986), addressed various accounting approaches to "tracing."

United States v. Voigt, 89 F.3d 1050, 1084–87 (3rd Cir. 1996), addressed the meaning of "traceable to" in a case in which the personal property targeted for forfeiture (jewelry) was purchased with bank account funds containing legitimate and illegitimate funds. In *Account No. 1115000763247*, the Seventh Circuit found *Voigt* factually distinguishable.

18 U.S.C. § 982(a)(1) FORFEITURE INSTRUCTION

The government seeks to forfeit the following property: [LIST PROPERTY]

In order for you to find that the property is subject to forfeiture, the government must prove the following by a preponderance of the evidence:

The [real] or [personal] property was involved in the offense[s] as charged in Count[s] _____ or is property traceable to real or personal property involved in [that] [those] offense[s];

If you find from your consideration of all the evidence that the government has proved this by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove this by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Section 982(a)(1) applies where the real or personal property was involved in one or more of these offenses: 1) 18 U.S.C. § 1956, laundering of monetary instruments; 2) 18 U.S.C. § 1957, engaging in monetary transactions in property derived from specified unlawful activity; or 3) 18 U.S.C. § 1960, unlicensed money transmitting businesses. Section 982(a)(1) does not require a specific connection between the property and the defendant. The only required connection is between the property and the offense.

The Committee recommends that attorneys consider the pos-

sible extension of the reasoning of *Honeycutt v. United States*, 137 S. Ct. 1626, 1632 (2017) to 18 U.S.C § 982. In *Honeycutt*, the Supreme Court held that under 21 U.S.C. § 853(a)(1) a defendant may not be held "jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." 137 S. Ct. at 1632. In reaching this conclusion, the Court highlighted Section 853(a)'s textual requirement that a defendant "obtain" the proceeds—which evidenced the statute's focus on personal possession or use. 137 S. Ct. at 1632. The Court also highlighted the other provisions in Section 853(a), which similarly address property the defendant personally obtained. For instance, Section 853(a)(2) mandates forfeiture of property used to facilitate the crime, but limits the forfeiture to "the person's property." *Id.* at 1633. Similarly, Section 853(a)(3) requires the forfeiture of property related to continuing criminal enterprises, but requires the defendant to forfeit only "his interest in" the enterprise. *Id*.

The Court's holding in *Honeycutt* applies to Section 853 only, but its reasoning arguably reaches more broadly. Before discussing Section 853, the Court referred to the consequences of applying joint and several liability to co-conspirators "in the forfeiture context." *Honeycutt*, 137 S. Ct. at 1631. The Court focused on the term "obtain" in Section 853(a)(1)'s text, but also grounded its decision on "several other provisions" in Section 853. *Id.* at 1633-34. Those provisions—Sections 853(c), 853(e), and 853(p)—are widely incorporated by reference in criminal forfeiture statutes. See, *e.g.*, 18 U.S.C. § 982(b)(1); 28 U.S.C. § 2461(c). Additionally, in rejecting the government's *Pinkerton* argument, the Court reasoned that Section 853's text and structure did not provide for co- conspirator forfeiture liability and that joint and several liability is inconsistent with *in personam* criminal forfeiture liability. *Honeycutt*, 137 S. Ct. at 1634-35. At least one Circuit has held that *Honeycutt* applies to 18 U.S.C. § 982(a)(2). See *United States v. Brown*, 2017 WL 3404979, at *1 (3d Cir. Aug. 9, 2017)(unpublished).

18 U.S.C. § 982(a)(2) FORFEITURE INSTRUCTION

The Forfeiture Allegation[s] in the Indictment allege[s] that the following property is subject to forfeiture:

[LIST PROPERTY]

In order for you to find that this property is subject to forfeiture, the government must prove the following by a preponderance of the evidence:

1. That the property constitutes or was derived from proceeds the defendant[s] obtained directly or indirectly as a result of the offense[s] charged in Count[s] —; and

2. That the offense charged in Count[s] ———— affected a financial institution.

If you find from your consideration of all the evidence that the government has proved these things by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove these things by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Section 982(a)(2) applies where the property constitutes or was derived from proceeds the defendant obtained directly or

indirectly as a result of the violation of, or conspiracy to violate one of the following statutes, as long as it affects a financial institution: 1) 18 U.S.C. § 215, receipt of commissions or gifts for procuring loans, theft; 2) 18 U.S.C. § 656, embezzlement, or misapplication by a bank officer or employee; 3) 18 U.S.C. § 657, embezzlement, or misapplication by a lending, credit or insurance institution officer or employee; 4) 18 U.S.C. § 1005, false entries by a bank officer or employee; 5) 18 U.S.C. § 1006, false entries by officers or employees of federal credit institutions; 6) 18 U.S.C § 1007, false statements to influence the Federal Deposit Insurance Corporation; 7) 18 U.S.C. § 1014, false statement on loan or credit application; 8) 18 U.S.C. § 1341, mail fraud; 9) 18 U.S.C. § 1343, wire fraud; 10) 18 U.S.C. § 1344, bank fraud.

Section 982(a)(2) also applies where the property at issue constitutes or was derived from proceeds the defendant obtained directly or indirectly as a result of the violation of, or conspiracy to violate one of the following statutes: 1) 18 U.S.C. § 471, false obligation of security; 2) 18 U.S.C. § 472, uttering counterfeit obligations or securities; 3) 18 U.S.C. § 473, dealing in counterfeit obligations or securities; 4) 18 U.S.C. § 474, plates, stones, or analog, digital, or electronic images for counterfeiting obligations or securities; 5) 18 U.S.C. § 476, taking impressions of tools used for obligations or securities; 6) 18 U.S.C. § 477, possessing or selling impressions of tools used for obligations or securities; 7) 18 U.S.C. § 478, false foreign obligations or securities; 8) 18 U.S.C. § 479, uttering counterfeit foreign obligations or securities; 9) 18 U.S.C. § 480, possessing counterfeit foreign obligations or securities; 10) 18 U.S.C. § 481, plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities; 11) 18 U.S.C. § 485, false coins or bars; 12) 18 U.S.C. § 486, uttering coins of gold, silver or other metal; 13) 18 U.S.C. §§ 487 or 488, making or possessing counterfeit dies for U.S. or foreign coins; 14) 18 U.S.C. § 501, counterfeit postage stamps, postage meter stamps, and postal cards; 15) 18 U.S.C. § 502, counterfeit postage and revenue stamps of foreign government; 16) 18 U.S.C. § 510, forging endorsements on Treasury checks or bonds or securities of the United States; 17) 18 U.S.C. § 542 entry of goods by means of false statements; 18) 18 U.S.C. § 545, smuggling goods into the United States; 19) 18 U.S.C. § 842, unlawful acts relating to explosive materials; 20) 18 U.S.C. § 844, unlawful importation manufacture, distribution and storage of explosive materials; 21) 18 U.S.C. § 1028, fraud and related activity in connection with identification documents, authentication features, and information; 22) 18 U.S.C. § 1029, fraud and related activity in connection with access devices; and 23) 18 U.S.C. § 1030, fraud and related activity in connection with computers. Unlike the offenses listed above, a violation of one of these statutes does not require that the offense affected a financial institution for purposes of § 982(a)(2).

Section 982 does not define proceeds. Section 981, the civil forfeiture statute, provides two different definitions of proceeds, depending on the circumstances involved. In the context of the money laundering statute, a plurality of the Supreme Court noted that because of the ambiguity of the meaning of proceeds "the 'profits' definition of 'proceeds' is always more defendant-friendly than the 'receipts' definition, the rule of lenity dictates that it should be adopted." *United States v. Santos*, 553 U.S. 507, 514 (2008). The Seventh Circuit has not ruled on whether *Santos* applies in the forfeiture context. The Committee takes no position on the question.

18 U.S.C. § 982(a)(3) FORFEITURE INSTRUCTION

The Forfeiture Allegation[s] in the Indictment allege[s] that the following property is subject to forfeiture under Title 18, United States Code, Section 982(a)(3):

[LIST PROPERTY]

In order for you to find that this property is subject to forfeiture, the government must prove the following by a preponderance of the evidence:

1. That the [real] or [personal] property represents or is traceable to the gross receipts obtained, directly or indirectly, as a result of the offense[s] charged in Count[s] _____; and

2. That the offense[s] in Counts _____ involved the sale of assets acquired or held by [((the Resolution Trust Corporation) (the Federal Deposit Insurance Corporation) as a conservator or receiver for a financial institution) (any other conservator for a financial institution appointed by (the Office of the Comptroller of the Currency or the Office of Thrift Supervision) (the National Credit Union Administration) as conservator or liquidating agent for a financial institution))].

If you find from your consideration of all the evidence that the government has proved each of these things by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove these things by a preponderance of the evi-

dence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Section 982(a)(3) applies where the real or personal property represents or is traceable to the gross receipts obtained, directly or indirectly, as a result of a violation of one of these statutes: 1) 18 U.S.C. § 666(a)(1), Federal program fraud; 2) 18 U.S.C. § 1001, false statements; 3) 18 U.S.C. § 1031, major fraud against the United States; 4) 18 U.S.C. § 1032, concealment of assets from conservator, receiver, or liquidating agent of insured financial institution; 5) 18 U.S.C. § 1341, mail fraud; or 6) 18 U.S.C. § 1343, wire fraud. The offense under one of these statutes must involve the sale of assets acquired or held by the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution, any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency or the Office of Thrift Supervision, or the National Credit Union Administration as conservator or liquidating agent for a financial institution.

The Committee recommends that attorneys consider the possible extension of the reasoning of *Honeycutt v. United States*, 137 S. Ct. 1626, 1632 (2017) to 18 U.S.C § 982. In *Honeycutt*, the Supreme Court held that under 21 U.S.C. § 853(a)(1) a defendant may not be held "jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." 137 S. Ct. at 1632. In reaching this conclusion, the Court highlighted Section 853(a)'s textual requirement that a defendant "obtain" the proceeds—which evidenced the statute's focus on personal possession or use. 137 S. Ct. at 1632. The Court also highlighted the other provisions in Section 853(a), which similarly address property the defendant personally obtained. For instance, Section 853(a)(2) mandates forfeiture of property used to facilitate the crime, but limits the forfeiture to "the person's property." *Id.* at 1633. Similarly, Section 853(a)(3) requires the forfeiture of property related to continuing criminal enterprises, but requires the defendant to forfeit only "his interest in" the enterprise. *Id*.

The Court's holding in *Honeycutt* applies to Section 853 only, but its reasoning arguably reaches more broadly. Before discussing Section 853, the Court referred to the consequences of applying joint and several liability to co-conspirators "in the forfeiture context." *Honeycutt*, 137 S. Ct. at 1631. The Court focused on the

term "obtain" in Section 853(a)(1)'s text, but also grounded its decision on "several other provisions" in Section 853. *Id.* at 1633-34. Those provisions—Sections 853(c), 853(e), and 853(p)—are widely incorporated by reference in criminal forfeiture statutes. See, *e.g.*, 18 U.S.C. § 982(b)(1); 28 U.S.C. § 2461(c). Additionally, in rejecting the government's *Pinkerton* argument, the Court reasoned that Section 853's text and structure did not provide for co-conspirator forfeiture liability and that joint and several liability is inconsistent with *in personam* criminal forfeiture liability. *Honeycutt*, 137 S. Ct. at 1634-35. At least one Circuit has held that *Honeycutt* applies to 18 U.S.C. § 982(a)(2). See *United States v. Brown*, 2017 WL 3404979, at *1 (3d Cir. Aug. 9, 2017)(unpublished).

18 U.S.C. § 982(a)(4) FORFEITURE INSTRUCTION

The Forfeiture Allegation[s] in the Indictment allege[s] that the following property is subject to forfeiture under Title 18, United States Code, Section 982(a)(4):

[LIST PROPERTY]

In order for you to find that this property is subject to forfeiture, the government must prove the following by a preponderance of the evidence:

1. That the [real] or [personal] [tangible or intangible] property represents or is traceable to the gross receipts obtained, directly or indirectly, as a result of the offense[s] charged in Count _____; and

2. That the offense[s] in Count _____ [was] [were] committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations, or promises.

If you find from your consideration of all the evidence that the government has proved these things by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove these things by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should

check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Section 982(a)(4) applies where the real or personal tangible or intangible property are gross receipts obtained, directly or indirectly, as a result of a violation of one of these statutes: 1) 18 U.S.C. § 666(a)(1), Federal program fraud; 2) 18 U.S.C. § 1001, false statements; 3) 18 U.S.C. § 1031, major fraud against the United States; 4) 18 U.S.C. § 1032, concealment of assets from conservator, receiver, or liquidating agent of insured financial institution; 5) 18 U.S.C. § 1341 mail fraud; or 6) 18 U.S.C. § 1343, wire fraud.

The Committee recommends that attorneys consider the possible extension of the reasoning of *Honeycutt v. United States*, 137 S. Ct. 1626, 1632 (2017) to 18 U.S.C § 982. In *Honeycutt*, the Supreme Court held that under 21 U.S.C. § 853(a)(1) a defendant may not be held "jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." 137 S. Ct. at 1632. In reaching this conclusion, the Court highlighted Section 853(a)'s textual requirement that a defendant "obtain" the proceeds—which evidenced the statute's focus on personal possession or use. 137 S. Ct. at 1632. The Court also highlighted the other provisions in Section 853(a), which similarly address property the defendant personally obtained. For instance, Section 853(a)(2) mandates forfeiture of property used to facilitate the crime, but limits the forfeiture to "the person's property." *Id.* at 1633. Similarly, Section 853(a)(3) requires the forfeiture of property related to continuing criminal enterprises, but requires the defendant to forfeit only "his interest in" the enterprise. *Id*.

The Court's holding in *Honeycutt* applies to Section 853 only, but its reasoning arguably reaches more broadly. Before discussing Section 853, the Court referred to the consequences of applying joint and several liability to co-conspirators "in the forfeiture context." *Honeycutt*, 137 S. Ct. at 1631. The Court focused on the term "obtain" in Section 853(a)(1)'s text, but also grounded its decision on "several other provisions" in Section 853. *Id.* at 1633-34. Those provisions—Sections 853(c), 853(e), and 853(p)—are widely incorporated by reference in criminal forfeiture statutes. See, *e.g.*, 18 U.S.C. § 982(b)(1); 28 U.S.C. § 2461(c). Additionally, in rejecting the government's *Pinkerton* argument, the Court reasoned that Section 853's text and structure did not provide for co-conspirator forfeiture liability and that joint and several liability is inconsistent with *in personam* criminal forfeiture liability. *Honeycutt*, 137

S. Ct. at 1634-35. At least one Circuit has held that *Honeycutt* applies to 18 U.S.C. § 982(a)(2). See *United States v. Brown*, 2017 WL 3404979, at *1 (3d Cir. Aug. 9, 2017)(unpublished).

18 U.S.C. § 982(a)(5) FORFEITURE INSTRUCTION

The Forfeiture Allegation[s] in the Indictment allege[s] that the following property is subject to forfeiture under Title 18, United States Code, Section 982(a)(5):

[LIST PROPERTY]

In order for you to find that this property is subject to forfeiture, the government must prove the following by a preponderance of the evidence:

1. That the [real] or [personal] property represents or is traceable to the gross proceeds obtained, directly or indirectly, as a result of the offense of which the defendant [you are considering] was convicted in Count[s] _____.

If you find from your consideration of all the evidence that the government has proved this by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove this by a preponderance of the evidence [as to property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Section 982(a)(5) applies where the real or personal property represents or is traceable to the gross proceeds obtained, directly or indirectly, as a result of a violation of, or a conspiracy to violate

1) 18 U.S.C. § 511, altering or removing motor vehicle identification numbers; 2) 18 U.S.C. § 553, importing or exporting stolen motor vehicles; 3) 18 U.S.C. § 2119, armed robbery of automobiles; 4) 18 U.S.C. § 2312, transporting stolen motor vehicles in interstate commerce; or 5) 18 U.S.C. § 2313, possessing or selling a stolen motor vehicle that has moved in interstate commerce.

The Committee recommends that attorneys consider the possible extension of the reasoning of *Honeycutt v. United States*, 137 S. Ct. 1626, 1632 (2017) to 18 U.S.C § 982. In *Honeycutt*, the Supreme Court held that under 21 U.S.C. § 853(a)(1) a defendant may not be held "jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." 137 S. Ct. at 1632. In reaching this conclusion, the Court highlighted Section 853(a)'s textual requirement that a defendant "obtain" the proceeds—which evidenced the statute's focus on personal possession or use. 137 S. Ct. at 1632. The Court also highlighted the other provisions in Section 853(a), which similarly address property the defendant personally obtained. For instance, Section 853(a)(2) mandates forfeiture of property used to facilitate the crime, but limits the forfeiture to "the person's property." *Id.* at 1633. Similarly, Section 853(a)(3) requires the forfeiture of property related to continuing criminal enterprises, but requires the defendant to forfeit only "his interest in" the enterprise. *Id*.

The Court's holding in *Honeycutt* applies to Section 853 only, but its reasoning arguably reaches more broadly. Before discussing Section 853, the Court referred to the consequences of applying joint and several liability to co-conspirators "in the forfeiture context." *Honeycutt*, 137 S. Ct. at 1631. The Court focused on the term "obtain" in Section 853(a)(1)'s text, but also grounded its decision on "several other provisions" in Section 853. *Id.* at 1633-34. Those provisions—Sections 853(c), 853(e), and 853(p)—are widely incorporated by reference in criminal forfeiture statutes. See, *e.g.*, 18 U.S.C. § 982(b)(1); 28 U.S.C. § 2461(c). Additionally, in rejecting the government's *Pinkerton* argument, the Court reasoned that Section 853's text and structure did not provide for co-conspirator forfeiture liability and that joint and several liability is inconsistent with *in personam* criminal forfeiture liability. *Honeycutt*, 137 S. Ct. at 1634-35. At least one Circuit has held that *Honeycutt* applies to 18 U.S.C. § 982(a)(2). See *United States v. Brown*, 2017 WL 3404979, at *1 (3d Cir. Aug. 9, 2017)(unpublished).

18 U.S.C. § 982(a)(6) FORFEITURE INSTRUCTION

The Forfeiture Allegation[s] in the Indictment allege[s] that the following property is subject to forfeiture under Title 18, United States Code, Section 982(a)(6):

[LIST PROPERTY]

In order for you to find that this property is subject to forfeiture, the government must prove the following by a preponderance of the evidence:

1. That the conveyance was used in commission of the offense of which the defendant [you are considering] was convicted in Count[s] _____; or

2. That the [real] or [personal] property constitutes or is derived from or is traceable to the proceeds obtained directly or indirectly from the commission of the offense of which the defendant [you are considering] was convicted in Count[s] _____; or

3. That the [real] or [personal] property was used to facilitate or was intended to be used to facilitate the commission of the offense of which the defendant [you are considering] was convicted in Count[s] _____.

If you find from your consideration of all the evidence that the government has proved these things by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove these things by a preponderance of the evi-

dence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Section 982(a)(6) applies where the defendant has been convicted of a violation of or conspiracy to violate one of these statutes: Section 274(a), 274A(a)(1), or 274A(a)(2) of the Immigration and Nationality Act; or Section 555, constructing border tunnel or passage; Section 1425, unlawful procurement of citizenship or naturalization; Section 1426, false/fraudulent reproduction of naturalization or citizenship papers; Section 1427, unlawful sale of naturalization or citizenship papers; Section 1541, issuance of passport without authority; Section 1542, false statement in application and use of passport; Section 1543, forgery or false use of passport; Section 1544, misuse of passport; Section 1546, fraud and misuse of visas, permits, and other documents; or Section 1028, fraud and related activity in connection with identification documents, if committed in connection with passport or visa issuance or use.

The Committee recommends that attorneys consider the possible extension of the reasoning of *Honeycutt v. United States*, 137 S. Ct. 1626, 1632 (2017) to 18 U.S.C § 982. In *Honeycutt*, the Supreme Court held that under 21 U.S.C. § 853(a)(1) a defendant may not be held "jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." 137 S. Ct. at 1632. In reaching this conclusion, the Court highlighted Section 853(a)'s textual requirement that a defendant "obtain" the proceeds—which evidenced the statute's focus on personal possession or use. 137 S. Ct. at 1632. The Court also highlighted the other provisions in Section 853(a), which similarly address property the defendant personally obtained. For instance, Section 853(a)(2) mandates forfeiture of property used to facilitate the crime, but limits the forfeiture to "the person's property." *Id.* at 1633. Similarly, Section 853(a)(3) requires the forfeiture of property related to continuing criminal enterprises, but requires the defendant to forfeit only "his interest in" the enterprise. *Id*.

The Court's holding in *Honeycutt* applies to Section 853 only, but its reasoning arguably reaches more broadly. Before discussing Section 853, the Court referred to the consequences of applying joint and several liability to co-conspirators "in the forfeiture

context." *Honeycutt*, 137 S. Ct. at 1631. The Court focused on the term "obtain" in Section 853(a)(1)'s text, but also grounded its decision on "several other provisions" in Section 853. *Id.* at 1633-34. Those provisions—Sections 853(c), 853(e), and 853(p)—are widely incorporated by reference in criminal forfeiture statutes. See, *e.g.*, 18 U.S.C. § 982(b)(1); 28 U.S.C. § 2461(c). Additionally, in rejecting the government's *Pinkerton* argument, the Court reasoned that Section 853's text and structure did not provide for co-conspirator forfeiture liability and that joint and several liability is inconsistent with *in personam* criminal forfeiture liability. *Honeycutt*, 137 S. Ct. at 1634-35. At least one Circuit has held that *Honeycutt* applies to 18 U.S.C. § 982(a)(2). See *United States v. Brown*, 2017 WL 3404979, at *1 (3d Cir. Aug. 9, 2017)(unpublished).

18 U.S.C. § 982(a)(7) FORFEITURE INSTRUCTION

The Forfeiture Allegation[s] in the Indictment allege[s] that the following property is subject to forfeiture under Title 18, United States Code, Section 982(a)(7):

[LIST PROPERTY]

In order for you to find that this property is subject to forfeiture, the government must prove the following by a preponderance of the evidence:

1. That the [real] or [personal] property that constitutes or was derived, directly or indirectly, from the gross proceeds traceable to the commission of the federal health care offense of which the defendant [you are considering] was convicted in Count[s] _____.

If you find from your consideration of all the evidence that the government has proved this by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove this by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

The Committee recommends that attorneys consider the possible extension of the reasoning of *Honeycutt v. United States*, 137 S. Ct. 1626, 1632 (2017) to 18 U.S.C § 982. In *Honeycutt*, the

Supreme Court held that under 21 U.S.C. § 853(a)(1) a defendant may not be held "jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." 137 S. Ct. at 1632. In reaching this conclusion, the Court highlighted Section 853(a)'s textual requirement that a defendant "obtain" the proceeds—which evidenced the statute's focus on personal possession or use. 137 S. Ct. at 1632. The Court also highlighted the other provisions in Section 853(a), which similarly address property the defendant personally obtained. For instance, Section 853(a)(2) mandates forfeiture of property used to facilitate the crime, but limits the forfeiture to "the person's property." *Id.* at 1633. Similarly, Section 853(a)(3) requires the forfeiture of property related to continuing criminal enterprises, but requires the defendant to forfeit only "his interest in" the enterprise. *Id*.

The Court's holding in *Honeycutt* applies to Section 853 only, but its reasoning arguably reaches more broadly. Before discussing Section 853, the Court referred to the consequences of applying joint and several liability to co-conspirators "in the forfeiture context." *Honeycutt*, 137 S. Ct. at 1631. The Court focused on the term "obtain" in Section 853(a)(1)'s text, but also grounded its decision on "several other provisions" in Section 853. *Id.* at 1633-34. Those provisions—Sections 853(c), 853(e), and 853(p)—are widely incorporated by reference in criminal forfeiture statutes. See, *e.g.*, 18 U.S.C. § 982(b)(1); 28 U.S.C. § 2461(c). Additionally, in rejecting the government's *Pinkerton* argument, the Court reasoned that Section 853's text and structure did not provide for co-conspirator forfeiture liability and that joint and several liability is inconsistent with *in personam* criminal forfeiture liability. *Honeycutt*, 137 S. Ct. at 1634-35. At least one Circuit has held that *Honeycutt* applies to 18 U.S.C. § 982(a)(2). See *United States v. Brown*, 2017 WL 3404979, at *1 (3d Cir. Aug. 9, 2017)(unpublished).

18 U.S.C. § 982(a)(8) FORFEITURE INSTRUCTION

The Forfeiture Allegation[s] in the Indictment allege[s] that the following property is subject to forfeiture:

[LIST PROPERTY]

In order for you to find that this property is subject to forfeiture, the government must prove the following by preponderance of the evidence:

1. That the [real; personal] property was used or intended to be used to commit, to facilitate or to promote the offense of which the defendant [you are considering] was convicted in Count[s] _____, and that the offense involved telemarketing; or

2. That the [real; personal] property constituted, was derived from or traceable to the gross proceeds that the defendant [you are considering] obtained directly or indirectly as a result of the offense of which the defendant [you are considering] was convicted in Count[s] _____, and that the offense involved telemarketing.

If you find from your consideration of all the evidence that the government has proved these things by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove these things by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should

check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Section 982(a)(8) of Title 18 applies where the real or personal property was used or intended to be used to commit, to facilitate or to promote the violation of one of these statutes: 1) 18 U.S.C. § 1028, fraud and related activity in connection with identification documents; 2) 18 U.S.C. § 1029, fraud and related activity in connection with access devices; 3) 18 U.S.C. § 1341, mail fraud; 4) 18 U.S.C. § 1342, fictitious name or address; 5) 18 U.S.C. § 1343, wire fraud; or 6) 18 U.S.C. § 1344, bank fraud where the conviction involved telemarketing.

18 U.S.C. § 982(a)(8) DEFINITION OF "NEXUS" INSTRUCTION

In order to establish a "nexus" between the property alleged to be forfeitable and the offense giving rise to the forfeiture allegation, the government must establish a connection between the property and the offense. The connection must be more than incidental, but the connection need not be substantial.

Committee Comment

Fed. R. Crim. P. 32.2(b)(5)(B) requires that, upon request, "the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant." For the most part, the nexus requirement of the Rule will be met under the statutory requirement of what property is subject to forfeiture. The Committee recognizes that there may be overlap between the statutory requirement and the nexus requirement of the Rule, but the Committee has concluded that we need this separate instruction to meet both the statutory and Rule requirements.

18 U.S.C. § 982(a)(8) DEFINITION OF FEDERAL "HEALTH CARE FRAUD OFFENSE"

A defendant is convicted of a "health care fraud offense" if he is convicted of violating or conspiring to violate: 1) theft or embezzlement in connection with health care (18 U.S.C. § 669); 2) false statements relating to health care matters (18 U.S.C. § 1035); 3) health care fraud (18 U.S.C. § 1347); or 4) obstruction of a criminal investigation of a health care offense (18 U.S.C. § 1518). A defendant is also convicted of a health care fraud offense if he is convicted of violating or conspiring to violate: 1) submitting false, fictitious or fraudulent claims (18 U.S.C. § 287); 2) conspiracy to commit an offense or to defraud the United States (18 U.S.C. § 371); 3) theft or embezzlement from employee benefit plan (18 U.S.C. § 664); 4) theft or bribery concerning programs receiving Federal funds (18 U.S.C. § 666); 5) false statements (18 U.S.C. § 1001); 6) false statements and concealment of facts in relation to documents required by the Employee Retirement Income Security Act of 1974 (18 U.S.C. § 1027); 7) mail fraud (18 U.S.C. § 1341); 8) wire fraud (18 U.S.C. § 1343); or 9) offer, acceptance, or solicitation to influence operations of an employee benefit plan (18 U.S.C. § 1954), if the offense relates to a health care benefit program.

A health care benefit program is any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract. Commerce was affected if the health care program[s] had any impact on the movement of any money, goods, services, or persons from one state to another [or between another country and the United States].

Committee Comment

This definition comes from 18 U.S.C. § 24—"definitions relat-

ing to Federal health care offense." Courts have interpreted "affecting commerce" under § 24 as requiring an interstate commerce effect. *United States v. Klein*, 543 F.3d 206, 211 (5th Cir. 2008); *United States v. Lucien*, 78 F. App'x 141 (2d Cir. 2003); *United States v. Whited*, 311 F.3d 259 (3d Cir. 2002).

18 U.S.C. § 982(a)(8) DEFINITION OF "CONVEYANCE"

A "conveyance" includes a vessel, vehicle or aircraft used in the commission of the offense.

Committee Comment

The definition of "conveyance" comes from 18 U.S.C. § 982(a)(6).

18 U.S.C. § 982(a)(8) PROPERTY SUBJECT TO FORFEITURE

The government is not required to prove that the money obtained by the Defendant is still in the Defendant's possession. Rather, the government is only required to prove the elements that I have described to you. You are further instructed that what happens to any property that is declared subject to forfeiture is exclusively a matter for the court to decide. You should not consider what might happen to the property in determining whether the property is subject to forfeiture. [In this connection, you should disregard any claims that other persons may have to the property because those interests will be taken into account by the court at a later time.]

Committee Comment

United States v. Ginsburg, 773 F.2d 798 (7th Cir. 1985) (*en banc*) holds that the government does not have to prove that the property is in existence at the time of conviction.

18 U.S.C. § 1001 DEFINITION OF FALSE OR FICTITIOUS

A statement is [false; fictitious] if it was untrue when made.

18 U.S.C. § 1001 DEFINITION OF FRAUDULENT

A statement or representation is fraudulent if it is made [or caused to be made] with intent to deceive.

18 U.S.C. § 1001 DEFINITION OF "MATERIAL"

A statement is "material" if it is capable of influencing the actions of the [name the body or agency]. [The government is not required to prove that the statement actually influenced the actions of the [name the body or agency].]

Committee Comment

See *United States v. Gaudin*, 515 U.S. 506, 509 (1995) (To be material for purposes of section 1001, a statement must have "a natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed."); *United States v. Turner*, 551 F.3d 657, 663 (7th Cir. 2008).

18 U.S.C. § 1001 DEFINITION OF "WILLFULLY"

A person acts "willfully" if he acts voluntarily and intentionally, and with the intent to do something illegal.

Committee Comment

This instruction defines the requirement of "willful" conduct as used in the fourth element of the section 1001 instructions. That same element also requires "knowing" conduct. Given the standard definition of "knowing" conduct as set forth elsewhere in the pattern instructions, there is some overlap between these two concepts as they are used in section 1001. The Seventh Circuit, however, has specifically approved the definition of "willful" conduct under section 1001 as set forth in this instruction. See *United States v. Ranum*, 96 F.3d 1020, 1028–29 (7th Cir. 1996).

The willfulness element does not require government to prove that the underlying conduct about which the defendant made representations was unlawful. See *United States v. Lupton*, 620 F.3d 790, 806 (7th Cir. 2010).

18 U.S.C. § 1001 DEPARTMENT OR AGENCY

The [name of department, agency, or office] is a part of the [executive; legislative; judicial] branch of the government of the United States. [Statements; Representations; Facts] concerning [specify] are within the jurisdiction of that branch.

Committee Comment

The statement need not be made directly to a United States agency. If made to a local entity administering a totally or partially federally funded program then such a statement may also be within the jurisdiction of a federal agency. See *United States v. Petullo*, 709 F.2d 1178, 1180 (7th Cir. 1983); see also *United States v. Ross*, 77 F.3d 1525, 1544 (7th Cir. 1996) ("This court has repeatedly found the submission of a fraudulent statement to a private (or non-federal government) entity to be within the jurisdiction of a federal agency where the agency has given funding to the entity and fraudulent statements cause the entity to utilize the funds improperly.").

It is of no consequence whether the government suffered monetary loss or was actually deceived by the acts charged.

18 U.S.C. § 1001(a)(1) CONCEALING A MATERIAL FACT—ELEMENTS

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

1. The defendant [falsified; concealed; covered up] a fact by trick, scheme or device; and

2. The fact was material; and

3. [The defendant had a legal duty to disclose the fact]; and

4. The defendant acted knowingly and willfully; and

5. The defendant [falsified; concealed; covered up] the material fact in a matter within the jurisdiction of the [executive; legislative; judicial] branch of the government of the United States.

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 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

See comment to Pattern Instruction 18 U.S.C. § 1001, Making a False Statement or Representation.

On the third element (duty to disclose), see *United States v. Moore*, 446 F.3d 671, 677 (7th Cir. 2006).

18 U.S.C. § 1001(a)(1) DEFINITION OF "TRICK, SCHEME, OR DEVICE"

A "trick, scheme, or device" includes any plan or course of action intended to deceive others.

18 U.S.C. § 1001(a)(2) MAKING A FALSE STATEMENT OR REPRESENTATION—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ___ of the indictment charge[s] the defendant[s] with] making a [false; fictitious; fraudulent] [statement; representation]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [five] following elements beyond a reasonable doubt:

1. The defendant made a [statement; representation]; and

2. The statement was [false; fictitious; fraudulent]; and

3. The [statement; representation] was material; and

4. The defendant acted knowingly and willfully; and

5. The defendant made the [statement; representation] in a matter within the jurisdiction of the [executive; legislative; judicial] branch of the government of the United States.

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 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. Moore, 446 F.3d 671, 677 (7th Cir. 2006), says that the court has "identified five elements of a charge under section 1001, and lists them in the manner set forth in the revised pattern instruction." See also*, e.g., United States v. Ranum*, 96 F.3d 1020, 1028 (7th Cir. 1996); *United States v. Petullo*, 709 F.2d 1178, 1180 (7th Cir. 1983). The prior Pattern Instruction collapsed elements 1 and 2 into a single element. This instruction separates the making of the statement and its falsity into two separate elements.

Section 1001 does not require proof that the defendant knew the false statement involved a matter within the jurisdiction of a federal agency. *United States v. Yermian*, 468 U.S. 63, 69 (1984). Nor does it require proof of an intent to deceive the government. *Id*. ("Any natural reading of § 1001 . . . establishes that the terms 'knowingly and willfully' modify only the making of 'false, fictitious or fraudulent statements' . . . The statute contains no language suggesting any additional element of intent, such as a requirement that false statements be 'knowingly made in a matter within federal agency jurisdiction,' or 'with the intent to deceive the Federal Government.' "). See also*, e.g., United States v. Lupton*, 620 F.3d 790, 806 (7th Cir. 2010) ("the 'knowingly and willfully' requirement in 18 U.S.C. § 1001 relates only to the defendant's knowledge and intent that the statements he made to a government entity were false or were made with the conscious purpose of evading the truth.").

18 U.S.C. § 1001(a)(3) MAKING OR USING A FALSE WRITING OR DOCUMENT—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [making; using] a false [writing; document] knowing it to contain any [false; fictitious; fraudulent] [statement; entry]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each the [five] following elements beyond a reasonable doubt:

1. The defendant [made; used] a false [writing; document]; and

2. The defendant knew the [writing; document] contained a [false; fictitious; fraudulent] [statement; entry]; and

3. The [false; fictitious; fraudulent] [statement; entry] was material; and

4. The defendant [made; used] the [document; writing] knowingly and willfully; and

5. The defendant [made; used] the [writing; document] in a matter within the jurisdiction of the [executive; legislative; judicial] branch of the government of the United States.

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 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

See comment to Pattern Instruction 18 U.S.C. § 1001, Making a False Statement or Representation.

18 U.S.C. § 1005 FRAUDULENTLY BENEFITTING FROM A LOAN BY A FEDERALLY INSURED INSTITUTION—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] fraudulently benefitting from a loan made by a financial institution. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant received or otherwise benefitted, directly or indirectly, from a loan made by a financial institution; and

2. The defendant acted with the intent to defraud the financial institution; and

3. The deposits of the [name the financial institution] were then insured by the Federal Deposit Insurance Corporation.

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 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 definition of "intent to defraud" see the Pattern Instruction regarding that terms as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343.

18 U.S.C. § 1006 INSIDER FRAUD ON A FEDERALLY INSURED FINANCIAL INSTITUTION—ELEMENTS

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

1. The defendant was an [officer, agent or employee of or connected in some capacity with] or [name of qualifying institution as listed in the statute]; and

2. The defendant [choose whichever applies];

(A) made a false entry in a book, report or statement of [name of institution].

(B) without authorization, drew an [order; bill of exchange], [made an acceptance], [issued, put forth or assigned a note, debenture, bond, draft, bill of exchange, mortgage, judgment, or decree].

(C) [participated in; shared in; received], directly or indirectly, [money; profit; property; benefits] through a [transaction; loan; commission; contract; or insert other act of the institution].

and

3. The defendant acted with the intent to defraud the [name of defrauded institution, corporation, association, or individual]

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 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 definition of "intent to defraud" see the Pattern Instruction regarding that terms as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343.

18 U.S.C. § 1007 FALSE STATEMENTS TO INFLUENCE THE FDIC—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] making [or inviting reliance on] a false statement [document or other thing] to influence the Federal Deposit Insurance Corporation. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. The defendant knowingly [made; invited reliance on] a [false; forged; counterfeit] [statement; document; thing] as alleged in Count __ of the indictment; and

2. The defendant acted for the purpose of influencing in some way an action of the Federal Deposit Insurance Corporation.

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 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 term "knowingly" is defined in Pattern Instruction 4.10.

18 U.S.C. § 1014 FALSE STATEMENT TO FINANCIAL INSTITUTION—ELEMENTS

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

1. The defendant made a false statement to a [bank; financial institution], [orally; in writing]; and

2. At the time the defendant made the statement, he knew it was false; and

3. The defendant made the statement with the intent to influence the action of the [bank; financial institution] concerning a[n] [describe type of action: application, loan, etc.]; and

4. The accounts of the [bank; financial institution] were insured by the Federal Deposit Insurance Corporation.

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 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

There are several types of institutions listed in the statute for

which this instruction should be modified, but the vast majority of section 1014 cases are based on statements to banks.

See *United States v. Lane*, 323 F.3d 568, 583 (7th Cir. 2003) (elements of offense under 18 U.S.C. § 1014 include "knowledge of falsity, and the intent to influence action by the financial institution concerning a loan or one of the other transactions listed in the statute"). Proof of materiality is not required under section 1014. *United States v. Wells*, 519 U.S. 482 (1997); *Lane*, 323 F.3d at 583.

The term "knowingly" is defined in Pattern Instruction 4.10.

18 U.S.C. § 1015(a) MAKING A FALSE STATEMENT IN AN IMMIGRATION DOCUMENT—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] making a false statement in an immigration document. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. The defendant knowingly made a false statement under oath; and

2. The statement was made in a [case; proceeding; matter] [related to; under; by virtue of] any law of the United States related to [naturalization; citizenship; registry] of aliens.

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 plain language of 18 U.S.C. § 1015(a) does not include a materiality element. In *Kungys v. United States*, 485 U.S. 759, 770 (1988), the Supreme Court held that a statute which criminalizes the making of a false statement without express reference to materiality, criminalizes both material and not material false statements. See also *United States v. Youssef*, 547 F.3d 1090 (9th Cir. 2008) (18 U.S.C. § 1015(a) does not include a materiality requirement).

The term "knowingly" is defined in Pattern Instruction 4.10.

18 U.S.C. § 1015(b) FALSE DENIAL OF NATURALIZATION OR CITIZENSHIP—ELEMENTS

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

1. The defendant was a citizen of the United States;

2. The defendant knowingly and intentionally denied being a citizen of the United States; and

3. The defendant's denial was made for the purpose of avoiding any [duty; liability] [imposed; required] as charged in the indictment.

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].

18 U.S.C. § 1015(c) USE OF FRAUDULENT IMMIGRATION DOCUMENT—ELEMENTS

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

1. The defendant [used; attempted to use] [the document named in the indictment]; and

2. The defendant knew [the document named in the indictment] was procured [by fraud; by false evidence; without required [appearance; hearing] of the applicant in court; otherwise unlawfully obtained].

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].

18 U.S.C. § 1015(d) MAKING FALSE CERTIFICATE OF APPEARANCE—ELEMENTS

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

1. The defendant knowingly:

(a) made any false [certificate; acknowledgment; statement] concerning the appearance of [person named in the indictment] before the defendant with respect to any [application; declaration; petition; affidavit; deposition; certificate of naturalization; certificate of citizenship; other [paper; writing]]; or

(b) took an [oath; affirmation; signature; attestation; execution] by [person named in the indictment] related to any [application; declaration; petition; affidavit; deposition; certificate of naturalization; certificate of citizenship; other [paper; writing]]; and

2. The defendant knew the [certificate; acknowledgment; statement; oath; affirmation; signature; attestation] was [required; authorized] as charged in the indictment.

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 term "knowingly" is defined in Pattern Instruction 4.10.

18 U.S.C. § 1015(e) FALSE CLAIM OF CITIZENSHIP—ELEMENTS

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

1. The defendant was an alien; and

2. The defendant knowingly made a [false statement; claim] that the defendant [is; has been] a [citizen; national] of the United States; and

3. The defendant made the [false statement; claim] for the purpose of obtaining [Federal benefits; State benefits; Federal services; State services; to unlawfully gain employment] in the United States.

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 term "knowingly" is defined in Pattern Instruction 4.10.

18 U.S.C. § 1015(f) FALSE CLAIM OF CITIZENSHIP IN ORDER TO VOTE—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] making a false claim of citizenship in order to vote. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. The defendant was an alien; and

2. The defendant knowingly made a false [statement; claim] to be a citizen of the United States in order to [register to vote; vote] in a [Federal; State; local] election.

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 term "knowingly" is defined in Pattern Instruction 4.10.

18 U.S.C. § 1028 PENALTY-ENHANCING INSTRUCTIONS AND SPECIAL VERDICT FORMS

Committee Comment

The Supreme Court has held "that it is within the jury's province to determine any fact (other than the existence of a prior conviction) that increases the maximum punishment authorized for a particular offense." *Oregon v. Ice*, 555 U.S. 160, 163 (2009) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004)). Therefore, if the government seeks, and the evidence supports, an enhanced penalty under § 1028(b), then the principles of *Apprendi* require that the jury be instructed on the penalty-enhancing factor(s). In that event, the Committee suggests that the jury also be provided with a special verdict form.

The default maximum penalty for § 1028(a) convictions ranges from one to fifteen years of imprisonment. See 18 U.S.C. § 1028(b). If the jury finds beyond a reasonable doubt that the government has proven certain factors specified in § 1028(b), then the applicable statutory maximum is increased. But the elements of the substantive offenses described in § 1028(a) remain the same; only the statutory maximum is dependent on the factors specified in § 1028(b). If the penalty-enhancing factors were incorporated into the offense-elements instruction, then the jury could mistakenly find a defendant not guilty of the offense, when instead the defendant should be found guilty of the offense but subject only to the default statutory maximum. Thus, rather than incorporate those penalty-enhancing factors into the offense-elements instruction, the court should provide the jury with an additional penalty-enhancing instruction as necessary. But two significant caveats apply.

Section 1028(c). First, § 1028(c)(1), has a potential impact on the propriety of giving such an instruction. Section 1028(c) identifies several federal-interest grounds; proof of one of them is an element of a § 1028(a) offense. For example, one way to satisfy (c)(1) is to prove that the identification document, authentication feature, or false identification document "is or appears to be issued by or under the authority of the United States." If the indictment alleges this ground as an element of the offense and the jury is so instructed, then a finding of guilt would trigger the 15-year statutory maximum in § 1028(b)(1)(A)(i). In that situation, no penalty-enhancing instruction or corresponding special verdict form should be given to the jury. That is, if the indictment in such a case al-

leges no fact to trigger the greater maximum in § 1028(b)(3) (20 years) or (b)(4) (30 years), specifically, that the offense was committed to facilitate a drug trafficking crime, in connection with a crime of violence, or to facilitate an act of domestic terrorism or international terrorism, then a penalty-enhancing instruction and corresponding special verdict form are also unnecessary. But if the indictment alleges and the evidence supports a fact that triggers (b)(3) or (b)(4), then an additional penalty-enhancing instruction and corresponding special verdict form should be given.

Section 1028(b)(3)(C). Second, is that one of the § 1028(b) enhancements does not require a special verdict form. Specifically, (b)(3)(C) provides for a 20-year statutory maximum if the offense is committed "after a prior conviction under this section becomes final." An enhancement for a prior conviction is an exception to the rule of *Apprendi*. *Ice*, 555 U.S. at 163 (describing *Apprendi* line of cases as holding "that it is within the jury's province to determine any fact (other than the existence of a prior conviction) that increases the maximum punishment authorized for a particular offense"); *Cunningham v. California*, 549 U.S. 270, 274–75 (2007) (*Apprendi* applies only to those facts "other than a prior conviction"). Accordingly, the jury should not be asked to determine the existence of the prior conviction. Indeed, the defendant could be unduly prejudiced by evidence of the prior conviction if there is no independent basis to admit that evidence.

The penalty-enhancing instructions and special verdict forms for § 1028(a) offenses begin on the following page.

18 U.S.C. § 1028 PENALTY-ENHANCING PROVISIONS UNDER § 1028(b)

If you find that the government proved beyond a reasonable doubt [specify the offense charged in the indictment] as charged in Count [__] of the indictment, then you must also determine whether the government proved beyond a reasonable doubt that the offense in Count [__]:

(insert appropriate alternative(s))

[involved the production or transfer of an identification document, authentication feature, or false identification document that is or appears to be an identification document or authentication feature issued by or under the authority of the United States.] ((b)(1)(A)(i))

- or -

[involved the production or transfer of an identification document, authentication feature, or false identification document that is or appears to be a birth certificate, or a driver's license or personal identification card.] ((b)(1)(A)(ii))

- or -

[involved the production or transfer of more than five identification documents, authentication features, or false identification documents.] ((b)(1)(B))

- or -

[involved the transfer, possession, or use of 1 or more means of identification and, as a result of the offense, [the defendant] obtained anything of value aggregating $1,000 or more during any 1 year period.] [(b)(1)(D) for 1028(a)(7) offenses only]

- or -

[involved any production, transfer, or use of a means of identification, an identification document, authentication feature, or a false identification document.] ((b)(2)(A))

- or -

[was committed to facilitate a drug trafficking crime.] ((b)(3)(A))

- or -

[was committed in connection with a crime of violence.] ((b)(3)(B))

- or -

[was committed to facilitate an [act of domestic terrorism; act of international terrorism].] ((b)(4))

Committee Comment

The jury's determination on these characteristics of the offense influences the defendant's maximum sentence. If supported by allegations in the indictment and proof at trial, this instruction may be given for any of the offenses listed under § 1028(a). The Committee recommends that if this instruction is given, then the jury also be given a special verdict form, see the following.

The bracketed citations to the subsections of § 1028(b) at the end of each of the above alternatives are included only to assist the court in crafting an appropriate instruction. The citations are not intended to be included in the instructions given to the jury.

It should again be noted that § 1028(c)(1), may impact the propriety of giving a penalty-enhancing instruction and special verdict form. Section 1028(c) identifies several federal-interest grounds; proof of one of them is an element of a § 1028(a) offense. For example, one way to satisfy (c)(1) is to prove that the identification document, authentication feature, or false identification document "is or appears to be issued by or under the authority of the United States." If the indictment alleges this ground as an element of the offense and the jury is so instructed, then a finding of guilt

would trigger the statutory maximum in § 1028(b)(1)(A)(i). In that situation, no penalty-enhancing instruction or corresponding special verdict form should be given to the jury. If the indictment alleges no fact to trigger the greater maximum in § 1028(b)(3) or (b)(4), specifically, that the offense was committed to facilitate a drug trafficking crime, in connection with a crime of violence, or to facilitate an act of domestic terrorism or international terrorism, then a penalty-enhancing instruction and corresponding special verdict form are also unnecessary. But if the indictment alleges and the evidence supports a fact that triggers (b)(3) or (b)(4) other than the fact of a prior conviction under § 1028, then an additional penalty-enhancing instruction and corresponding special verdict form should be given.

See the Committee Comment to Penalty-Enhancing Instructions and Special Verdict Forms preceding this instruction.

18 U.S.C. § 1028 SPECIAL VERDICT FORM

If you find the defendant(s) guilty of [specify the offense charged in the indictment] in Count [__], then you must also answer the following question(s).

We, the jury, find beyond a reasonable doubt that the offense described in Count [__]:

[involved the production or transfer of an identification document, authentication feature, or false identification document that is or appears to be an identification document or authentication feature issued by or under the authority of the United States.] [(b)(1)(A)(i)]

- or -

[involved the production or transfer of an identification document, authentication feature, or false identification document that is or appears to be a birth certificate, or a driver's license or personal identification card.] [(b)(1)(A)(ii)]

- or -

[involved the production or transfer of more than five identification documents, authentication features, or false identification documents.] [(b)(1)(B)]

- or -

[involved the transfer, possession, or use of 1 or more means of identification and, as a result of the offense, [the defendant] obtained anything of value aggregating $1,000 or more during any 1 year period.] [(b)(1)(D) for § 1028(a)(7) offenses only]

- or -

[involved any production, transfer, or use of a means of identification, an identification document,

authentication feature, or a false identification document.] [(b)(2)(A)]

- or -

[was committed to facilitate a drug trafficking crime.] [(b)(3)(A)]

- or -

[was committed in connection with a crime of violence.] [(b)(3)(B)]

- or -

[was committed to facilitate an [act of domestic terrorism; act of international terrorism].] [(b)(4)]

Committee Comment

The bracketed citations to the subsections of § 1028(b) at the end of each of the above alternatives are included only to assist the court in crafting an appropriate special verdict form. The citations are not intended to be included in the verdict form given to the jury.

Care should be exercised in determining whether a special verdict form is necessary. Certain convictions under § 1028(a), which by necessity contain elements that trigger the penalty-enhancing provisions of § 1028(b), do not require the giving of any penalty-enhancing instruction or corresponding verdict form, unless the indictment alleges, and the evidence supports, finding facts that would trigger a greater maximum penalty under other subsections of § 1028(b). See the Committee Comment to Penalty-Enhancing Instructions and Special Verdict Forms preceding this instruction.

18 U.S.C. § 1028 DEFINITIONS

Committee Comment

These definitions are designed to accompany the pattern instructions for the offenses listed in §§ 1028(a) and 1028A(a). The source of most of these definitions is § 1028(d), which defines several terms unique to §§ 1028(a) and 1028A(a).

In providing these definitions, the Committee does not intend to imply that the court should always instruct the jury on all of the definitions. The court should provide the jury with the definitions only for the terms that are necessary for the particular case on trial. In addition, the court should excise from each definition terms that are inapplicable to the facts of the particular case.

Unless otherwise noted, these pattern definitions simply reproduce the definitions provided by § 1028(d) with only minor stylistic changes. Incorporating the complete statutory definitions in this manner is consistent with the relatively few pattern instructions for § 1028(a) published by other circuits.

18 U.S.C. § 1028 DEFINITION OF "LAWFUL AUTHORITY"

"Lawful authority" means authorization recognized by statute or regulation. Thus, "without lawful authority" means without authorization recognized by statute or regulation.

To prove the "without lawful authority" element, the government need not prove that the identification document(s), authentication feature(s), false identification documents(s), or means of identification were stolen. However, proof that such documents, features or means of identification were stolen would satisfy the "without lawful authority" element.

Committee Comment

The "without lawful authority" language used in § 1028A(a) is also used in § 1028(a)(1), (2), (6) and (7), and the Committee believes the same meaning should be applied under the latter statute.

A number of circuits have held that "without lawful authority" includes situations in which a defendant comes into lawful possession of identifying information and had the lawful authority to use that information for a lawful purpose, but used the information for an unlawful purpose.

See *United States v. Abdelshafi*, 592 F.3d 602, 608–09 (4th Cir. 2010) (government was not required to prove that the identifying information was stolen or misappropriated in order to prove a violation of the aggravated-identity theft statute, 18 U.S.C. § 1028A(a)(1)); *United States v. Hurtado*, 508 F.3d 603, 607–08 (11th Cir. 2007) (*per curiam*) (18 U.S.C. § 1028A(a)(1) does not require the government to prove that the defendant stole the identification of another person); *United States v. Mahmood*, 820 F.3d 177, 187–88 (5th Cir. 2016); *United States v. Gatwas*, 910 F.3d 362, 368 (8th Cir. 2018); *United States v. Osuna-Alvarez*, 788 F.3d 1183, 1186 (9th Cir. 2015); *United States v. Reynolds*, 710 F.3d 434, 436 (D.C. Cir. 2013). Litigants have cited the Seventh Circuit's opinion in *United States v. Spears*, 729 F.3d 753, 757 (7th Cir. 2013), as evidence that the Seventh Circuit takes a contrary position. See, *e.g.*, *Mahmood*, 820 F.3d at 188–189. The Seventh Circuit, however, has not yet articulated a position on the scope of

"without lawful authority."

18 U.S.C. § 1028 DEFINITION OF "INTERSTATE OR FOREIGN COMMERCE"

"Interstate or foreign commerce" involves business, trade, travel, transportation or communication between any place in a state and any place outside that state [, or any two places within a state but through any place outside that state]. A defendant's conduct affects commerce if the natural consequences of the defendant's actions had some effect on commerce, however minimal.

Committee Comment

This definition is derived from instructions addressing the Hobbs Act, 18 U.S.C. § 1951, which uses the similar phrase "affects commerce."

18 U.S.C. § 1028(a) OFFENSES AND § 1028(b) PENALTIES

Committee Comment

Section 1028(a) defines eight substantive fraud offenses in subsections (a)(1) through (a)(8). Section 1028(b) provides for a variety of punishments ranging from one year to thirty years depending on the manner in which § 1028(a) was violated. See 18 U.S.C. § 1028(b)(1) (15 years maximum), (b)(2) (5 years maximum), (b)(3) (20 years maximum), (b)(4) (30 years maximum), (b)(6) (one year maximum). Section 1028(b)(5) provides for forfeiture. Subject to the analysis in the Notes below, the default statutory maxima (that is, the maxima that apply when no other factors are proven except for the elements of the offense) are:

Subsection	Default Maximum	Citation
(a)(1)	5 years' imprisonment	§ 1028(b)(2)(A)[1]
(a)(2)	5 years' imprisonment	§ 1028(b)(2)(A)[2]
(a)(3)	5 years' imprisonment	§ 1028(b)(2)(B)
(a)(4)	1 year imprisonment	§ 1028(b)(6)[3]
(a)(5)	15 years' imprisonment	§ 1028(b)(1)(C)
(a)(6)	1 year imprisonment	§ 1028(b)(6)[3]
(a)(7)	5 years' imprisonment	§ 1028(b)(2)(B)
(a)(8)	5 years' imprisonment	§ 1028(b)(2)(A)[4]

Note 1. Section 1028(b)(2)(A) applies because the circumstances in (b)(2)(A) are necessarily proven if the § 1028(a)(1) offense elements are proven. Compare (b)(2)(A) ("any other production . . . of . . . an identification document, authentication feature, or a false identification document") with (a)(1) ("knowingly and without lawful authority produces an identification document, authentication feature, or a false identification document").

Note 2. Section 1028(b)(2)(A) applies because the circumstances in (b)(2)(A) are necessarily proven if the § 1028(a)(2) offense elements are proven. Compare (b)(2)(A) ("any other . . . transfer . . . of . . . an identification document, authentication feature, or a false identification document") with (a)(2) ("knowingly transfers an identification document, authentication feature, or a false identification document knowing that such document or feature was stolen or produced without lawful authority").

Note 3. Neither § 1028(a)(4) nor (a)(6)—which are possession offenses—are covered by the penalty provisions in § 1028(b)(1) and (b)(2). The reason is that, setting aside (a)(5) offenses and certain (a)(7) offenses, an offense satisfies (b)(1) only "if the offense is" the "production or transfer" of a covered document or feature. Likewise, setting aside (a)(3) and (a)(7) offenses, an offense satisfies (b)(2)

only "if the offense is" "any other production, transfer, or use" of a covered document or feature. Possession "is" not production, transfer, or use. Additionally, the legislative history of (a)(4) and (a)(6)'s original enactment described them as default misdemeanors. See H.R. Rep. 97-802, at 7 (1982), reprinted in 1982 U.S.C.C.A.N. 3519, 3525 (characterizing (a)(4) as "a misdemeanor with a maximum fine of $5000 and imprisonment of not more than one year or both"); H.R. Rep. 97-975 at 1, 4 (1982) (Conf. Rep.) (describing (a)(6) as "a misdemeanor subject to a fine of not more than $5,000, imprisonment for not more than one year, or both."). To be sure, other subsections do provide circumstances that would elevate (a)(4) and (a)(6) offenses to felonies, namely, if the subsequently-enacted penalties in § 1028(b)(3) and (b)(4) apply. But (b)(1) and (b)(2) do not apply to (a)(4) and (a)(6) offenses.

Note 4. Section 1028(b)(2)(A) applies because the circumstances in (b)(2)(A) are necessarily proven if the § 1028(a)(8) offense elements are proven, so long as it is correct to interpret "traffics" in (a)(8) as necessarily comprising "transfer" or "use" of an authentication feature in (b)(2)(A). Compare (b)(2)(A) ("any other . . . transfer, or use . . . of . . . an . . . authentication feature") with (a)(8) ("knowingly traffics in false or actual authentication features for use in false identification documents, document making implements, or means of identification"). The statutory definition of "traffic" includes "transfer." 18 U.S.C. § 1028(d)(12)(A).

18 U.S.C. § 1028(a)(1) FRAUDULENT PRODUCTION OF AN IDENTIFICATION DOCUMENT, AUTHENTICATION FEATURE, OR FALSE IDENTIFICATION DOCUMENT—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ___ of the indictment charge[s] the defendant[s] with] fraud in connection with the production of [a; an] [identification document; authentication feature; false identification document]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly produced [a; an] [identification document; authentication feature; false identification document]; and

2. He did so without lawful authority; and

[3. The [document; feature] is or appears to be issued by or under the authority of [the United States; a sponsoring entity of an event designated as a special event of national significance]];

- or -

[3. [The production of the [document; feature] occurred in or affected interstate or foreign commerce.]; [The document was transported in the mail in the course of the production.]]

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 consider-

ation 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 alternate third elements, which set forth the circumstances described in § 1028(c) that are required for any conviction under § 1028(a), should be used as appropriate based on the facts of the case. The first alternate should be used if the evidence supports a finding that the defendant produced an identification document or authentication feature that is or appears to be "issued by or under the authority of the United States or a sponsoring entity of an event designated as a special event of national significance." When the production of the document or feature occurred in or affected interstate or foreign commerce, or the document was transported in the mail in the course of the production, use the other alternate element.

For a discussion of the effect of 18 U.S.C. § 1028(b)'s enhanced penalty provisions on the jury instructions, see the Committee Comment on those issues below. However, it bears emphasizing here that certain convictions under § 1028(a)(1) will by necessity contain elements that trigger a § 1028(b) penalty-enhancing provision and in such a case do not require the giving of a penalty-enhancing instruction and corresponding special verdict form, unless other factors triggering another penalty-enhancing provision exist. For example, if the offense elements of § 1028(a)(1) are proven, then the circumstances in § 1028(b)(2)(A), which trigger a five-year maximum, are necessarily proven. Compare § 1028(b)(2)(A) ("any other production . . . of . . . an identification document, authentication feature, or a false identification document"), with § 1028(a)(1) ("knowingly and without lawful authority produces an identification document, authentication feature, or a false identification document").

Similarly, if the third element of the § 1028(a)(1) offense involves a document or feature that "is or appears to be issued by or under the authority of the United States," then upon a finding of guilt, the statutory maximum provided in § 1028(b)(1)(A)(i) of fifteen years applies, and no penalty-enhancing instruction or corresponding verdict form should be given, unless the facts alleged and proved trigger another penalty-enhancing provision (such as facilitation of a drug trafficking crime, § 1028(b)(3)(A) (20 years), connection with a crime of violence, § 1028(b)(3)(B) (20 years), or

facilitation of an act of domestic terrorism or international terrorism, § 1028(b)(4) (30 years)).

However, if the elements involved in the offense charged do not necessarily involve a finding that the document or feature at issue "is or appears to be issued by or under the authority of the United States," then the penalty-enhancing provisions of § 1028(b) should be addressed if the facts alleged in the indictment and proved at trial support those enhancements.

"Drug trafficking crime" is defined at 18 U.S.C. § 929(a)(2), "crime of violence" at § 924(c)(3), "act of domestic terrorism" at § 2331(5), and "act of international terrorism" at § 2331(1).

The term "knowingly" is defined at Pattern Instruction 4.10.

18 U.S.C. § 1028(a)(2) FRAUDULENT TRANSFER OF AN IDENTIFICATION DOCUMENT, AUTHENTICATION FEATURE, OR FALSE IDENTIFICATION DOCUMENT—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ____ of the indictment charge[s] the defendant[s] with] fraud in connection with the transfer of a[n] [identification document; authentication feature; false identification document]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly transferred a[n] [identification document; authentication feature; false identification document]; and

2. The defendant knew that such [identification document; authentication feature; false identification document] was stolen or produced without lawful authority; and

[3. The [document; feature] is or appears to be issued by or under the authority of [the United States; a sponsoring entity of an event designated as a special event of national significance]];

- or -

[3. [The transfer of the [document; feature] occurred in or affected interstate or foreign commerce [including the transfer of a document by electronic means.]; [The document was transported in the mail in the course of the transfer.]]

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 alternate third elements, which set forth the circumstances described in § 1028(c) that are required for any conviction under § 1028(a), should be used as appropriate based on the facts of the case. The first alternate should be used if the evidence supports a finding that the defendant transferred an identification document or authentication feature that is or appears to be "issued by or under the authority of the United States or a sponsoring entity of an event designated as a special event of national significance." When the transfer of the document or feature occurred in or affected interstate or foreign commerce, or the document was transported in the mail in the course of the transfer, use the other alternate element.

For a discussion of the effect of 18 U.S.C. § 1028(b)'s enhanced penalty provisions on the jury instructions, see the Committee Comment below on those issues. However, it bears emphasizing here that certain convictions under § 1028(a)(2) will by necessity contain elements that trigger a § 1028(b) penalty-enhancing provision and in such a case do not require the giving of a penalty-enhancing instruction and corresponding special verdict form, unless other factors triggering another penalty-enhancing provision exist. For example, if the offense elements of § 1028(a)(2) are proven, then the circumstances in § 1028(b)(2)(A), which trigger a five-year maximum, are necessarily proven. Compare (b)(2)(A) ("any other . . . transfer . . . of . . . an identification document, authentication feature, or a false identification document") with (a)(2) ("knowingly transfers an identification document, authentication feature, or a false identification document knowing that such document or feature was stolen or produced without lawful authority").

Similarly, if the third element of the § 1028(a)(2) offense involves a document or feature that "is or appears to be issued by or under the authority of the United States," then upon a finding of guilt, the statutory maximum provided in § 1028(b)(1)(A)(i) of

fifteen years applies, and no penalty-enhancing instruction or corresponding verdict form should be given, unless the facts alleged and proved trigger another penalty-enhancing provision (such as facilitation of a drug trafficking crime, § 1028(b)(3)(A) (20 years), connection with a crime of violence, § 1028(b)(3)(B) (20 years), or facilitation of an act of domestic terrorism or international terrorism, § 1028(b)(4) (30 years)).

However, if the elements involved in the offense charged do not necessarily involve a finding that the document or feature at issue "is or appears to be issued by or under the authority of the United States," then the penalty-enhancing provisions of § 1028(b) should be addressed if the facts alleged in the indictment and proved at trial support those enhancements.

"Drug trafficking crime" is defined in 18 U.S.C. § 929(a)(2), "crime of violence" at § 924(c)(3), "act of domestic terrorism" at § 2331(5), and "act of international terrorism" at § 2331(1).

The term "knowingly" is defined in Pattern Instruction 4.10.

18 U.S.C. § 1028(a)(3) FRAUDULENT POSSESSION OF FIVE OR MORE IDENTIFICATION DOCUMENTS, AUTHENTICATION FEATURES, OR FALSE IDENTIFICATION DOCUMENTS—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] fraud in connection with the possession of five or more [identification documents; authentication features; false identification documents]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly possessed five or more [identification documents; authentication features; false identification documents]; and

2. The defendant intended to use or transfer those [identification documents; authentication features; false identification documents] [in a manner that would violate one or more federal, state, or local laws]; and

[3. The [documents; features] are or appear to be issued by or under the authority of [the United States; a sponsoring entity of an event designated as a special event of national significance].]

- or -

[3. [The possession of the [documents; features] occurred in or affected interstate or foreign commerce.]; [The documents were transported in the mail in the course of the possession.]]

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 the second element, the bracketed language "in a manner that would violate one or more federal, state, or local laws" is intended to serve as a placeholder only. The Committee recommends that the court instruct the jury as to what federal, state or local law is alleged to have been violated and the manner in which that law was allegedly violated by the defendant.

The alternate third elements, which set forth the circumstances described in § 1028(c) that are required for any conviction under § 1028, should be used as appropriate based on the facts of the case. The first alternate should be used if the evidence supports a finding that the defendant possessed identification documents or authentication features that are or appear to be "issued by or under the authority of the United States or a sponsoring entity of an event designated as a special event of national significance." When the possession of the documents or features occurred in or affected interstate or foreign commerce, or the documents or features were transported in the mail in the course of the possession, use the other alternate element.

For a discussion of the effect of 18 U.S.C. § 1028(b)'s enhanced penalty provisions on the jury instructions, see the Committee Comment below on those issues. However, note that a conviction under § 1028(a)(3) will necessarily trigger the penalty provision in § 1028(b)(2)(B), which provides for a five-year maximum for a § 1028(a)(3) offense. If this is the only penalty provision supported by the allegations and facts proved at trial, then an additional penalty-enhancing instruction and special verdict form would be unnecessary.

Similarly, if the third element of the § 1028(a)(3) offense involves documents or features that are or appear "to be issued by or under the authority of the United States," then upon a finding of guilt, the statutory maximum provided in § 1028(b)(1)(A)(i) of

fifteen years applies, and no penalty-enhancing instruction or corresponding verdict form should be given, unless the facts alleged and proved trigger another penalty-enhancing provision (such as facilitation of a drug trafficking crime, § 1028(b)(3)(A) (20 years), connection with a crime of violence, § 1028(b)(3)(B) (20 years), or facilitation of an act of domestic terrorism or international terrorism, § 1028(b)(4) (30 years)).

However, if the elements involved in the offense charged do not necessarily involve a finding that the documents or features at issue are or appear "to be issued by or under the authority of the United States," then the penalty-enhancing provisions of § 1028(b) should be addressed if the facts alleged in the indictment and proved at trial support those enhancements.

"Drug trafficking crime" is defined at 18 U.S.C. § 929(a)(2), "crime of violence" at § 924(c)(3), "act of domestic terrorism" at § 2331(5), and "act of international terrorism" at § 2331(1).

The term "knowingly" is defined in Pattern Instruction 4.10.

18 U.S.C. § 1028(a)(4) POSSESSION OF AN IDENTIFICATION DOCUMENT, AUTHENTICATION FEATURE, OR FALSE IDENTIFICATION DOCUMENT WITH INTENT TO DEFRAUD THE UNITED STATES—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ____ of the indictment charge[s] the defendant[s] with] fraud in connection with the possession of a[n] [identification document; authentication feature; false identification document]. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the following elements:

1. The defendant knowingly possessed a[n] [identification document; authentication feature; false identification document]; and

2. The defendant did so with the intent that it be used to defraud the United States.

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 a discussion of the effect of 18 U.S.C. § 1028(b)'s enhanced penalty provisions on the jury instructions, see the Committee Comment on those issues below. However, it should be noted that the penalty provisions in § 1028(b)(1) and (b)(2) do not apply to § 1028(a)(4) offenses, which are possession offenses. With a few

exceptions not applicable to (a)(4) offenses, (b)(1) and (b)(2) apply only to offenses involving production, transfer, or use. The penalty provisions in § 1028(b)(3) (20 years) (applicable to offenses committed to facilitate a drug trafficking crime or in connection with a crime of violence) and § 1028(b)(4) (30 years) (applicable to offenses committed to facilitate an act of domestic terrorism or international terrorism) may apply to § 1028(a)(4) offenses if the facts alleged and proved at trial warrant it.

"Drug trafficking crime" is defined in 18 U.S.C. § 929(a)(2), "crime of violence" at § 924(c)(3), "act of domestic terrorism" at § 2331(5), and "act of international terrorism" at § 2331(1).

The term "knowingly" is defined at Pattern Instruction 4.10.

For a general definition of "intent to defraud" see the Pattern Instruction regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343. It should be noted, however, that the intent required under § 1028(a)(4) is that the document or feature "be used to defraud the United States."

18 U.S.C. § 1028(a)(5) FRAUDULENT PRODUCTION, TRANSFER, OR POSSESSION OF A DOCUMENT—MAKING IMPLEMENT OR AUTHENTICATION FEATURE—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] fraud in connection with the [production; transfer; possession] of a [document-making implement; authentication feature]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements:

1. The defendant knowingly [produced; transferred; possessed] a [document-making implement; authentication feature]; and

2. The defendant intended that the [document-making implement; authentication feature] be used to produce [a false identification document; another document-making implement or authentication feature which will be used to create a false identification document]; and

[3. The document-making implement is designed or suited for making a[n] [identification document; authentication feature; false identification document] that is or appears to be issued by or under the authority of [the United States; a sponsoring entity of an event designated as a special event of national significance].]

- or -

[3. The authentication feature is or appears to be issued by or under the authority of [the United States; a sponsoring entity of an event designated as a special event of national significance].]

- or -

[3. [The [production; transfer; possession] of the [document-making implement; authentication feature] is in or affects interstate or foreign commerce.]; [The document-making implement is transported in the mail in the course of the [production; transfer; possession.]]

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 third element sets forth the circumstances described in subsection (c) that are required for any conviction under § 1028. The first two alternatives contain subsection (c)(1)'s circumstances that either the "document-making implement" be suited for making one of the covered documents, or the "authentication feature" appear to be issued by the United States. The third alternative contains the circumstances described in subsection (c)(3) and thus applies when the production, transfer or possession of the document-making implement was in or affected interstate or foreign commerce or the document-making implement was transported in the mail in the course of the production, transfer or possession.

For a discussion of the effect of 18 U.S.C. § 1028(b)'s enhanced penalty provisions on the jury instructions, see the Committee Comment below on those issues. However, note that a conviction under § 1028(a)(5) will necessarily trigger the penalty provision in § 1028(b)(1)(C), which provides for a fifteen-year maximum for a § 1028(a)(5) offense. If this is the only penalty provision supported by the allegations and facts proved at trial, then an additional penalty-enhancing instruction and special verdict form would be unnecessary. If the facts alleged and proved at trial trigger the greater maximum penalty in § 1028(b)(3) (20 years) or (b)(4) (30 years) (such as facilitation of a drug trafficking crime,

§ 1028(b)(3)(A), connection with a crime of violence, § 1028(b)(3)(B), or facilitation of an act of domestic terrorism or international terrorism, § 1028(b)(4)), then the penalty-enhancing provisions of § 1028(b) should be addressed.

"Drug trafficking crime" is defined at 18 U.S.C. § 929(a)(2), "crime of violence" at § 924(c)(3), "act of domestic terrorism" at § 2331(5), and "act of international terrorism" at § 2331(1).

The term "knowingly" is defined at Pattern Instruction 4.10.

18 U.S.C. § 1028(a)(6) POSSESSION OF A STOLEN IDENTIFICATION DOCUMENT OR AUTHENTICATION FEATURE—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] possession of a stolen [identification document; authentication feature]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly possessed a[n] [document; authentication feature] that is or appears to be an [identification document; authentication feature] of the [United States; a sponsoring entity of an event designated as a special event of national significance]; and

2. The [document; authentication feature] was [stolen; produced without lawful authority]; and

3. The defendant knew that the [document; authentication feature] was [stolen; produced without lawful authority].

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 a discussion of the effect of 18 U.S.C. § 1028(b)'s enhanced

penalty provisions on the jury instructions, see the Committee Comment below on those issues. However, it should be noted that the penalty provisions in § 1028(b)(1) and (b)(2) do not apply to § 1028(a)(6) offenses, which are possession offenses. With a few exceptions not applicable to (a)(6) offenses, (b)(1) and (b)(2) apply only to offenses involving production, transfer, or use. The penalty provisions in § 1028(b)(3) (20 years) (applicable to offenses committed to facilitate a drug trafficking crime or in connection with a crime of violence) and § 1028(b)(4) (30 years) (applicable to offenses committed to facilitate an act of domestic terrorism or international terrorism) may apply to § 1028(a)(6) offenses if the facts alleged and proved at trial warrant it.

The term "knowingly" is defined in Pattern Instruction 4.10.

"Drug trafficking crime" is defined at 18 U.S.C. § 929(a)(2), "crime of violence" at § 924(c)(3), "act of domestic terrorism" at § 2331(5), and "act of international terrorism" at § 2331(1).

18 U.S.C. § 1028(a)(7) FRAUDULENT TRANSFER, POSSESSION, OR USE OF A MEANS OF IDENTIFICATION—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ____ of the indictment charge[s] the defendant[s] with] fraud in connection with the [transfer; possession; use] of a means of identification. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [five] elements beyond a reasonable doubt:

1. The defendant knowingly [transferred; possessed; used] a means of identification of another person; and

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

3. The defendant acted [with the intent to [commit; aid or abet]; in connection with] any activity that [violates federal law; is a felony under any applicable State or local law]; and

4. The defendant acted without lawful authority; and

5. The [transfer; possession; use] of the means of identification occurred in or affected interstate or foreign commerce; [The means of identification was transported in the mail in the course of the [transfer; possession; use].]

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 consider-

ation 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 the third element, the bracketed language "violates federal law; is a felony under any applicable State or local law" is intended to serve as a placeholder only. The Committee recommends that the court instruct the jury as to the specific law which would have been violated by the alleged activity.

A single identification document or false identification document that contains one or more means of identification shall be construed to be one means of identification. 18 U.S.C. § 1028(i). Similarly, in *United States v. Miller*, 883 F.3d 998, 1004 (7th Cir. 2018), the Court held that where an individual possesses multiple means of identification in a single notebook as part of the same predicate violation of law, they can only be convicted of one violation of § 1028(a)(7).

If the means of identification is of a certain type, *e.g.*, a driver's license, and it is undisputed that the means of identification was a driver's license, then the court should substitute the specific type of a means of identification, *e.g.*, a driver's license, for "a means of identification" wherever used in the instruction.

In *Flores Figueroa v. United States*, 556 U.S. 646 (2009), the Supreme Court held that 18 U.S.C. § 1028A(a)(1) (aggravated identity theft) required the Government to prove that the defendant knew that the means of identification at issue belonged to another person. The language of § 1028A is nearly identical to that in § 1028(a)(7)—"knowingly transfers, possesses, or uses . . . a means of identification of another person." Thus, the holding in *Flores Figueroa* should apply to § 1028(a)(7) offenses as well.

For a discussion of the effect of 18 U.S.C. § 1028(b)'s enhanced penalty provisions on the jury instructions, see the Committee Comment below on those issues. However, note that a conviction under § 1028(a)(7) will necessarily trigger the penalty provision in § 1028(b)(2)(B), which provides for a five-year maximum for a § 1028(a)(7) offense. If this is the only penalty provision supported by the allegations and facts proved at trial, then an additional penalty-enhancing instruction and special verdict form would be unnecessary. But if the facts alleged and proved at trial trigger the greater maximum penalty in § 1028(b)(1) (15 years), (b)(3) (20

years) or (b)(4) (30 years), then the penalty-enhancing provisions of § 1028(b) should be addressed.

"Drug trafficking crime" is defined at 18 U.S.C. § 929(a)(2), "crime of violence" at § 924(c)(3), "act of domestic terrorism" at § 2331(5), and "act of international terrorism" at § 2331(1).

The term "knowingly" is defined in Pattern Instruction 4.10.

18 U.S.C. § 1028(a)(8) TRAFFICKING IN FALSE OR ACTUAL AUTHENTICATION FEATURES—ELEMENTS

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

1. The defendant knowingly trafficked in [false] authentication features; and

2. The authentication features were for use in [false identification documents; document-making implements; means of identification]; and

[3. The authentication features were or appeared to be issued by or under the authority of [the United States; a sponsoring entity of an event designated as a special event of national significance].]

- or -

[3. The trafficking in the [false] authentication features occurred in or affected [interstate; foreign] commerce [including the transfer of a document by electronic means].]

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 first element can involve trafficking in either false or actual authentication features. The word "false" should be included in this element only if the evidence at trial proved that the authentication features in question were false.

The third element has two alternatives. The appropriate one should be selected based on the facts alleged in the indictment and proved at trial.

For a discussion of the effect of 18 U.S.C. § 1028(b)'s enhanced penalty provisions on the jury instructions, see the Committee Comment below on those issues. However, it bears emphasizing here that certain convictions under § 1028(a)(8) may necessarily contain elements that trigger a § 1028(b) penalty-enhancing provision and in such a case do not require the giving of a penalty-enhancing instruction and corresponding special verdict form, unless other factors triggering another penalty-enhancing provision exist. For example, if the offense elements of § 1028(a)(8) are proven, then the circumstances in § 1028(b)(2)(A), which trigger a five-year maximum, are necessarily proven, as long as it is correct to interpret "traffics" in (a)(8) as necessarily comprising "transfer" or "use" of an authentication feature in (b)(2)(A). Compare (b)(2)(A) ("any other . . . transfer, or use . . . of . . . an . . . authentication feature") with (a)(8) ("knowingly traffics in false or actual authentication features for use in false identification documents, document making implements, or means of identification"). The statutory definition of "traffic" includes "transfer." 18 U.S.C. § 1028(d)(12)(A).

Similarly, if the third element of the § 1028(a)(8) offense involves authentication features that were or appeared "to be issued by or under the authority of the United States," then upon a finding of guilt, the statutory maximum provided in § 1028(b)(1)(A)(i) of fifteen years applies, and no penalty-enhancing instruction or corresponding verdict form should be given, unless the facts alleged and proved at trial trigger a greater maximum penalty under another penalty-enhancing provision (such as facilitation of a drug trafficking crime, § 1028(b)(3)(A) (20 years), connection with a crime of violence, § 1028(b)(3)(B) (20 years), or facilitation of an act of domestic terrorism or international terrorism, § 1028(b)(4) (30 years)).

However, if the elements involved in the offense charged do

not necessarily involve a finding that the authentication features at issue were or appeared "to be issued by or under the authority of the United States," then the penalty-enhancing provisions of § 1028(b) should be addressed if the facts alleged in the indictment and proved at trial support those enhancements.

"Drug trafficking crime" is defined at 18 U.S.C. § 929(a)(2), "crime of violence" at § 924(c)(3), "act of domestic terrorism" at § 2331(5), and "act of international terrorism" at § 2331(1).

The term "knowingly" is defined in Pattern Instruction 4.10.

18 U.S.C. § 1028(d)(1) DEFINITION OF "AUTHENTICATION FEATURE"

"Authentication feature" means any hologram, watermark, certification, symbol, code, image, sequence of numbers or letters that is used by the issuing authority on an identification document, document making implement, or means of identification to determine if the document is counterfeit, altered, or otherwise falsified. The issuing authority may use the authentication feature either by itself or in combination with another feature to make this determination.

Committee Comment

This instruction is applicable to offenses under 18 U.S.C. § 1028(a)(1)–(6) and (8) and the definitions of "false authentication feature" and "issuing authority."

18 U.S.C. § 1028(d)(2) DEFINITION OF "DOCUMENT-MAKING IMPLEMENT"

"Document making implement" means any implement, impression, template, computer file, computer disc, electronic device, or computer hardware or software, that is specifically configured or primarily used for making an identification document, a false identification document, or another document making implement.

Committee Comment

This instruction is applicable to offenses under 18 U.S.C. § 1028(a)(5) and (8) and the definitions of "authentication feature," "false authentication feature," and "transfer."

For definitions of the terms "hardware" and "software" see the definitions regarding those terms as used under § 1029.

18 U.S.C. § 1028(d)(3) DEFINITION OF "IDENTIFICATION DOCUMENT"

"Identification document" means a document made or issued by or under the authority of the United States Government, a State, political subdivision of a State, a sponsoring entity of an event designated as a special event of national significance, a foreign government, political subdivision of a foreign government, an international governmental or an international quasi-governmental organization which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.

Committee Comment

This instruction is applicable to offenses under 18 U.S.C. § 1028(a)(1)–(4), (6), and the definitions of "authentication feature," "document-making implement," "false authentication feature," "issuing authority," "personal identification card" and "transfer."

18 U.S.C. § 1028(d)(4) DEFINITION OF "FALSE IDENTIFICATION DOCUMENT"

"False identification document" means a document that is of a type that is intended or commonly accepted to identify individuals that [is not issued by or under the authority of a governmental entity; was issued under the authority of a governmental entity but was subsequently altered for purposes of deceit] and appears to be issued by or under the authority of [the United States Government; a State; a political subdivision of a State; a sponsoring entity of an event designated by the President as a special event of national significance; a foreign government; a political subdivision of a foreign government; or an international governmental or quasi-governmental organization].

Committee Comment

This definition is applicable to offenses under 18 U.S.C. § 1028(a)(1)–(5) and (8) and § 1028A(a)(2) and the definitions of "document-making implement" and "transfer."

Ideally, the facts charged in the indictment or the evidence presented at trial will be particular enough to allow the court to determine which alternative definition of "false identification document" applies. If not, the court may have to give both alternative definitions.

18 U.S.C. § 1028(d)(5) DEFINITION OF "FALSE AUTHENTICATION FEATURE"

"False authentication feature" means an authentication feature that

[is genuine in origin, but, without the authorization of the issuing authority, has been tampered with or altered for purposes of deceit.]

- or -

[is genuine, but, without the authorization of the issuing authority, has been distributed or is intended for distribution for use other than by the issuing authority in a lawfully made [identification document; document making implement; means of identification].]

- or -

[appears to be genuine, but is not.]

Committee Comment

This pattern instruction, to be used in connection with offenses charged under 18 U.S.C. § 1028(a)(8), separates the three definitions of "false authentication feature" provided by 18 U.S.C. § 1028(d)(5)(A)–(C) into three alternative jury instructions. The second alternative significantly condenses the language of § 1028(d)(5)(B), which contains several terms that seem unnecessary to convey the key requirement that the distribution be for a purpose other than making a valid identification document.

18 U.S.C. § 1028(d)(6) DEFINITION OF "ISSUING AUTHORITY"

"Issuing authority" means any governmental entity or agency that is authorized to issue identification documents, means of identification, or authentication features. An issuing authority includes the United States Government, a State, a political subdivision of a State, a sponsoring entity of an event designated by the President as a special event of national significance, a foreign government, a political subdivision of a foreign government, or an international government or quasi-governmental organization.

Committee Comment

This instruction is applicable to offenses under 18 U.S.C. § 1028 and the definitions of "authentication feature" and "false authentication feature."

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).

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.

18 U.S.C. § 1028(d)(8) DEFINITION OF "PERSONAL IDENTIFICATION CARD"

"Personal identification card" means an identification document issued by a State or local government solely for the purpose of identification.

Committee Comment

This instruction is applicable to production or transfer offenses subject to a 15-year maximum under 18 U.S.C. § 1028(b)(1)(A)(ii).

18 U.S.C. § 1028(d)(9) DEFINITION OF "PRODUCE"

"Produce" includes alter, authenticate, and assemble.

Committee Comment

This instruction is applicable to offenses under 18 U.S.C. § 1028(a)(1) and (5).

18 U.S.C. § 1028(d)(10) DEFINITION OF "TRANSFER"

"Transfer" includes selecting an identification document, false identification document, or document making implement and placing or directing the placement of such identification document, false identification document, or document making implement on an online location where it is available to others.

Committee Comment

This instruction is applicable to offenses under 18 U.S.C. § 1028(a)(2)–(3), (5), and (7) and § 1028A(a)(1)–(2) and the definition of "traffic."

The court should give this pattern definition of "transfer" only when appropriate based on the facts of the particular case. Although the statutory definition provided by § 1028(d)(10) makes clear that the transfers prohibited by § 1028 may include an online posting, a conviction under § 1028 does not require such an electronic transfer. If the defendant is charged with physically carrying counterfeit identification documents, this pattern definition would be unnecessary and potentially confusing to the jury.

18 U.S.C. § 1028(d)(11) DEFINITION OF "STATE"

"State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any other commonwealth, possession, or territory of the United States.

Committee Comment

This instruction is applicable to offenses under 18 U.S.C. § 1028(a)(7) and the definitions of "identification document," "false identification document," "issuing authority," "means of identification," and "personal identification card."

18 U.S.C. § 1028(d)(12) DEFINITION OF "TRAFFIC"

"Traffic" means to transport, transfer, or otherwise dispose of, to another, for anything of value, or to make or obtain control of with intent to so transport, transfer, or otherwise dispose of.

Committee Comment

This instruction is applicable to offenses under 18 U.S.C. § 1028(a)(8).

18 U.S.C. § 1028A DEFINITION OF "IN RELATION TO"

A person [transfers; possesses; uses] a [means of identification; false identification document] "in relation to" a crime if it had a purpose, role or effect with respect to the [felony; terrorism] offense. It also means that the [transfer; possession; use] of the [means of identification; false identification document] had a connection to or relationship with the [felony; terrorism] offense.

Committee Comment

Section 1028A of Title 18 does not provide a specific definition for "in relation to." This definition borrows from the meaning of that phrase in the firearms context, see Pattern Instruction 18 U.S.C. § 924(c)(1); see also Pattern Crim. Jury Instr. 5th Cir. 2.44 (2020); Mod. Crim. Jury Instr. 3rd Cir. 6.18.924B (2018); Pattern Crim. J. Instr. 11th Cir. OI 35.2 (2020). The definition should be tailored to the particular facts of the case on trial and the government's theory of how the defendant's transfer, possession, or use was related to the felony or terrorism offense.

18 U.S.C. § 1028A(a)(1) 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 [the; a] defendant guilty of this count, the government must prove each of the [four] following elements beyond a reasonable doubt:

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

2. The defendant knowingly [transferred; possessed; used] a means of identification;

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

4. The defendant knew that such [transfer; possession; use] was without lawful authority;

5. 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 count you are considering], then you should find the defendant guilty [of that count].

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 count you are considering], then you should find the defendant not guilty [of that count].

Committee Comment

In the first element of the offense, the term "title of offense" should be substituted with the specific name of the predicate felony from 18 U.S.C. § 1028A(c).

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. In *United States v. Miller*, 883 F.3d 998, 1004 (7th Cir. 2018), the court held that where an individual possesses multiple means of identification in a single notebook as part of the same predicate violation of law, he can only be convicted of one violation of § 1028A(1)(a).

The First, Sixth, Ninth Circuits have held that the term "use" requires an individual to attempt to pass him or herself off as another person or purport to take some other action on another person's behalf. See *United States v. Berroa*, 856 F.3d 141, 156 n.2 (1st Cir. 2017); *United States v. Miller*, 734 F.3d 530 (6th Cir. 2013); *United States v. Hong*, 938 F.3d 1040, 1051 (9th Cir. 2019). *Berroa* and *Hong* approvingly cited the reasoning in the Seventh Circuit's opinion in *United States v. Spears*, 729 F.3d 753, 757 (7th Cir. 2013), in reaching this result. The Seventh Circuit, however, has not articulated a position on the proper interpretation of "use" in this context.

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.

If the predicate offense is not separately charged, the jury must be instructed as to the elements of that count and has to find the elements beyond a reasonable doubt.

18 U.S.C. § 1029 ACCESS DEVICE FRAUD—DEFINITIONS

Committee Comment

These pattern definitions are designed to accompany the Pattern Instructions for the offenses listed in 18 U.S.C. § 1029. The source of most of these definitions is § 1029(e), which defines several terms unique to § 1029.

In providing these definitions, the Committee does not intend to imply that the court should always instruct the jury on all of the definitions. The court should provide the jury with the definitions only for the terms that are necessary for the particular case on trial. In addition, the court should excise from each definition terms that are inapplicable to the facts of the particular case.

Unless otherwise noted, these pattern definitions simply reproduce the definitions provided by § 1029(e) with only minor stylistic changes.

18 U.S.C. § 1029 DEFINITION OF "TELECOMMUNICATIONS INSTRUMENT"

"Telecommunications instrument" means a device, tool or implement, especially one held in the hand, which is used to transmit information over a distance by electronic means such as by cable, telegraph, telephone, or broadcasting. [A mobile phone, often referred to as a cellular phone, is an example of a telecommunications instrument.]

Committee Comment

This definition is applicable to offenses under 18 U.S.C. 1029(a)(7) and (9) and the definition of "telecommunication identifying information." It is based on several sources, including The New Oxford American Dictionary, the definition of "telecommunications" in 47 U.S.C. § 153(43), and the online glossary of computer and internet terms, http://pc.net/glossary/definition/telecommunication.

18 U.S.C. § 1029 DEFINITION OF "HARDWARE"

"Hardware" consists of the machines, wiring, and other physical components of a computer or other electronic system or media storage device. Hardware includes the [cables; connectors; power supply units; monitors; keyboards; mice; audio speakers; printers; scanners; microprocessors; disks; disk drives; optical drives; USB drives; and digital media but not data stored on the devices].

Committee Comment

This definition is applicable for offenses under 18 U.S.C. § 1029(a)(9). It is adapted from several sources, including the New Oxford American Dictionary, The Oxford English Dictionary, the online glossary of computer and internet terms, http://pc.net/glossary and the online dictionary of technology terms, www.techdictionary.com.

The facts of the case determine which of the items within the brackets should be included in the definition for the particular case.

18 U.S.C. § 1029 DEFINITION OF "SOFTWARE"

"Software" includes programs, applications, operating instructions, code, and other digital information or data used or processed by a microprocessor.

Committee Comment

This definition is applicable for offenses under 18 U.S.C. § 1029(a)(9). It is adapted from several sources, including the New Oxford American Dictionary, The Oxford English Dictionary, the online glossary of computer and internet terms, http://pc.net/glossary and the online dictionary of technology terms, www.techdictionary.com.

18 U.S.C. § 1029 DEFINITION OF "INTERSTATE OR FOREIGN COMMERCE"

Committee Comment

"Interstate or foreign commerce" is not defined within § 1029. The Committee recommends employing the pattern definition suggested for offenses in violation of 18 U.S.C. § 1028.

This definition is applicable to offenses under 18 U.S.C. § 1029(a)(1)–(10).

18 U.S.C. § 1029(a)(1) PRODUCTION, USE OR TRAFFICKING IN COUNTERFEIT ACCESS DEVICES—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] the [production; use; trafficking] of [a] counterfeit access device[s]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the following [three] elements beyond a reasonable doubt:

1. The defendant knowingly [produced; used; trafficked in] one [or more] counterfeit access device[s]; and

2. The defendant did so with the intent to defraud; and

3. The defendant's conduct affected [interstate; 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

The Committee recommends that the court name the access device (such as "credit card" or "debit card") rather than using the generic term "access device" in its instructions unless there is an issue as to whether the device qualifies as an "access device."

The Committee also recommends that the court instruct the

jury on the definition of "interstate or foreign commerce" and "intent to defraud." For a definition of "interstate or foreign commerce" see the Pattern Instruction regarding that term as used in 18 U.S.C. § 1028. For a definition of "intent to defraud" see the Pattern Instruction regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343.

18 U.S.C. § 1029(a)(2) TRAFFICKING OR USE OF UNAUTHORIZED ACCESS DEVICES—ELEMENTS

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

1. The defendant knowingly [used; trafficked in] one or more [unauthorized access devices [as charged in the indictment]; and

2. By such conduct the defendant obtained any [money; good(s); service(s); any other thing of value] with a total value of at least $1,000 during any one year period; and

3. The defendant did so with the intent to defraud; and

4. The defendant's conduct affected [interstate; 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

The Committee recommends that the court name the access

device (such as "credit card" or "debit card") rather than using the generic term "access device" in its instructions unless there is an issue as to whether the device qualifies as an "access device."

The Committee recommends that the court instruct the jury on the definition of "interstate or foreign commerce" and "intent to defraud." For a definition of "interstate or foreign commerce" see the Pattern Instruction regarding that term as used in 18 U.S.C. § 1028. For a definition of "intent to defraud" see the Pattern Instruction regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343.

When the indictment alleges an attempt, Pattern Instruction 4.09 for attempt should also be employed.

18 U.S.C. § 1029(a)(3) POSSESSION OF MULTIPLE UNAUTHORIZED OR COUNTERFEIT ACCESS DEVICES—ELEMENTS

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

1. The defendant knowingly possessed fifteen or more [unauthorized; counterfeit] access devices; and

2. The defendant possessed those devices with the intent to defraud; and

3. The defendant's conduct affected [interstate; 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

The Committee recommends that the court name the access device (such as "credit card" or "debit card") rather than using the generic term "access device" in its instructions unless there is a dispute over whether the device at issue qualifies as an "access device."

The Committee recommends that the court instruct the jury

on the definition of "interstate or foreign commerce" and "intent to defraud." For a definition of "interstate or foreign commerce" see the Pattern Instruction regarding that term as used in 18 U.S.C. § 1028. For a definition of "intent to defraud" see the Pattern Instruction regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343.

When the indictment alleges an attempt, Pattern Instruction 4.09 for attempt should also be employed.

18 U.S.C. § 1029(a)(4) PRODUCTION, TRAFFICKING AND POSSESSION OF DEVICE-MAKING EQUIPMENT—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] fraud involving access device making equipment. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly [produced; trafficked in; had control or custody of; possessed] device making equipment; and

2. The defendant did so with the intent to defraud; and

3. The defendant's conduct affected [interstate; 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

The Committee recommends that district courts name the access device (such as "credit card" or "debit card") rather than using the generic term "access device" in its instructions unless there is an issue as to whether the device qualifies as an "access device."

The Committee recommends that district courts instruct juries

on the definition of "interstate or foreign commerce" and "intent to defraud." For a definition of "interstate or foreign commerce" see the Pattern Instruction regarding that term as used in 18 U.S.C. § 1028. For a definition of "intent to defraud" see the Pattern Instruction regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343.

18 U.S.C. § 1029(a)(5) FRAUDULENT TRANSACTIONS WITH ANOTHER'S ACCESS DEVICE—ELEMENTS

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

1. The defendant knowingly [engaged in; caused; conducted] [a] transaction[s] with [one; or more] access device[s] that had been issued to another person[s]; and

2. The defendant did so to obtain [money; good(s); service(s); any other thing of value] with a total value of at least $1,000 during any one-year period; and

3. The defendant did so with the intent to defraud; and

4. The defendant's conduct affected [interstate; 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

The Committee recommends that the court name the access device (such as "credit card" or "debit card") rather than using the

generic term "access device" in its instructions unless there is an issue as to whether the device qualifies as an "access device."

The Committee recommends that the court instruct the jury on the definition of "interstate or foreign commerce" and "intent to defraud." For a definition of "interstate or foreign commerce" see the Pattern Instruction regarding that term as used in 18 U.S.C. § 1028. For a definition of "intent to defraud" see the Pattern Instruction regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343.

The Committee notes that the statute employs the phrase "effects transactions" but recommends that district courts use "engaged in," "caused" or "conducted" transactions because those terms are more likely to be understood by juries.

18 U.S.C. § 1029(a)(6) SOLICITATION TO SELL ACCESS DEVICE OR INFORMATION REGARDING AN ACCESS DEVICE—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] fraud in connection with the unauthorized solicitation of information relating to access devices. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly solicited a person for the purpose of [offering an access device; selling information regarding an access device; selling information regarding an application to obtain an access device]; and

2. The defendant did so without authorization of the issuer of the access device; and

3. The defendant did so with the intent to defraud; and

4. The defendant's conduct affected [interstate; 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

The Committee recommends that the court name the access device (such as "credit card" or "debit card") rather than using the generic term "access device" in its instructions unless there is an issue as to whether the device qualifies as an "access device."

The Committee recommends that the court instruct the jury on the definition of "interstate or foreign commerce" and "intent to defraud." For a definition of "interstate or foreign commerce" see the Pattern Instruction regarding that term as used in 18 U.S.C. § 1028. For a definition of "intent to defraud" see the Pattern Instruction regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343.

18 U.S.C. § 1029(a)(7) USE, PRODUCTION, TRAFFICKING OR POSSESSION OF MODIFIED TELECOMMUNICATION INSTRUMENT—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] fraud in connection with [insert type of telecommunications instrument]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly [used; produced; trafficked in; had control or custody of; possessed] a [insert type of telecommunications instrument] that has been modified or altered to obtain unauthorized use of telecommunications services; and

2. The defendant did so with the intent to defraud; and

3. The defendant's conduct affected [interstate; 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

The Committee recommends that the court name the particu-

lar telecommunications instrument at issue (such as "cellular telephone") rather than using the generic term "telecommunications instrument" in its instructions unless there is an issue as to whether the device qualifies as an "telecommunications instrument." If there is such a dispute, then the jury should be instructed on the meaning of a "telecommunications instrument."

The Committee recommends that the court instruct the jury on the definition of "interstate or foreign commerce" and "intent to defraud." For a definition of "interstate or foreign commerce" see the Pattern Instruction regarding that term as used in 18 U.S.C. § 1028. For a definition of "intent to defraud" see the Pattern Instruction regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343.

18 U.S.C. § 1029(a)(8) USE, PRODUCTION, TRAFFICKING OR POSSESSION OF A SCANNING RECEIVER—ELEMENTS

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

1. The defendant knowingly [used; produced; trafficked in; had control or custody of; possessed] [a; one or more] scanning receiver[s]; and

2. The defendant acted with the intent to defraud; and

3. The defendant's conduct affected [interstate; 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

The Committee recommends that the court instruct the jury on the definition of "interstate or foreign commerce" and "intent to defraud." For a definition of "interstate or foreign commerce" see the Pattern Instruction regarding that term as used in 18 U.S.C. § 1028. For a definition of "intent to defraud" see the Pattern Instruction regarding that term as used in the mail and wire fraud

statutes, 18 U.S.C. §§ 1341 & 1343.

18 U.S.C. § 1029(a)(9) USE, PRODUCTION, TRAFFICKING OR POSSESSION OF HARDWARE OR SOFTWARE CONFIGURED TO OBTAIN TELECOMMUNICATION SERVICES—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] fraud involving hardware or software used to obtain unauthorized telecommunications services. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly [used; produced; trafficked in; had control or custody of; possessed] [hardware; software] that has been configured to [insert; modify] telecommunication identifying information [associated with; contained in] a telecommunications instrument so that the instrument may be used to obtain telecommunications services without authorization; and

2. The defendant knew the software or hardware had been so configured; and

3. The defendant's conduct affected [interstate; 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

If no issue exists as to whether the device is a "telecommunications instrument" (such as a cellular telephone), the Committee recommends that the phrase "telecommunications instrument" be replaced with the name of the device. If an issue does exist as to whether the device is a telecommunications instrument then, of course, the term should be used and defined for the jury.

The Committee recommends that court instruct the jury on the definition of "interstate or foreign commerce." For a definition of "interstate or foreign commerce" see the Pattern Instruction regarding that term as used in 18 U.S.C. § 1028.

18 U.S.C. § 1029(a)(10) FRAUDULENT PRESENTATION OF EVIDENCE OF CREDIT CARD TRANSACTION TO CLAIM UNAUTHORIZED PAYMENT—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] fraud involving [a] claim[s] for unauthorized payment[s] of [a] credit card transaction[s]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly [arranged for; caused] another person to present, for payment to a credit card system [member; agent], one or more [records; evidences] of transactions made by an access device [as described in the indictment]; and

2. The defendant was not authorized by the credit card system [member; agent] to [arrange; cause] such a claim for payment; and

3. The defendant acted with the intent to defraud; and

4. The defendant's conduct affected [interstate; 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

The Committee recommends that the court name the access device (such as "credit card" or "debit card") rather than using the generic term "access device" in its instructions unless there is an issue as to whether the device qualifies as an "access device."

The Committee also recommends that, if there is agreement on the issue, the court name the bank or other institution rather than using the generic term "credit card system member."

The Committee recommends that the court instruct the jury on the definition of "interstate or foreign commerce" and "intent to defraud." For a definition of "interstate or foreign commerce" see the Pattern Instruction regarding that term as used in 18 U.S.C. § 1028. For a definition of "intent to defraud" see the Pattern Instruction regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343.

18 U.S.C. §§ 1029(b)(1) & (b)(2) ATTEMPT AND CONSPIRACY—ELEMENTS

Committee Comment

18 U.S.C. §§ 1029(b)(1) and (b)(2) proscribe attempts and conspiracies to violate any subsection of § 1029(a). Where the indictment charges an attempt adjust the instruction accordingly, using relevant elements from the attempt pattern jury instructions, see Pattern Instructions 4.09 (Attempt), as appropriate.

18 U.S.C. §§ 1029(b)(2) provides for criminal liability for conspiracy "if any of the parties engages in any conduct in furtherance of such offense. . .." Therefore, the statutory language for conspiracies under § 1029 requires proof of an overt act, a few courts appear to have assumed that such proof is required. See *United States v. Luttrell*, 889 F.2d 806, 809–10 (9th Cir. 1989) (concluding that the government proved an overt act was committed and thus the evidence was sufficient to support the conspiracy conviction under § 1029), amended and vacated in other part, 923 F.2d 764 (9th Cir. 1991) (*en banc*); *United States v. Ayeki*, 289 F. Supp. 2d 183, 189 (D. Conn. 2003) (holding indictment was sufficient and noting that it listed six overt acts allegedly performed by the coconspirators). Therefore, Pattern Instruction 5.08(A), Conspiracy—Overt Act Required should be given along with other relevant Pattern Instructions 5.09 et seq. as appropriate.

18 U.S.C. § 1029(e)(1) DEFINITION OF "ACCESS DEVICE"

"Access device" includes a credit card, debit card or a personal identification number such as that used to obtain cash at an ATM. It also means [a; an] [card; plate; code; account number; electronic serial number; mobile identification number; personal identification number] or other [telecommunications service; equipment; instrument identifier; other means of account access] that can be used, alone or in conjunction with another access device, [to obtain [money; goods; services; any other thing of value]; to initiate a transfer of funds].

Committee Comment

The Committee recommends that courts name the access device (such as "credit card" or "debit card") rather than using the generic term "access device" in its instructions unless there is an issue as to whether the device qualifies as an "access device."

This definition is applicable to offenses under 18 U.S.C. § 1029(a)(5), (6) and (10) and the definitions of "counterfeit access device," "unauthorized access device," and "device-making equipment."

18 U.S.C. § 1029(e)(2) DEFINITION OF "COUNTERFEIT ACCESS DEVICE"

"Counterfeit access device" means any access device that is [counterfeit; fictitious; altered; forged]. [The term also includes an identifiable component of an access device or a counterfeit access device.]

Committee Comment

This definition is applicable to offenses under 18 U.S.C. § 1029(a)(1) and (3) and the definition of "device-making equipment."

18 U.S.C. § 1029(e)(3) DEFINITION OF "UNAUTHORIZED ACCESS DEVICE"

"Unauthorized access device" means any access device that is [lost; stolen; expired; revoked; canceled; obtained with intent to defraud].

Committee Comment

This definition is applicable to offenses under 18 U.S.C. § 1029(a)(2) and (3).

18 U.S.C. § 1029(e)(4) DEFINITION OF "PRODUCE"

"Produce" includes [design; alter; authenticate; duplicate; assemble].

Committee Comment

This definition is applicable to offenses under 18 U.S.C. § 1029(a)(1), (4), and (7)–(9).

18 U.S.C. § 1029(e)(5) DEFINITION OF "TRAFFIC" OR "TRAFFICKING"

"Traffic" or "trafficking" means to transfer something to another, or otherwise dispose of something. It also means to obtain control of something with intent to transfer or dispose of it.

Committee Comment

This definition is applicable to offenses under 18 U.S.C. § 1029(a)(1), (2), (4), and (7)–(9).

18 U.S.C. § 1029(e)(6) DEFINITION OF "DEVICE-MAKING EQUIPMENT"

"Device making equipment" means any equipment, mechanism, or impression designed or primarily used for making an access device or a counterfeit access device.

Committee Comment

This definition is applicable to offenses under 18 U.S.C. § 1029(a)(4).

18 U.S.C. § 1029(e)(7) DEFINITION OF "CREDIT CARD SYSTEM MEMBER"

"Credit card system member" means an entity, including a financial institution, that is a member of a credit card system, such as a bank, credit union, or credit card company. The term includes an entity that is the sole member of a credit card system, whether affiliated with or identical to the credit card issuer.

Committee Comment

This definition is applicable to offenses under 18 U.S.C. § 1029(a)(10).

18 U.S.C. § 1029(e)(8) DEFINITION OF "SCANNING RECEIVER"

"Scanning receiver" means a device or apparatus that can be used to intercept an electronic serial number, mobile identification number, or other identifier of any telecommunications service, equipment, or instrument.

Committee Comment

This definition is applicable to offenses under 18 U.S.C. § 1029(a)(8).

The statutory definition of "scanning receiver" includes a device that can be used to intercept wire or electronic communications in violation of chapter 119 (18 U.S.C. §§ 2510–2522). The types of devices and conduct covered by §§ 2510 to 2522 are so broad, that the Committee concluded it would be unable to capture all of the potential conduct in a pattern instruction. Thus, the Committee recommends that if the theory of prosecution addresses a scanning receiver that can be used to intercept wire or electronic communications, the district court should craft a definition of "scanning receiver" that is specific to §§ 2510 to 2522.

18 U.S.C. § 1029(e)(9) DEFINITION OF "TELECOMMUNICATIONS SERVICE"

"Telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used. Telephone service, cellular telephone service, instant messaging and email messaging services are all examples of "telecommunications services."

Committee Comment

This definition is applicable to offenses under 18 U.S.C. § 1029(a)(7) and (9) and the definitions of "access device" and "scanning receiver."

18 U.S.C. § 1029(e)(11) DEFINITION OF "TELECOMMUNICATION IDENTIFYING INFORMATION"

"Telecommunication identifying information" means electronic serial number or any other number or signal that identifies a specific telecommunications instrument or account, or a specific communication transmitted from a telecommunications instrument.

Committee Comment

This definition applies to offenses under 18 U.S.C. § 1029(a)(9).

18 U.S.C. § 1030 COMPUTER FRAUD AND RELATED ACTIVITY—DEFINITIONS

Committee Comment

These pattern definitions are designed to accompany the pattern instructions for the offenses listed in 18 U.S.C. § 1030. The source of most of these definitions is § 1030(e), which defines several terms unique to § 1030.

In providing these definitions, the Committee does not intend to imply that the court should always instruct the jury on all of the definitions. The court should provide the jury with the definitions only for the terms that are necessary for the particular case on trial. In addition, the court should excise from each definition terms that are inapplicable to the facts of the particular case.

Unless otherwise noted, these pattern definitions simply reproduce the definitions provided by § 1030(e) with only minor stylistic changes.

18 U.S.C. § 1030 DEFINITION OF "GOVERNMENT ENTITY"

"Government entity" includes the Government of the United States, any state or political subdivision of the United States, any foreign country, and any state, province, municipality, or other political subdivision of a foreign country.

Committee Comment

This definition is applicable where the enhanced penalty under 18 U.S.C. § 1030(c)(4)(A)(V) is sought and in the definition of "person," 18 U.S.C. § 1030(e)(12).

18 U.S.C. § 1030 DEFINITION OF "PASSWORD"

A "password" is a sequence of letters, numbers, symbols or other characters used to gain access to a computer, computer system, network, file, program, or function. A password helps ensure that only authorized users access the computer, computer system, network, file, program or function.

Committee Comment

This definition is based on several sources: The New Oxford American Dictionary, The Oxford English Dictionary, the online glossary of computer and internet terms, http://pc.net/glossary, and the online dictionary of technology terms, www.techdictionary.com.

This definition is applicable to offenses under 18 U.S.C. § 1030(a)(6).

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 [the; a] defendant guilty of this count, 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 count you are considering], then you should find the defendant guilty [of that count].

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 count you are considering], then you should find the defendant not guilty [of that count].

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, Pattern Instruction 4.09 for attempt should also be employed.

18 U.S.C. § 1030(a)(2)(A), (B) & (C) OBTAINING FINANCIAL INFORMATION BY UNAUTHORIZED ACCESS OF A COMPUTER—ELEMENTS

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

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

2. By accessing the computer the defendant obtained [information contained in a [financial record of (name financial institution), a financial institution; of (name card issuer), a card issuer]; file of (name consumer reporting agency), a consumer reporting agency maintained on a consumer]; information from any department or agency of the United States; information from any protected computer].

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 Supreme Court has held "that it is within the jury's prov-

ince to determine any fact (other than the existence of a prior conviction) that increases the maximum punishment authorized for a particular offense." *Oregon v. Ice*, 555 U.S. 160, 163 (2009) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004)). Therefore, if the government seeks, and the evidence supports, the enhanced maximum penalty provided by 18 U.S.C. § 1030(c)(2)(B), that is, if the offense was committed for purpose of commercial advantage or private financial gain, was in furtherance of any criminal or tortious act, or the value of the information obtained exceeded $5,000, then the principles of *Apprendi* require that the jury be instructed on the penalty-enhancing factor(s).

The instruction on the penalty-enhancing factor(s) should read:

If you find that the government proved beyond a reasonable doubt [specify the offense charged in the indictment] as charged in Count [__] of the indictment, then you must also determine whether the government proved beyond a reasonable doubt that

(insert appropriate alternative(s))

[the offense in Count [__] was committed for purposes of commercial advantage or private financial gain] [(c)(2)(B)(i)]

- or -

[the offense in Count [__] was committed in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or of any State] [(c)(2)(B)(ii)]

- or -

[the value of the information obtained exceeded $5,000] [(c)(2)(B)(iii)].

The bracketed citations to the subsections of § 1030(c) at the end of each of the above alternatives are included only to assist the court in crafting an appropriate instruction. They are not intended to be included in the instructions given to the jury.

The Committee recommends that if this instruction is given, then the jury also be given a special verdict form as follows:

Special Verdict Form

If you find the defendant(s) guilty of [specify the offense

charged in the indictment] Count [__], then you must also answer the following question(s).

We, the jury, find beyond a reasonable doubt that

[the offense in Count [__] was committed for purposes of commercial advantage or private financial gain] [(c)(2)(B)(i)]

- or -

[the offense in Count [__] was committed in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or of any State] [(c)(2)(B)(ii)]

- or -

[the value of the information obtained by the defendant exceeded $5,000] [(c)(2)(B)(iii)].

Yes ____ No ____

(As before, the bracketed citations to the appropriate subparts of § 1030(c) at the end of each of the above alternatives are included only to assist the court in crafting an appropriate special verdict form. They are not intended to be included in the verdict form given to the jury.)

18 U.S.C. § 1030(a)(3) ACCESSING A NON-PUBLIC GOVERNMENT COMPUTER—ELEMENTS

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

1. The defendant intentionally accessed a non-public computer of a (identify department or agency of the United States); and

2. [The computer was exclusively for the use of the government; the computer was used by or for the government and defendant's conduct affected the use by or for the government]; and

3. The defendant lacked authorization to access any non-public computer of (identify the department or agency of the United States).

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].

18 U.S.C. § 1030(a)(4) COMPUTER FRAUD USE BY OR FOR FINANCIAL INSTITUTION OR GOVERNMENT—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] fraud by using a protected computer. In order for you to find [the; a] 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 protected computer without authorization; exceeded authorized access to a protected computer]; and

2. The defendant did so with the intent to defraud; and

3. By [accessing; exceeding authorized access to] the protected computer, the defendant furthered the fraud; and

4. The defendant thereby obtained anything of value.

–or–

[4. The object of the fraud and the thing obtained was the use of the computer and the value of that use exceeded $5000 in any one-year period.]

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 Committee recommends that the court define "intent to defraud." For a definition of "intent to defraud" see the Pattern Instruction regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343.

A person does not violate this statute if the object of the fraud and the thing of value obtained consists only of the use of the computer and the value of such use is not more than $5000 in any 1-year period. If the theory of the case is that the object of the fraud was simply the use of the computer, and there is evidence to support a finding that the value of that use exceeded $5000 in any one-year period, then the alternate fourth element should be used.

18 U.S.C. § 1030(a)(5)(A) TRANSMISSION OF PROGRAM TO INTENTIONALLY CAUSE DAMAGE TO A COMPUTER—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] transmitting a program that damages a computer. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. The defendant knowingly caused the transmission of a [program; information; code; command]; and

2. By doing so, the defendant intentionally caused damage to a protected computer without authorization.

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 Supreme Court has held "that it is within the jury's province to determine any fact (other than the existence of a prior conviction) that increases the maximum punishment authorized for a particular offense." *Oregon v. Ice*, 555 U.S. 160, 163 (2009) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004)). Therefore, if the government seeks, and the evidence supports, an enhanced maximum penalty provided by 18 U.S.C. § 1030(c)(4)(B), (E) or (F), the principles of *Apprendi* require that the jury be instructed on the penalty-enhancing factor(s). The additional jury instruction on the penalty-enhancing factor(s) should read:

If you find that the government proved beyond a reasonable doubt [specify the offense charged in the indictment] as charged in Count [__] of the indictment, then you must also determine whether the government proved beyond a reasonable doubt that

(insert appropriate alternative(s))

the offense [caused; if completed, would have caused] [loss to one or more persons during any one-year period aggregating at least $5,000 in value; the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of one or more individuals; physical injury to any person; a threat to public health or safety; damage affecting a computer used by or for an entity of the United States Government in furtherance of the administration of justice, national defense, or national security; damage affecting ten or more protected computers during any one-year period]. [(c)(4)(B)]

- or -

[the defendant [attempted to cause; knowingly or recklessly caused] serious bodily injury] [(c)(4)(E)]

- or -

[the defendant [attempted to cause; knowingly or recklessly caused] death]. [(c)(4)(F)]

The bracketed citations to the subsections of § 1030(c) are included only to assist the court in crafting an appropriate instruction. They are not intended to be included in the jury instruction.

If the government pursues a "recklessness" theory, the Committee recommends that the term be defined as follows:

A person acts recklessly if he was aware of a substantial and unjustifiable risk that his actions would cause [serious bodily injury; death] and that the defendant consciously disregarded that risk.

See Model Jury Instructions, Criminal, Third Circuit, Section 5.08 (West 2009).

If the term "serious bodily injury" is used, the Committee recommends that the term be defined as follows:

> Serious 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.

This definition of "serious bodily injury" is the same as the pattern instruction regarding that term as used in these Pattern Instructions under the manslaughter statute, 18 U.S.C. § 1112, which is taken from 18 U.S.C. § 1365(h)(3).

The Committee recommends that if the additional instruction is given, then the jury also be given a special verdict form as follows:

Special Verdict Form

If you find the defendant(s) guilty of [specify the offense charged in the indictment] Count [__], then you must also answer the following question(s).

We, the jury, find beyond a reasonable doubt that

the offense [caused; in the case of an attempted offense would, if completed, have caused] [loss to one or more persons during any one-year period aggregating at least $5,000 in value; the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of one or more individuals; physical injury to any person; a threat to public health or safety; damage affecting a computer used by or for an entity of the United States Government in furtherance of the administration of justice, national defense, or national security; damage affecting ten or more protected computers during any one-year period]] [(c)(4)(B)]

- or -

[the defendant [attempted to cause; knowingly or recklessly caused] serious bodily injury] [(c)(4)(E)]

- or -

[the defendant [attempted to cause; knowingly or recklessly caused] death]. [(c)(4)(F)]

Yes ____ No ____

(As before, the bracketed citations to the appropriate subparts of § 1030(c) at the end of each of the above alternatives are included only to assist the court in crafting an appropriate special verdict form. They are not intended to be included in the verdict form given to the jury.)

18 U.S.C. § 1030(a)(5)(B) RECKLESSLY CAUSING DAMAGE BY ACCESSING A PROTECTED COMPUTER—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] recklessly causing damage by accessing a protected computer. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. The defendant intentionally accessed a protected computer without authorization; and

2. As a result of that conduct, the defendant recklessly caused damage.

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 Committee recommends that district courts define the term "recklessly," as follows:

> A person acts recklessly if he was aware of a substantial and unjustifiable risk that his conduct would cause damage and that the defendant consciously disregarded that risk.

See Model Jury Instructions, Criminal, 3d Circuit § 5.08 (West 2009).

The Supreme Court has held "that it is within the jury's prov-

ince to determine any fact (other than the existence of a prior conviction) that increases the maximum punishment authorized for a particular offense." *Oregon v. Ice*, 555 U.S. 160, 163 (2009) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004)). Therefore, if the government seeks, and the evidence supports, the enhanced maximum penalty under 18 U.S.C. § 1030(c)(4)(A), then the principles of *Apprendi* require that the jury be instructed on the penalty-enhancing factor(s).

The additional instruction on the penalty-enhancing factor(s) should read:

If you find that the government proved beyond a reasonable doubt [specify the offense charged in the indictment] as charged in Count [__] of the indictment, then you must also determine whether the government proved beyond a reasonable doubt that [the offense caused; the attempt to commit the offense would, if completed, have caused] [a loss to one or more persons during any one-year period aggregating at least $5,000 in value; the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of one or more individuals; physical injury to any person; a threat to public health or safety; damage affecting a computer used by or for an entity of the United States Government in furtherance of the administration of justice, national defense, or national security; damage affecting ten or more protected computers during any one-year period].

The Committee recommends that if this additional instruction is given, then the jury also be given a special verdict form as follows:

Special Verdict Form

If you find the defendant(s) guilty of [specify the offense charged in the indictment] Count [__], then you must also answer the following question(s).

We, the jury, find beyond a reasonable doubt that [the offense caused; the attempt to commit the offense would, if completed, have caused] [a loss to one or more persons during any one-year period aggregating at least $5,000 in value; the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of one or more individuals; physical injury to any person; a threat to public health

or safety; damage affecting a computer used by or for an entity of the United States Government in furtherance of the administration of justice, national defense, or national security; damage affecting ten or more protected computers during any one-year period].

Yes ____ No ____

18 U.S.C. § 1030(a)(5)(C) CAUSING DAMAGE AND LOSS BY ACCESSING A PROTECTED COMPUTER—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] causing damage and loss by accessing a protected computer. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. The defendant, without authorization, intentionally accessed a protected computer; and

2. As a result of that conduct, the defendant caused damage and loss.

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].

18 U.S.C. § 1030(a)(6) TRAFFICKING IN PASSWORDS—ELEMENTS

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

1. The defendant knowingly and without authorization trafficked in a password, or similar information through which a computer may be accessed; and

2. The defendant acted with intent to defraud; and

3. The defendant's acts [affected interstate or foreign commerce; involved access to a computer used by or for the government of the United States].

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

"Trafficking" is not defined in § 1030; the Committee recommends the definition in § 1029(e)(5).

The phrase "interstate or foreign commerce" is not defined in § 1030. The Committee recommends employing the pattern definition suggested for offenses in violation of 18 U.S.C. § 1028.

The Committee recommends instructing the jury on the meaning of "intent to defraud." For a definition of "intent to defraud" see the Pattern Instruction regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343.

18 U.S.C. § 1030(a)(7)(A) EXTORTION BY THREATENING TO DAMAGE A PROTECTED COMPUTER—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] extortion by threatening to damage a protected computer. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. The defendant transmitted, in interstate or foreign commerce, a threat to cause damage to a protected computer; and

2. The defendant intended to extort money or anything of value from any 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

The phrase "interstate or foreign commerce" is not defined in 18 U.S.C. § 1030; the Committee recommends employing the pattern definition suggested for offenses in violation of § 1028.

The term "extort" is also not defined in § 1030; the Committee recommends that the pattern definition for "extortion" suggested for Hobbs Act offenses in violation of 18 U.S.C. § 1951, be adapted for this offense.

18 U.S.C. § 1030(a)(7)(B) EXTORTION BY THREATENING TO OBTAIN INFORMATION FROM A PROTECTED COMPUTER—ELEMENTS

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

1. The defendant transmitted, in interstate or foreign commerce, a threat [to obtain information from a protected computer without authorization; to obtain information from a protected computer in excess of authorization; to impair the confidentiality of information obtained from a protected computer without authorization; to impair the confidentiality of information obtained from a protected computer by exceeding authorized access]; and

2. By doing so, the defendant intended to extort money or anything of value from any 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

The phrase "interstate or foreign commerce" is not defined in

18 U.S.C. § 1030; however, the Committee recommends employing the pattern definition suggested for offenses in violation of 18 U.S.C. § 1028.

The term "extort" is also not defined in § 1030; the Committee recommends that the pattern definition for "extortion" suggested for Hobbs Act offenses in violation of 18 U.S.C. § 1951, be adapted for this offense.

18 U.S.C. § 1030(a)(7)(C) EXTORTION BY DEMANDING MONEY IN RELATION TO A PROTECTED COMPUTER—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] extortion by demanding money in relation to a protected computer. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant transmitted in interstate or foreign commerce any communication containing a demand or request for money or other thing of value in relation to damage to a protected computer;

2. The defendant did so with intent to extort money or anything of value from any person; and

3. Damage to a protected computer was caused to facilitate the extortion.

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 phrase "interstate or foreign commerce" is not defined in 18 U.S.C. § 1030; the Committee recommends employing the pattern definition suggested for offenses in violation of 18 U.S.C. § 1028.

The statute does not define the phrase "in relation to." The Committee recommends that the phrase be defined as in the following instruction.

The term "extort" is also not defined in § 1030; the Committee recommends that the pattern definition for "extortion" suggested for Hobbs Act offenses in violation of 18 U.S.C. § 1951, adapted for this offense.

18 U.S.C. § 1030(a)(7)(C) DEFINITION OF "IN RELATION TO"

"In relation to" means that the communication had a purpose, role or effect with respect to the damage to the protected computer. It also means that the communication had a connection to or relationship with the damage to the protected computer.

Committee Comment

Section 1030(a)(C) of Title 18 does not define "in relation to" as used in the statute. This definition borrows from the meaning of that phrase as used in the firearms context, see Pattern Instruction 18 U.S.C. § 924(c)(1), see Pattern Crim. Jury Instr. 5th Cir. 2.48 (2001); Mod. Crim. Jury Instr. 3rd Cir. 6.18.924B (2009); Pattern Crim. J. Instr. 11th Cir. OI 35.2 (2003).

This definition is applicable to offenses under § 1030(a)(7)(C).

18 U.S.C. § 1030(b) ATTEMPT AND CONSPIRACY—ELEMENTS

Committee Comment

Section 1030(b) of Title 18 proscribes attempts and conspiracies to violate any subsection of § 1030(a). Where the indictment charges an attempt or conspiracy adjust the instruction accordingly, using relevant elements from the attempt pattern instruction or pattern instruction for conspiracies where an overt act is not required, see Pattern Instructions 4.09 and 5.08(B), as appropriate.

18 U.S.C. § 1030(b) was amended in 1986 to delete the requirement of an overt act to support a conspiracy conviction.

18 U.S.C. § 1030(e)(1) DEFINITION OF "COMPUTER"

"Computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions. The term includes any data storage facility or communications facility directly related to or operating in conjunction with such device. But the term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.

Committee Comment

This definition is applicable to offenses under 18 U.S.C. § 1030(a)(1)–(7).

The Committee anticipates that in most cases, it will be unnecessary to instruct the jury on the meaning of the term "computer."

18 U.S.C. § 1030(e)(2) DEFINITION OF "PROTECTED COMPUTER"

"Protected computer" means a computer that is [exclusively for the use of a financial institution or the United States government] [not exclusively for the use of, used by or for a financial institution or the United States government when the defendant's conduct affects the use of the computer by or for the financial institution or the government] [used in or affecting interstate or foreign commerce or communication, even if the computer is located outside of the United States] [part of a voting system and is used for the management, support, or administration of a Federal election].

Committee Comment

This definition is applicable to offenses under 18 U.S.C. § 1030(a)(2), (4), (5), and (7).

In 2018, 18 U.S.C. § 1030(e)(2) was amended to add § 1030(e)(2)(C), which expanded the definition of "protected computer" to include one that is part of a voting system for a Federal election. If the case involves a voting system, the definition of "voting system" and "Federal election" should be included as found in 18 U.S.C. § 1030(e)(13) and (14).

18 U.S.C. § 1030(e)(3) DEFINITION OF "STATE"

"State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any other commonwealth, possession or territory of the United States.

Committee Comment

This definition is applicable to 18 U.S.C. § 1030(a)(2) when the enhanced penalty under § 1030(c)(2)(B)(ii) is sought.

18 U.S.C. § 1030(e)(4) DEFINITION OF "FINANCIAL INSTITUTION"

"Financial institution" means an institution whose deposits are insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration; the Federal Reserve or a member of the Federal Reserve including any Federal Reserve Bank; a member of the Federal home loan bank system and any home loan bank; any institution of the Farm Credit System; a broker dealer registered with the Securities and Exchange Commission; the Securities Investor Protection Corporation; a branch or agency of a foreign bank; and an organization operating under § 25 or § 25(a) of the Federal Reserve Act.

Committee Comment

This definition applies to offenses under 18 U.S.C. § 1030(a)(2) and the definitions of "protected computer," "financial record," and "person." It should not be confused with the more generally applicable definition of "financial institution" set forth at 18 U.S.C. § 20.

The Committee recommends that the term "financial institution" not be defined except when an issue exists as to whether an entity qualifies as a financial institution. Whenever the term "financial institution" is defined, only that part which is pertinent to the trial should be employed.

18 U.S.C. § 1030(e)(5) DEFINITION OF "FINANCIAL RECORD"

"Financial record" means information derived from any record held by a financial institution pertaining to a customer's relationship with the financial institution.

Committee Comment

This definition is applicable for offenses under 18 U.S.C. § 1030(a)(2).

18 U.S.C. § 1030(e)(6) DEFINITION OF "EXCEEDS AUTHORIZED ACCESS"

"Exceeds authorized access" means to access a computer with authorization but to use such access to obtain or alter information in the computer that the person is not entitled to obtain or alter.

Committee Comment

This definition is applicable for offenses under 18 U.S.C. § 1030(a)(1), (2), and (4).

18 U.S.C. § 1030(e)(7) DEFINITION OF "DEPARTMENT OF THE UNITED STATES"

"Department of the United States" means the legislative or judicial branch of the Government or one of the executive departments of the United States.

Committee Comment

This definition is applicable for offenses under 18 U.S.C. § 1030(a)(2) and (3).

18 U.S.C. § 1030(e)(8) DEFINITION OF "DAMAGE"

"Damage" means any impairment to the integrity or availability of data, a program, a system, or information.

Committee Comment

This definition is applicable for offenses under 18 U.S.C. § 1030(a)(5) and (7)(A) and (C) and where an enhanced penalty is sought under § 1030(c)(4)(A).

18 U.S.C. § 1030(e)(10) DEFINITION OF "CONVICTION"

"Conviction" includes a conviction under the law of any state for a crime punishable by imprisonment for more than 1 year, an element of which is unauthorized access, or exceeding authorized access, to a computer.

Committee Comment

This definition is for use when certain enhanced penalties under 18 U.S.C. § 1030(c) are sought.

18 U.S.C. § 1030(e)(11) DEFINITION OF "LOSS"

"Loss" means any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense. The term also includes any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service.

Committee Comment

This definition is applicable to offenses under 18 U.S.C. § 1030(a)(5)(C) and where the enhanced penalties under § 1030(c)(4)(A)(i)(I) are sought.

18 U.S.C. § 1030(e)(12) DEFINITION OF "PERSON"

"Person" means any individual, firm, corporation, educational institution, financial institution, governmental entity, or legal or other entity.

Committee Comment

The Committee recommends that the term "person" not be defined unless the term is being used in the case to describe an entity other than a human being.

This definition is applicable to offenses under § 1030(a)(1) and (7) and when certain enhanced penalties are sought under § 1030(c)(4)(A).

18 U.S.C. § 1030(e)(13) DEFINITION OF "FEDERAL ELECTION"

The term "Federal election" is an election for the office of President, Vice President, Senator, or Congressional Representative, or Delegate or Resident Commissioner to Congress.

The term "election" includes:

(A) a general, special, primary, or runoff election;

(B) a convention or caucus of a political party which has authority to nominate a candidate;

(C) a primary election held for the selection of delegates to a national nominating convention of a political party; or

(D) a primary election held for the expression of a preference for the nomination of individuals for election to the office of President.

The term "Federal office" means the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress.

Committee Comment

18 U.S.C. § 1030(e)(13) adopts this definition from § 30101(1) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30101(1) and (3)).

18 U.S.C. § 1030(e)(14) DEFINITION OF "VOTING SYSTEM"

The term "voting system" means—

(1) the total combination of mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to program, control, and support the equipment) that is used—

(A) to define ballots;

(B) to cast and count votes;

(C) to report or display election results; and

(D) to maintain and produce any audit trail information; and

(2) the practices and associated documentation used—

(A) to identify system components and versions of such components;

(B) to test the system during its development and maintenance;

(C) to maintain records of system errors and defects;

(D) to determine specific system changes to be made to a system after the initial qualification of the system; and

(E) to make available any materials to the voter (such as notices, instructions, forms, or paper ballots).

Committee Comment

18 U.S.C. § 1030(e)(14) adopts this definition from section 301(b) of the Help America Vote Act of 2002 (52 U.S.C. 21081(b)).

18 U.S.C. § 1035 FALSE STATEMENTS RELATED TO HEALTH CARE MATTERS: FALSIFICATION AND CONCEALMENT—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] making a false statement in a matter involving a health care benefits program. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant [falsified; concealed; covered up by any trick, scheme or device] a fact in a matter involving a health care benefit program;

2. The fact was material;

3. The defendant did so knowingly and willfully; and

4. The defendant did so in connection with the delivery of or payment for health care benefits, items or services.

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 count that you are considering], then you should find the defendant guilty [of that count].

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

Committee Comment

This instruction is modeled on the general false statements

instruction under 18 U.S.C. § 1001.

18 U.S.C. § 1035 FALSE STATEMENTS RELATED TO HEALTH CARE MATTERS: FALSE STATEMENT—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] making a false statement in a matter involving a health care benefits program. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [five] following elements beyond a reasonable doubt:

1. The defendant made a [statement; representation] in a matter involving a health care benefit program;

2. The [statement; representation] was in connection with the [delivery of; payment for] health care benefits, items or services;

3. The [statement; representation] was material to the health care benefit program;

4. The [statement; representation] was [false; fictitious; fraudulent]; and

5. The defendant made the statement knowingly and willfully.

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 count that you are considering], then you should find the defendant guilty [of that count].

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

Committee Comment

See *United States v. Natale*, 719 F.3d 719, 742 (7th Cir. 2013).

18 U.S.C. § 1035(a)(1) & (2) DEFINITION OF "HEALTH CARE BENEFIT PROGRAM"

A "health care benefit program" is a [public; private] [plan; contract], affecting commerce, under which any medical benefit, item or service is provided to any individual and includes any individual or entity who is providing a medical benefit, item or service for which payment may be made under the plan or contract. A health care program affects commerce if the health care program had any impact on the movement of any money, goods, services, or persons from one state to another [or between another country and the United States].

The government need only prove that the health care program itself either engaged in interstate commerce or that its activity affected interstate commerce to some degree. The government need not prove that [the; a] defendant engaged in interstate commerce or that the acts of [the; a] defendant affected interstate commerce.

Committee Comment

"Health care benefit program" is defined in 18 U.S.C. § 24(b). In this statute, "affecting commerce" means affecting interstate commerce. See *United States v. Natale*, 719 F.3d 719, 732 n.5 (7th Cir. 2013). The court may also find it appropriate to adapt for health care offenses the RICO Pattern Instruction describing enterprises that engage in interstate commerce or whose activities affect interstate commerce. This definition is taken from the parallel instruction under 18 U.S.C. § 669(a).

18 U.S.C. § 1035(a)(1) & (2) DEFINITION OF "MATERIAL"

A statement is "material" if it is capable of influencing the decision of the health care benefit program regarding the [delivery of; payment for] health care [benefits; items; services].

Committee Comment

See *United States v. Natale*, 719 F.3d 719, 737 (7th Cir. 2013).

18 U.S.C. § 1035(a)(1) & (2) DEFINITION OF "WILLFULLY"

A person acts "willfully" if he acts voluntarily and intentionally and with the intent to do something he knows is illegal.

Committee Comment

See *United States v. Bryan*, 524 U.S. 184, 191–92 (1998) ("[I]n order to establish a willful violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful.") (internal quotation marks omitted); *United States v. Natale*, 719 F.3d 719, 740–41 (7th Cir. 2013) (Section 1035 does not require specific intent to deceive; approving an instruction that included language that "[a]n act is done willfully if done voluntarily and intentionally and with intent to do something the law forbids.").

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 [the; a] 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 count you are considering], then you should find the defendant guilty [of that count].

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 count you are considering], then you should find the defendant not guilty [of that count]. [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 defendant properly raises a heat of passion defense. *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. In *United States v. White Feather*, 768 F.3d 735 (7th Cir. 2014), the court 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."

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.

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*, 819 F.3d 310, 319 (7th Cir. 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.

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."

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.

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.

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

The requirement 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 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).

The Seventh Circuit has noted that "[c]riminal statutes frequently punish defendants for their action's unintended consequences. 'It is unusual to impose criminal punishment for the consequences of purely accidental conduct. But it is not unusual to punish individuals for the unintended consequences of their *unlawful* acts.' " *United States v. Waldrip*, 859 F.3d 446, 451 (7th Cir. 2017) (quoting *Dean v. United States*, 556 U.S. 568, 575 (2009)).

18 U.S.C. § 1112 DEFINITIONS

The following definitions may be relevant to a determination of whether the crime of manslaughter is voluntary manslaughter or involuntary manslaughter:

"Assault" means to intentionally inflict, attempt to inflict, or threaten to inflict bodily injury upon another person with the apparent and present ability to cause such injury that creates in the victim a reasonable fear or apprehension of bodily harm. An assault may be committed without actually touching, striking, or injuring the other person.

A "deadly or dangerous weapon" 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 deadly or dangerous weapon if it, or the manner in which it is used, would cause fear in the average person.

"Serious 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

The definition provided in the instruction is the same as the pattern instruction for "assault" as used in the bank robbery statute, 18 U.S.C. § 2113(d). See, *e.g.*, *United States v. Vallery*, 437 F.3d 626, 631 (7th Cir. 2006); *United States v. Smith*, 103 F.3d 600, 605 (7th Cir. 1996); *United States v. Woody*, 55 F.3d 1257, 1265–66 (7th Cir. 1995); *United States v. Rizzo*, 409 F.2d 400, 402–03 (7th Cir. 1969).

The definition provided in the instruction is the same as the pattern instruction for "dangerous weapon or device" as used in the bank robbery statute, 18 U.S.C. § 2113(d).

In *United States v. Loman*, 551 F.2d 164, 169 (7th Cir. 1977), the Seventh Circuit, in finding a walking stick as used constituted

a dangerous weapon under 18 U.S.C. § 111, explained that "[n]ot the object's latent capability alone, but that, coupled with the manner of its use, is determinative." As the Fourth Circuit concluded in *United States v. Murphy*, 35 F.3d 143, 147 (4th Cir. 1994), many objects, "even those seemingly innocuous, may constitute dangerous weapons," including a garden rake, shoes, and a wine bottle. See also U.S. Sentencing Guidelines Manual § 1B1.1 cmt. n.1 (2018).

In *United States v. Gometz*, 879 F.2d 256, 259 (7th Cir. 1989), the Seventh Circuit rejected the defendant's argument that a defective zip gun was not a dangerous weapon within the meaning of 18 U.S.C. § 111. In so doing, the Court found that the Supreme Court's logic in *McLaughlin v. United States*, 476 U.S. 16 (1986), which held an unloaded gun to be a dangerous weapon under 18 U.S.C. § 2113, applied to § 111 as well. "In particular we believe that Congress, in enacting § 111, could reasonably presume that a zip gun is an inherently dangerous object and meant to proscribe all assaults with this object irrespective of the particular zip gun's capability to inflict injury. Moreover, a zip gun, like an ordinary gun, instills fear in the average citizen and creates an immediate danger that a violent reaction will ensue." *Gometz*, 879 F.2d at 259; see also Eleventh Circuit Pattern Criminal Instruction O1.1 (2020).

18 U.S.C. § 1112 DEFINITIONS OF MANSLAUGHTER

Malice marks the boundary that separates the crimes of murder and manslaughter.

Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

Voluntary Manslaughter is the intentional unlawful killing of a human being without malice and upon a sudden quarrel or in the heat of passion.

Involuntary Manslaughter is the unlawful killing of a human being [in the commission of an unlawful act not amounting to a felony] [in the commission [in an unlawful manner] [without due caution and circumspection] of a lawful act which might produce death].

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 [the; a] 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].

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.

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 [the; a] 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).

18 U.S.C. § 1201(a)(1) KIDNAPPING

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

1. The defendant unlawfully [seized; confined; inveigled; decoyed; kidnapped; abducted; carried away] the victim without [his; her] consent; and

2. [The defendant intentionally transported the victim across state lines] [the defendant [traveled in [interstate; foreign] commerce] [used the mail [in committing; in furtherance of] the offense] [used any [means; facility; instrumentality] of [interstate; foreign] commerce in [committing; furtherance of committing] the offense].

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 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 does not have to prove that the kidnapping was committed for ransom or personal financial gain. See *United States v. Healy*, 376 U.S. 75, 82 (1964) (holding a kidnapping does not have to be for pecuniary or illegal benefit). Moreover, "purpose is not an element of the offense of kidnapping and need not be charged or proven to support a conviction." *United States v. Atchison*, 524 F.2d 367, 371 (7th Cir. 1975).

The victim's lack of consent is necessary to establish the crime because it is the "involuntariness of the seizure and detention" that is "the very essence of the crime of kidnapping." *Chatwin v. United States*, 326 U.S. 455, 464 (1946). If the victim is of such an age or mental state as to be incapable of having a recognizable will, the confinement must be against the will of the parents or legal guardian of the victim. *Id.* at 460; see also *United States v. Eason*, 854 F.3d 922 (7th Cir. 2017).

The fact that the victim may have initially voluntarily accompanied the defendant does not negate the existence of a later kidnapping. *United States v. Redmond*, 803 F.2d 438, 439 (9th Cir. 1986).

The government need not prove that the defendant knew he was transporting the victim in interstate [foreign] commerce, only that he did. See *United States v. Hattaway*, 740 F.2d 1419, 1427 (7th Cir. 1984) (interstate transportation requirement for Mann Act violation "is an element of federal jurisdiction and not part of the knowledge requirement for a Mann Act conviction") (citing *United States v. Bankston*, 603 F.2d 528, 532 (5th Cir. 1979) (a conviction under 18 U.S.C. § 1201 "does not require that an offender know that he is crossing state lines [with victim]")).

18 U.S.C. § 1201(a)(1) KIDNAPPING—DEFINITION OF INTERSTATE OR FOREIGN COMMERCE

"Interstate commerce" means commerce between different states, territories, and possessions of the United States, including the District of Columbia.

"Foreign commerce" as used above means commerce between any state, territory, or possession of the United States and a foreign country.

"Commerce" include, among other things, travel, trade, transportation, and communication.

Committee Comment

These definitions of "interstate commerce" and "foreign commerce" are found at 18 U.S.C. § 10 and are modified here to consolidate and harmonize various definitions of those terms.

The government need not prove that the defendant knew he was transporting the victim in interstate [foreign] commerce, only that he did. See *United States v. Hattaway*, 740 F.2d 1419, 1427 (7th Cir. 1984) (interstate transportation requirement for Mann Act violation "is an element of federal jurisdiction and not part of the knowledge requirement for a Mann Act conviction") (citing *United States v. Bankston*, 603 F.2d 528, 532 (5th Cir. 1979) (a conviction under 18 U.S.C. § 1201 "does not require that an offender know that he is crossing state lines [with victim]")).

18 U.S.C. § 1201(a)(1) KIDNAPPING—DEFINITION OF INVEIGLE OR DECOY

To inveigle or decoy a person means to lure, or entice, or lead the person astray by false representations or promises, or other deceitful means.

Committee Comment

See *United States v. Macklin*, 671 F.2d 60, 64 (2d Cir. 1982) (" 'Inveigle' means to entice, lure or lead astray, by false representations or promises, or by other deceitful means. 'Decoy' means enticement or luring by means of some fraud, trick or temptation").

18 U.S.C. §§ 1341 & 1343 MAIL/WIRE/CARRIER FRAUD—ELEMENTS

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

1. That the defendant knowingly [devised; participated in] a scheme [to defraud], as described in Count[s] __; and

2. That the defendant did so with the intent to defraud; and

3. The scheme to defraud involved a materially false or fraudulent pretense, representation, or promise; and

4. That for the purpose of carrying out the scheme [or attempting to do so], the defendant [used; caused the use of] [the United States Mails] [a private or commercial interstate carrier] [caused interstate wire communications to take place] in the manner charged in the particular count.

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

Section 1341 (and § 1343) of Title 18 begins, "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . .." The 1999 pattern instruction set forth the elements as if there are two separate types of prohibited schemes, using bracketed language to signify the different types: a scheme "[to defraud] [or] [to obtain money or property by means of false pretenses, representations, or promises]." In other words, the current pattern instruction treats § 1341 as prohibiting (a) schemes to defraud and (b) schemes to obtain money or property by false representations.

To conform the instruction to controlling case law and to improve the instruction's comprehensibility, the Committee proposes that the instruction refer only to a singular "scheme to defraud," with another instruction further defining "scheme to defraud." In *Cleveland v. United States*, 531 U.S. 12, 25–26 (2000), the Supreme Court rejected the argument that § 1341 prohibits two separate types of schemes. The Supreme Court acknowledged that, "[b]ecause the two phrases identifying the proscribed schemes appear in the disjunctive, it is arguable that they are to be construed independently." *Id*. at 26. But the Court rejected that interpretation, and reaffirmed a prior decision that had construed the second phrase—the "for obtaining money or property" phrase—as "simply modif[ying] the first" to make clear that the statute covered false representations as to future events, not just already-existing facts. *Id*. (citing *McNally v. United States*, 483 U.S. 350, 359 (1987)). Accordingly, the pattern instruction should refer only to a "scheme to defraud," with a further instruction defining that term, and should not refer to a separate scheme to obtain money or property.

Another substantive change involves the addition of the materiality element. See *Neder v. United States*, 527 U.S. 1 (1999). Cases recommend inclusion of the materiality element in jury instructions. See *United States v. Fernandez*, 282 F.3d 500, 509 n. 6 (7th Cir. 2002); *United States v. Reynolds*, 189 F.3d 521, 525 n. 2 (7th Cir. 2000).

Because the honest services statute defines a form of a "scheme to defraud," *United States v. Boscarino*, 437 F.3d 634, 636 (7th Cir. 2006), it has not been separately identified as a type of mail/wire/carrier fraud in the elements instruction.

The wire fraud statute, 18 U.S.C. § 1343, does not provide for attempt liability on its own. Instead, attempt liability for a wire

fraud is authorized under 18 U.S.C. § 1349. The bracketed "[or attempting to do so]" language in the fourth element should only be used in mail fraud cases under 18 U.S.C. § 1341 (which does contain attempt liability) or in wire fraud cases that charge a violation of 18 U.S.C. § 1349.

18 U.S.C. §§ 1341 & 1343 USE OF MAILS/ INTERSTATE CARRIER/INTERSTATE COMMUNICATION FACILITY

The government must prove that [the United States mails; [a] private or commercial interstate carrier[s]; interstate communication facilities] [was; were] used to carry out the scheme, or [was; were] incidental to an essential part of the scheme.

In order to [use; cause the use of] [the United States mails; a private or commercial interstate carrier] [cause interstate wire communications to take place], [the; a] defendant need not actually intend that use to take place. You must find that the defendant knew this use would actually occur, or that the defendant knew that it would occur in the ordinary course of business, or that the defendant knew facts from which that use could reasonably have been foreseen. [However, the government does not have to prove that [the; a] defendant knew that [the wire communication was of an interstate nature; the carrier was an interstate carrier].]

[The defendant need not actually or personally use [the mail; an interstate carrier; interstate communication facilities].]

[Although an item [mailed; sent by interstate carrier; communicated interstate] need not itself contain a fraudulent representation or promise or a request for money, it must carry out or attempt to carry out the scheme.]

[In connection with whether a [mailing; wire transmission] was made, you may consider evidence of the habit or the routine practice of [a person; an organization].]

[Each separate use of [the mail; an interstate carrier; interstate communication facilities] in furtherance of the scheme to defraud constitutes a separate offense.]

Committee Comment

A defendant does not actually have to use the mail or wire or a carrier to violate § 1341; he only needs to cause such use to occur as a part of the scheme. The two essential elements are a scheme to defraud and that mailing or wiring or use of a carrier occurred as a part of that scheme. *Pereira v. United States*, 347 U.S. 1, 8–9 (1954). The use of mail need not be intended, but must be reasonably foreseeable and follow in the course of business of furthering the scheme. *United States v. Ashman*, 979 F.2d 469, 481–84 (7th Cir. 1992); *United States v. Draiman*, 784 F.2d 248, 251 (7th Cir. 1986); *United States v. Briscoe*, 65 F.3d 576,583 (7th Cir. 1995); *United States v. Hickok*, 77 F.3d 992, 1004 (7th Cir. 1996); *United States v. Kenofskey*, 243 U.S. 440 (1917); *United States v. Calvert*, 523 F.2d 895 (8th Cir. 1975); *Hart v. United States*, 112 F.2d 128 (5th Cir. 1940).

United States v. Briscoe, 65 F.3d 576, 583 (7th Cir. 1995), holds that wire fraud parallels mail fraud. Consequently, the government is not required to prove the scheme was successful, but only that use of a wire communication was reasonably foreseeable, and actual wiring occurred in furtherance of the scheme. *United States v. Kenofskey*, 243 U.S. 440 (1917); *United States v. Clavert*, 523 F.2d 895 (8th Cir. 1975); *Hart v. United States*, 112 F.2d 128 (5th Cir. 1940).

The Committee has combined separate mail and wire instructions, and has added interstate carrier language. It has also added the "incidental to" line in response to *Schmuck v. United States*, 489 U.S. 705, 710–11 (1989). The Committee has also amended the knowledge requirement to conform with *Pereira v. United States*, 347 U.S. 1 (1954) and, in the case of interstate wire/interstate carrier communications, with *United States v. Lindemann*, 85 F.3d 1232 (7th Cir. 1996).

The instruction also includes optional language related to habit or practice that is drawn from Fed. R. Evid. 406.

18 U.S.C. §§ 1341 & 1343 SUCCESS NOT REQUIRED

The [mail; interstate carrier; wire] fraud statute can be violated whether or not there is any [loss or damage to the victim of the crime; gain to the defendant].

[The government need not prove that the scheme to defraud actually succeeded.]

Committee Comment

See *United States v. Lupton*, 620 F.3d 790, 805 (7th Cir. 2010) (the "wire fraud statutes criminalize the fraudulent acts undertaken to secure illicit gains, not their ultimate successes").

18 U.S.C. §§ 1341 & 1343 DEFINITION OF "SCHEME TO DEFRAUD"

A scheme is a plan or course of action formed with the intent to accomplish some purpose.

[A "scheme to defraud" is a scheme that is intended to deceive or cheat another and [to obtain money or property or cause the [potential] loss of money or property to another by means of materially false or fraudulent pretenses, representations or promises]; [to deprive another of the intangible right to honest services through [bribery; kickbacks].]]

[A materially false or fraudulent pretense, representation, or promise may be accomplished by [an] omission[s] or the concealment of material information.]

Committee Comment

The "scheme to defraud" and "intent to defraud" elements are distinct, and subject to definition in separate instructions. See *United States v. Doherty*, 969 F.2d 425, 429 (7th Cir. 1992).

As the Supreme Court held in *Skilling v. United States*, 561 U.S. 358, 409 (2010) the honest services statue only covers bribery and kickback schemes.

In cases in which the indictment alleges multiple schemes, the jury should be instructed that it must be unanimous on at least one of the schemes. See *United States v. Davis*, 471 F.3d 783, 791 (7th Cir. 2006) ("Jury Instruction 13 informed the jury that the government need not prove every scheme that it had alleged, but that it must prove one of them beyond a reasonable doubt."); see also *United States v. Sababu*, 891 F.2d 1308, 1326 (7th Cir. 1989). A unanimity instruction can be found at Pattern Instruction 4.04.

A jury need not be given a specific unanimity instruction regarding the means by which an offense is committed. See *Richardson v. United States*, 526 U.S. 813, 817 (1999) (citing *Schad v. Arizona*, 501 U.S. 624, 631–32 (1991) (plurality)); see also *United States v. Griggs*, 569 F.3d 341 (7th Cir. 2009) (jury is not required to unanimously agree on overt act in a conspiracy prosecution). In the absence of definitive precedent on the subject, the Committee takes no position on whether a specific unanimity instruction as to

money/property and honest services fraud should be given when the indictment charges both money/property and honest services fraud. If money/property and honest services fraud are viewed as establishing separate scheme objects, a specific unanimity instruction may be appropriate. On the other hand, if money/property and honest services fraud are viewed as different means by which to commit the "scheme to defraud" essential element, cf. *United States v. Boscarino*, 437 F.3d 634 (7th Cir. 2006) (honest services is a definition of scheme to defraud), or as something akin to an overt act, the general unanimity instruction applicable to essential elements may be sufficient. See *United States v. Blumeyer*, 114 F.3d 758, 769 (8th Cir. 1997) (*dicta*) ("we have serious doubts whether the jury was required to agree on the precise manner in which the scheme violated the law"); *United States v. Zeidman*, 540 F.2d 314, 317–18 (7th Cir. 1976) ("[T]he indictment cannot be attacked because it would permit a conviction by less than a unanimous jury. The trial judge clearly instructed the jury that they must not return a guilty verdict unless they all agreed that the defendants had devised a scheme to defraud at least the creditor or the debtor.").

The mail/wire fraud statutes do not include the words "omission" or "concealment," but cases interpreting the statutes hold that omissions or concealment of material information may constitute money/property fraud, without proof of a duty to disclose the information pursuant to a specific statute or regulation. See *United States v. Powell*, 576 F.3d 482, 490, 492 (7th Cir. 2009); *United States v. Stephens*, 421 F.3d 503, 507 (7th Cir. 2005); *United States v. Palumbo Bros., Inc.*, 145 F.3d 850, 868 (7th Cir. 1998); *United States v. Biesiadecki*, 933 F.2d 539, 543 (7th Cir. 1991); *United States v. Keplinger*, 776 F.2d 678, 697–98 (7th Cir. 1985); see also *United States v. Colton*, 231 F.3d 890, 891–901 (4th Cir. 2000).

Nevertheless, it is not clear that an omission by itself is sufficient to comprise a scheme to defraud. Most of the cases cited in the preceding paragraph involved more than just an omission; their facts also included other misrepresentations or affirmative acts of concealment. Some cases state the proposition in a way that suggests that an omission-based fraud scheme must include an act of concealment. *Powell*, 576 F.3d at 491 ("a failure to disclose information may constitute fraud if the 'omission [is] accompanied by acts of concealment' ") (quoting *Stephens*, 421 F.3d at 507)). It is also worth noting that in *Skilling*, 561 U.S. at 409–11, the Supreme Court refused to hold that an undisclosed conflict of interest by itself constituted honest services fraud. The Court cautioned that an attempt to criminalize undisclosed conflicts of interest would require answering specific questions. *Id.* at 411, n.44 ("How direct or significant does the conflicting financial inter-

est have to be? To what extent does the official action have to further that interest in order to amount to fraud? To whom should the disclosure be made and what information should it convey? These questions and others call for particular care in attempting to formulate an adequate criminal prohibition in this context."). In cases where the indictment charges that the scheme to defraud was to obtain "property," the property cannot include State licenses. In *Cleveland v. United States*, 531 U.S. 12, 23–24 (2000), the Supreme Court explained that a State gambling license was not, for purposes of § 1341, "property" in the hands of the State. *Id*. at 23–24, 26–27. The same reasoning would apply to § 1343 (wire fraud), and was so applied in a wire (and mail) fraud case to reverse convictions premised on the obtaining of vehicle title papers issued by the State. *United States v. Borrero*, 771 F.3d 973, 976 (7th Cir. 2014) (citing *Cleveland*, 531 U.S. at 23–24, and *Toulabi v. United States*, 875 F.2d 122 (7th Cir. 1989)). If the evidence at trial raises the risk that a jury would rely on State licenses to be a form of "property," then it might be appropriate to include an explicit instruction in a way that prevents that reliance. *See also Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020) (applying *Cleveland* to a traffic-regulation decision and holding that the employee-labor costs was not the object of the fraud).

18 U.S.C. §§ 1341 & 1343 PROOF OF SCHEME

In considering whether the government has proven a scheme to defraud, the government must prove that one or more of the [false or fraudulent pretenses, representations or promise] [bribes; kickbacks] charged in the portion of the indictment describing the scheme be proved beyond a reasonable doubt. The government, however, is not required to prove all of them.

Committee Comment

Where unanimity as to a specific act is required, refer to Pattern Instruction 4.04.

If the scheme involves an omission or concealment, the second paragraph of the instruction defining materiality should be given. The mail/wire fraud statutes do not include the words "omission" or "concealment," but cases interpreting them hold that omissions or concealment of material information may constitute money/property fraud, even without proof of a duty to disclose the information pursuant to a specific statute or regulation. See *United States v. Powell*, 576 F.3d 482, 490, 492 (7th Cir. 2009); *United States v. Stephens*, 421 F.3d 503, 507 (7th Cir. 2005); *United States v. Palumbo Bros., Inc.*, 145 F.3d 850, 868 (7th Cir. 1998); *United States v. Biesiadecki*, 933 F.2d 539, 543 (7th Cir. 1991); *United States v. Keplinger*, 776 F.2d 678, 697–98 (7th Cir. 1985); see also *United States v. Colton*, 231 F.3d 890, 891–901 (4th Cir. 2000).

Nevertheless, it is not clear that an omission by itself is sufficient to comprise a scheme to defraud. Most of the cases cited in the preceding paragraph involved more than just an omission; their facts also included other misrepresentations or affirmative acts of concealment. Some cases state the proposition in a way that suggests that an omission-based fraud scheme must include an act of concealment. *Powell*, 576 F.3d at 491 ("a failure to disclose information may constitute fraud if the 'omission [is] accompanied by acts of concealment' ") (quoting *Stephens*, 421 F.3d at 507)). It is also worth noting that in *Skilling v. United States*, 561 U.S. at 409–11 (2010), the Supreme Court refused to hold that an undisclosed conflict of interest by itself constituted honest services fraud. The Court cautioned that an attempt to criminalize undisclosed conflicts of interest would require answering specific questions. *Id.* at 411, n.44 ("How direct or significant does the conflicting financial interest have to be? To what extent does the official action have to further that interest in order to amount to

fraud? To whom should the disclosure be made and what information should it convey? These questions and others call for particular care in attempting to formulate an adequate criminal prohibition in this context.")

18 U.S.C. §§ 1341 & 1343 DEFINITION OF "MATERIAL"

A false or fraudulent pretense, representation, [or] promise[,] [omission, or concealment] is "material" if it is capable of influencing the decision of the [person[s]; list victim] to whom it was addressed.

[It is not necessary that the false or fraudulent pretense, representation, promise, omission, or concealment actually have that influence or be relied on by the alleged victim, as long as it is capable of doing so.]

Committee Comment

Neder v. United States, 527 U.S. 1 (1999), held that materiality is an essential element of mail/wire fraud. Cases recommend inclusion of the materiality element in jury instructions. See *United States v. Fernandez*, 282 F.3d 500, 509 n.6 (7th Cir. 2002); *United States v. Reynolds*, 189 F.3d 521, 525 n.2 (7th Cir. 2000).

The mail/wire fraud statutes do not include the words "omission" or "concealment," but cases interpreting them hold that omissions or concealment of material information may constitute fraud without proof of a duty to disclose the information pursuant to a specific statute or regulation. See *United States v. Powell*, 576 F.3d 482, 490–92 (7th Cir. 2009); *United States v. Stephens*, 421 F.3d 503, 507 (7th Cir. 2005); *United States v. Palumbo Bros., Inc.*, 145 F.3d 850, 868 (7th Cir. 1998); *United States v. Biesiadecki*, 933 F.2d 539, 543 (7th Cir. 1991); *United States v. Keplinger*, 776 F.2d 678, 697–98 (7th Cir. 1985); see also *United States v. Colton*, 231 F.3d 890, 891–901 (4th Cir. 2000). It is unclear whether an omission by itself is sufficient to comprise a scheme to defraud. Most of the cases cited above also involved other misrepresentations or acts of concealment. Some cases suggest that an omission-based fraud scheme must be accompanied by an act of concealment. *Powell*, 576 F.3d at 491 ("a failure to disclose information may constitute fraud if the 'omission [is] accompanied by acts of concealment' "); quoting *Stephens*, 421 F.3d at 507. It is also worth noting that, in *Skilling v. United States*, 561 U.S. at 409–11 (2010), the Supreme Court declined to interpret honest-services fraud to encompass an undisclosed conflict of interest by itself. The Court cautioned that an attempt to criminalize undisclosed conflicts of interest would require answering specific questions. *Id.* at 411, n.44 ("How direct or significant does the conflicting financial interest have to be? To what extent does the official action have to fur-

ther that interest in order to amount to fraud? To whom should the disclosure be made and what information should it convey? These questions and others call for particular care in attempting to formulate an adequate criminal prohibition in this context.")

18 U.S.C. §§ 1341 & 1343 DEFINITION OF "INTENT TO DEFRAUD"

A person acts with "intent to defraud" if he acts knowingly with the intent to deceive or cheat [the victim] in order to cause [a gain of money or property to the defendant or another; the potential] [loss of money or property to another; to deprive another of the intangible right to honest services through bribery or kickbacks].

Committee Comment

In *United States v. Spano*, 421 F.3d 599, 603 (7th Cir. 2005), the court stated, "A participant in a scheme to defraud is guilty even if he is an altruist and all the benefits of the fraud accrue to other participants." In *United States v. Sorich*, 523 F.3d 702, 709–10 (7th Cir. 2008), the court held that fraud could exist when the benefit accrues to third parties who are not co-schemers.

18 U.S.C. §§ 1341, 1343 & 1346 TYPES OF MAIL/ WIRE/CARRIER FRAUD

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] committing [mail; wire; carrier] fraud in two different ways: First, the defendant[s] [is; are] charged with [mail; wire; carrier] fraud by participating in a scheme to obtain money or property. Second, the defendant[s] [is; are] charged with [mail; wire; carrier] fraud by participating in a scheme to defraud [list victim of the intangible right to honest services].

Committee Comment

This instruction applies when the indictment charges more than one type of mail/wire/carrier fraud, 18 U.S.C. §§ 1341, 1343 & 1346.

When an indictment charges both money/property and honest services fraud, the court may consider giving a special verdict form requiring the jury to make findings on each theory. The Committee takes no position on whether such a verdict form should be given. In *Black v. United States*, 561 U.S. 465 (2010), the Supreme Court discussed special verdict forms in mail/wire fraud cases charging both money/property and honest services fraud. The Supreme Court held that the defendants did not forfeit their right to challenge the jury instructions simply because they objected to the government's request for a special verdict form requiring the jury to make separate findings on money/property and honest services fraud.

18 U.S.C. §§ 1341, 1343 & 1346 DEFINITION OF "HONEST SERVICES"

A scheme to defraud another of the intangible right to "honest services" consists of a scheme to violate a fiduciary duty by bribery or kickbacks. A fiduciary duty is a duty to act only for the benefit of the [public; employer; shareholder; union].

[A public official owes a fiduciary duty to the public.]

[An employee owes a fiduciary duty to his employer.]

[An officer of a corporation owes a fiduciary duty to the corporation's shareholders.]

[A union official owes a fiduciary duty to the union.]

[The defendant need not owe the fiduciary duty personally, so long as he devises or participates in a bribery or kickback scheme intended to deprive the [public; employer; union] of its right to a fiduciary's honest services.]

Committee Comment

As the Supreme Court held in *Skilling v. United States*, 561 U.S. 358 (2010), the honest services statute covers only bribery and kickback schemes. See the bribery and kickback instructions for further definition.

Skilling noted certain examples of fiduciary relationships covered by § 1346. See 561 U.S. at 408, n.42. The list of fiduciary duties in this instruction is not exhaustive and courts may need to use other fiduciary duties than those identified above. See, *e.g.*, *United States v. Hausmann*, 345 F.3d 952, 955–56 (7th Cir. 2003).

In most cases, public official status will not be in dispute. If public official status is a disputed issue, the court may consider giving an instruction tailored for the case.

The final bracketed instruction may be given in cases in which

one or more of the trial defendants is not the individual who personally owed the fiduciary duty. See, *e.g.*, *United States v. Alexander*, 741 F.2d 962, 964 (7th Cir. 1984) ("[t]here can be no doubt that a non-fiduciary who schemes with a fiduciary to deprive the victim of intangible rights is subject to prosecution under the mail fraud statute"), overruled on other grounds, *United States v. Ginsburg*, 773 F.2d 798 (7th Cir. 1985) (*en banc*); *United States v. Lovett*, 811 F.2d 979, 984 (7th Cir. 1987) (lawyer guilty of mail fraud for bribing mayor, and thereby depriving the citizens of their right to the mayor's honest services). The public official/fiduciary, in fact, need not even be a party to the scheme. See *United States v. Potter*, 463 F.3d 9, 17 (1st Cir. 2006) (businessmen guilty of honest services fraud for scheming to bribe state speaker of the house; no requirement that public official agree to the scheme; "that [official] might prove unwilling or unable to perform, or that the scheme never achieved its intended end, would not preclude conviction").

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; asks for; agrees to accept; agrees to receive; accepts; 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; asks for; agrees to accept or receive; accepts; 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*, 561 U.S. 358 (2010), explains, that is what happened in *McNally v. United States*, 483 U.S. 350, 359 (1987). See *Skilling*, 561 U.S. at 410 ("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.).

In cases in which the defendant asserts that the payment was a mere gratuity or that the defendant falsely promised to take official action but never intended to do so, the parties and the court should examine *United States v. Hawkins*, 777 F.3d 880, 883–84 (7th Cir. 2015), and *McDonnell v. United States*, 136 S. Ct. 2355, 2371 (2016). *Hawkins* held that § 1346 only covers bribery and kickback schemes and does not cover mere gratuities. *Hawkins*, 777 F.3d at 883. The Seventh Circuit also held that § 1346 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 under § 1346. *Id.* at 884. Among other things, *Hawkins* reasoned that 18 U.S.C. § 201(b) (bribery of federal officials) "requires proof that the public official demanded or took money in exchange for doing or omitting some official act." *Id.* at 883.

But there is some reason to question that line of reasoning, because § 201(b) *does* deem a false promise to commit an official act as bribery. In *United States v. Peleti*, the public official argued that he did not actually intend to commit the official act for which he had been paid. 576 F.3d 377, 382 (7th Cir. 2009). In discussing the definition of corruptly, the Seventh Circuit explained:

> An officer can act corruptly without intending to be influenced; the officer need only "solicit or receive the money on the representation that the money is for the purpose of influencing his performance of some official act.

Id. (quoting *United States v. Arroyo*, 581 F.2d 649, 657 (7th Cir. 1978)). The public official "knew, when he accepted the money, that [the bribe payer] gave Peleti the money for the purposes of influencing Peleti's official actions." *Id.* That was enough to act "corruptly." See *id.*

Also, in *McDonnell*, the Supreme Court arguably contradicted *Hawkins* by stating that honest-services bribery does *not* require that the public official actually intend to perform the official act. 136 S. Ct. at 2371 ("Nor must the public official in fact intend to perform the 'official act,' so long as he agrees to do so. A jury could, for example, conclude that an agreement was reached if the evidence shows that the public official received a thing of value knowing that it was given with the expectation that the official would perform an 'official act' in return.") But this part of *McDonnell* is arguably dicta; does not discuss *Skilling v. United States*, 561 U.S. 358, 404, 413 (2010), which described honest-services bribery as official action "in exchange for" value and as a crime in which the

bribes are paid by "a third party who had not been deceived"; and relies on *Evans v. United States*, 504 U.S. 255, 268 (1992), which arguably does not hold that a false promise to take official action qualifies as bribery. The Committee does not adopt a position because the case law is currently unclear.

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." *Skilling*, 561 U.S. at 412. 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.

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

[A defendant offers a bribe when he, directly or indirectly, [promises; gives; offers] a [public official; employee; corporate officer; union official] anything of value in exchange for a promise for, or performance of, an [official act].] [Describe act at issue.]

[A defendant offers a kickback when he, directly or indirectly, [promises; gives; offers] a [public official; employee; corporate officer; union official] something of value 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."] [Describe act at issue.]

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

Committee Comment

See Committee Comment for the pattern instruction on Receiving a Bribe or Kickback.

18 U.S.C. §§ 1341, 1343 & 1346 INTENT TO INFLUENCE

It is not necessary that the [public official; defendant] had the power to or did perform the act for which he was promised or which he agreed to receive something of value; it is sufficient if the matter was before him in his official capacity. [Nor is it necessary that the [public official; defendant] in fact intended to perform the specific official act. It is sufficient if the [public official; defendant] knew that the thing of value was offered with the intent to exchange the thing of value for the performance of the official act.]

Committee Comment

This instruction was adapted from the Intent to Influence instruction for 18 U.S.C. § 201. But the parties and the court should review the Committee Comment for 18 U.S.C. §§ 1341, 1343 & 1346 (Receiving a Bribe or Kickback), for a discussion of the case law's uncertainty on whether an official must actually intend to perform the official act. It remains accurate to say, as this Intent to Influence instruction does, that the official need not actually carry out the official action in order to be convicted of bribery. *McDonnell v. United States*, 136 S. Ct. 2355, 2371 (2016) (citing *Evans v. United States*, 504 U.S. 255, 268 (1992)).

18 U.S.C. § 1343 WIRE COMMUNICATION

[Telephone calls,] [mobile or cellular telephone calls,] [facsimiles,] [e-mails,] [instant messages,] [wire transfer of funds,] [text messages] [and] [electronic filing of documents] constitute[s] transmission by means of wire communication.

Committee Comment

This instruction lists various types of transmissions covered by the wire fraud statute. The list may not be exhaustive given the evolution of technology.

18 U.S.C. § 1344(1) SCHEME TO DEFRAUD A FINANCIAL INSTITUTION—ELEMENTS

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

1. There was a scheme to defraud a [bank; specified financial institution under 18 U.S.C. § 20] as charged in the indictment; and

2. The defendant knowingly [carried out; attempted to carry out] the scheme; and

3. The defendant acted with the intent to defraud the [bank; specified financial institution under 18 U.S.C. § 20]

4. The scheme involved a materially false or fraudulent pretense, representation, or promise [; and

5. At the time of the charged offense the deposits of the [bank; financial institution] were insured by the Federal Deposit Insurance Corporation.

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 *Loughrin v. United States*, 573 U.S. 351 (2014), the Supreme Court held that the Government need not prove that a defendant charged under 18 U.S.C. § 1344(2) intended to defraud the bank or financial institution that owned, or had custody or control over, the money or property that was the object of the scheme. Accordingly, the Committee has divided the previously unified instruction for § 1344 into two separate instructions.

In *Neder v. United States*, 527 U.S. 1 (1999), the Supreme Court held that materiality is an element under § 1344. Following *Neder*, "district courts should include materiality in the jury instructions for section 1344." *United States v. Reynolds*, 189 F.3d 521, 525 n. 2 (7th Cir. 1999); see also *United States v. LeBeau*, 949 F.3d 334, 341 (7th Cir. 2020) (materiality required under both subsections of § 1344); *United States v. Fernandez*, 282 F.3d 500, 509 (7th Cir. 2002). Reference may be made to the Pattern Instruction for materiality ("Definition of Material") accompanying the mail and wire fraud instructions, which incorporates the notion that a materially false or fraudulent pretense, representation, or promise may be accomplished by an omission or by the concealment of material information.

The final element concerns proof that the institution's deposits were federally insured, which was a required element in the 1999 instructions. Effective May 20, 2009, though, the definition of "financial institution" set forth at 18 U.S.C. § 20 was broadened substantially by the Fraud Enforcement and Recovery Act, Pub. L. 111-21, to include several types of financial institutions the assets of which might not be federally insured. The definition of the term "financial institution" set forth in § 20 is incorporated into § 1344, as well as into other statutes such as 18 U.S.C. § 215 (bank bribery), and is also addressed in 18 U.S.C. §§ 1341 and 1343 in connection with mail or wire fraud schemes that affect a financial institution. This instruction should be appropriately modified in the event that the indictment charges a scheme directed at the money or property of a financial institution other than a federally insured bank.

18 U.S.C. § 1344(1) DEFINITION OF "SCHEME"

A "scheme" is a plan or course of action formed with the intent to accomplish some purpose.

A scheme to defraud a [bank; financial institution] is a plan or course of action that is intended [to deceive or cheat that [bank; financial institution]] [or] [to obtain money or property or to cause the [potential] loss of money or property [belonging to; in the [care; custody; control] of] the [bank; financial institution]. [A scheme to defraud need not involve any specific false statement or misrepresentation of fact.]

Committee Comment

This instruction is based on the instruction applicable to the mail/wire fraud statutes, 18 U.S.C. §§ 1341 and 1343. For a discussion of the use of proof of omission or concealment to show a scheme to defraud, see the Committee Comment to that instruction and to the accompanying "Definition of Material" instruction.

For a discussion of whether a unanimity instruction should be given, see the Committee Comment to Pattern Instruction 18 U.S.C. §§ 1341 & 1343—Definition of Scheme to Defraud.

The Seventh Circuit has held that § 1344(1) covers check kiting schemes, even though it believes that they may not involve specific false statements or misrepresentations of fact. *United States v. Doherty*, 969 F.2d 425, 429 (7th Cir. 1992) ("As its ordinary meaning suggests, the term 'scheme to defraud' describes a broad range of conduct, some which involve false statements or misrepresentations of fact. . . and others which do not. . . . [O]ne need not make a false representation to execute a scheme to defraud."); see also *United States v. Norton*, 108 F.3d 133, 135 (7th Cir. 1997); *United States v. LeDonne*, 21 F.3d 1418, 1427–28 (7th Cir. 1994).

The final bracketed sentence in this instruction reflects the holdings in the check kiting cases, and should be given in a case (like one charging check kiting) where no specific false statement or misrepresentation is charged. However, the Committee recognizes that there is tension between that language, which says that a scheme need not involve a specific false statement or misrepresentation, and the language in the fourth element of the elements

instruction for § 1344(1), which requires the government to prove that "[t]he scheme involved a materially false or fraudulent pretense, representation, or promise." The Committee believes that this language in the fourth element under § 1344(1) is, despite the holdings in the check kiting cases, made necessary by the holdings in *Neder v. United States*, 527 U.S. 1 (1999), and *United States v. Reynolds*, 189 F.3d 521, 525 n. 2 (7th Cir. 1999), that juries must be instructed on the requirement of materiality in bank fraud cases, as they are in mail and wire fraud cases. Moreover, consistent with the additional observation in *Neder* that the mail, wire and bank fraud statutes should be considered similarly, the Committee believes that the materiality requirement must be addressed this way in the elements instruction, as is done in the mail and wire fraud instructions. But reconciling the requirement of a "materially false or fraudulent pretense, representation, or promise" in the fourth element under § 1344(1) with the holding in the *Doherty* line of cases that no specific false statement or misrepresentation is required, and determining just what it is that must be material in a check-kiting case, is beyond the Committee's authority to resolve.

In the Committee Comment to the "Definition of Scheme to Defraud" instruction applicable to the mail and wire fraud instructions, the Committee discusses at some length cases that address whether, and when, a mail or wire fraud conviction can be based on an omission and/or concealment. As that Comment points out, omissions plus an affirmative act of concealment can comprise a scheme to defraud in mail/wire fraud cases. But it is not clear, even from cases construing those statutes, whether an omission itself, without more, is enough. As unresolved as the issue is with respect to the mail and wire fraud statutes, it is even more so with respect to bank fraud. In bank fraud cases in which the issue arises, the court may wish to consider adding some iteration of the final bracketed sentence in the mail and wire fraud scheme instruction: "A materially false or fraudulent pretense, representation, or promise may be accomplished by [an] omission[s] [and] [or] the concealment of material information."

18 U.S.C. § 1344(2) OBTAINING BANK PROPERTY BY FALSE OR FRAUDULENT PRETENSES—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] scheming to obtain [money; property] belonging to a [bank; financial institution] by false or fraudulent pretenses or misrepresentations. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four; five] following elements beyond a reasonable doubt:

1. There was a scheme to obtain moneys, funds, credits, assets, securities, or other property that [was; were] [owned by; in the [care; custody; control] of] a [bank; specified financial institution under 18 U.S.C. § 20] by means of false or fraudulent pretenses, representations or promises, as charged in the indictment; and

2. The defendant knowingly [carried out; attempted to carry out] the scheme; and

3. The defendant acted with the intent to defraud; and

4. The scheme involved a materially false or fraudulent pretense, representation, or promise [; and

5. At the time of the charged offense the deposits of the [bank; other financial institution] were insured by the Federal Deposit Insurance Corporation]].

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 consider-

ation 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 *Loughrin v. United States*, 573 U.S. 351 (2014), the Supreme Court held that the Government need not prove that a defendant charged under 18 U.S.C. § 1344(2) intended to defraud the bank or financial institution that owned, or had custody or control over, the money or property that was the object of the scheme. This separate instruction for violations of § 1344(2) reflects that holding.

In *Neder v. United States*, 527 U.S. 1 (1999), the Supreme Court held that materiality is an element under § 1344. Following *Neder*, "district courts should include materiality in the jury instructions for section 1344." *United States v. Reynolds*, 189 F.3d 521, 525 n. 2 (7th Cir. 1999); see also *United States v. LeBeau*, 949 F.3d 334, 341 (7th Cir. 2020) (materiality required under both subsections of § 1344); *United States v. Fernandez*, 282 F.3d 500, 509 (7th Cir. 2002).

The final element concerns proof that the institution's deposits were federally insured, which was a required element in the 1999 instructions. Effective May 20, 2009, though, the definition of "financial institution" set forth at 18 U.S.C. § 20 was broadened substantially by the Fraud Enforcement and Recovery Act, Pub. L. 111-21, to include several types of financial institutions the assets of which might not be federally insured. The definition of the term "financial institution" set forth in § 20 is incorporated in § 1344, as well as in other statutes such as 18 U.S.C. § 215 (bank bribery), and is also addressed in 18 U.S.C. §§ 1341 and 1343 in connection with mail or wire fraud schemes that affect a financial institution. This instruction should be appropriately modified in the event that the indictment charges a scheme directed at the money or property of a financial institution other than a federally insured bank.

18 U.S.C. § 1344(2) DEFINITION OF SCHEME

A scheme is a plan or course of action formed with the intent to accomplish some purpose.

To prove a scheme to obtain moneys, funds, credits, assets, securities, or other property [belonging to; in the [care; custody; control] of] a [bank; financial institution] by means of false pretenses, representations or promises, the government must prove that [the; a] false pretense, representation or promise charged was what induced[, or would have induced,] the [bank; financial institution] to part with the [money; property].

[In considering whether the government has proven a scheme to obtain moneys, funds, credits, assets, securities, or other property [belonging to; in the [care; custody; control] of] a [bank; financial institution] by means of false pretenses, representations or promises, the government must prove at least one of the [false pretenses, representations, promises, or] acts charged in the portion of the indictment describing the scheme. However, the government is not required to prove all of them.]

Committee Comment

The second paragraph of this instruction is based on the discussion in *Loughrin v. United States*, 573 U.S. 351, 362–64 (2014), of the requirement in 18 U.S.C. § 1344(2) that the money or property at issue in a scheme punishable under § 1344(2) be obtained "by means of" the false pretense(s), representation(s) and/or promise(s) charged. In that discussion the Court observed that the "by means of" requirement contained "a relational component," that is, that "the given result (the 'end') is achieved, at least in part, *through* the specified action, instrument, or method (the 'means'), such that the connection between the two is something more than oblique, indirect and incidental." *Id*. at 362–63 (emphasis original). As the Court emphasized, this may require something more than mere "but-for" causation. The Court's discussion of this requirement in *Loughrin* is complex, though, as is the range of concepts of causation potentially encompassed by the word "induced." In an appropriate case the court may wish to

consider whether some word other than "induced" more accurately captures the meaning of the "by means of" requirement. The bracketed phrase "or would have induced" should be given in a case in which there is an issue with respect to whether the charged scheme actually came to fruition.

Although this instruction reflects the holding in *Loughrin* that a § 1344(2) violation does not require proof of intent to defraud the financial institution that owns or holds the subject money or property, it does retain "intent to defraud" as an element. It has been suggested that § 1344(2), which does not itself mention "fraud" or "defraud" or "intent to defraud"—but still requires a "scheme or artifice"—does not require proof of intent to defraud at all. While this argument may have merit, no federal appellate court has yet addressed it. The Committee also notes that the pattern instructions of other Circuits are not unanimous on the issue. For example, the Eighth and Ninth Circuits, like this Committee, continue to require intent to defraud in § 1344(2) cases after Loughrin. See Eighth Circuit Pattern Criminal Jury Instruction 6.18.1344; Ninth Circuit Pattern Criminal Jury Instruction 8.127. So do pattern instructions used in the Fourth Circuit, see E.W. Ruschky, Pattern Jury Instructions for Federal Criminal Cases, District of South Carolina 253 (2016 ed.), available at http://www.scd.uscourts.gov/pji/patternjuryinstructions.pdf. By contrast, the Third and Fifth Circuits' pattern instructions leave out "intent to defraud," citing *Loughrin*. See Third Circuit Pattern Criminal Jury Instruction 6.18.1344 Fifth Circuit Pattern Criminal Jury Instruction 2.58B. While the Committee believes the pattern instruction should remain as it is in the absence of guiding case law, it flags the issue for litigants.

The final, bracketed paragraph should be given in cases in which, as will usually be the case, more than one false pretense, representation or promise is charged.

In the Committee Comment to the "Definition of Scheme to Defraud" instruction applicable to the mail and wire fraud instructions, the Committee discusses at some length cases that address whether, and when, a mail or wore fraud conviction can be based on an omission and/or concealment. As that Comment points out, it is not clear, even from cases construing those statutes, whether an omission itself, without more, can comprise a scheme to defraud. As unresolved as the issue is with respect to the mail and wire fraud statutes, it is even more so with respect to bank fraud. In bank fraud cases in which the issue arises, the Court may wish to consider adding some iteration of the final bracketed sentence in the mail and wire fraud scheme instruction: "A materially false or

fraudulent pretense, representation or promise may be accomplished by [an] omission[s] [and] [or] the concealment of material information."

For a discussion of whether a unanimity instruction should be given, see the Committee Comment to Pattern Instruction 18 U.S.C. §§ 1341 & 1343—Definition of Scheme to Defraud.

18 U.S.C. § 1347(a) DEFINITION OF "HEALTH CARE BENEFIT PROGRAM"

A "health care benefit program" is a [public; private] [plan; contract], affecting commerce, under which any medical benefit, item or service is provided to any individual and includes any individual or entity who is providing a medical benefit, item or service for which payment may be made under the plan or contract.

A health care program affects commerce if the health care program had any impact on the movement of any money, goods, services, or persons from one state to another [or between another country and the United States]. The government need only prove that the health care program itself either engaged in interstate commerce or that its activity affected interstate commerce to some degree. The government need not prove that [the; a] defendant engaged in interstate commerce or that the acts of [the; a] defendant affected interstate commerce.

Committee Comment

"Health care benefit program" is defined in 18 U.S.C. § 24(b). "Affecting commerce" means affecting interstate commerce under 18 U.S.C. § 24(b). See *United States v. Natale*, 719 F.3d 719, 732 n.5 (7th Cir. 2013). The court may also find it appropriate to adapt for health care offenses the RICO Pattern Instruction describing enterprises that engage in interstate commerce or whose activities affect interstate commerce.

18 U.S.C. § 1347(a)(1) HEALTH CARE FRAUD—ELEMENTS

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

1. There was a scheme to defraud a health care benefit program, as charged in the indictment; and

2. The defendant knowingly [carried out; attempted to carry out] the scheme; and

3. The defendant willfully [carried out; attempted to carry out] the scheme, which means to act with the intent to defraud the health care benefit program; and

4. The scheme involved a materially false or fraudulent pretense, representation, or promise; and

5. The scheme was in connection with the delivery of or payment for [health care benefits; health care items; health care services].

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 *Loughrin v. United States*, 573 U.S. 351 (2014), the Supreme Court held that the Government need not prove that a defendant charged under 18 U.S.C. § 1344(2) intended to defraud the bank or financial institution that owned, or had custody or control over, the money or property that was the object of the scheme. The bank fraud statute is almost identical to the health care fraud statute. Accordingly, the Committee has divided the previously unified instruction for this statute, which is structured similarly to the bank fraud statute, into two separate instructions. See the Committee Comment to the Pattern Instructions related to § 1347(a)(2) for further discussions of this issue.

Willfulness: For *mens rea*, § 1347(a) uses both "knowingly" and "willfully." In *United States v. Schaul*, the Seventh Circuit held that "knowingly" and "willfully" have separate meanings and must be proven in the conjunctive. 962 F.3d 917, 924 (7th Cir. 2020). The Seventh Circuit further held that the defendant in that case acted willfully because he had an intent to defraud. *Id.* at 925. In light of *Schaul*, the Committee has listed "knowingly" and "willfully" as separate elements. Further, the Seventh Circuit in *Schaul* equated the definition of "willfully" in § 1347 with "intent to defraud," which was already considered an element of § 1347. Thus, "willfully" and "intent to defraud" have been listed as a single element. See the Committee Comment explaining Intent to Defraud for further discussions of this definition.

In *United States v. Awad*, 551 F.3d 930, 939 (9th Cir. 2008), the Ninth Circuit held that to establish a willful state of mind in a § 1347 prosecution, the government must prove that the defendant acted with knowledge that his conduct was unlawful. But in 2010, after *Awad* was decided, Congress amended § 1347 and added, in what is now § 1347(b), that "a person need not have actual knowledge of this section or specific intent to commit a violation of this section." No Seventh Circuit decision has interpreted this amendment, so it remains an open question whether it is strictly limited to "this section," meaning specifically § 1347, or whether the amendment more broadly eliminates the need to prove that the defendant knew he was violating any law. Additionally, § 1347 prosecutions are sometimes premised on representations that are deemed to be false due to a federal regulation, and it is also an open question whether a defendant must know that he is violating the regulation.

Intent to Defraud: The third element requires the government to prove that there was a "specific intent to deceive or defraud." See *United States v. Natale*, 719 F.3d 719, 741–42 (7th

Cir. 2013) ("intent to defraud requires a specific intent to deceive or mislead") (citing *Awad*, 551 F.3d at 940 (" 'intent to defraud' [is] defined as 'an intent to deceive or cheat' "); *United States v. Choiniere*, 517 F.3d 967, 972 (7th Cir. 2008) (in a § 1347 prosecution jury instructions defined intent to defraud to mean that "the acts charged were done knowingly and with the intent to do deceive or cheat the victims"); *United States v. White*, 492 F.3d 380, 393–94 (6th Cir. 2007) ("the government must prove the defendant's 'specific intent to deceive or defraud' "). As noted above, effective on March 23, 2010, the Patient Protection and Affordable Care Act, Pub. L. 111-148, Title VI, § 10606(b), added § 1347(b), which provides that "a person need not have actual knowledge of this section or specific intent to commit a violation of this section." Just as the interpretation of Section 1347(b) remains open on the issue of willfulness (see the discussion above), no Seventh Circuit decision has interpreted this section for purposes of the specific-intent element.

Materiality: With regard to the fourth element, in *Neder v. United States*, 527 U.S. 1 (1999), the Supreme Court held that materiality is an element of the offense defined at 18 U.S.C. § 1344. Following *Neder*, "district courts should include materiality in the jury instructions for section 1344." *United States v. Reynolds*, 189 F.3d 521, 525 n. 2 (7th Cir. 1999); see also *United States v. Fernandez*, 282 F.3d 500, 509 (7th Cir. 2002). The Seventh Circuit addressed the application of *Neder* to § 1344(1) in *United States v. LeBeau*, 949 F.3d 334 (7th Cir. 2020), cert. denied, 19-1424, 2020 WL 5882354 (U.S. Oct. 5, 2020). In *LeBeau*, the Seventh Circuit acknowledged its recent holding that the materiality element was required only when section 1344(2) was charged in *United States v. Ajayi*, 808 F.3d 1113, 1119 (7th Cir. 2015), and concluded that "[t]he better course, consistent with *Neder*, is to require the materiality instruction on all bank-fraud charges, whether brought under section 1344(1) or (2). The government has informed us that this is its current practice, and we encourage that practice to continue until such time as we receive greater clarity from the Supreme Court about what is required." *LeBeau*, 949 F.3d at 342. The Ninth Circuit, in *United States v. Omer*, 395 F.3d 1087 (9th Cir. 2005), has similarly held that materiality is an element of a § 1344(1) violation under *Neder*. In light of *LeBeau* and the general admonitions in *Neder* and in *Reynolds*, as well as the similarity of the bank fraud statute to the health care fraud statute, this instruction has been modified to reflect this requirement. Reference may be made to the Pattern Instruction for materiality ("Definition of Material") accompanying the mail and wire fraud instructions, which incorporate the notion that a materially false or fraudulent pretense, representation, or promise may be accomplished by an omission or by the concealment of material information.

The jury instruction defining Health Care Benefit Program and Interstate Commerce should be given in conjunction with this instruction.

18 U.S.C. § 1347(a)(1) DEFINITION OF "SCHEME"

A scheme is a plan or course of action formed with the intent to accomplish some purpose.

A scheme to defraud a health care benefit program means a plan or course of action intended to deceive or cheat that health care benefit program [or to obtain money or property or to cause the [potential] loss of money or property [belonging to; in the [care; custody; control] of] the health care benefit program]. [A scheme to defraud need not involve any false statement or misrepresentation of fact.]

Committee Comment

This instruction is based on the instructions applicable to mail/wire/bank fraud statutes, 18 U.S.C. § § 1341, 1343, and 1344. For a discussion of the use of proof of omission or concealment to show a scheme to defraud, see the Committee Comment to the mail/wire fraud statutes instruction and to the accompanying "Definition of Material" instruction.

For a discussion of whether the unanimity instruction should be given see the Committee Comment to Pattern Instruction 18 U.S.C. § § 1341 & 1343—Definition of "Scheme to Defraud."

The issue of whether a specific false statement or misrepresentation of fact is necessary has not been decided in the context of health care fraud. Under the bank fraud statute, the Seventh Circuit has recognized that a check-kiting scheme can be charged under § 1344(1) even though the scheme may not involve a specific false statement or misrepresentation of fact. *United States v. Doherty*, 969 F.2d 425, 429 (7th Cir. 1992) ("As its ordinary meaning suggests, the term 'scheme to defraud' describes a broad range of conduct, some which involve false statements or misrepresentations of fact... and others which do not..... [O]ne need not make a false representation to execute a scheme to defraud."); see also *United States v. Norton*, 108 F.3d 133, 135 (7th Cir. 1997); *United States v. LeDonne*, 21 F.3d 1418, 1427–28 (7th Cir. 1994). If such a scheme is charged, the Committee recommends that the final bracketed sentence in the first bracketed paragraph reflects these holdings, and should be given in a case where no specific false

statement or misrepresentation is charged. For a more detailed discussion of this issue, see the Committee Comment to Pattern Instruction 18 U.S.C. § 1344(1)—Definition of "Scheme."

In the Committee Comment to the Definition of "Scheme to Defraud" Pattern Instruction applicable to the mail and wire fraud instructions the Committee discusses at some length cases that address whether, and when, a mail or wire fraud conviction can be based on an omission and/or concealment. As that Comment points out, omissions plus an affirmative act of concealment can comprise a scheme to defraud in mail/wire fraud cases. But it is not clear, even from cases construing those statutes, whether an omission itself, without more, is enough. Similarly, the Seventh Circuit has not resolved this issue with respect to health care fraud. Note, however, that the Sixth Circuit has approved the use of omission only, without further affirmative acts, to sustain a conviction under 18 U.S.C. § 1347. See *United States v. Bertram*, 900 F.3d 743, 748–49 (6th Cir. 2018). As such, in health care fraud cases in which the issue arises, the Court may wish to consider adding some iteration of the final bracketed sentence in the mail and wire fraud scheme instruction: "A materially false or fraudulent pretense, representation, or promise may be accomplished by [an] omission[s] [and] [or] the concealment of material information."

18 U.S.C. § 1347(a)(2) OBTAINING PROPERTY FROM A HEALTH CARE BENEFIT PROGRAM BY FALSE OR FRAUDULENT PRETENSES—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] scheming to obtain [money; property] belonging to a health care benefit program by false or fraudulent pretenses or misrepresentations. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the following five elements beyond a reasonable doubt:

1. There was a scheme to obtain the [money; property] that [was; were] [owned by; in the [care; custody; control] of] a health care benefit program by means of false or fraudulent pretenses, representations, or promises, as charged in the indictment; and

2. The defendant knowingly [carried out; attempted to carry out] the scheme; and

3. The defendant willfully [carried out; attempted to carry out] the scheme, which means to act with the intent to defraud; and

4. The scheme involved a materially false or fraudulent, pretense, representation, or promise; and

5. The scheme was in connection with the delivery of or payment for [health care benefits; health care items; health care services].

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 *McNally v. United States*, 483 U.S. 350 (1987), the Supreme Court held that language in the mail fraud statute, 18 U.S.C. § 1341, "sets forth just one offense, using the mail to advance a scheme to defraud." But in *Loughrin v. United States*, 573 U.S. 351 (2014), the Court held that different language in the bank fraud statute, 18 U.S.C. § 1344—language that is almost identical to that used in § 1347(a)—gives rise to two theories of liability, and that the government need not prove that a defendant charged under § 1344(2) intended to defraud the financial institution that owned or had custody or control over the money or property that was the object of the scheme.

This separate instruction for § 1347(a)(2) reflects that holding. (For further discussion of this issue, see the Committee Comments to the Elements and Scheme Pattern Instructions for § 1344(2).) Although the Supreme Court has not yet applied *Loughrin* to § 1347(a), that statute is constructed almost identically to § 1344. See *United States v. Hickman*, 331 F.3d 439, 445-46 (5th Cir. 2003) (language and structure of the health care fraud statute indicates that Congress patterned it after the bank fraud statute); *United States v. Awad*, 551 F.3d 930 (9th Cir. 2008) (agreeing with *Hickman*'s view that the health care fraud statute provides two theories of liability). For those reasons the Committee has concluded that, like the bank fraud statute, § 1347(a) sets forth two theories of liability. It is important to note, though, that the *Loughrin* Court supported its holding that the bank fraud statute described two theories of liability in part by noting that, at the time the bank fraud statute was enacted, the two clauses of the mail fraud statute had been construed independently by the courts. The health care fraud statute, though, was enacted after *McNally* was decided and after the Court had limited the mail fraud statute to a single theory of liability.

Willfulness: For *mens rea*, § 1347(a) uses both "knowingly" and "willfully." In *United States v. Schaul*, the Seventh Circuit held that "knowingly" and "willfully" have separate meanings and must be proven in the conjunctive. 962 F.3d 917, 924 (7th Cir. 2020). The Seventh Circuit further held that the defendant in that case acted willfully because he had an intent to defraud. *Id.* at

925. In light of *Schaul*, the Committee has listed "knowingly" and "willfully" as separate elements. Further, while open to some interpretation, the Seventh Circuit in *Schaul* equated the definition of "willfully" in § 1347 with "intent to defraud," which was already considered an element of § 1347. Thus, "willfully" and "intent to defraud" have been listed as a single element. See the Committee Comment explaining intent to defraud for further discussions of this definition.

In *United States v. Awad*, 551 F.3d 933, 939 (9th Cir. 2008), the Ninth Circuit held that to establish a willful state of mind in a § 1347 prosecution, the government must prove that the defendant acted with knowledge that his conduct was unlawful. But in 2010, after *Awad* was decided, Congress amended § 1347 and added, in § 1347(b), that "a person need not have actual knowledge of this section or specific intent to commit a violation of this section." 18 U.S.C. 1347(b). No Seventh Circuit decision has interpreted this amendment, so it remains an open question whether it is strictly limited to "this section," meaning specifically § 1347, or whether the amendment more broadly eliminates the need to prove that the defendant knew he was violating any law. Additionally, § 1347 prosecutions are sometimes premised on representations that are deemed to be false due to a federal regulation, and it is also an open question whether a defendant must know that he is violating the regulation.

Intent to Defraud: Although this instruction reflects the holding in *Loughrin* that a § 1344(2) violation does not require proof of intent to defraud the financial institution that owns or holds the subject money or property, it does, like the Pattern Instruction for § 1344(2), retain "intent to defraud" as an element. It has been suggested that § 1344(2), which does not itself mention "fraud" or "defraud" or "intent to defraud"—but that still requires proof of a "scheme or artifice"—does not require proof of intent to defraud at all. While this argument may have merit, no federal appellate court has yet addressed it. The Committee also notes that the pattern instructions of other Circuits are not unanimous on the issue. For example, the Eighth and Ninth Circuits, like this Committee, continue to include a requirement of proof of intent to defraud in § 1344(2) cases, even after *Loughrin*. See Eighth Circuit Pattern Criminal Jury Instruction 6.18.1344; Ninth Circuit Pattern Criminal Jury Instruction 8.127. So do pattern instructions used in the Fourth Circuit, see E.W. Ruschky, *Pattern Jury Instructions for Federal Criminal Cases, District of South Carolina 366* (2019 ed.), available at http://www.scd.uscourts.gov/pji/patternjuryinstructions.pdf. But the Third and Fifth Circuits' pattern instructions leave out "intent to defraud," citing *Loughrin*.

See Third Circuit Pattern Criminal Jury Instruction 6.18.1344; Fifth Circuit Pattern Criminal Jury Instruction 2.58B. While the Committee believes the Pattern Instruction should remain as it is in the absence of guiding Seventh Circuit case law, it flags the issue for litigants.

Materiality: In *Neder v. United States*, 527 U.S. 1 (1999), the Supreme Court held that materiality is an element of the offense defined in 18 U.S.C. § 1344. Following *Neder*, "district courts should include materiality in the jury instructions for section 1344." *United States v. Reynolds*, 189 F.3d 521, 525 n. 2 (7th Cir. 1999); *United States v. LeBeau*, 949 F.3d 334, 342 (7th Cir. 2020), cert. denied, 19-1424, 2020 WL 5882354 (U.S. Oct. 5, 2020) ("The better course, consistent with *Neder*, is to require the materiality instruction on all bank-fraud charges, whether brought under section 1344(1) or (2)."); see also *United States v. Fernandez*, 282 F.3d 500, 509 (7th Cir. 2002). In keeping with the similarity between section 1344 and section 1347, the fourth element of this instruction includes materiality.

The jury instruction defining "Health Care Benefit Program" under 18 U.S.C. § 1347(a) should be given in conjunction with this instruction.

18 U.S.C. § 1347(a)(2) DEFINITION OF SCHEME

A scheme is a plan or course of action formed with the intent to accomplish some purpose.

To prove a scheme to obtain money [or other property] [belonging to; in the [care; custody; control] of] a health care benefit program by means of false pretenses, representations or promises, the government must prove that [the; a] false pretense, representation or promise charged was what induced[, or would have induced,] the health care benefit program to part with the [money; property].

[In considering whether the government has proven a scheme to obtain moneys or other property [belonging to; in the [care; custody; control] of] a health care benefit program by means of false pretenses, representations or promises, the government must prove at least one of the [false pretenses, representations, promises, or] acts charged in the portion of the indictment describing the scheme. However, the government is not required to prove all of them.]

Committee Comment

This instruction is based on the mail/wire/bank fraud statutes, 18 U.S.C. § § 1341, 1343, and 1344. For a discussion of whether the unanimity instruction should be given see the Committee Comment to Pattern Instruction 18 U.S.C. § § 1341 & 1343—Definition of "Scheme to Defraud."

The second paragraph of this instruction is based on the discussion in *Loughrin v. United States*, 573 U.S. 351, 362-65 (2014), of the requirement in 18 U.S.C. § 1344(2) that the money or property at issue be obtained "by means of" the false pretense(s), representation(s) and/or promise(s) charged. Although this case involved the bank fraud statute, as previously noted the language of the health care fraud statute substantially similar. In the *Loughrin* discussion, the Court observed that the "by means of" requirement contained "a relational component," that is, that "the given result (the 'end') is achieved, at least in part, through the specified action, instrument, or method (the "means"), such that

the connection between the two is something more than oblique, indirect and incidental." *Id.* at 362-63 (emphasis original). As the Court emphasized, this may require something more than mere "but-for" causation. The Court's discussion of this requirement in *Loughrin* is complex, though, as is the range of concepts of causation potentially encompassed by the word "induced." In an appropriate case the Court may wish to consider whether some word other than "induced" more accurately captures the meaning of the "by means of" requirement. The bracketed phrase "or would have induced" should be given in a case in which there is an issue with respect to whether the charged scheme actually came to fruition.

The final, bracketed paragraph should be given in cases in which, as will usually be the case, more than one false pretense, representation or promise is charged.

In the Committee Comment to Definition of "Scheme to Defraud" instruction applicable to the mail and wire fraud instructions the Committee discusses at some length cases that address whether, and when, a mail or wire fraud conviction can be based on an omission and/or concealment. As that Comment points out, omissions plus an affirmative act of concealment can comprise a scheme to defraud in mail/wire fraud cases. But it is not clear, even from cases construing those statutes, whether an omission itself, without more, is enough. Similarly, this issue has not been resolved with respect to health care fraud. In health care fraud cases in which the issue arises, the Court may wish to consider adding some iteration of the final bracketed sentence in the mail and wire fraud scheme instruction: "A materially false or fraudulent pretense, representation, or promise may be accomplished by [an] omission[s] [and] [or] the concealment of material information."

For a discussion of whether a unanimity instruction should be given, see the Committee Comment to Pattern Instruction for 18 U.S.C. § § 1341 & 1343—Definition of "Scheme to Defraud."

18 U.S.C. § 1461 MAILING OBSCENE MATERIAL—ELEMENTS

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

1. The defendant knowingly [used the mails; caused the mails to be used] for the delivery of certain materials, as charged; and

2. The defendant knew the content, character, and nature of the materials; and

3. The materials were obscene.

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

To fulfill the "knowingly" requirement of 18 U.S.C. § 1461, the Supreme Court held that the prosecution need only show that the defendant had knowledge of the content, character and nature of the materials, not of the law. *Hamling v. United States*, 418 U.S. 87, 122–24 (1974) (the defendant must have knowledge of the contents and the "character and nature" of the materials); see also *Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001, 2012 (2015) (knowledge of substance of material is required); *United States v. Wellman*, 663 F.3d 224, 230–31 (4th Cir. 2011) (knowledge of

content of material required, but a defendant's knowledge of the law "is not a relevant consideration" and a jury need not find that a defendant "knew that the images at issue were obscene"); *United States v. Little*, 365 F. App'x 159, 166 (11th Cir. 2010) (no requirement that the defendant have knowledge of the illegality of the materials in question); *United States v. Johnson*, 855 F.2d 299, 306 (6th Cir. 1988) (in affirming a conviction under 18 U.S.C. § 1461, stating that defendant must know the nature and character of the materials).

Because the statute's references to materials that are indecent, filthy and vile raise constitutional issues, the proposed pattern instruction does not include them.

"Obscene" is defined in Pattern Instruction 18 U.S.C. § 1470.

18 U.S.C. § 1462 BRINGING OBSCENE MATERIAL INTO THE UNITED STATES—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] bringing obscene material into the United States. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly brought [name the material charged in the indictment] into the United States; and

2. The defendant knew the character or nature of [name the material charged in the indictment] at the time it was brought into the United States; and

3. [Name the material charged in the indictment] was obscene.

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].

18 U.S.C. § 1462 TAKING OR RECEIVING OBSCENE MATERIAL—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ____ of the indictment charge[s] the defendant[s] with] taking or receiving obscene material. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly took or received [name the material charged in the indictment] from [any express company; other common carrier; interactive computer service]; and

2. The defendant knew the content, character and nature of [the material charged in the indictment] at the time it was [taken; received]; and

3. [The material charged in the indictment] was obscene.

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

With regard to the requisite level of knowledge, the Supreme Court has held that the prosecution need only show that the defendant had knowledge of the content, character and nature of the materials, not of the law. *Hamling v. United States*, 418 U.S. 87, 122–24 (1974) (the defendant must have knowledge of the

contents and the "character and nature" of the materials); see also *Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001, 2012 (2015) (knowledge of substance of material is required); *United States v. Wellman*, 663 F.3d 224, 230–31 (4th Cir. 2011) (knowledge of content of material required, but a defendant's knowledge of the law "is not a relevant consideration" and a jury need not find that a defendant "knew that the images at issue were obscene"); *United States v. Little*, 365 F. App'x 159, 166 (11th Cir. 2010) (no requirement that the defendant have knowledge of the illegality of the materials in question); *United States v. Johnson*, 855 F.2d 299, 306 (6th Cir. 1988) (in affirming a conviction under 18 U.S.C. § 1461, stating that defendant must know the nature and character of the materials).

"Computer" is defined in Pattern Instruction 18 U.S.C. § 1030(e)(1).

"Obscene" is defined in Pattern Instruction 18 U.S.C. § 1470.

18 U.S.C. § 1462 IMPORTING OR TRANSPORTING OBSCENE MATERIAL—ELEMENTS

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

1. The defendant knowingly used [any express company; other common carrier; interactive computer service] to transport [name the material charged in the indictment] in interstate or foreign commerce; and

2. The defendant knew the content, character, and nature of [name the material charged in the indictment] at the time of such use; and

3. [Name the material charged in the indictment] was obscene.

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

With regard to the requisite level of knowledge, the Supreme Court has held that the prosecution need only show that the defendant had knowledge of the content, character and nature of the materials, not of the law. *Hamling v. United States*, 418 U.S.

87, 122–24 (1974) (the defendant must have knowledge of the contents and the "character and nature" of the materials); see also *Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001, 2012 (2015) (knowledge of substance of material is required); *United States v. Wellman*, 663 F.3d 224, 230–31 (4th Cir. 2011) (knowledge of content of material required, but a defendant's knowledge of the law "is not a relevant consideration" and a jury need not find that a defendant "knew that the images at issue were obscene"); *United States v. Little*, 365 F. App'x 159, 166 (11th Cir. 2010) (no requirement that the defendant have knowledge of the illegality of the materials in question); *United States v. Johnson*, 855 F.2d 299, 306 (6th Cir. 1988) (in affirming a conviction under 18 U.S.C. § 1461, stating that defendant must know the nature and character of the materials).

"Computer" is defined in Pattern Instruction 18 U.S.C. § 1030(e)(1).

The definitions of "interstate commerce" and "foreign commerce" are found at 18 U.S.C. § 10 and are set forth in Pattern Instruction on Definition of Interstate or Foreign Commerce, below, which consolidates and harmonizes various definitions of those terms.

"Obscene" is defined in Pattern Instruction 18 U.S.C. § 1470.

18 U.S.C. § 1465 PRODUCTION WITH INTENT TO TRANSPORT/DISTRIBUTE/TRANSMIT OBSCENE MATERIAL FOR SALE OR DISTRIBUTION—ELEMENTS

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

1. The defendant knowingly used [any express company] [other common carrier] [interactive computer service] to [transport; distribute; transmit] [name the material charged in the indictment] in interstate or foreign commerce; and

2. The defendant knowingly produced the materials with the intent to [transport; distribute; transmit] them; and

3. The defendant knew of the content, character and nature of [name the material charged in the indictment] at the time of production; and

4. [Name the material charged in the indictment] was obscene.

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

With regard to the requisite level of knowledge, the Supreme Court has held that the prosecution need only show that the defendant had knowledge of the content, character and nature of the materials, not of the law. *Hamling v. United States*, 418 U.S. 87, 122–24 (1974) (the defendant must have knowledge of the contents and the "character and nature" of the materials); see also *Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001, 2012 (2015) (knowledge of substance of material is required); *United States v. Wellman*, 663 F.3d 224, 230–31 (4th Cir. 2011) (knowledge of content of material required, but a defendant's knowledge of the law "is not a relevant consideration" and a jury need not find that a defendant "knew that the images at issue were obscene"); *United States v. Little*, 365 F. App'x 159, 166 (11th Cir. 2010) (no requirement that the defendant have knowledge of the illegality of the materials in question); *United States v. Johnson*, 855 F.2d 299, 306 (6th Cir. 1988) (in affirming a conviction under 18 U.S.C. § 1461, stating that defendant must know the nature and character of the materials).

"Computer" is defined in Pattern Instruction 18 U.S.C. § 1030(e)(1).

The definitions of "interstate commerce" and "foreign commerce" are found at 18 U.S.C. § 10 and are set forth in Pattern Instruction on Definition of Interstate or Foreign Commerce, below, which consolidates and harmonizes various definitions of those terms.

"Obscene" is defined in Pattern Instruction 18 U.S.C. § 1470.

18 U.S.C. § 1465 TRANSPORTATION OF OBSCENE MATERIAL FOR SALE OR DISTRIBUTION—ELEMENTS

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

1. The defendant knowingly [transported in; traveled in; used any facility or means of] interstate or foreign commerce; and

2. The defendant did so for the purpose of [sale; distribution] of [name the material charged in the indictment]; and

3. The defendant knew of the content, character and nature of [name the material charged in the indictment] at the time of [transportation; travel]; and

4. [Name the material charged in the indictment] was obscene.

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

It is possible for a defendant to travel in interstate commerce for the purpose of selling or distributing obscene material, without possessing the obscene material at the time of travel. It is also arguably possible for a defendant to use a facility or means of interstate or foreign commerce for the purpose of selling or distributing obscene material, without sending the obscene material through the means of interstate commerce. The Committee takes no position on whether the statute is intended to apply to these situations.

In certain cases, a rebuttable presumption may apply to the defendant's intent to sell or distribute. See 18 U.S.C. § 1465, ¶ 2.

DEFINITION OF INTERSTATE OR FOREIGN COMMERCE

"Interstate commerce" means commerce between different states, territories, and possessions of the United States, including the District of Columbia.

"Foreign commerce" as used above, means commerce between any state, territory or possession of the United States and a foreign country.

"Commerce" includes, among other things, travel, trade, transportation and communication.

Images transmitted or received over the Internet have moved in interstate or foreign commerce. It is for you to determine, however, if [the material containing] the visual depiction [had been transmitted or received over the Internet; was produced using materials that had been transmitted or received over the Internet].

Committee Comment

These instructions are intended for use in cases involving various sexual exploitation-related charges, and are cross-referenced for many of them. These definitions of "interstate commerce" and "foreign commerce" are found at 18 U.S.C. § 10, and are modified here to consolidate and harmonize various definitions of those terms.

Several circuits have now held that use of the internet satisfies the interstate commerce nexus. See *United States v. Lewis*, 554 F.3d 208, 215 (1st Cir. 2009); *United States v. MacEwan*, 445 F.3d 237, 244 (3d Cir. 2006); *United States v. Runyon*, 290 F.3d 223, 239 (5th Cir. 2002).

The bracketed language that addresses material that "was produced" should only be used in cases that charge such conduct, including cases brought under 18 U.S.C. § 2252A(a)(5)(B) or (6)(B).

18 U.S.C. § 1466 ENGAGING IN BUSINESS OF PRODUCING/SELLING OBSCENE MATTER—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] engaging in the business of [producing obscene material with intent to [distribute; sell]] [[selling; transferring] obscene material]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant is engaged in the business of [producing; selling; transferring] [name the material charged in the indictment]; and

2. The defendant knowingly [[sold; transferred; produced] [name the material charged in the indictment]] with intent to [distribute; sell]; and

3. [The material charged in the indictment] is obscene; and

4. [The material charged in the indictment] has been [shipped; transported] in [interstate; 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 certain cases, a rebuttable presumption may apply. See 18 U.S.C. § 1466(b).

"Producing" is defined in Pattern Instruction 18 U.S.C. § 2256(3).

"Obscene" is defined in Pattern Instruction 18 U.S.C. § 1470.

18 U.S.C. § 1466 ENGAGING IN BUSINESS OF SELLING/TRANSFERRING OBSCENE MATTER—ELEMENTS

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

1. The defendant is engaged in the business of [selling; transferring] [name the material charged in the indictment]; and

2. The defendant knowingly [sold; transferred] [name the material charged in the indictment]; and

3. [Name the material charged in the indictment] is obscene; and

4. The [name the material charged in the indictment] has been [shipped; transported] in 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 certain cases, a rebuttable presumption may apply. See 18 U.S.C. § 1466(b).

The definitions of "interstate commerce" and "foreign commerce" are found at 18 U.S.C. § 10 and are set forth in Pattern Instruction on Definition of Interstate or Foreign Commerce, above, which consolidates and harmonizes various definitions of those terms.

"Obscene" is defined in Pattern Instruction 18 U.S.C. § 1470.

18 U.S.C. § 1466 ENGAGING IN BUSINESS OF RECEIVING/POSSESSING OBSCENE MATTER—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] engaging in the business of [receiving; possessing] obscene material with intent to distribute. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant is engaged in the business of [receiving; possessing] [name the material charged in the indictment]; and

2. The defendant knowingly [received; possessed] [name the material charged in the indictment] with intent to distribute; and

3. [Name the material charged in the indictment] is obscene; and

4. [Name the material charged in the indictment] has been [shipped; transported] in 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 certain cases, a rebuttable presumption may apply. See 18 U.S.C. § 1466(b).

The definitions of "interstate commerce" and "foreign commerce" are found at 18 U.S.C. § 10 and are set forth in Pattern Instruction on Definition of Interstate or Foreign Commerce, above, which consolidates and harmonizes various definitions of those terms.

"Obscene" is defined in Pattern Instruction 18 U.S.C. § 1470.

18 U.S.C. § 1466(b) DEFINITION OF "ENGAGED IN THE BUSINESS"

A person who produces, sells or transfers or offers to sell or transfer obscene matter is "engaged in the business" of doing so, if he devotes time, attention or labor to such activities, as a regular course of trade or business, with the objective of earning a profit. It is not necessary that the person make a profit or that the production, selling or transferring or offering to sell or transfer such material be the person's sole or principal business or source of income.

18 U.S.C. § 1466A(a)(1) PRODUCING/ DISTRIBUTING/RECEIVING/POSSESSING WITH INTENT TO DISTRIBUTE OBSCENE VISUAL REPRESENTATIONS OF SEXUAL ABUSE OF CHILDREN—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charges the defendant[s] with] [producing; distributing; receiving; possessing with intent to distribute], a visual depiction. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly [produced; distributed; received; possessed with intent to distribute], a visual depiction; and

2. The visual depiction is of a minor engaging in sexually explicit conduct; and

3. The visual depiction is obscene; and

4. [A communication involved in or made in furtherance of this offense was communicated or transported by [mail; in interstate or foreign commerce, including by computer]]

[A communication involved in or made in furtherance of the offense contemplated the transmission or transportation of a visual depiction by the [mail; in interstate or foreign commerce, including by computer]]

[Any person traveled or was transported in interstate or foreign commerce in the course of or in furtherance of the commission of this offense]

[Any visual depiction involved in the offense was produced using materials that were [mailed; shipped or

transported in interstate or foreign commerce, including by computer]]

[The offense was committed in the special maritime or territorial jurisdiction of the United States].

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

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

The definitions of "interstate commerce" and "foreign commerce" are found at 18 U.S.C. § 10 and are set forth in Pattern Instruction on Definition of Interstate or Foreign Commerce, above, which consolidates and harmonizes various definitions of those terms.

"Computer" is defined in Pattern Instruction 18 U.S.C. § 1030(e)(1).

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

"Obscene" is defined in Pattern Instruction 18 U.S.C. § 1470.

18 U.S.C. § 1466A(a)(2) PRODUCING/ DISTRIBUTING/RECEIVING/POSSESSING WITH INTENT TO DISTRIBUTE OBSCENE VISUAL REPRESENTATIONS OF SEXUAL ABUSE OF CHILDREN—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [producing; distributing; receiving; possessing with intent to distribute, a visual depiction. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant knowingly [produced; distributed; received; possessed with intent to distribute], a visual depiction; and

2. The visual depiction is of an image [that is; appears to be] a minor engaging in [graphic bestiality; sadistic abuse; masochistic abuse; sexual intercourse]; and

3. The visual depiction lacks serious literary, artistic, political or scientific value; and

4. [A communication involved in or made in furtherance of this offense was communicated or transported by [mail; in interstate or foreign commerce, including by computer]]

[A communication involved in or made in furtherance of the offense contemplated the transmission or transportation of a visual depiction by the [mail; in interstate or foreign commerce, including by computer]]

[Any person traveled or was transported in interstate or foreign commerce in the course of or in furtherance of the commission of this offense]

[Any visual depiction involved in the offense was produced using materials that were [mailed; shipped or transported in interstate or foreign commerce, including by computer]]

[The offense was committed in the special maritime or territorial jurisdiction of the United States].

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

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

"Producing" is defined in Pattern Instruction 18 U.S.C. § 2256(3).

"Computer" is defined in Pattern Instruction 18 U.S.C. § 1030(e)(1).

The definitions of "interstate commerce" and "foreign commerce" are found at 18 U.S.C. § 10 and are set forth in Pattern Instruction on Definition of Interstate or Foreign Commerce, above, which consolidates and harmonizes various definitions of those terms.

18 U.S.C. § 1466A(b)(1) POSSESSION OF OBSCENE VISUAL REPRESENTATIONS OF SEXUAL ABUSE OF CHILDREN—ELEMENTS

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

1. The defendant knowingly possessed a visual depiction; and

2. The visual depiction is of a minor engaging in sexually explicit conduct; and

3. The visual depiction is obscene; and

4. [A communication involved in or made in furtherance of this offense was communicated or transported by [mail; in interstate or foreign commerce, including by computer]]

[A communication involved in or made in furtherance of the offense contemplated the transmission or transportation of a visual depiction by the [mail; in interstate or foreign commerce, including by computer]]

[Any person traveled or was transported in interstate or foreign commerce in the course of or in furtherance of the commission of this offense]

[Any visual depiction involved in the offense was produced using materials that were [mailed; shipped or transported in interstate or foreign commerce, including by computer]]

[The offense was committed in the special maritime or territorial jurisdiction of the United States].

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

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

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

"Computer" is defined in Pattern Instruction 18 U.S.C. § 1030(e)(1).

The definitions of "interstate commerce" and "foreign commerce" are found at 18 U.S.C. § 10 and are set forth in Pattern Instruction on Definition of Interstate or Foreign Commerce, above, which consolidates and harmonizes various definitions of those terms.

"Obscene" is defined in Pattern Instruction 18 U.S.C. § 1470.

18 U.S.C. § 1466A(b)(2) POSSESSION OF OBSCENE VISUAL REPRESENTATIONS OF SEXUAL ABUSE OF CHILDREN—ELEMENTS

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

1. The defendant knowingly possessed a visual depiction; and

2. The visual depiction is of an image [that is; appears to be] a minor engaging in [graphic bestiality; sadistic abuse; masochistic abuse; sexual intercourse]; and

3. The visual depiction lacks serious literary, artistic, political or scientific value; and

4. [A communication involved in or made in furtherance of this offense was communicated or transported by [mail; in interstate or foreign commerce, including by computer]]

[A communication involved in or made in furtherance of the offense contemplated the transmission or transportation of a visual depiction by the [mail; in interstate or foreign commerce, including by computer]]

[Any person traveled or was transported in interstate or foreign commerce in the course of or in furtherance of the commission of this offense]

[Any visual depiction involved in the offense was produced using materials that were [mailed; shipped or transported in interstate or foreign commerce, including by computer]]

[The offense was committed in the special maritime or territorial jurisdiction of the United States].

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

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

"Computer" is defined in Pattern Instruction 18 U.S.C. § 1030(e)(1).

The definitions of "interstate commerce" and "foreign commerce" are found at 18 U.S.C. § 10 and are set forth in Pattern Instruction on Definition of Interstate or Foreign Commerce, above, which consolidates and harmonizes various definitions of those terms.

18 U.S.C. § 1466A(f)(1) DEFINITION OF "VISUAL DEPICTION"

"Visual depiction" includes undeveloped film and videotape, and data stored on a computer disk or by electronic means which is capable of conversion into a visual image, and also includes any photograph, film, video, picture, digital image or picture, computer image or picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means.

Committee Comment

Only the applicable terms within this definition should be used.

18 U.S.C. § 1466A(f)(3) DEFINITION OF "GRAPHIC"

A depiction of sexually explicit conduct is "graphic" if a viewer can observe any part of the genitals or pubic area of any depicted person [or animal] during any part of the time that the sexually explicit conduct is being depicted.

18 U.S.C. § 1470 TRANSFER OF OBSCENE MATERIAL TO A MINOR—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ____ of the indictment charge[s] the defendant[s] with] transfer of obscene material to an individual who has not attained the age of sixteen years. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the six following elements beyond a reasonable doubt:

1. The defendant knowingly transferred [name the material charged in the indictment]; and

2. The defendant transferred [name the material charged in the indictment] to an individual less than sixteen years old; and

3. The defendant knew the other individual was less than sixteen years-old; and

4. The defendant knew at the time of the transfer the content, character and nature of the material; and

5. [Name the material charged in the indictment] is obscene; and

6. The defendant knowingly used the [mail; any means or facility of interstate commerce] to transfer [name the material charged in the indictment].

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 definitions of "interstate commerce" and "foreign commerce" are found at 18 U.S.C. § 10 and are set forth in Pattern Instruction on Definition of Interstate or Foreign Commerce, above, which consolidates and harmonizes various definitions of those terms.

With regard to the requisite level of knowledge, the Supreme Court has held that the prosecution need only show that the defendant had knowledge of the content, character and nature of the materials, not of the law. *Hamling v. United States*, 418 U.S. 87, 123 (1974) (the defendant must have knowledge of the contents and the "character and nature" of the materials); see also *Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001, 2012 (2015) (knowledge of substance of material is required); *United States v. Wellman*, 663 F.3d 224, 230–31 (4th Cir. 2011) (knowledge of content of material required, but a defendant's knowledge of the law "is not a relevant consideration" and a jury need not find that a defendant "knew that the images at issue were obscene"); *United States v. Little*, 365 F. App'x 159, 166 (11th Cir. 2010) (no requirement that the defendant have knowledge of the illegality of the materials in question); *United States v. Johnson*, 855 F.2d 299, 306 (6th Cir. 1988) (in affirming a conviction under 18 U.S.C. § 1461, stating that defendant must know the nature and character of the materials).

18 U.S.C. § 1470 DEFINITION OF "OBSCENE"

No evidence of what constitutes obscene material has been or needs to be presented. It is up to you to determine whether the material is obscene using the standard in this instruction.

Material is obscene when it meets all three of the following requirements:

1. The average person, applying contemporary adult community standards, would find that the material, taken as a whole, appeals to the prurient interest. Material appeals to "prurient interest" when it is directed to an unhealthy or abnormally lustful or erotic interest, or to a lascivious or degrading interest, or to a shameful or morbid interest, in [sex].

2. The average person, applying contemporary adult community standards, would find that the material depicts or describes sexual conduct in an obviously offensive way.

3. A reasonable person would find that the material, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Before you can find material to be obscene, you must find that it meets all three of these requirements.

You are to apply these requirements from the standpoint of an average adult in the community, namely, the counties in the ____ District of ____ in which you reside.

You are not to apply these standards from the standpoint of the sender, the recipient, or the intended recipient of the material.

You must also avoid applying subjective personal

and privately held views regarding what is obscene. Rather, the standard is that of an average adult applying the collective view of the community as a whole.

Committee Comment

The three-part test for determining whether material is obscene is taken from *Miller v. California*, 413 U.S. 15, 24 (1973) and *Pope v. Illinois*, 481 U.S. 497, 500–01 (1987). See also *Smith v. United States*, 431 U.S. 291, 302 (1977) ("community standards . . . provide the measure against which the jury decides the questions of appeal to prurient interest and patent offensiveness"); *United States v. Rogers*, 474 F. App'x 463, 467–68 (7th Cir. 2012) (in a prosecution under 18 U.S.C. § 1470, applying the *Miller* test and concluding that, under the facts presented, an image defendant sent to a minor of defendant holding his erect penis met the definition of obscene); see also *United States v. Little*, 365 Fed. App'x 159, 163–64 (11th Cir. 2010).

The definition of "prurient interest" comes from a number of decisions, including *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504–07 (1985); *Roth v. United States*, 354 U.S. 476, 487 n.20 (1957); and *Mishkin v. New York*, 383 U.S. 502, 508–09 (1966); see also *Rogers*, 474 F. App'x at 468–69 (defining "prurient interest" as "shameful or morbid").

The definition of the relevant "community" is taken from *Hamling v. United States*, 418 U.S. 87, 104–05 (1974) ("A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination . . .."). Accord *Smith*, 431 U.S. at 302; see also *United States v. Langford*, 688 F.2d 1088, 1092 (7th Cir. 1982) ("the community whose standards the jury must apply need not be precisely defined").

The admonition to apply the standard of an average person and not particular persons (*e.g.* the sender and recipient, or the juror himself or herself) comes from several Supreme Court decisions. See, *e.g.*, Miller, 413 U.S. at 33 ("the primary concern in requiring a jury to apply the standard of the average person, applying contemporary community standards is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one") (internal quotation marks omitted). See also *Pinkus v. United States*, 436 U.S. 293, 300–01 (1978) ("Cautionary instructions to avoid substantive personal and private views in determining com-

munity standards can do no more than tell the individual juror that in evaluating the hypothetical 'average' person he is to determine the collective view of the community, as best as it can be done."); *Hamling*, 418 U.S. at 107 (material is not to be judged "on the basis of each juror's personal opinion").

18 U.S.C. § 1503 OBSTRUCTION OF JUSTICE GENERALLY—ELEMENTS

The defendant has been charged in [Count[s] __ of] the indictment with obstruction of justice. In order for you to find the defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. There was a pending proceeding before a federal [court; grand jury];

2. The defendant knew of that proceeding;

3. The defendant [intentionally influenced, obstructed or impeded] [endeavored to influence, obstruct or impede] the due administration of that proceeding; and

4. The defendant acted [corruptly, that is, with the purpose of wrongfully impeding the due administration of justice] [by threat; by force; by threatening letter or communication].

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

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

Committee Comment

This instruction is for use when the omnibus, or catch-all, "due administration of justice" provision of § 1503 is used. *United States v. Macari*, 453 F.3d 926, 939 (7th Cir. 2006); *United States v. Aguilar*, 515 U.S. 593, 599 (1995); *United States v. Fassnacht*, 332 F.3d 440, 448–49 (7th Cir. 2003).

In defining "corruptly," the word "wrongfully" is used to limit the statute only to those acts where a defendant has no legal right to impede the proceeding. See *United States v. Matthews*, 505 F.3d 698 (7th Cir. 2007) (citing *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005)); *United States v. Fassnacht*, 332 F.3d 440 (7th Cir. 2003); *United States v. Ashqar*, 582 F.3d 819 (2d Cir. 2009) (approving *Matthews* definition of corruptly in context of § 1503 prosecution).

18 U.S.C. § 1503 OBSTRUCTION OF JUSTICE—CLAUSE 2—INJURING JURORS OR THEIR PROPERTY—ELEMENTS

The defendant has been charged in [Count[s] __ of] the indictment with obstruction of justice. In order for you to find the defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. (Name) was a [grand; petit; prospective] juror;

2. The defendant intentionally injured (name)'s [person; property];

3. The defendant did so because [name] [[was; had been] a juror].

18 U.S.C. § 1503 OBSTRUCTION OF JUSTICE—CLAUSE 3—INJURING COURT OFFICIALS—ELEMENTS

The defendant has been charged in [Count[s] __ of] the indictment with obstruction of justice. In order for you to find the defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. [Name] was a [court officer; magistrate judge];

2. The defendant intentionally injured [name]'s [person; property];

3. The defendant did so because of [name]'s performance of their official duties.

18 U.S.C. § 1503 DEFINITION OF "ENDEAVOR"

A defendant endeavors to influence, obstruct or impede [the due administration of a proceeding] [a [juror; witness; court officer]] if the defendant acts purposefully, with the knowledge or notice that his actions would have the natural and probable effect of wrongfully [obstructing, impeding or interfering with the due administration of the proceeding][obstructing, influencing, intimidating or impeding the [juror; witness; court officer] in the discharge of their duties]. The endeavor need not be successful.

Committee Comment

See *United States v. Aguilar*, 515 U.S. 593, 599 (1995) ("the endeavor must have the natural and probable effect of interfering with the due administration of justice") (internal quotation marks omitted); *United States v. Cueto*, 151 F.3d 620, 634 (7th Cir. 1998) ("acted in a manner that had natural and probable effect of interfering with the lawful function of . . . governmental entities"); *United States v. Buckley*, 192 F.3d 708, 710 (7th Cir. 1999) (discussing U.S.S.G. § 3C1.1, not 18 U.S.C. § 1503).

The term "purposefully," which this instruction adopts from the 1999 version, appears to come from *United States v. Machi*, 811 F.2d 991, 998 (7th Cir. 1987), which refers to "knowingly and purposefully undertaking an act, the natural and probable consequence of which is to influence, obstruct, or impede the due administration of justice." Based on a Westlaw search, however, the term "purposefully" does not appear in the same sentence as the term "endeavor!" or the term "obstruct!" in any other Seventh Circuit criminal case. Careful consideration should be given regarding whether to include this term.

The term "reasonable tendency," which appeared in the 1999 version of this instruction, appears to have come from two Seventh Circuit cases: *United States v. Arnold*, 773 F.2d 823, 834 (7th Cir. 1985), and *United States v. Harris*, 558 F.3d 366, 369 (7th Cir. 1977), which *Arnold* quotes. It may originally come from *Nye v. United States*, 313 U.S. 33, 49 (1941), a criminal case involving an almost identically-worded phrase in a predecessor statute. This language, however, does not appear in any post-*Aguilar* obstruction case in the Seventh Circuit. *United States v. Palivos*, 486 F.3d 250, 258 (7th Cir. 2007), quotes a jury instruction using this same phrase (likely derived from the 1999 Pattern Instruction) but does

not address its appropriateness. The Committee has eliminated it.

18 U.S.C. § 1503 INFLUENCING COURT OFFICER—ELEMENTS

The defendant has been charged in [Count[s] __ of] the indictment with obstruction of justice. In order for you to find the defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. [Name] was an officer of any court of the United States;

2. The defendant endeavored to [influence; intimidate; impede] [name] by here insert [act as described in the indictment] on account of [name] being an officer in or of any court of the United States;

3. The defendant acted knowingly; and

4. The defendant acted [corruptly, that is, with the purpose of wrongfully impeding the due administration of justice] by [threats; force; threatening letter or communication].

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

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

Committee Comment

In defining "corruptly," the word "wrongfully" is used to limit the statute only to those acts where a defendant has no legal right to impede the proceeding. See *United States v. Matthews*, 505 F.3d 698 (7th Cir. 2007) (citing *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005)); *United States v. Fassnacht*, 332 F.3d 440

(7th Cir. 2003); *United States v. Ashqar*, 582 F.3d 819 (2d Cir. 2009) (approving *Matthews* definition of corruptly in context of § 1503 prosecution).

18 U.S.C. § 1503 INFLUENCING JUROR—ELEMENTS

The defendant has been charged in [Count[s] __ of] the indictment with obstruction of justice. In order for you to find the defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. [Name] was a [prospective] juror;

2. The defendant endeavored to [influence; intimidate; impede] [name] by [here insert act as described in the indictment] on account of [name] being a [prospective] juror;

3. The defendant acted knowingly; and

4. The defendant acted [corruptly, that is, with the purpose of wrongfully impeding the due administration of justice] by [threats; force; threatening letter or communication].

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

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

Committee Comment

This statute also applies to venire members who have not been sworn or selected as jurors and are prospective jurors. *United States v. Russell*, 255 U.S. 138 (1921); *United States v. Jackson*, 607 F.2d 1219 (8th Cir. 1979), cert. denied, 444 U.S. 1080 (1980).

In defining "corruptly," the word "wrongfully" is used to limit the statute only to those acts where a defendant has no legal right

to impede the proceeding. See *United States v. Matthews*, 505 F.3d 698 (7th Cir. 2007) (citing *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005)); *United States v. Fassnacht*, 332 F.3d 440 (7th Cir. 2003); *United States v. Ashqar*, 582 F.3d 819 (2d Cir. 2009) (approving *Matthews* definition of corruptly in context of § 1503 prosecution).

18 U.S.C. § 1503 INFLUENCING WITNESS—ELEMENTS

The defendant has been charged in Count[s] __ of the indictment with obstruction of justice. In order for you to find the defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. [Name] was a witness;

2. The defendant endeavored to [influence; intimidate; impede] [name] by here insert [act as described in the indictment] on account of [name] being a witness;

3. The defendant acted knowingly; and

4. The defendant acted [corruptly, that is, with the purpose of wrongfully impeding the due administration of justice] by [threats; force; threatening letter or communication].

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

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

Committee Comment

In 1982, as part of an amendment to § 1503, Congress eliminated any explicit reference to "witnesses" in the statute, and enacted the witness tampering statute, 18 U.S.C. § 1512. Nonetheless, the Seventh Circuit has held that the omnibus "due administration of justice" clause of § 1503 continues to cover witness tampering. *United States v. Maloney*, 71 F.3d 645, 659 (7th Cir. 1995).

In defining "corruptly," the word "wrongfully" is used to limit

the statute only to those acts where a defendant has no legal right to impede the proceeding. See *United States v. Matthews*, 505 F.3d 698 (7th Cir. 2007) (citing *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005)); *United States v. Fassnacht*, 332 F.3d 440 (7th Cir. 2003); *United States v. Ashqar*, 582 F.3d 819 (2d Cir. 2009) (approving *Matthews* definition of corruptly in context of § 1503 prosecution).

SPECIAL VERDICT INSTRUCTIONS ON § 1503 OFFENSES ALLEGED TO HAVE INVOLVED PHYSICAL FORCE OR THE THREAT OF PHYSICAL FORCE

You will see on the verdict form a question concerning whether the offense charged [in Count ____] involved [physical force] [the threat of physical force]. You should consider this question only if you have found that the government has proven the defendant guilty of the offense charged [in Count ____ of] the indictment.

If you find that the government has proven beyond a reasonable doubt that the offense charged [in Count ____] involved [physical force] [the threat of physical force] then you should answer the question "Yes."

If you find that the government has not proven beyond a reasonable doubt that the offense involved [physical force] [the threat of physical force], then you should answer the question "No."

If, but only if, you answered "Yes" to the above question, then you should consider the following question(s):

1. If the physical force is alleged to have resulted in a death and the facts support it, then the court should give the § 1111 and/or § 1112 instructions, and ask the jury to render a verdict on whether the offense involved a murder or manslaughter.

2. If the alleged physical force did not result in a death and the facts support it, then the jury should be instructed to answer the question of whether the physical force involved an attempt to kill.

In using physical force, did the defendant attempt to kill [name alleged victim]? A person "attempts" to kill if he knowingly takes a substantial step toward

committing a killing, with the intent to kill. The substantial step must be an act that strongly corroborates that the defendant intended to kill the victim.

If you find that the government has proven beyond a reasonable doubt that the defendant attempted to kill [name the alleged victim], then you should answer this question "Yes." If you find that the government has not proven beyond a reasonable doubt that the defendant attempted to kill [name the alleged victim], then you should answer this question "No."

3. Finally, if the obstruction offense was alleged to have been committed against a juror in a criminal case, then the jury should be asked specifically whether that was the case, and whether the case on which the juror was sitting was a Class A or Class B felony.

Was [name of alleged victim] chosen and sitting as a juror in a criminal case involving a Class A or Class B felony? If so, you should answer this question "Yes." If not, you should answer this question "No." You are instructed that [name the felony in the case on which the victim was sitting as a juror] is a Class [A][B] felony.

Committee Comment

The italicized language is not part of the instruction but rather serves as a direction regarding usage.

18 U.S.C. § 1512 DEFINITION OF "CORRUPTLY"

A person acts "corruptly" if he or she acts with the purpose of wrongfully impeding the due administration of justice.

Committee Comment

See *United States v. Matthews*, 505 F.3d 698 (7th Cir. 2007). This instruction defines "corruptly" under § 1512(c) as it is defined in 18 U.S.C. § 1503 which prohibits similar conduct.

18 U.S.C. §§ 1512 & 1515(a)(1) DEFINITION OF OFFICIAL PROCEEDING

The term "official proceeding" as used in Count[s] ____ means [name official proceeding].

An official proceeding need not be pending or about to be instituted at the time of the offense. However, the government must prove beyond a reasonable doubt that the defendant[s] foresaw the particular official proceeding.

[There are [number] official proceedings identified in Count[s] ____. The government need not prove beyond a reasonable doubt that the defendant intended to obstruct all of these proceedings. Instead, the government must prove beyond a reasonable doubt that the defendant intended to obstruct at least one of these official proceedings. You must unanimously agree as to which official proceeding the defendant intended to obstruct.]

Committee Comment

The term "official proceeding" means a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, a Federal grand jury, Congress, a Federal Government agency which is authorized by law, or any proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce. 18 U.S.C. § 1515(a).

"Obstructive conduct need not 'occur *in or during* the official proceeding before a judge or court' in order to come within the scope of the statute. *United States v. Burge*, 711 F.3d 803, 809 (7th Cir. 2013). "[T]he phrase "before a judge or court" in § 1515(a)(1)(A) only describes which *types* of proceedings can be considered "official," not *where* the criminal obstruction must occur. Obstruction

of justice occurs when a defendant acts to impede the types of proceedings that take place before judges or grand juries." *Id*.

Although there is no requirement that the official proceeding is pending or about to be instituted at the time of the offense, 18 U.S.C. § 1512(f)(1), the official proceeding must be foreseeable to the defendant. *Arthur Andersen v. United States*, 544 U.S. 696, 707–08 (2005) ("It is . . . one thing to say that a proceeding 'need not be pending or about to be instituted at the time of the offense' and quite another to say a proceeding need not even be foreseen. A 'knowingly . . . corrupt persuader' cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material."); *United States v. Matthews*, 505 F.3d 698, 708–09 (7th Cir. 2007) (finding that the nexus requirement had been met when district court instructed jury that defendant acted with intent to impair objects availability for use "in an official proceeding," specifically identified the proceeding as the federal grand jury for the Southern District of Illinois and also instructed the jury that "for the purposes of these instructions an official proceeding need not be pending or about to be instituted at the time of the offense."); *United States v. Kaplan*, 490 F.3d 110, 125–27 (2nd Cir. 2007) ("[A] 'knowingly corrupt persuader' must believe that his actions are likely to affect a particular, existing or foreseeable official proceeding" and "it would surely have been more prudent, even where the evidence only points to one federal proceeding, for the district judge to identify the 'particular' federal proceeding that the defendant intended to obstruct.").

The bracketed language in the third paragraph should be used where the defendant is charged in the indictment with obstructing more than one official proceeding.

Not every section of § 1512(b) requires a nexus to a federal proceeding. For example, § 1512(b)(3) does not connect the federal interest to a federal proceeding, instead the federal interest derives from the transmission of certain information to a federal officer or judge. *United States v. Ronda*, 455 F.3d 1273 (11th Cir. 2006); *United States v. Veal*, 153 F.3d 1233 (11th Cir. 1998).

18 U.S.C. §§ 1512 & 1515(a)(3) DEFINITION OF "MISLEADING CONDUCT"

The term "misleading conduct" means [knowingly making a false statement; intentionally omitting [material] information from a statement and thereby causing a portion of such a statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement; with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered or otherwise lacking in authenticity; with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; knowingly using a trick, scheme, or device with intent to mislead].

Committee Comment

Section 1515 of Title 18 does not specify that omitted information needs to be "material." However, the district court may wish to include a materiality requirement, as materiality is included with regard to the other clauses in the definition of misleading conduct.

18 U.S.C. § 1512(b)(1) WITNESS TAMPERING—INFLUENCING OR PREVENTING TESTIMONY—ELEMENTS

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

1. The defendant [intimidated; threatened; corruptly persuaded; engaged in misleading conduct toward] another person [or attempted to do so]; and

2. The defendant acted knowingly; and

3. The defendant acted with the intent to influence, delay or prevent the testimony of any person in an official proceeding.

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 court should define "official proceeding" for the jury. The court should define "corruptly" and "official proceeding" using the pattern instructions set forth below. The court may substitute the name of the individual for "another person" and "any person" in the instruction.

18 U.S.C. § 1512(b)(2)(A) WITNESS TAMPERING—WITHHOLDING EVIDENCE—ELEMENTS

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

1. The defendant [intimidated; threatened; corruptly persuaded; engaged in misleading conduct toward] another person [or attempted to do so]; and

2. The defendant acted knowingly; and

3. The defendant acted with the intent to cause or induce any person to withhold [testimony; a record; a document; another object] from an official proceeding.

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 court should define "official proceeding" for the jury. The court should define "corruptly" and "official proceeding" using the pattern instructions set forth below. The court may substitute the name of the individual for "another person" and "any person" in the instruction.

18 U.S.C. § 1512(b)(2)(B) WITNESS TAMPERING—ALTERING OR DESTROYING EVIDENCE—ELEMENTS

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

1. The defendant [intimidated; threatened; corruptly persuaded; engaged in misleading conduct toward] another person [or attempted to do so]; and

2. The defendant acted knowingly; and

3. The defendant acted with the intent to cause or induce any person to [alter; destroy; mutilate; conceal] an object with the intent to impair the object's integrity or availability for use in an official proceeding.

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 court should define "official proceeding" for the jury. The court should define "corruptly" and "official proceeding" using the pattern instructions set forth below. The court may substitute the name of the individual for "another person" and "any person" in the instruction.

18 U.S.C. § 1512(b)(2)(C) WITNESS TAMPERING—EVADING LEGAL PROCESS—ELEMENTS

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

1. The defendant [intimidated; threatened; corruptly persuaded; engaged in misleading conduct toward] another person [or attempted to do so]; and

2. The defendant acted knowingly; and

3. The defendant acted with the intent to cause or induce any person to evade legal process summoning that person [to appear as a witness] [or] [to produce a record; document; other object]], in an official proceeding.

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 court should define "official proceeding" for the jury. The court should define "corruptly" and "official proceeding" using the pattern instructions set forth below. The court may substitute the name of the individual for "another person" and "any person" in

the instruction.

18 U.S.C. § 1512(b)(2)(D) WITNESS TAMPERING—ABSENCE FROM LEGAL PROCEEDING—ELEMENTS

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

1. The defendant [intimidated; threatened; corruptly persuaded; engaged in misleading conduct toward] another person [or attempted to do so]; and

2. The defendant acted knowingly; and

3. The defendant acted with the intent to cause or induce any person to be absent from an official proceeding to which such person has been summoned by legal process.

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 court should define "official proceeding," "corruptly" and "misleading" when these terms are used in these instructions, using the pattern instructions set forth below. The court may substitute the name of the individual for "another person" and "any person" in the instruction.

18 U.S.C. § 1512(b)(3) WITNESS TAMPERING—HINDER, DELAY OR PREVENT COMMUNICATION RELATING TO COMMISSION OF OFFENSE—ELEMENTS

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

1. The defendant [intimidated; threatened; corruptly persuaded; engaged in misleading conduct toward] another person [or attempted to do so]; and

2. The defendant acted knowingly; and

3. The defendant acted with the intent to hinder, delay or prevent the communication of information to [a law enforcement officer of the United States; judge of the United States]; and

4. Such information related to the commission or possible commission of a [federal offense; violation of conditions of [probation; supervised release; release pending judicial proceedings].

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 court should define "corruptly" and "misleading" when these terms are used in these instructions, using the pattern instructions set forth below. The court may substitute the name of the individual for "another person" and "any person" in the instruction.

In *United States v. Fowler*, 563 U.S. 668 (2011), the Supreme Court interpreted "intent to prevent the communication . . . to a law enforcement officer . . . of information relating to the commission or possible commission of a Federal offense" under 18 U.S.C. § 1512(a)(1)(C). Section 1512(b)(3) contains almost identical language. In *Fowler*, the Court held that a defendant need not have a particular federal law enforcement officer, nor even a "general thought about federal officers" in mind. *Fowler*, 563 U.S. at 673. The Court further held that the government was not required to prove that a communication "would have been federal." *Id.* at 678. However, the government must prove "a reasonable likelihood . . . that . . . at least one of the relevant communications would have been made to a federal law enforcement officer." *Id.* at 677–78 (government need not show that such communication would have been federal "beyond a reasonable doubt, nor even that it is more likely than not . . . . But the Government must show that the likelihood of communication to a federal office was more than remote, outlandish, or simply hypothetical.").

18 U.S.C. § 1512(c)(1) DESTROY, ALTER OR CONCEAL DOCUMENT OR OBJECT—ELEMENTS

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

1. The defendant [attempted to] [alter[ed]; destroy[ed]; mutilate[d]; conceal[ed]] a [record; document; other object]; and

2. The defendant acted knowingly; and

3. The defendant acted corruptly; and

4. The defendant acted with the intent to impair the object's integrity or availability for use in an official proceeding.

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

See *United States v. Matthews*, 505 F.3d 698 (7th Cir. 2007). The court should define "corruptly" and "official proceeding" using the pattern instructions set forth below.

Section 1512(b) requires that the defendant act "knowingly"

with regard to each offense listed in § 1512(b). The § 1512(c) offenses require that defendant act "corruptly." Thus, the Committee has not included "knowingly" as an element for the two § 1512(c) offenses. The Committee notes, though, that § 1503 requires the defendant act "corruptly" and does not include "knowingly" in the statute. Nonetheless, the 1999 Committee included both "corruptly" and "knowingly" in Pattern Instruction § 1503. In *Matthews*, although in a different context, the Court of Appeals analogized § 1503 and § 1512 conduct. *Matthews*, 505 F.3d at 706 ("because both sections prohibit similar types of conduct, it was proper for the district court to refer to § 1503 in arriving at a definition for 'corruptly' under § 1512").

In *United States v. Johnson*, 655 F.3d 594 (7th Cir. 2011), the court confirmed that "other object" in the first element is not limited to items in the nature of records or documents of the sort that are characteristic of white-collar criminal investigations, but rather "criminalizes the alteration, destruction, mutilation, or concealment of any object, including contraband." *Id*. at 605. The defendant in that case flushed cocaine down the toilet while law enforcement officers were executing a search warrant; see also *Yates v. United States*, 574 U.S. 528, 544–45 (2015) (interpreting "tangible object" in 18 U.S.C. 1519 as narrower in scope than "other object" in 18 U.S.C. 1512(c)(1)).

18 U.S.C. § 1512(c)(2) OTHERWISE OBSTRUCT OFFICIAL PROCEEDING—ELEMENTS

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

1. The defendant [attempted to] [obstruct[ed]; influence[d]; impede[d]] any official proceeding; and

2. The defendant acted corruptly.

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

See *United States v. Matthews*, 505 F.3d 698 (7th Cir. 2007). The court should define "corruptly" and "official proceeding" using the pattern instructions set forth below.

18 U.S.C. § 1512(e) AFFIRMATIVE DEFENSE

If the defendant proves that it is more likely than not that the defendant's conduct consisted solely of lawful conduct and the defendant's sole intention was to encourage, induce or cause the other person to testify truthfully, then you must find the defendant not guilty as charged in Count[s] _____.

Committee Comment

18 U.S.C. § 1512(e) provides for this affirmative defense, which is applicable to all prosecutions for offenses under § 1512. The burden is on the defendant to prove the affirmative defense by a preponderance of the evidence.

18 U.S.C. §§ 1512 & 1515(a)(4) DEFINITION OF "LAW ENFORCEMENT OFFICER"

The term "law enforcement officer" means [an officer or employee of the Federal Government; a person authorized to act for or on behalf of the Federal Government; a person serving the Federal Government as an adviser or consultant] who is [authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; serving as a probation or pretrial services officer under federal law].

18 U.S.C. § 1519 OBSTRUCTION OF JUSTICE—DESTRUCTION, ALTERATION, OR FALSIFICATION OF RECORDS IN FEDERAL INVESTIGATIONS AND BANKRUPTCY—ELEMENTS

The defendant is charged in [Count—of] the indictment with obstructing [an investigation] [an agency of the United States]. In order for you to find the defendant guilty of this charge, the government must prove the following elements beyond a reasonable doubt:

1. The defendant knowingly [altered] [destroyed] [mutilated] [concealed] [covered up] [falsified] [made a false entry into] a [record] [document] [tangible object, in other words, an object used to record or preserve information];

2. The defendant acted with intent to impede, obstruct or influence [an investigation] [the proper administration of any [contemplated] matter]. [The government is not required to prove that the matter or investigation was pending or imminent at the time of the obstruction, only that the acts were taken in relation to or in contemplation of any such matter or investigation.]; and

3. The [investigation][matter] was within the jurisdiction of (name the federal department or agency), which is [an agency] [a department] of the United States] [any case filed under Title 11]. The government is not required to prove that the defendant specifically knew the matter or investigation was within the jurisdiction of a department or agency of the United States.

Notes on Elements of § 1519

We have not included "in relation to" or "in contemplation of" in the elements, but instead included these concepts in the second paragraph following the elements. If they were to be inserted into

the elements, they should go in the first element, as connected to the acts of the defendant, rather than connected to intent in second element.

> The defendant, [in relation to a matter; in contemplation of a matter], knowingly [altered; destroyed; mutilated; concealed; covered up; falsified; made a false entry into] any [record; document; tangible object]

See *United States v. Gray*, 642 F.3d 371, 379 (2d Cir. 2011) (section 1519 does not require the existence or likelihood of a federal investigation*; United States v. Moyer*, 674 F.3d 192 (3d Cir. 2012); *United States v. Yielding*, 657 F.3d 688 (8th Cir. 2011) (three scenarios under which § 1519 applies: (1) when a defendant acts directly with respect to a pending matter; (2) when he acts in contemplation of any such matter; or (3) when he acts in relation to such matter. While matter doesn't have to be pending, the defendant must have an intent to obstruct for all three scenarios); *United States v. Kernell*, 667 F.3d 746 (6th Cir. 2012); *United States v. McQueen*, 727 F.3d 1144 (11th Cir. 2013) (statute requires proof that defendant knowingly altered or destroyed, but does not require knowledge of any possible investigation is federal in nature. The term "any matter within the jurisdiction. . ." is merely a jurisdictional element for which no *mens rea* is required).

On the "tangible object" element, see *Yates v. United States*, 574 U.S. 528, 536 (2015).

18 U.S.C. § 1543 FORGERY OF PASSPORT—ELEMENTS

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

1. The defendant [falsely made; forged; counterfeited; mutilated; altered] a [passport; instrument purporting to be a passport]; and

2. The defendant intended that the [passport; instrument purporting to be a passport] be used.

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].

18 U.S.C. § 1543 FALSE USE OF PASSPORT—ELEMENTS

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

1. The defendant knowingly [used; attempted to use; furnished to another for use] a passport; and

2. The defendant [acted willfully, that is, he] deliberately and voluntarily [used; attempted to use; furnished to another for use] a passport;

3. The passport:

(a) was [false; forged; counterfeited; mutilated; altered]; or

(b) was void.

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

Willfulness is defined within the instruction. "Willfully" as used in the statute means "that the misrepresentation was deliberate and voluntary." See *Chow Bing Kew v. United States*, 248

F.2d 466, 469 (9th Cir. 1957); see also *Hernandez-Robledo v. INS*, 777 F.2d 536, 539 (9th Cir. 1985) (determining that willfully, as used in 8 U.S.C. § 1182(a)(19), false representation of citizenship, requires proof that the misrepresentation was deliberate and voluntary); *Espinoza-Espinoza v. INS*, 554 F.2d 921, 925 (9th Cir. 1977) (finding that willfully, as used in 8 U.S.C. § 1182(a)(19), requires proof that "the misrepresentation was voluntarily and deliberately made") (quoting *Chow Bing Kew*, 248 F.2d at 469); *Anderson v. Cornejo*, 284 F. Supp. 2d 1008, 1035 (N.D. Ill. 2003) (willful and wanton conduct described as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property").

18 U.S.C. § 1544 MISUSE OF A PASSPORT—ELEMENTS

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

1. The defendant knowingly [used; attempted to use] any passport; and

2. The defendant [acted willfully, that is, he] deliberately and voluntarily [used; attempted to use] any passport; and

3. The passport was:

(a) [[issued; designed] for the use of another person]; or

(b) [[used; attempted to be used] in violation of [conditions; restrictions] placed on the passport]; or

(c) [[used; attempted to be used] in violation of [the rules pursuant to the laws regulating the issuance of passports]].

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

Use this instruction in connection with crimes charged under 18 U.S.C. § 1544, first and second paragraphs.

Willfulness is defined within the instruction. "Willfully" as used in the statute means "that the misrepresentation was deliberate and voluntary." See *Chow Bing Kew v. United States*, 248 F.2d 466, 469 (9th Cir. 1957); see also *Hernandez-Robledo v. INS*, 777 F.2d 536, 539 (9th Cir. 1985) (determining that willfully, as used in 8 U.S.C. § 1182(a)(19), false representation of citizenship, requires proof that the misrepresentation was deliberate and voluntary); *Espinoza-Espinoza v. INS*, 554 F.2d 921, 925 (9th Cir. 1977) (finding that willfully, as used in 8 U.S.C. § 1182(a)(19), requires proof that "the misrepresentation was voluntarily and deliberately made") (quoting *Chow Bing Kew*, 248 F.2d at 469); *Anderson v. Cornejo*, 284 F. Supp. 2d 1008, 1035 (N.D. Ill. 2003) (willful and wanton conduct described as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property").

18 U.S.C. § 1544 FURNISHING A FALSE PASSPORT—ELEMENTS

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

1. The defendant knowingly [furnished a passport; disposed of a passport; delivered a passport]; and

2. The defendant [acted willfully, that is, he] deliberately and voluntarily [furnished a passport; disposed of a passport; delivered a passport]; and

3. The defendant intended another person to use the passport as his own; and

4. The passport was originally issued and designed for a person different from [person named in the indictment].

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

Use this instruction in connection with crimes charged under 18 U.S.C. § 1544, third paragraph.

Willfulness is defined within the instruction. "Willfully" as

used in the statute means "that the misrepresentation was deliberate and voluntary." See *Chow Bing Kew v. United States*, 248 F.2d 466, 469 (9th Cir. 1957); see also *Hernandez-Robledo v. INS*, 777 F.2d 536, 539 (9th Cir. 1985) (determining that willfully, as used in 8 U.S.C. § 1182(a)(19), false representation of citizenship, requires proof that the misrepresentation was deliberate and voluntary); *Espinoza-Espinoza v. INS*, 554 F.2d 921, 925 (9th Cir. 1977) (finding that willfully, as used in 8 U.S.C. § 1182(a)(19), requires proof that "the misrepresentation was voluntarily and deliberately made") (quoting *Chow Bing Kew*, 248 F.2d at 469); *Anderson v. Cornejo*, 284 F. Supp. 2d 1008, 1035 (N.D. Ill. 2003) (willful and wanton conduct described as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property").

18 U.S.C. § 1546(a) FRAUDULENT IMMIGRATION DOCUMENT—ELEMENTS

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

1. The defendant knowingly [forged; counterfeited; altered; falsely made] [name document described in the indictment]; and

2. [Name document described in the indictment] is an [immigrant; non-immigrant] [visa; permit; border crossing card; alien registration receipt card; other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States].

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 is intended to apply to allegations under the first paragraph of § 1546, specifically:

Whoever knowingly forges, counterfeits, alters or falsely makes an immigrant or non-immigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by

statute or regulation for entry into or as evidence of authorized stay or employment in the United States. . .knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or go have been otherwise procured by fraud or unlawfully obtained.

If the charge in the indictment relies on a document that falls into the category of "other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States," noted as "other identified document" in the second element, the document should be specifically described to the jury in the instruction.

18 U.S.C. § 1546(a) MAKING A FALSE STATEMENT ON IMMIGRATION DOCUMENT—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] making a false statement on an immigration document. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly made a false statement on an [application; affidavit; other] required by immigration laws or regulations; and

2. The statement was material; and

3. The statement was made under oath.

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

Use this instruction in connection with crimes charged under 18 U.S.C. § 1546(a), in the first part of the fourth paragraph.

The term "oath" as used in Section 1546 should be construed the same as "oath" as used in 18 U.S.C. § 1621 and 28 U.S.C. § 1746.

The statute does not define "material." The Committee recom-

mends that "material" be defined according to Pattern Instruction 18 U.S.C. § 1546(A).

18 U.S.C. § 1546(a) PRESENTATION OF FALSE STATEMENT ON IMMIGRATION DOCUMENT—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] presenting a false statement on an immigration document. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly presented an [application; affidavit; other document] required by immigration laws or regulations containing a false statement; and

2. The statement was material; and

3. The statement was made under oath.

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

Use this instruction in connection with crimes charged under 18 U.S.C. § 1546(a), in the second part of the fourth paragraph.

The term "oath" as used in Section 1546 should be construed the same as "oath" as used in 18 U.S.C. § 1621 and 28 U.S.C. § 1746.

18 U.S.C. § 1546(a) DEFINITION OF MATERIAL

A statement or fact is material if it has a natural tendency to influence agency action.

Committee Comment

See *United States v. Garcia-Ochoa*, 607 F.3d 371 (4th Cir. 2010) ("The test of materiality is whether the false statement has a natural tendency to influence agency action or is capable of influencing agency action.")(citations omitted). See also *Kungys v. United States*, 485 U.S. 759, 771 (1988) ("[A] statement is material if it is capable of affecting or influencing a governmental decision through the use of clear, unequivocal, and convincing evidence.") To be material, the false statement "need not have actually influenced the agency decision." *U.S. v. Green*, 745 F.2d 1205, 1208 (9th Cir. 1984).

18 U.S.C. § 1591 SEX TRAFFICKING OF A MINOR—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] sex trafficking of a minor. In order for you to find [the; a] 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; maintained] [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

Acts that fall within the meaning of "commercial sex act" are listed in 18 U.S.C. § 1591(e)(3).

A person "recklessly disregards" a fact within the meaning of this offense when he is aware of, but consciously or carelessly ignores facts and circumstances that would reveal the fact that [force][threats of force][fraud][coercion] would be used to cause, or the minor status of the person identified in the indictment being caused to engage in a commercial sex act. See *United States v. Pina-Suarez*, 280 F. App'x 813 (11th Cir. 2008); *United States v. Wilson*, 2010 WL 2991561 (S.D. Fl. 2010).

The definitions of "interstate commerce" and "foreign commerce" are found at 18 U.S.C. § 10 and are set forth in Pattern Instruction on Definition of Interstate or Foreign Commerce, above, which consolidates and harmonizes various definitions of those terms.

18 U.S.C. § 1591 BENEFITTING FROM SEX TRAFFICKING OF A MINOR—ELEMENTS

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

1. The defendant knowingly benefitted, financially or by receiving a thing of value, from participation in a venture which has engaged in an act of [recruiting; enticing; harboring; transporting; providing; obtaining; maintaining] [the person identified in the indictment];

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

(a) force, fraud, or 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

Acts that fall within the meaning of "commercial sex act" are listed in 18 U.S.C. § 1591(e)(3).

A person "recklessly disregards" a fact within the meaning of this offense when he is aware of, but consciously or carelessly ignores facts and circumstances that would reveal the fact that [force; threats of force; fraud; coercion] would be used to cause, or the minor status of the person identified in the indictment being caused to engage in a commercial sex act. See *United States v. Pina-Suarez*, 280 F. App'x 813 (11th Cir. 2008); *United States v. Wilson*, 2010 WL 2991561 (S.D.Fl. 2010).

The definitions of "interstate commerce" and "foreign commerce" are found at 18 U.S.C. § 10 and are modified in Pattern Instruction on Definition of Interstate or Foreign Commerce, above, which consolidates and harmonizes various definitions of those terms.

18 U.S.C. § 1591(a)(1) SEX TRAFFICKING OF A MINOR OR BY FORCE, FRAUD, OR COERCION—ELEMENTS

[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, and coercion].

In order for you to find [the; a] defendant guilty of this count, 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] by any means [the person identified in the indictment]; and

2. The defendant:

(a) [knew; recklessly disregarded] the fact that [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) [knew; recklessly disregarded] the fact that [the person identified in the indictment] was under eighteen years of age and would be caused to engage in a commercial sex act; or

(c) had a reasonable opportunity to observe [the person identified in the indictment] who had not yet attained the age of 18, and knew or recklessly disregarded the fact that [the person identified in the indictment] 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 count you are considering], then you should find the defendant guilty of [that count].

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 count you are considering], then you should find the defendant not guilty of [that count].

Committee Comment

The Committee provides the following guidance regarding the inclusion of applicable subsections under section (2) of the instruction. For cases in which the defendant has been charged with sex trafficking of a non-minor using force, fraud, or coercion, the court should use only subsection (2)(a). For cases in which the defendant has been charged with sex trafficking of a minor that does not use force, fraud, or coercion, the court should not use subsection (2)(a) and only use subsections (2)(b) and (2)(c) as applicable. For cases in which the defendant has been charged with sex trafficking of a minor in which the government is pursuing multiple theories, the court should use those subsections of (2)(a)(b) and (c) that are applicable.

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).

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").

In a case that involves advertising, neither the "reckless disregard" nor the reasonable opportunity to observe aspect of the jury instruction should be included. Under § 1591(a) and § 1591(c), if the government charges "advertising", the *mens rea* element is knowingly.

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 F. App'x 592 (9th Cir. 2015); *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).

Although the Seventh Circuit has not explicitly approved a particular jury instruction for "recklessly disregards" in the context of § 1591, the Committee recommends defining it. In *United States v. Carson*, 870 F.3d 584, 601 (7th Cir. 2017), however, the Seventh Circuit found the following instruction erroneous:

> A person "recklessly disregards" a fact within the meaning of this offense when he is aware of, but consciously or carelessly ignores facts and circumstances that would reveal the fact that either: (1) force, threats of force, or coercion would be used to cause the person identified in the indictment to engage in a commercial sex act, or (2) the person identified in the indictment was under eighteen years of age and would be caused to engage in a commercial sex act.

The "or carelessly ignores" language lowered the requisite

standard. See also *United States v. Groce*, 891 F.3d 260, 269 (7th Cir. 2018) (wrong to instruct the jury that recklessly disregards can be satisfied by where the person "consciously *or* carelessly ignores facts and circumstances") (emphasis added). Other Circuits have associated "recklessly disregards" with consciously ignoring facts and circumstances. See *United States v. O'Neal*, 742 F. App'x 836, 842–43 (5th Cir. 2018) ("We have not had many cases that discuss a defendant's reckless disregard of a victim's age under § 1591. But the common definition of reckless disregard is "[c]onscious indifference to the consequences of an act"); *United States v. Roy*, 630 F. App'x 169 (4th Cir. 2015) (jury instruction provided "A person 'recklessly disregards' a fact within the meaning of this offense when he is aware of, but consciously ignores, facts and circumstances that would reveal that force, threats of force, fraud, or coercion, or any combination of such means, could be used to cause a victim to engage in a commercial sex act.").

The definitions of "interstate commerce" and "foreign commerce" are found at 18 U.S.C. § 10 and are set forth in Pattern Instruction on Definition of Interstate or Foreign Commerce, 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.

18 U.S.C. § 1591(e)(1) DEFINITION OF "ABUSE OR THREATENED ABUSE OF LAW OR LEGAL PROCESS"

"Abuse or threatened abuse of law or legal process" means the use or threatened use of a law or legal process, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to take or refrain from taking some action.

18 U.S.C. § 1591(e)(2) DEFINITION OF "COERCION"

"Coercion" means:

(1) threats of serious harm to or physical restraint against any person;

(2) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(3) the abuse or threatened abuse of law or the legal process.

Committee Comment

This instruction should be accompanied by the pattern instructions defining "serious harm" and/or "abuse or threatened abuse of law or legal process" set forth below.

18 U.S.C. § 1591(e)(3) DEFINITION OF "COMMERCIAL SEX ACT"

"Commercial sex act" means any sex act for which anything of value is given to or received by any person.

18 U.S.C. § 1591(e)(4) DEFINITION OF "SERIOUS HARM"

"Serious harm" means any harm, whether physical or non-physical, including psychological, financial, or reputational harm, that is sufficiently serious, under the circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

18 U.S.C. § 1591(e)(5) DEFINITION OF "VENTURE"

"Venture" means any group of two or more individuals associated in fact, whether or not a legal entity.

18 U.S.C. § 1623 FALSE DECLARATIONS BEFORE GRAND JURY OR COURT—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] making a false declaration before a grand jury or in a court. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant, while under oath, testified falsely before a [United States grand jury; Court of the United States] as charged in the indictment; and

2. The defendant's testimony concerned a material matter; and

3. The defendant knew the testimony was false. [Mistake; Confusion; Faulty memory] does not constitute knowledge that the testimony was false.

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 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 Seventh Circuit has defined perjury under 18 U.S.C. § 1623 as requiring "the willful intent to provide false testimony." *United States v. Dumeisi*, 424 F.3d 566, 582 (7th Cir. 2005); see also *United States v. Fawley*, 137 F.3d 458, 463 (7th Cir. 1998). The definition of "willful" in this context appears to be the equiva-

lent of "knowing" conduct. The language in the proposed instruction that distinguishes knowing conduct from confusion, mistake, or faulty memory comes from the same sentence of *Dumeisi* that requires "willful intent." It is included to draw the distinction the court drew in that case. The general instruction defining "knowing" conduct may be used in conjunction with this instruction.

If recantation is raised by the defendant, see Pattern Instruction § 1623 Recantation. As noted in the comment to that instruction, there is no Seventh Circuit authority on which side bears the burden of persuasion if recantation is raised. If the burden is placed on the government, a fourth element should be added to this instruction, *e.g.*, "4. The defendant did not recant the false [testimony; declaration]." If the burden is placed on the defendant, the form of instruction for affirmative defenses should be used. See Pattern Instruction 4.03. In that event, the court must make a determination regarding the nature of the defense burden, *e.g.*, preponderance of the evidence.

If the charge alleges multiple false statements, the jury must agree unanimously on the statement that constitutes perjury. See *United States v. Griggs*, 569 F.3d 341, 344 (7th Cir. 2009). In such a case, the court should give the unanimity instruction contained in Pattern Instruction 4.04.

18 U.S.C. § 1623 DEFINITION OF "MATERIALITY"

Testimony concerns a material matter if it is capable of impeding, interfering with or influencing the [court; jury; grand jury]. [The government is not required to prove that the testimony actually impeded, interfered with, or influenced the [court; jury; grand jury]].

Committee Comment

See*, e.g., United States v. Burke*, 425 F.3d 400, 414 (7th Cir. 2005); *United States v. Waldemer*, 50 F.3d 1379, 1382 (7th Cir. 1995). Materiality is an element of the offense and is an issue for the jury, not the court. See, *e.g.*, *United States v. Gellene*, 182 F.3d 578, 590 (7th Cir. 1999).

18 U.S.C. § 1623 RECORDS OR DOCUMENTS

Making or using a record or document knowing it to be false or to contain a false declaration constitutes making or using a false declaration.

18 U.S.C. § 1623 SEQUENCE OF QUESTIONS

In determining whether an answer to a question is false, you should consider the sequence of questions in which the question and answer occurred as an aid to understanding the defendant's intent when giving the answer.

Committee Comment

See *United States v. Bonacorsa*, 528 F.2d 1218, 1221 (2d Cir. 1976).

18 U.S.C. § 1623 INCONSISTENT STATEMENTS

If you find that the defendant under oath has knowingly made two or more declarations which are so inconsistent that one of them is necessarily false, you need not find which of the two declarations is false. If you find that the defendant believed each declaration to be true when made, then you must find the defendant not guilty.

Committee Comment

See 18 U.S.C. § 1623(c); *United States v. Bacani*, 236 F.3d 857, 859 (7th Cir. 2001); *United States v. Bomski*, 125 F.3d 1115, 1119 (7th Cir. 1997).

18 U.S.C. § 1623 RECANTATION

A person recants [false testimony; a false declaration] when, in the same continuous proceeding, he admits to the [grand jury; court] that his earlier declarations were false. The defendant must admit the falsity: (1) before the proceeding has been substantially affected by the false [testimony; declaration], and (2) before it has become apparent to the defendant that the false [testimony; declaration] has been or will be exposed to the [grand jury; court].

Committee Comment

1. General authority. See 18 U.S.C. § 1623(d); *United States v. DeLeon*, 603 F.3d 397, 404–05 (7th Cir. 2010).

2. Conjunctive vs. disjunctive. Section 1623(d) states that

> [w]here, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

Although the statute uses the word "or," the weight of appellate authority is that both of its conditions must be fulfilled before a defendant's admission of falsity bars prosecution. See, *e.g.*, *United States v. Moore*, 613 F.2d 1029, 1039–45 (D.C. Cir. 1979); *United States v. Scrimgeour*, 636 F.2d 1019, 1024 (5th Cir. 1981); *United States v. Fornaro*, 894 F.2d 508, 511 (2d Cir. 1990). There is, however, contrary appellate authority. See *United States v. Smith*, 35 F.3d 344, 345–47 (8th Cir. 1994). The Seventh Circuit has not addressed the point. The pattern instruction adopts the majority rule.

3. Burden of proof. There is a split of appellate authority regarding which side bears the burden of proof when the defendant claims recantation. Compare *United States v. Tobias*, 863 F.2d 685, 688 (9th Cir. 1988) (defendant must raise defense of recantation, but if raised, the government must disprove recantation beyond a reasonable doubt) with *United States v. Moore*, 613 F.2d 1029, 1044 (D.C. Cir. 1979) (defendant bears burden of proof on

recantation). The Committee does not take a position on this point. There is also authority suggesting that the viability of the defense may be an issue that the court can address prior to trial. See *United States v. Denison*, 663 F.2d 611, 618 (5th Cir. 1981).

4. "Has become manifest." *United States v. Denison*, 663 F.2d 611, 615–16 (5th Cir. 1981), construed the "has become manifest" clause as referring to whether it was manifest to the witness at the time of recantation that the grand jury or trial court knew or would come to learn of the declaration's falsity. *Moore*, 613 F.2d at 1043, implicitly accepts the *Denison* view. In the Seventh Circuit, both Judges Swygert and Pell, in separate statements following a *per curiam en banc* opinion in *United States v. Clavey*, 578 F.2d 1219 (7th Cir. 1978), adopted the view that the term "manifest" concerns whether the likelihood of exposure had become apparent to the witness, not to the court or grand jury to which the false testimony had been given. The use of the term "apparent" in the instruction as the equivalent of the statutory term "manifest" is taken from *United States v. Fornaro*, 894 F.2d 508, 511 (2d Cir. 1990).

5. "Substantially affected." The only circuit-level decision that addresses the phrase "substantially affected" does so by reviewing the standards for materiality in perjury prosecutions. That court concluded that false testimony that did not have a substantial effect for purposes of Section 1623(d) may still be material in the Section 1623(d) sense. See *Moore*, 613 F.2d at 1038. The court in *United States v. Krogh*, 366 F.Supp. 1255 (D.D.C. 1973), concluded as a matter of law that the grand jury had been substantially affected when it "acted" on issues that encompassed the given matter of the testimony which had been falsely given. The court in *United States v. Tucker*, 495 F. Supp. 607 (E.D.N.Y. 1980), citing *Krogh's* approach, found that a grand jury had been substantially affected when it was unable to indict a suspect due to the defendant's false declaration.

18 U.S.C. § 1701 OBSTRUCTION OF MAILS

Committee Comment

Because there is no present statutory or constitutional right to a jury trial under this section, the Committee has not drafted a jury instruction to cover this section.

18 U.S.C. § 1708 THEFT OF MAIL FROM AUTHORIZED DEPOSITORY—ELEMENTS

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

1. The defendant [stole; attempted to steal] a[n] [identify mail item charged in the indictment];

2. The [identify mail item charged in the indictment] was [in; on] a [mailbox; post office; letter box; mail receptacle; authorized depository for mail; mail route; mail carrier]; and

3. At the time the defendant [stole; attempted to steal] the [identify mail item charged in the indictment], the defendant intended to deprive the owner of the rights and benefits of ownership.

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 the 1999 pattern instructions, the definition of "stolen" was set forth in a separate definitional instruction. This instruction incorporates it directly into the elements instruction (as element 3) because the definition is simple and succinct. The definition is

taken from *United States v. Lampson*, 627 F.2d 62, 66 (7th Cir. 1980).

In addition to theft and attempted theft, 18 U.S.C. § 1708 also prohibits obtaining or attempting to obtain mail by fraud. In a case charging that sort of offense, the instruction must be modified accordingly.

Besides prohibiting what might be considered a run-of-the-mill theft by one person of mail from someone else's mailbox or from a letter carrier, § 1708 also prohibits the conversion of "misdelivered" mail, that is, mail that is delivered to someone other than the addressee. See *United States v. Palmer*, 864 F.2d 524, 526–27 (7th Cir. 1988). The Seventh Circuit has held that the statute also applies to "misaddressed" mail, that is, mail intended for Person A that mistakenly addressed to Person B. In Palmer, the court considered a case in which the defendant "found in her mailbox three envelopes addressed to Clifton Powell, Jr., the former occupant" of her home. *Id*. at 525. The envelopes contained checks, which the defendant converted. The court held that the defendant had violated section 1708, stating:

> From the perspectives of senders, addressees, (unintended) recipients, and the postal system, misdelivered and misaddressed mail are the same. The sender wants mail to go to the right person at the right address; an out-of-date address and an incorrect address (perhaps because of a typographical error) have the same consequences for the sender as a goof by the postal system. The intended addressee does not care whether the sender's use of an outdated address or an error by a letter carrier thwarts delivery. The unintended recipient learns in either case—from the name of the addressee, the address on the envelope, or both—that the item was meant for someone else. The recipient must return to the postal system an envelope sent to another, no matter the address written on it. . . . If misaddressed and misdelivered mail are identical from the perspectives of senders, addressees, accidental recipients, and postal system, on what account would they be different for purposes of § 1708? None that we can see. The statute protects the interests of sender and intended recipient in the privacy and integrity of their communication; these interests are identical whether the problem be misdelivery or misaddress.

Id. at 527.

Section 1708 does not cover cases in which mail is correctly addressed but is constructively delivered to a third person. In *United States v. Logwood*, 360 F.2d 905 (7th Cir. 1966), for

example, mail for tenants in a rooming house was always delivered to the landlord, who in turn delivered it to her tenants. The landlord's son stole a letter from the landlord. The court held that the letter was not stolen from an authorized mail receptacle and that the theft was therefore outside the purview of § 1708. Accord *United States v. Patterson*, 664 F.2d 1346 (9th Cir. 1982) (mail delivered to front desk of YMCA and held there in boxes for guests not in authorized mail receptacle under § 1708).

18 U.S.C. § 1708 MAIL THEFT ON OR NEXT TO A DEPOSITORY—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] theft of mail that had been left on or next to an authorized mail depository. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the following three elements beyond a reasonable doubt:

1. The defendant stole [identify specific mail item charged in the indictment];

2. At the time defendant stole [identify specific mail item charged in the indictment], it had been left for collection on or next to an authorized depository for mail; and

3. At the time the defendant stole the [identify mail item charged in the indictment], the defendant intended to deprive the owner of the rights and benefits of ownership.

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 the 1999 pattern instructions, the definition of "stolen" was set forth in a separate definitional instruction. This instruction incorporates it directly into the elements instruction (as element 3)

because the definition is simple and succinct. The definition is taken from *United States v. Lampson*, 627 F.2d 62, 66 (7th Cir. 1980).

18 U.S.C. § 1708 BUYING, RECEIVING, CONCEALING, OR UNLAWFULLY POSSESSING STOLEN MAIL—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [buying; receiving; concealing; unlawfully possessing] stolen mail. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the following three elements beyond a reasonable doubt:

1. The defendant knowingly [bought; received; concealed; possessed] [identify specific mail item as charged in the indictment];

2. The [identify specific mail item as charged in the indictment] previously had been [stolen; taken; embezzled] from [the mail; a post office; a letter box; a mail receptacle; a mail route; an authorized depository for mail; a mail carrier]; and

3. The defendant knew that [identify specific mail item as charged in the indictment] previously had been [stolen; taken; embezzled].

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 is unchanged from the 1999 version. The

wording of the second paragraph is intended to make clear to the jury, without burdening it with an additional instruction, that the defendant need not have stolen the mail himself.

18 U.S.C. § 1708 REMOVING CONTENTS OF/ SECRETING/ EMBEZZLING/DESTROYING MAIL

Committee Comment

Because the second and third sections of the first paragraph of 18 U.S.C. § 1708, which proscribe removing the contents of a piece of mail or secreting, embezzling or destroying mail or its contents, are unclear, little-used, and apparently repetitive of other sections of Title 18, the Committee has not drafted pattern instructions for them.

18 U.S.C. § 1709 THEFT OF MAIL BY OFFICER OR EMPLOYEE—ELEMENTS

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

1. The defendant was a Postal Service [employee; officer];

2. The [identify specific mail item involved], an article or thing contained within [identify specific mail item involved], [was entrusted to the defendant; came into the defendant's possession] for the purpose of being [conveyed by mail; carried or delivered by a person employed in any department of the Postal Service; forwarded through or delivered from a post office or postal station established by authority of the Postmaster General or of the Postal Service]; and

[3. The defendant embezzled the [identify specific mail item involved], an article or thing contained within the [identify specific mail item involved]. A person embezzles an item if he wrongfully takes it after it lawfully comes into his possession.]

[3. The defendant [stole; removed] with intent to convert to his own use an article or thing contained within the [identify specific mail item involved].]

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 consider-

ation 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

Section 1709 covers two crimes. The first clause of the statute makes it a crime for a Postal Service employee to "embezzle" an item of mail "or any article or thing therein" that has been entrusted to him. In other words, it is a crime under the first clause to embezzle either an item of mail or something contained within an item of mail. The second clause of the statute makes it a crime to "steal[ ], abstract[ ], or remove[ ] from any item of mail that has been entrusted to him "any article or thing contained therein." In other words, it is a crime under the second clause only to steal or remove something that is contained within an item of mail. See *United States v. Trevino*, 491 F.2d 74, 75 (5th Cir. 1974).

The pattern instruction covers both crimes. The third element will differ depending on whether the charge is made under the first clause or the second clause of the statute. If the defendant is charged under both clauses, separate instructions should be used.

The 1999 version of this instruction did not include a definition of the term "embezzle." This instruction does so. The definition is derived from *United States v. Alexander*, 415 F.2d 1352, 1356 (7th Cir. 1969) ("Embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully") (citing *United States v. Jannsen*, 339 F.2d 916, 918 (7th Cir. 1965)). See also Tenth Circuit Pattern Criminal Instruction 2.69 (2011); Eleventh Circuit Pattern Criminal Instruction O67 (2020).

For cases under the second clause of § 1709, which makes it a crime to "steal" or "remove" an article contained within an item of mail, the 1999 instruction and the current instruction require the government to prove that the Postal Service employee intended to convert the item stolen or removed to his own use. For this proposition, the 1999 Committee Comment cited a Fifth Circuit case, *United States v. Coleman*, 449 F.2d 772, 773 (5th Cir. 1971), and a district court case, *United States v. Rush*, 551 F. Supp. 148, 151 (S.D. Iowa 1982), while noting contrary authority, see *United States v, Greene*, 349 F. Supp. 1112, 1114 (D. Md. 1971), aff'd, 468 F.2d 920 (4th Cir. 1972). More recently, however, two other circuits have held that a prosecution under the "remove" provision of the

second clause of § 1709 does not require such intent—in other words, that a Postal Service employee's simple removal of an article from an item of mail is sufficient. See *United States v. Monday*, 614 F.3d 983, 985 (9th Cir. 2010); *United States v. Toomey*, 456 F.3d 1178, 1181–83 (10th Cir. 2006).

There is no Seventh Circuit authority on this issue. The current pattern instruction adheres to the Committee's 1999 formulation, but the Committee takes no position regarding the merits of these competing authorities.

18 U.S.C. § 1831 ECONOMIC ESPIONAGE (INCLUDING FEDERAL NEXUS AND KNOWLEDGE)

[The indictment charges the defendant[s] with; Count[s] ____ of the indictment charge[s] the defendant[s] with] economic espionage. It is against federal law to commit economic espionage. For you to find [defendant] guilty of this crime, the government must prove the following four elements beyond a reasonable doubt:

1. The [information] was a trade secret;

2. [[Defendant] knew that the [information] possessed was a trade secret;]

3. [Defendant] knowingly [stole; took without permission; obtained by fraud; copied without permission; downloaded without permission; duplicated without permission; conveyed without permission; received while knowing it was stolen or taken without permission] a trade secret; or [attempted to do so;] [conspired to do so and takes an act in furtherance to do so;]; and

4. [Defendant] intended or knew that the offense would benefit a foreign government, foreign instrumentality, or foreign agent.

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 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 term "trade secret" means all forms and types of financial, business, scientific, technical, economic or engineering information, including program devices, designs, prototypes, methods, techniques, processes, procedures, programs or codes, whether tangible or intangible, and however stored if the owner has taken reasonable measures to keep the information secret and if the information derives independent economic value, actual or potential, from not being generally known to or readily ascertainable through proper means, by another person who can obtain economic value from the disclosure or use of such information. 18 U.S.C. § 1839(3).

The second element is bracketed because the Seventh Circuit has not yet addressed whether the government must prove that the defendant knew that the information possessed was a trade secret. Both the Supreme Court and the Seventh Circuit have interpreted similarly structured statutes but reached different results. For example, in *Flores-Figueroa v. United States*, the Supreme Court interpreted 18 U.S.C. § 1028A, which prohibits "knowingly transfer[ring], possess[ing], or us[ing], without lawful authority, a means of identification of another person." 556 U.S. 646 (2009). The Supreme Court held that the word "knowingly" applied to all elements that followed it in the statute, such that the government must prove that the defendant knew that the "means of identification" he or she unlawfully transferred, possessed, or used did, in fact, belong to another person. *Id.* By contrast, in *United States v. Cox*, which was decided after *Flores-Figueroa*, the Seventh Circuit interpreted the prohibition in 18 U.S.C. § 2423 on "knowingly transport[ing] an individual who has not attained the age of 18 years" with intent that the individual engage in prostitution or a criminal sexual act. 577 F.3d 833, 834 (7th Cir. 2009). The Seventh Circuit held that § 2423 does not require the government to prove that the defendant knew the victim was a minor. *Id.* at 836. The Committee takes no position on whether the government needs to prove the defendant knew that the information described in the indictment was a "trade secret."

If the defendant is charged with conspiracy, the government must prove that the defendant committed an overt act to affect the object of the conspiracy. 18 U.S.C. § 1831(a)(5). For a pattern instruction regarding a conspiracy, see the Seventh Circuit's Pattern Instruction 5.08.

18 U.S.C. § 1832 THEFT OF TRADE SECRETS (INCLUDING FEDERAL NEXUS AND KNOWLEDGE)

[The indictment charges the defendant[s] with; Count[s] ____ of the indictment charge[s] the defendant[s] with] stealing trade secrets. It is against federal law to steal trade secrets. For you to find [defendant] guilty of this crime, the government must prove each of the six following elements beyond a reasonable doubt:

1. The [information] contained a trade secret;

2. [Defendant] intended to convert the trade secret to the economic benefit of anyone other than the trade secret's owner;

3. [Defendant]

   OPTION 1: knew or believed that such information was a trade secret;

   OPTION 2: knew or believed that such information was proprietary information, meaning belonging to someone else who had an exclusive right to it;]

4. [Defendant] knowingly [stole; took without permission; obtained by fraud; copied without permission; downloaded without permission; duplicated without permission; conveyed without permission; received while knowing it was stolen or taken without permission] a trade secret or [attempted to do so;] [conspired to do so and committed any act to effect the object of the conspiracy;];

5. The trade secret was related to or included in a [product or service used in or intended for use in] interstate or foreign commerce; and

6. [Defendant] intended or knew that this action would injure any owner of the trade secret.

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 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 term "trade secret" means all forms and types of financial, business, scientific, technical, economic or engineering information, including program devices, designs, prototypes, methods, techniques, processes, procedures, programs or codes, whether tangible or intangible, and however stored if the owner has taken reasonable measures to keep the information secret and if the information derives independent economic value, actual or potential, from not being generally known to or readily ascertainable through proper means, by another person who can obtain economic value from the disclosure or use of such information. 18 U.S.C. § 1839(3).

The second element is bracketed because the Seventh Circuit has not yet addressed whether the government must prove that the defendant knew that the information possessed was a trade secret. Both the Supreme Court and the Seventh Circuit have interpreted similarly structured statutes but reached different results. For example, in *Flores-Figueroa v. United States*, the Supreme Court interpreted 18 U.S.C. § 1028A, which prohibits "knowingly transfer[ring], possess[ing], or us[ing], without lawful authority, a means of identification of another person." 556 U.S. 646 (2009). The Supreme Court held that the word "knowingly" applied to all elements that followed it in the statute, such that the government must prove that the defendant knew that the "means of identification" he or she unlawfully transferred, possessed, or used did, in fact, belong to another person. *Id*. By contrast, in *United States v. Cox*, which was decided after *Flores-Figueroa*, the Seventh Circuit interpreted the prohibition in 18 U.S.C. § 2423 on

"knowingly transport[ing] an individual who has not attained the age of 18 years" with intent that the individual engage in prostitution or a criminal sexual act. 577 F.3d 833, 834 (7th Cir. 2009). The Seventh Circuit held that § 2423 does not require the government to prove that the defendant knew the victim was a minor. *Id*. at 836. In *United States v. Nosal*, the Ninth Circuit affirmed a formulation of the jury instruction for the third element of § 1832 that required the government to prove that the defendant "knew" the information "was a trade secret." 844 F.3d 1024 (9th Cir. 2016). The Committee takes no position on whether the government needs to prove the defendant knew that the information described in the indictment was a "trade secret."

The government does not need to prove that the owner of the secret suffered an actual economic loss as a result of the theft. *United States v. Yihao Pu*, 814 F.3d 818, 828 (7th Cir. 2016). The "independent economic value" attributable to the information remaining secret, see 18 U.S.C. § 1839(3)(B), need only be potential value, as distinct from actual value. *United States v. Hanjuan Jin*, 733 F.3d 718, 722 (7th Cir. 2013).

The Seventh Circuit has not yet decided whether to prove attempted theft of a trade secret the government must prove that the information was, in fact, a trade secret or whether it is sufficient that the government prove the defendant reasonably believed that the information was a trade secret. See *United States v. Lange*, 312 F.3d 263, 268–69 (7th Cir. 2002) (discussing this issue in dicta). Two circuits have decided this issue, and both held that the government need not prove that the information was actually a trade secret. See *United States v. Yang*, 281 F.3d 534 (6th Cir. 2002); *United States v. Hsu*, 155 F.3d 189, 203 (3d Cir. 1998).

If the defendant is charged with conspiracy, the government must prove that the defendant committed an overt act to affect the object of the conspiracy. 18 U.S.C. § 1832(a)(5). For a pattern instruction regarding a conspiracy, see the Seventh Circuit's Pattern Instruction 5.08.

18 U.S.C. § 1951 EXTORTION—NON-ROBBERY—ELEMENTS

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

1. That the defendant knowingly obtained money or property from [name of victim]; and

2. That the defendant did so by means of extortion [by] [threatened [force; violence]; fear; under color of official right], as that term is defined in these instructions; and

3. That [name of victim] consented to part with the money or property because of the extortion; and

4. That the defendant believed that [name of victim] parted with the money or property because of the extortion; and

5. That the conduct of the defendant affected 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

In *United States v. Jett*, 908 F.3d 252, 264–65 (7th Cir. 2018), the Seventh Circuit explicitly held that an overt act is not a required element of a Hobbs Act conspiracy charge. *Jett* explained that, like the antitrust and drug conspiracy statutes, the Hobbs Act's text contains no reference to an overt act. *Id.* at 265 (citing *Nash v. United States*, 229 U.S. 373, 378 (1913) (antitrust, 15 U.S.C. § 1), and *United States v. Shabani*, 513 U.S. 10, 13–14 (1994) (drugs, 21 U.S.C. § 846)). On that reasoning, the Seventh Circuit concluded: "We therefore hold that an overt act is not an element of a Hobbs Act conspiracy." *Id.* So the Pattern Instruction omits any mention of an overt-act element.

18 U.S.C. § 1951 ATTEMPTED EXTORTION—ELEMENTS

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

1. That the defendant knowingly [obtained or] attempted to obtain money or property from [name the victim]; and

2. That the defendant did so by means of extortion [by] [threatened [force; violence]; fear; under color of official right], as that term is defined in these instructions; and

3. That the defendant believed that [name the victim] [would have] parted with the money or property because of the extortion; and

4. That the conduct of the defendant affected, would have affected or had the potential to affect 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].

18 U.S.C. § 1951 EXTORTION—ROBBERY—ELEMENTS

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

1. That the defendant knowingly obtained money or property from or in the presence of [name of victim]; and

2. That the defendant did so by means of robbery, as that term is defined in these instructions; and

3. That the defendant believed that [name of victim] parted with the money or property because of the robbery; and

4. That the robbery affected 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

In *United States v. Jett*, 908 F.3d 252, 264–65 (7th Cir. 2018), the Seventh Circuit explicitly held that an overt act is not a required element of a Hobbs Act conspiracy charge. *Jett* explained that, like the antitrust and drug conspiracy statutes, the Hobbs

Act's text contains no reference to an overt act. *Id.* at 265 (citing *Nash v. United States*, 229 U.S. 373, 378 (1913) (antitrust, 15 U.S.C. § 1), and *United States v. Shabani*, 513 U.S. 10, 13–14 (1994) (drugs, 21 U.S.C. 846)). On that reasoning, the Seventh Circuit concluded: "We therefore hold that an overt act is not an element of a Hobbs Act conspiracy." *Id.* So the Pattern Instruction omits any mention of an overt-act element.

18 U.S.C. § 1951 DEFINITION OF "ROBBERY"

"Robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence [or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining].

Committee Comment

Use material in brackets when appropriate.

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

[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 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; that the official could have actually taken the action in return for which payment was made; 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 official power, he 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*:

> [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).

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*.

18 U.S.C. § 1951 DEFINITION OF "EXTORTION"

[Attempted] "Extortion" by [threatened [force; violence]; fear] means the wrongful use of [threatened [force; violence]; fear] to obtain [or attempt to obtain] money or property. "Wrongful" means that the defendant had no lawful right to obtain [money; property] in that way. ["Fear" includes fear of economic loss. This includes fear of a direct loss of money, fear of harm to future business operations or a fear of some loss of ability to compete in the marketplace in the future if the victim did not pay the defendant.] The government must prove that the victim's fear [was; would have been] reasonable under the circumstances. [However, the government need not prove that the defendant actually intended to cause the harm threatened.]

Committee Comment

See *United States v. Mitov*, 460 F.3d 901, 907–09 (7th Cir. 2006); see also *United States v. Capo*, 791 F.2d 1054, 1062 (2d Cir. 1986); *United States v. Beeler*, 587 F.2d 340, 344 (6th Cir. 1978); *United States v. Brecht*, 540 F.2d 45, 51–52 (2d Cir. 1976); *United States v. Crowley*, 504 F.2d 992, 997 (7th Cir. 1974); *United States v. DeMet*, 486 F.2d 816, 819–20 (7th Cir. 1973); *United States v. Biondo*, 483 F.2d 635, 640 (8th Cir. 1973); *United States v. Varlack*, 225 F.2d 665, 668–69 (2d Cir. 1955).

18 U.S.C. § 1951 DEFINITION OF "PROPERTY"

"Property" includes [name that the property that was extorted as charged in the indictment].

Committee Comment

In cases where there is no dispute that the item at issue is property (such as in cases in which the "property" is money), the Committee suggests that the appropriate term be incorporated into the elements instruction rather than using a separate definitional instruction.

18 U.S.C. § 1951 DEFINITION OF "INTERSTATE COMMERCE"

With respect to Count[s] ____, the government must prove that the defendant's actions [affected; had the potential to affect] interstate commerce in any way or degree. This occurs if the natural consequences of the defendant's actions [were; would have been] some effect on interstate commerce, however minimal. [This would include reducing the assets of a [person who; business that] customarily purchased goods from outside the state of [name the state] or actually engaged in business outside the state of [name the state], and if those assets would have been available to the [person; business] for the purchase of such goods or the conducting of such business if not for defendant's conduct.] It is not necessary for you to find that the defendant knew or intended that his actions would affect interstate commerce [or that there have been an actual effect on interstate commerce].

[Even though money was provided by a law enforcement agency as part of an investigation, a potential effect on interstate commerce can be established by proof that the money, if it had come from _____, would have affected interstate commerce as I have described above.]

Committee Comment

Under the Hobbs Act the government need only show a *de minimus* actual effect on interstate commerce, or where there is no actual effect, a realistic probability of or potential for an effect on interstate commerce. *United States v. Re*, 401 F.3d 828, 835 (7th Cir. 2005) (given that the Hobbs Act criminalizes attempted as well as completed crimes, the impact on commerce need not be actual, it is enough that the conduct had the potential to impact commerce); *United States v. Moore*, 363 F.3d 631 (7th Cir. 2004) (extortion case); *United States v. Sutton*, 337 F.3d 792 (7th Cir. 2003) (robbery case); *United States v. Peterson*, 236 F.3d 848, 851–52 (7th Cir. 2001) (holding that Supreme Court decisions in *United States v. Morrison*, 529 U.S. 598 (2000) and *United States*

v. Lopez, 514 U.S. 549 (1995), do not undermine prior holdings that a de minimus effect on interstate commerce is constitutionally satisfactory in a Hobbs Act prosecution). See also *United States v. Carter*, 530 F.3d 565, 572 (7th Cir. 2008) (when the government uses a depletion of assets theory to prove the interstate commerce element, there is no requirement that the business directly purchase its items through interstate commerce, it is enough that the business purchase such items through a wholesaler or other intermediary, and the money used can be the FBI's and not the money of the business itself); *United States v. Watson*, 525 F.3d 583, 589 (7th Cir. 2008) (government's theory that the money that defendants stole traveled in interstate commerce was legally insufficient as cash itself cannot serve as the jurisdictional hook or any robbery would be a federal crime); *United States v. Mitov*, 460 F.3d 901, 908 (7th Cir. 2006) (government could prove effect on interstate commerce through temporary depletion of assets); *United States v. McCarter*, 406 F.3d 460, 462 (7th Cir. 2005) (in a case charging attempted robbery in violation of the Hobbs Act, "the question is merely whether commerce would have been affected had the attempt succeeded"); *United States v. Marrero*, 299 F.3d 653, 655 (7th Cir. 2002) (case charging multiple robberies of drug dealers, each individual criminal act need not have a measurable impact on commerce, it is enough if a class of acts has such an impact).

Much of the language in brackets is designed for undercover cases charged as attempted extortion. Courts should feel free to customize the bracketed sentence in the first paragraph regarding the "asset depletion" theory to fit the allegations in particular cases.

18 U.S.C. § 1952 INTERSTATE AND FOREIGN TRAVEL OR TRANSPORTATION IN AID OF RACKETEERING ENTERPRISES—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] interstate or foreign [travel; transportation] in aid of racketeering enterprises. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant traveled or caused another to travel in interstate or foreign commerce, or used or caused to be used a facility in interstate or foreign commerce, including the mail; and

2. The defendant did so with the intent to [distribute the proceeds of an unlawful activity; commit a crime of violence to further unlawful activity; promote, manage, establish, carry on an unlawful activity; facilitate the promotion, management, establishment or carrying on of an unlawful activity]; and

3. Thereafter the defendant did [distribute or attempt to distribute the proceeds of an unlawful activity; commit or attempt to commit a crime of violence to further unlawful activity;[1] promote, manage, establish, carry on an unlawful activity; attempt to promote, manage, establish, carry on an unlawful activity; facilitate the promotion, management, establishment, or carrying on of an unlawful activity; attempt to facilitate the promotion, management, or carrying on of an unlawful activity].

If you find from your consideration of all the evi-

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[1]Where this is the predicate act, the elements of the crime of violence must be submitted to the jury. See Committee Comment.

dence 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

Facility is a broad term that can have many meanings. The most common 'facilities' are telephone systems, highways, banking systems, and the postal service. *United States v. Peskin*, 527 F.2d 71 (1975) (interstate transmission, deposit and clearance of checks of land development company considered use of interstate facilities); *United States v. Campione*, 942 F.2d 429 (7th Cir. 1991) (credit card charges authorized through interstate telephone calls considered 'interstate facility'); *United States v. Miller*, 379 F.2d 483 (7th Cir. 1967) (tickertape displaying baseball scores was transmitted from Illinois to Indiana on Western Union tickertape so that customers could check winning tickets in illegal baseball pool; this was sufficient use of interstate facility to satisfy the statute).

In *Haynes v. United States*, 936 F.3d 683, 692 (7th Cir. 2019), the Seventh Circuit held that a conviction under § 1952(a)(2)(B) requires proof beyond a reasonable doubt that the defendant committed or attempted to commit a specific crime of violence on which the jury must unanimously agree. Because the elements of the underlying crime of violence are incorporated as elements of the § 1952(a)(2)(B) charge, the jury must be instructed on the elements of the crime of violence. *Haynes*, 936 F.3d at 692–94. What constitutes a crime of violence under § 1952 remains a question of law for the judge to determine. *Id.* at 693.

For example, if the alleged underlying crime of violence is First-degree Homicide in violation of Wisconsin Stats. § 940.01, the jury should be instructed as follows:

The indictment charges the defendant with interstate travel in aid of racketeering enterprises. In order for you to find the defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. The defendant traveled in interstate commerce; and

2. The defendant did so with the intent to commit a crime of violence, namely First Degree Intentional Homicide, to further another unlawful activity; and

3. Thereafter the defendant did commit First Degree Intentional Homicide to further another unlawful activity. In order to satisfy its burden of proof as to this element, the government must prove beyond a reasonable doubt that:

   a. The defendant caused or attempted to cause the death of another human being; and

   b. The defendant acted with intent to kill that person or another.

18 U.S.C. § 1952 DEFINITION OF "INTERSTATE COMMERCE"

The term "interstate commerce" means travel between one state and another state or use of an interstate facility, including the mail.

The [interstate travel; use of an interstate facility] must relate significantly to the illegal activity charged in the indictment; that is, the relationship must be more than minimal or incidental. The [interstate travel; use of an interstate facility], however, need not be essential to the success of such illegal activity.

The defendant need not have contemplated or knowingly caused the [interstate travel; use of an interstate facility].

Committee Comment

To support a conviction under 18 U.S.C. § 1952, interstate travel need not be indispensable to illegal activity, it is necessary only that such use facilitates illegal activity. *United States v. McNeal*, 77 F.3d 938, 944 (7th Cir. 1996). The defendants need not cross state lines personally to be liable under § 1952. *United States v. Shields*, 793 F.Supp. 768, 774–75 (N.D.Ill. 1991) (finding defendants guilty where FBI agents had to travel and engage in interstate commerce to attempt bribe of defendant judge), aff'd, 999 F.2d 1090 (7th Cir. 1993). For additional cases discussing § 1952, see *United States v. Altobella*, 442 F.2d 310,315 (7th Cir. 1971); see *United States v. Raineri*, 670 F.2d 702, 717 (7th Cir. 1982); and *United States v. McCormick*, 442 F.2d 316, 318 (7th Cir. 1971). For cases discussing § 2314, see *United States v. Beil*, 577 F.2d 1313, 1316, 1319–20 (5th Cir. 1978); *United States v. Kelly*, 569 F.2d 928, 934–35 (5th Cir. 1978). The requirements of a significant relationship between the interstate commerce and the illegal activity apparently may not apply to statutes other than the Travel Act.

18 U.S.C. § 1952 DEFINITION OF "UNLAWFUL ACTIVITY"—BUSINESS ENTERPRISE

["Unlawful activity" means any business enterprise involving [gambling; liquor on which the federal excise tax has not been paid; narcotics or controlled substance; prostitution], in violation of the laws of the state in which they are committed or of the United States.]

["Unlawful activity" means [extortion; bribery; arson], in violation of the laws of the state in which it is committed or of the United States.]

Committee Comment

The first paragraph refers to a business enterprise involving the offenses listed, while the second paragraph refers to offenses that are not referred to in the statute as part of a business enterprise.

18 U.S.C. § 1952 DEFINITION OF UNLAWFUL BUSINESS ACTIVITY—CONTROLLED SUBSTANCES

I instruct you that [specify] is a controlled substance.

Committee Comment

The controlled substances within the purview of 18 U.S.C. § 1952 are those drugs, other substances or immediate precursors included in Schedule I, II, III, IV, or V, of 21 U.S.C. § 812(b). See 18 U.S.C. § 1952(b)(1) (1986).

18 U.S.C. § 1956 DEFINITION OF "PROCEEDS"

(For offenses alleged to have occurred before May 20, 2009)

The term "proceeds" is defined as the net proceeds, or profits, remaining after deducting all of the direct ordinary and necessary expenses, if any, incurred in acquiring the proceeds.

(For offenses alleged to have occurred on or after May 20, 2009)

The term "proceeds" is defined as any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.

Committee Comment

For offenses alleged to have occurred before May 20, 2009, the term "proceeds" as it is used in 18 U.S.C. § 1956 means profits, not gross receipts. *United States v. Santos*, 553 U.S. 507 (2008) (plurality opinion). Justice Stevens' concurring opinion was not as broad as the plurality opinion; however, independent of the *Santos* opinion, the law of this Circuit is consistent with the plurality opinion. *United States v. Scialabba*, 282 F. 3d 475, 478 (7th Cir. 2002) (in an illegal gambling prosecution: "We now hold that the word 'proceeds' in § 1956(a)(1) denotes net rather than gross income of an unlawful venture."); *United States v. Malone*, 484 F.3d 916 (7th Cir. 2007) (cash receipts from narcotics business used to purchase more narcotics are not considered "proceeds"). *Scialabba* and *Malone* explained that "the act of paying a criminal operation's expenses out of gross income is not punishable as a transaction in proceeds under § 1956(a)(A)(i)." *Malone*, 484 F.3d at 921 (citing *Scialabba*). If *Scialabba* remains the governing law—that is, if *Scialabba* survived *Santos*—then all "ordinary and necessary expenses," including capital expenditures, do not constitute proceeds. *United States v. Hodge*, 558 F.3d 630, 633–34 (7th Cir. 2009); *United States v. Lee*, 558 F.3d 638, 644 (7th Cir. 2009). The Seventh Circuit has not definitively decided whether certain capital expenditures, such as advertising expenses, that would not duplicate the underlying crime fall within Justice Stevens's—and thus perhaps a majority of the Supreme Court's—view of net proceeds. *Hodge*, 558 F.3d at 634 (refraining from deciding the

question because the government conceded the issue in that appeal and the jury verdict did not distinguish between advertising and other expenses).

It is unsettled whether "proceeds" means net profits for concealment money laundering offenses, 18 U.S.C. § 1956(a)(1)(B), (a)(2)(B), (a)(3)(B), as distinct from promotional money laundering. In *United States v. Aslan*, 644 F.3d 526, 541–549 (7th Cir. 2011), the Seventh Circuit explained the difference between the two forms of money laundering, and concluded that neither the Supreme Court nor the Seventh Circuit had held that "proceeds" means net profits for concealment money laundering. In *Aslan*, the Seventh Circuit did not definitively decide the issue because the only question on appeal was whether it was plain error not to use the net-profits interpretation, and the court held that it was not plain error.

For offenses alleged to have occurred after May 20, 2009, the Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, overruled *Santos* by inserting an explicit definition of proceeds: "the term 'proceeds' means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." 18 U.S.C. § 1956(c)(9).

18 U.S.C. § 1956 DEFINITION OF KNOWLEDGE REQUIREMENT

The government must prove that the defendant knew that the property involved in the financial transaction represented the proceeds of some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law. The government is not required to prove that the defendant knew that the property involved in the transaction represented the proceeds of [name specified unlawful activity].

Committee Comment

This definition is set forth in 18 U.S.C. § 1956(c)(1).

18 U.S.C. § 1956 DEFINITION OF "TRANSACTION"

The term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected.

Committee Comment

This definition is set forth in 18 U.S.C. § 1956(c)(3), and should be modified to conform to the alleged facts in the particular case. Usually the transaction at issue does not include all the examples set forth above. The court should include only those applicable to the facts of the case.

18 U.S.C. § 1956 DEFINITIONS

The term "financial transaction" means [a purchase, sale, transfer, delivery, or other disposition involving one or more monetary instruments, which in any way or degree affects interstate [or foreign] commerce] [or] [a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or use of a safe deposit box involving the use of a financial institution which is engaged in or the activities of which affect interstate [or foreign] commerce.]

The term "monetary instruments" includes coin or currency of the United States, personal checks, bank checks, and money orders.

The term "financial institution" includes, for example, commercial banks, trust companies, businesses engaged in vehicle sales including automobile sales, and businesses and persons engaged in real estate closings and settlements.

"Interstate commerce" means trade, transactions, transportation or communication between any point in a state and any place outside that state, or between two points within a state through a place outside the state. "Foreign commerce" means trade, transactions, transportation, or communication between a point in one country and a place outside that country, or between two points within a country through a place outside that country.

When [a financial institution; a business; an individual] in [name the state] is engaged in commerce outside of that state, or when [a financial institution; a business; an individual] in [name of state] purchases goods or services which come from outside that state, then the activities of that [financial institution; a business; an individual] affect interstate commerce.

The government must prove that it was foreseeable that defendant's acts would affect interstate or foreign commerce. The government need not prove that the defendant knew or intended that his actions would affect interstate or foreign commerce.

Committee Comment

The definition of "financial transaction" is set forth at 18 U.S.C. § 1956(c)(4).

This instruction includes the transactions most commonly prosecuted under this statute. Other types of transactions—for example a transaction involving the transfer of title to real estate or an automobile—may be included where appropriate.

18 U.S.C. § 1956 DEFINITION OF "CONCEAL OR DISGUISE"

The term "conceal or disguise" means to hide the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.

Committee Comment

See *United States v. Esterman*, 324 F.3d 565, 570 (7th Cir. 2003) (quoting *United States v. Jackson*, 935 F.2d 832, 843 (7th Cir. 1991)), overruled on other grounds, *Cuellar v. United States*, 553 U.S. 550 (2008) (overruling *Esterman* to the extent that it held that creating the appearance of legitimate wealth was the only means to prove concealment or disguise).

18 U.S.C. § 1956(a)(1)(A)(i) MONEY LAUNDERING—PROMOTING UNLAWFUL ACTIVITY—ELEMENTS

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

1. The defendant knowingly conducted or attempted to conduct a financial transaction; and

2. Some or all of the property involved in the financial transaction was proceeds of [name of specified unlawful activity]; and

3. The defendant knew that the property involved in the financial transaction represented proceeds of some form of unlawful activity; and

4. The defendant engaged in the financial transaction with the intent to [further the unlawful activity; promote the continued success of] the [name of specified unlawful activity].

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 financial transaction need not involve "all" illegal proceeds, only "some" illegal proceeds. See *United States v. Jackson*, 983 F.2d 757, 765 (7th Cir. 1993) (interpreting the term "involves the proceeds" in § 1956(a)(1)). An instruction to this effect is provided in Pattern Instruction 18 U.S.C. § 1956 Definition of Transaction.

See *United States v. Santos*, 553 U.S. 507, 517–18 (2008) (plurality opinion) ("promote the carrying on" means "[t]o contribute to the prosperity of something, or to further something") (internal quotations omitted); *United States v. Krasinski*, 545 F.3d 546, 551 (7th Cir. 2008) (transporting money to buy drugs "promoted the carrying on" of the drug conspiracy, even though the drug sales were part and parcel of the conspiracy, because the transportation "contributed to the drug conspiracy's prosperity and furthered it along") (citing *United States v. Malone*, 484 F.3d 916, 921 (7th Cir. 2007)) (delivery of cash for drugs satisfied the promotion element because it promoted "the continued prosperity of the underlying offense") (quoting *United States v. Febus*, 218 F.3d 784, 790 (7th Cir. 2000)).

18 U.S.C. § 1956(a)(1)(A)(ii) MONEY LAUNDERING—TAX VIOLATIONS—ELEMENTS

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

1. The defendant knowingly conducted or attempted to conduct a financial transaction; and

2. Some or all of the property involved in the financial transaction was proceeds of [name of specified unlawful activity]; and

3. The defendant knew that the property involved in the financial transaction represented proceeds of some form of unlawful activity; and

4. The defendant engaged in the financial transaction with the intent to engage in [tax evasion; willfully making or subscribing false statements on a tax, return, document or statement made under penalty of perjury].

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 financial transaction need not involve "all" illegal proceeds, only "some" illegal proceeds. See *United States v. Jackson*, 983 F.2d 757, 765 (7th Cir. 1993) (interpreting the term "involves the proceeds" in § 1956(a)(1)). An instruction to this effect is provided in Pattern Instruction 18 U.S.C. § 1956 Definition of Transaction.

Modify as necessary if the fourth element constitutes a violation of Title 26, U.S.C., §§ 7206(2), 7206(3), 7206(4), or 7206(5).

18 U.S.C. § 1956(a)(1)(B)(i) MONEY LAUNDERING—CONCEALING OR DISGUISING—ELEMENTS

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

1. The defendant knowingly conducted or attempted to conduct a financial transaction; and

2. Some or all of the property involved in the financial transaction was proceeds of [name of specified unlawful activity]; and

3. The defendant knew that the property involved in the financial transaction represented proceeds of some form of unlawful activity; and

4. The defendant knew that the transaction was designed in whole or in part to [conceal; disguise] [the nature; the location; the source; the ownership; the control] of the proceeds of [name of specified unlawful activity].

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 financial transaction need not involve "all" illegal proceeds, only "some" illegal proceeds. See *United States v. Jackson*, 983 F.2d 757, 765 (7th Cir. 1993) (interpreting the term "involves the proceeds" in § 1956(a)(1)). An instruction to this effect is provided in Pattern Instruction 18 U.S.C. § 1956 Definition of Transaction.

In light of *Cuellar v. United States*, 553 U.S. 550 (2008), which interpreted a similar conceal/disguise provision in 18 U.S.C. § 1956(a)(2)(B)(i), the word "designed" in § 1956(a)(1)(b)(i) likely also means that the purpose or intent of the transaction must be to conceal or disguise one of the listed attributes. *Cuellar* is discussed further in the comment on the instruction for § 1956(a)(2)(B)(i).

18 U.S.C. § 1956(a)(1)(B)(ii) MONEY LAUNDERING—AVOIDING REPORTING—ELEMENTS

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

1. The defendant knowingly conducted or attempted to conduct a financial transaction; and

2. Some or all of the property involved in the financial transaction was proceeds of [name of specified unlawful activity]; and

3. The defendant knew that the property involved in the financial transaction represented proceeds of some form of unlawful activity; and

4. The defendant knew that the transaction was designed in whole or in part to avoid [a transaction reporting requirement under state or federal law; the filing of a Currency Transaction Report].

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 appropriate cases the court may define the underlying transaction reporting requirement.

The financial transaction need not involve "all" illegal proceeds, only "some" illegal proceeds. See *United States v. Jackson*, 983 F.2d 757, 765 (7th Cir. 1993) (interpreting the term "involves the proceeds" in § 1956(a)(1)). An instruction to this effect is provided in Pattern Instruction 18 U.S.C. § 1956 Definition of Transaction.

18 U.S.C. § 1956(a)(2)(A) MONEY LAUNDERING—INTERNATIONAL PROMOTION—ELEMENTS

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

1. The defendant knowingly [transported, transmitted, or transferred; attempted to transport, transmit, or transfer] a monetary instrument or funds; and

2. The [transportation, transmittal, or transfer; attempted transportation, transmittal, or transfer] was [from a place in the United States to or through a place outside the United States; to a place in the United States from or through a place outside the United States]; and

3. The defendant did so with the intent to [further the; promote the continued success of] [name of specified unlawful activity].

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

Because 18, U.S.C. § 1956(a)(2)(A) contains no reference to

"proceeds," *United States v. Santos*, 553 U.S. 507 (2008), is inapplicable in this context. *United States v. Krasinski*, 545 F. 3d 546, 551 (7th Cir. 2008) ("The absence of a 'proceeds' requirement in section 1956(a)(2)(A) reflects that Congress decided to prohibit any funds transfer out of the country that promotes the carrying on of certain unlawful activity.")

18 U.S.C. § 1956(a)(2)(B)(i) MONEY LAUNDERING—INTERNATIONAL CONCEALING OR DISGUISING—ELEMENTS

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

1. The defendant knowingly [transported, transmitted, or transferred; attempted to transport, transmit or transfer] a [monetary instrument; funds]; and

2. The [transportation, transmittal, or transfer; attempted transportation, transmittal, or transfer] was [from a place in the United States to or through a place outside the United States; to a place in the United States from or through a place outside the United States]; and

3. The defendant did so knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represented the proceeds of some form of unlawful activity; and

4. The defendant knew that the transportation, transmission, or transfer was designed, in whole or in part, to [conceal; disguise] [the nature; the location; the source; the ownership; the control of the proceeds] of [name of specified unlawful activity].

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 consider-

ation 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

Cuellar v. United States, 553 U.S. 550 (2008), held that the transportation contemplated in 18 U.S.C. § 1956(a)(2)(B)(i) must itself be intended to avoid the detection of the funds. It is not sufficient that the funds be hidden or concealed during the transportation. As the Supreme Court explained in *Cuellar,* the word "designed" in this statute refers not to the manner in which the funds are concealed, but to the purpose or intent accompanying the transportation.

18 U.S.C. § 1957 UNLAWFUL MONETARY TRANSACTIONS IN CRIMINALLY DERIVED PROPERTY—ELEMENTS

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

1. The defendant engaged or attempted to engage in a monetary transaction; and

2. That defendant knew the transaction involved criminally derived property; and

3. The property had a value greater than $10,000; and

4. The property was derived from [name of specified unlawful activity]; and

5. The transaction occurred in the [United States].

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 also allows for prosecution where the offense occurs within the special maritime and territorial jurisdiction of the

United States, and where the offense occurs outside the United States but by qualifying persons as defined in 31 U.S.C. § 3077.

Section 1957(c) clearly states that the government need not prove that the defendant knew the offense from which the criminally derived property was derived was specified unlawful activity.

18 U.S.C. § 1957 DEFINITIONS

The term "monetary transaction" means the deposit, withdrawal, transfer or exchange, in or affecting interstate commerce, of funds or a monetary instrument, by, through, or to a financial institution.

[The alleged monetary transaction need not involve "all" criminally derived property, only over $10,000 in criminally derived property.]

"Interstate commerce" means trade, transactions, transportation or communication between any point in a state and any place outside that state or between two points within a state through a place outside the state.

The term "financial institution" includes [commercial banks; trust companies; businesses engaged in vehicle sales including automobile sales; businesses and persons engaged in real estate closings or settlements].

The term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense.

Committee Comment

Financial institutions are defined in 31 U.S.C. § 5312 (a)(2), and specific cases may require giving the statutory language to the jury.

Although the monetary transaction must involve criminally derived property valued at over $10,000, there is no requirement that all of the money involved in the transaction was criminally derived. *United States v. Haddad*, 462 F.3d 783, 791–92 (7th Cir. 2006) (although transactions of $16,000 and $15,000 were drawn from bank account where legitimate and illegitimate funds were commingled, evidence was sufficient because the "vast majority" of funds in the account were illegitimate and money is fungible). In a case where the transaction might include both legitimate funds and criminally derived property, the bracketed language instructs the jury that the transaction need not involve "all" criminally derived property, only over $10,000.

The transaction that created the criminally-derived property must be distinct from the charged money laundering transaction, because § 1957 criminalizes transactions in criminally-derived property, not the transactions that create the property—the latter transactions comprise the underlying specified activity itself. *United States v. Seward*, 272 F. 3d 831, 836 (7th Cir. 2001) (citing *United States v. Mankarious*, 151 F. 3d 694, 705 (7th Cir. 1998)). In the context of ongoing criminal activity, however, such as a fraud scheme, "there is no requirement that the entire fraudulent scheme be complete before the defendant starts laundering the proceeds from the early portions of the scheme." *Seward,* 272 F 3d at 837. In appropriate cases further clarification may be appropriate to address this merger issue.

Furthermore, the only transaction that is chargeable and may be presented to the jury is the "initial" transaction involving the criminally derived property. *Unites States v. Wright*, 651 F.3d 764, 771–72 (7th Cir. 2011) (if a "person used $1,000 in proceeds from marijuana to buy Apple stock in 2004, would he violate § 1957 if he sold that stock in 2011 for more than $31,000? We think not.")

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

[The indictment charges the defendant[s] with; Count ___ of the indictment charges the defendant[s] with] [committing; conspiring to commit; attempting to commit] [name the crime of violence] in aid of racketeering. In order for you to find [the; a] defendant guilty of this count, 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 [name the crime of violence] [as charged in Count ___ of the indictment]; and

5. The defendant committed the [name the crime of violence] 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 [name 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 count you are considering], then you should find the defendant guilty [of that count].

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 count you are considering], then you should find the defendant not guilty [of that count].

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).

18 U.S.C. § 1961(4) ENTERPRISE—LEGAL ENTITY

The term "enterprise" includes a[n] [type of entity].

Committee Comment

Where there is no dispute as to whether the "enterprise" charged in the indictment falls within the statutory definition, that enterprise should be inserted in the bracketed portion of this instruction. Where there is a dispute, all potential forms of enterprise listed in the statute should be included.

18 U.S.C. § 1961(4) ENTERPRISE—ASSOCIATION IN FACT

The term "enterprise" can include a group of people [or legal entities] associated together for a common purpose of engaging in a course of conduct. This group may be associated together for purposes that are both legal and illegal.

In considering whether a group is an "enterprise," you may consider whether it has an ongoing organization or structure, either formal or informal, and whether the various members of the group functioned as a continuing unit. [A group may continue to be an "enterprise" even if it changes membership by gaining or losing members over time.]

The government must prove that the group described in the indictment was the "enterprise" charged, but need not prove each and every allegation in the indictment about the enterprise or the manner in which the enterprise operated. The government need not prove the association had any form or structure beyond the minimum necessary to conduct the charged pattern of racketeering.

Committee Comment

In appropriate cases, the court should include language indicating that an "association in fact" may include legal entities. See *United States v. Masters*, 924 F.2d 1362 (7th Cir. 1991).

An association-in-fact includes any "group of persons associated together for a common purpose of engaging in a course of conduct." *Boyle v. United States*, 556 U.S. 938, 946 (2009). The Supreme Court reads this definition broadly. An association-in-fact under RICO need not have any structural features beyond "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Id.*; see also *United States v. Brown*, 973 F.3d 667, 682 (7th Cir. 2020).

18 U.S.C. § 1962 DEFINITION OF "INTERSTATE COMMERCE"

"Interstate commerce" includes the movement of money, goods, services or persons from one state to another [or between another country and the United States]. This would include the purchase or sale of goods or supplies from outside [name the state[s] in which the enterprise was located], the use of interstate mail or wire facilities, or the causing of any of those things. If you find that beyond a reasonable doubt either (a) that [name the enterprise] made, purchased, sold or moved goods or services that had their origin or destination outside [name the state[s] in which the enterprise was located], or (b) that the actions of [name the enterprise] affected in any degree the movement of money, goods or services across state lines, then interstate commerce was engaged in or affected.

The government need only prove that [name the enterprise] as a whole engaged in interstate commerce or that its activity affected interstate commerce to any degree, although proof that racketeering acts did affect interstate commerce meets that requirement. The government need not prove that [the; a] defendant engaged in interstate commerce, or that the acts of [the; a] defendant affected interstate commerce.

18 U.S.C. § 1962(c) SUBSTANTIVE RACKETEERING—ELEMENTS

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

1. That [name] was an enterprise; and

2. That the defendant was associated with [or employed by] the enterprise; and

3. That the defendant knowingly conducted or participated in the conduct of the affairs of [name] through a pattern of racketeering activity as described in Count __; and

4. That the activities of [name] affected interstate commerce[.] [; and]

[5. That the commission of at least one of the racketeering acts described in Count __ occurred on or after (five years prior to the return of the indictment).]

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].

18 U.S.C. § 1962(c) PATTERN REQUIREMENT—SUBSTANTIVE RACKETEERING

In order to find a "pattern of racketeering activity" for purposes of Count __, you must find beyond a reasonable doubt that the defendant committed [or caused another person to commit] at least two racketeering acts described in Count __, and that those acts were in some way related to each other and that there was continuity between them[, and that they were separate acts].

Although a pattern of racketeering activity must consist of two or more acts, deciding that two such acts were committed, by itself, may not be enough for you to find that a pattern exists.

Acts are related to each other if they are not isolated events, that is, if they have similar purposes, or results, or participants, or victims, or are committed a similar way[, or have other similar distinguishing characteristics; or are part of the affairs of the same enterprise].

There is continuity between acts if, for example, they are ongoing over a substantial period, or if they are part of the regular way some entity does business or conducts its affairs.

The government need not prove that all the acts described in Count __ were committed, but you must unanimously agree as to which two or more racketeering acts the defendant committed [or caused to be committed] in order to find the defendant guilty of that count.

18 U.S.C. § 1962(c) SUBPARTS OF RACKETEERING ACTS

Each of the racketeering acts described in [the substantive RICO count] is numbered and [some] consist[s] of multiple offenses set out in separate, lettered sub-paragraphs [(a), (b), (c), (d), etc]. To prove that a defendant committed a particular "racketeering act" that is made up of multiple offenses, it is sufficient if the government proves beyond a reasonable doubt that the defendant committed at least one of the offenses identified in the sub-paragraphs of that racketeering act. However, you must unanimously agree upon which of the different offenses alleged within a racketeering act the defendant committed.

Committee Comment

This instruction is provided for use in cases in which the indictment breaks up specified racketeering acts into alternative subparts.

18 U.S.C. § 1962(d) RACKETEERING CONSPIRACY—ELEMENTS

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

1. That the defendant knowingly conspired to conduct or participate in the conduct of the affairs of [name of enterprise], an enterprise, through a pattern of racketeering activity as described in Count __; and

2. That [name of enterprise] [was; would be] an enterprise; and

3. That the activities of [name of enterprise] would affect 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

The "Conspiracy" elements instruction, without the overt act requirement, should be given in conjunction with this instruction. There are other conspiracy charges under 1962(a), (b) and (c). This pattern instruction covers the most commonly charged offense, 1962(d).

In *United States v. Schiro*, 679 F.3d 521, 533–34 (7th Cir.

2012), the Court observed that cases from other Circuits have required that the jury be instructed that it must agree unanimously on the types of racketeering activity that the conspirators agreed to commit, but indicated that it had "doubts" about this proposition. The Committee expresses no opinion on whether such an instruction would be required.

18 U.S.C. § 1962(d) PATTERN REQUIREMENT—RACKETEERING CONSPIRACY

In order to find a "pattern of racketeering activity" for purposes of Count __, you must find beyond a reasonable doubt that the defendant agreed that some member[s] of the conspiracy would commit at least two acts of racketeering as described in Count __, [and that they were separate acts]. You must also find that those acts were in some way related to each other and that there was continuity between them.

Acts are related to each other if they are not isolated events, that is, if they have similar purposes, or results, or participants, or victims, or are committed a similar way[, or have other similar distinguishing characteristics; or are part of the affairs of the same enterprise].

There is continuity between acts if, for example, they are ongoing over a substantial period of time, or had the potential to continue over a substantial period, or if they are part of the regular way some entity does business or conducts its affairs.

For purposes of Count __, the government does not have to prove that any racketeering acts were actually committed at all, or that the defendant agreed to personally commit any such acts, or that the defendant agreed that two or more specific acts would be committed.

Committee Comment

See *Salinas v. United States*, 522 U.S. 52 (1997); *United States v. Glecier*, 923 F.2d 496 (7th Cir. 1991); *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 237 (1989); *United States v. Neapolitan*, 791 F.2d 489 (7th Cir. 1986) (as modified by *Brouwer v. Raffensperger, Hughes & Co.*, 199 F.3d 961, 967 (7th Cir. 2000)) (when analyzing a conspiracy to violate RICO pursuant to § 1962(d), to "participate in the affairs of an enterprise," "[o]ne must knowingly agree to perform services of a kind which facili-

tate the activities of those who are operating the enterprise in an illegal manner."); *United States v. Delatorre*, 581 F.Supp.2d 968, 992 (N.D. Ill. 2008).

18 U.S.C. § 1962(c) & (d) DEFINITION OF "CONDUCT OR PARTICIPATE IN THE CONDUCT OF"

A person "conducts or participates in the conduct of" the affairs of an enterprise if that person uses his position in, or association with, the enterprise to perform acts which are involved in some way in the operation or management of the enterprise, directly or indirectly, or if the person causes another to do so. In order to have conducted or participated in the conduct of the affairs of an enterprise, a person need not have participated in all of the activity alleged in [list the RICO count(s)].

[A person conspires to conduct or participate in the conduct of the affairs of an enterprise if that person agrees to knowingly facilitate the activities of the operators or managers who conduct or participate in the conduct of its affairs.]

Committee Comment

To "conduct" or "participate" in the substantive offense, subsection (c), one must participate in the "operation or management" of the enterprise. An enterprise is "operated" not just by upper management, but also by lower rung participants in the enterprise who are under the direction of upper management. An enterprise also might be "operated" or "managed" by others "associated with" the enterprise who exert control over it. See *Reves v. Ernst & Young*, 507 U.S. 170, 184 (1993).

The bracketed second paragraph should be used only when a defendant is charged with conspiracy.

18 U.S.C. § 1962(c) & (d) DEFINITION OF "ASSOCIATE"

To be associated with an enterprise, a person must be involved with the enterprise in a way that is related to its affairs [or common purpose] [, although the person [need not have a stake in the goals of the enterprise [and] [may even act in a way that subverts those goals]]]. A person may be associated with an enterprise without being so throughout its existence.

18 U.S.C. § 1963(a)(1) FORFEITURE—ELEMENTS

As a result of the [defendant's; defendants'] conviction for [racketeering; racketeering conspiracy], the government seeks forfeiture of the following interest[s]:

[LIST INTEREST[S]]

In order for you to find that an interest is subject to forfeiture, the government must prove both of the following elements by a preponderance of the evidence:

1. That the defendant acquired or maintained an interest in violation of the law as charged in Count[s] __; and

2. That there is a nexus between that interest and the offense charged in Count[s] __.

If you find from your consideration of all the evidence that the government has proved each of these elements by a preponderance of the evidence [as to the interest[s] you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to the interest[s] and [the; that] defendant].

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 by a preponderance of the evidence [as to the interest[s] you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to the interest[s] and [the; that] defendant].

Committee Comment

Under Fed. R. Crim. P. 32.2(a), as effective December 1, 2009, "[t]he indictment or information need not identify the property

subject to forfeiture or specify the amount of any forfeiture money judgment the government seeks." If a party makes a timely request for a jury determination on the issue of forfeiture, "the government must submit a Special Verdict Form listing each property subject to forfeiture and asking the jury to determine whether the government has established the requisite nexus between the property and the offense committed by the defendant." Rule 32.2(b)(5)(B).

The Committee recognizes that there may be some overlap between the RICO statutory requirement for forfeiture and the nexus requirement of Rule 32.2(b)(5)(B). The Committee has included both requirements in this instruction. See the Pattern Instruction defining the word "nexus."

18 U.S.C. § 1963(a)(1) DEFINITION OF "INTEREST"

The word "interest" includes every property interest [including [profits; proceeds; income; an employment position]].

A defendant acquires or maintains an "interest" only to the extent racketeering activities were the cause of the defendant's acquisition or maintenance of the interest. If the defendant would not have acquired or maintained his interest but for the racketeering activity, the interest is subject to forfeiture. If, on the other hand, the defendant acquired or maintained the interest regardless of any racketeering activities, then the interest under consideration is not subject to forfeiture.

Committee Comment

United States v. Russello, 464 U.S. 16, 22 (1983); *United States v. Horak*, 833 F.2d 1235, 1243 (7th Cir. 1987); *United States v. Ginsburg*, 773 F.2d 798 (7th Cir. 1985) (*en banc*).

18 U.S.C. § 1963(a)(2) FORFEITURE—ELEMENTS

As a result of the [defendant's; defendants'] conviction for [racketeering; racketeering conspiracy], the government seeks forfeiture of the following [interest; security; claim; property or contractual right]:

[LIST PROPERTY]

In order for you to find that an [interest; security; claim; property or contractual right] is subject to forfeiture, the government must prove both of the following propositions:

1. That the defendant has [an interest in; a security of; a claim against; a property or contractual right of any kind affording a source of influence over] the enterprise that defendant established, operated, controlled, conducted or participated in the conduct of, in violation of the law as charged in Count[s] __; and

2. That there is a nexus between the [interest; security; claim; property or contractual right] and the offense charged in Count[s] __.

If you find from your consideration of all the evidence that the government has proved each of these elements by a preponderance of the evidence [as to the [interest; security; claim; property or contractual right] you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that [interest; security; claim; property or contractual right] and [the; that] defendant].

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 by a preponderance of the evidence [as to the [interest; security; claim; prop-

erty or contractual right] you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that [interest; security; claim; property or contractual right] and [the; that] defendant].

Committee Comment

Under Fed. R. Crim. P. 32.2(a), as effective December 1, 2009, "The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment the government seeks." If a party makes a timely request for a jury determination on the issue of forfeiture, "the government must submit a Special Verdict Form listing each property subject to forfeiture and asking the jury to determine whether the government has established the requisite nexus between the property and the offense committed by the defendant." Rule 32.2(b)(5)(B).

The Committee recognizes that there may be some overlap between the RICO statutory requirement for forfeiture and the nexus requirement of Rule 32.2(b)(5)(B). The Committee has included both requirements in this instruction. See the Pattern Instruction defining the word "nexus."

When forfeiture is sought under 18 U.S.C. § 1963(a)(2), the jury should only be asked whether the interest is subject to forfeiture and should not be asked to determine what percentage of any interest subject to forfeiture. *United States v. Segal*, 495 F.3d 826, 838 (7th Cir. 2007).

18 U.S.C. § 1963(a)(3) FORFEITURE—ELEMENTS

As a result of the defendant's conviction for [racketeering; racketeering conspiracy], the government seeks forfeiture of the following proceeds:

[LIST PROCEEDS/PROPERTY]

In order for you to find that proceeds are subject to forfeiture, the government must prove both of the following elements by a preponderance of the evidence:

1. That the defendant, directly or indirectly, obtained property that constitutes, or was derived from, proceeds of [racketeering activity; unlawful debt collection] in violation of the law as charged in Count[s] __; and

2. That there is a nexus between the proceeds and the offense charged in Count[s] __.

If you find from your consideration of all the evidence that the government has proved each of these elements by a preponderance of the evidence [as to the proceeds you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to those proceeds and [the; that] defendant].

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 by a preponderance of the evidence [as to the proceeds you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to those proceeds and [the; that] defendant].

Committee Comment

Under Fed. R. Crim. P. Rule 32.2(a), as effective December 1, 2009, "The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment the government seeks." If a party makes a timely request for a jury determination on the issue of forfeiture, "the government must submit a Special Verdict Form listing each property subject to forfeiture and asking the jury to determine whether the government has established the requisite nexus between the property and the offense committed by the defendant." Rule 32.2(b)(5)(B).

The Committee recognizes that there may be some overlap between the RICO statutory requirement for forfeiture and the nexus requirement of Rule 32.2(b)(5)(B). The Committee has included both requirements in this instruction. See the Pattern Instruction defining the word "nexus."

18 U.S.C. § 1963(a)(3) DEFINITION OF "PROCEEDS"

The term "proceeds" means the net proceeds, or profits, remaining after deducting all of the direct ordinary and necessary expenses, if any, incurred in acquiring the proceeds.

Proceeds from a racketeering offense includes any property later purchased with proceeds.

[Value added independently by the defendant is not subject to forfeiture. Therefore, if you find that proceeds obtained by the defendant were obtained through lawful income, then the value of those proceeds is not subject to forfeiture.]

Committee Comment

The Seventh Circuit has held that the word "proceeds" in the RICO forfeiture statute means net proceeds, as opposed to gross receipts. *United States v. Genova*, 333 F.3d 750, 761 (7th Cir. 2003); *United States v. Masters*, 924 F.2d 1362, 1369–70 (7th Cir. 1991).

The definition of "net proceeds" is the same as recommended for certain money laundering offenses committed before May 20, 2009. See the Pattern Instruction defining "net proceeds."

United States v. Santos, 553 U.S. 507 (2008) (plurality opinion), found that the word "proceeds," as used in the criminal money laundering statute, 18 U.S.C. § 1956, means profits, not gross receipts. The Seventh Circuit has not ruled on whether *Santos* applies in the forfeiture context. The Committee takes no position on this issue. For money laundering offenses alleged to have occurred after May 20, 2009, however, the Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, overruled *Santos* by inserting an explicit definition of proceeds: "the term 'proceeds' means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." 18 U.S.C. § 1956(c)(9). FERA, however, did not define "proceeds" for purposes of the RICO forfeiture statute.

18 U.S.C. § 1963(b) DEFINITION OF "PROPERTY"

The word "property" includes [real property[, including things growing on, affixed to and found in land]; tangible things and intangible personal property[, including [rights; privileges; interests; claims; securities]].

FORFEITURE VERDICT FORM

[A] Special Forfeiture Verdict Form[s] [has; have] been prepared for you. [Judge reads verdict form.] Once you have unanimously agreed on the matters in the Special Forfeiture Verdict Form[s], please sign [it; them] and return [it; them] to me through the Court Security Officer.

Committee Comment

If a party makes a timely request for a jury determination on the issue of forfeiture, "the government must submit a Special Verdict Form listing each property subject to forfeiture and asking the jury to determine whether the government has established the requisite nexus between the property and the offense committed by the defendant." Fed. R. Crim. P. 32.2(b)(5)(B).

United States v. Tedder, 403 F.3d 836, 841 (7th Cir. 2005), suggests that a jury in a forfeiture proceeding need not make findings as to the amount subject to forfeiture:

> Although Fed. R. Crim. P. 32.2 offers the defendant a jury trial, this provision (unlike the sixth amendment) is limited to the nexus between the funds and the crime; Rule 32.2 does not entitle the accused to a jury's decision on the amount of the forfeiture. Even if it did, the rule would not foreclose what amounts to summary judgment or remittitur; as those procedures are compatible with the Seventh Amendment's jury-trial right in civil cases.

18 U.S.C. § 2113(a) BANK ROBBERY—ELEMENTS

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

1. The defendant [took; attempted to take] from the person or presence of another [money; property; specific thing of value] belonging to or in the care, custody, control, management or possession of [name bank, savings and loan, or credit union named in the indictment]; and

2. At the time the defendant [took; attempted to take] the [money; property; specific thing of value], the deposits of the [bank; savings and loan; credit union] were insured by the [Federal Deposit Insurance Corporation; Federal Savings and Loan Insurance Corporation; National Credit Union Administration]; and

3. The defendant acted to take such [money; property; specific thing of value] by force and violence, or by intimidation.

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 bank robbery statute covers "any bank operating under the law of the United States" regardless of the status of insurance. There are such banks, and the instruction should be tailored to the situation, if appropriate.

A conviction under 2113(a), ¶ 1, requires proof that the defendant actually used force and violence or intimidation; an attempt to use force and violence or intimidation will not suffice. *United States v. Thornton*, 539 F.3d 741, 747 (7th Cir. 2008) (concluding that "the 'attempt' language relates only to the taking and not to the intimidation"); see also *United States v. Bellew*, 369 F.3d 450 (5th Cir. 2004).

The statute, at § 2113(a), ¶ 1, includes a means of violation for whoever "obtains or attempts to obtain by extortion." If a defendant is charged with this means of violating the statute, the instruction should be adapted accordingly.

18 U.S.C. § 2113(a) DEFINITION OF "INTIMIDATION"

"Intimidation" means to say or do something that would make an ordinary person feel threatened, by giving rise to a reasonable fear that resistance or defiance will be met with force. [The government is not required to prove that the target of the intimidation actually felt threatened.]

Committee Comment

United States v. Williams, 864 F.3d 826, 827 (7th Cir. 2017) ("Intimidation means threatened force capable of causing bodily harm and therefore constitutes violent force. Intimidation exists when a bank robber's words and actions would cause an ordinary person to feel threatened by giving rise to a reasonable fear that resistance or defiance will be met with force.") (internal citations omitted).

The jury need not find that the target of intimidation was actually afraid; rather, the element is satisfied if an ordinary person would reasonably feel threatened under the circumstances. *United States v. Hill*, 187 F.3d 698, 702 (7th Cir. 1999); see also *United States v. Gordon*, 642 F.3d 596, 598 (7th Cir. 2011); *United States v. Thornton*, 539 F.3d 741, 748 (7th Cir. 2008); *United States v. Burnley*, 533 F.3d 901, 903 (7th Cir. 2008). Accordingly, the bracketed language is recommended for use only in cases in which an issue is raised regarding whether the target of the intimidation was actually put in fear.

A defendant need not brandish a weapon or make express threats of injury. See *United States v. Clark*, 227 F.3d 771, 774–75 (7th Cir. 2000); *Hill*, 187 F.3d at 701–02.

The jury need not agree unanimously as to the means employed to place such a reasonable person in fear. See *Richardson v. United States*, 526 U.S. 813, 817 (1999). For example, some jurors may conclude that the defendant intimidated by brandishing a weapon while others conclude that intimidation was established without traditional overt gestures.

18 U.S.C. § 2113(a) ENTERING TO COMMIT BANK ROBBERY OR ANOTHER FELONY—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ___ of the indictment charge[s] the defendant[s] with] entering to commit bank robbery or another felony. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant [entered; attempted to enter] [name bank, savings and loan, credit union, or building used in whole or in part as a bank, savings and loan, or credit union named in the indictment]; and

2. The defendant [entered; attempted to enter] the [bank; savings and loan; credit union; building] with the intent to commit a felony or larceny affecting such [bank; savings and loan; credit union; building]; and

3. At the time the defendant [entered; attempted to enter] the [bank; savings and loan; credit union; building], the deposits of the [bank; savings and loan; credit union; building] were insured by the [Federal Deposit Insurance Corporation; Federal Savings and Loan Insurance Corporation; National Credit Union Administration].

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 intended felony or larceny need not be accomplished. See *Brunjes v. United States*, 329 F.2d 339, 341 (7th Cir. 1964); *United States v. Goudy*, 792 F.2d 664, 677 (7th Cir. 1986).

Larceny is defined for purposes of § 2113(a) as the conduct proscribed in § 2113(b). See *Jerome v. United States*, 318 U.S. 101, 105–06 (1943). In cases charging the defendant with entering with intent to commit a larceny under § 2113(a), the jury should be instructed as to larceny in accordance with Pattern Instruction 18 U.S.C. § 2113(b), Bank Theft.

The statute includes "any bank operating under the laws of the United States" regardless of the status of insurance. There are such banks, and the instruction should be tailored to the situation, if appropriate.

18 U.S.C. § 2113(b) BANK THEFT—ELEMENTS

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

1. The defendant took and carried away [property; money; something of value] belonging to or in the [care; custody; control; management] of [name bank, credit union, or savings and loan named in the indictment]; and

2. At the time the defendant took and carried away such [property; money; something of value], the deposits of the [bank; credit union; savings and loan] were insured by the [Federal Deposit Insurance Corporation; Federal Savings and Loan Insurance Corporation; National Credit Union Administration]; and

3. The defendant took and carried away such [property; money; thing of value] with the intent to steal; and

4. Such [money; property; thing of value] exceeded $1,000 in value.

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

Section 2113(b) contains a lesser included misdemeanor where the value of the money or property does not exceed $1,000. The Committee has drafted this instruction to be used in felony cases. Where the crime charged is a misdemeanor, the fourth element of the instruction should read: "Fourth, such [money; property; thing of value] did not exceed $1,000 in value." If there is a real dispute as to whether the value of the money or property exceeded $1,000, the Committee recommends that two separate instructions be given as opposed to use of a special interrogatory.

The scope of 18 U.S.C. § 2113(b) is not limited to common law larceny. It also proscribes the crime of taking under false pretenses. *Bell v. United States*, 462 U.S. 356, 362 (1983); see also *United States v. Kucik*, 844 F.2d 493, 494 (7th Cir. 1988).

The Supreme Court has held that § 2113(b) is not a lesser included offense of § 2113(a). *Carter v. United States*, 530 U.S. 255, 274 (2000).

The statute includes "any bank operating under the laws of the United States" regardless of the status of insurance. There are such banks, and the instruction should be tailored to the situation, if appropriate.

18 U.S.C. § 2113(b) DEFINITION OF "STEAL"

"Steal" means to take with the intent to deprive the owner of the rights and benefits of ownership.

Committee Comment

"Steal" for the purposes of § 2113(b) means "felonious takings with intent to deprive the owner of rights and benefits of ownership." *United States v. Kucik*, 909 F.2d 206, 212 (7th Cir. 1990); *United States v. Goudy*, 792 F.2d 664, 677 (7th Cir. 1986); see also *United States v. Guiffre*, 576 F.2d 126, 128 (7th Cir. 1978).

18 U.S.C. § 2113(c) POSSESSION OF STOLEN BANK MONEY OR PROPERTY—ELEMENTS

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

1. The defendant [received; possessed; concealed; stored; bartered; sold; disposed of] any [property; money; thing of value] having a value in excess of $1,000; and

2. The [property; money; thing of value] was taken from [name bank, savings and loan, or credit union described in the indictment]; and

3. At the time the property was taken, the deposits of the [bank; savings and loan; credit union] were insured by the [Federal Deposit Insurance Corporation; Federal Savings and Loan Insurance Corporation; National Credit Union Administration]; and

4. The defendant knew that the [money; property; thing of value] was stolen when he [possessed; received; concealed; stored; bartered; sold; disposed of] 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

Section 2113(c) contains a lesser included misdemeanor offense where the value of the money or property does not exceed $1,000. The Committee has drafted this instruction to be used in felony cases. Where the crime charged is a misdemeanor, the first element of the instruction should read: "First, the defendant [received; possessed; concealed; stored; bartered; sold; disposed of; property; money; a thing of value] having a value of $1,000 or less." If there is a real dispute as to whether the value of the money or property exceeds $1,000, the Committee recommends that two separate instructions be given as opposed to use of a special interrogatory.

The statute includes "any bank operating under the laws of the United States" regardless of the status of insurance. There are such banks, and the instruction should be tailored to the situation, if appropriate.

The defendant need not know the exact bank robbed or that the bank was FDIC insured in order to satisfy the knowledge element. It is sufficient that the defendant knew he was possessing, concealing, or disposing of money stolen from a banking institution. *United States v. Kaplan*, 586 F.2d 980, 982 (2d Cir. 1978); *United States v. Whitney*, 425 F.2d 169, 171 (8th Cir. 1970); *United States v. Bolin*, 423 F.2d 834, 836 (9th Cir. 1970); *Nelson v. United States*, 415 F.2d 483, 486 (5th Cir. 1969).

There is a conflict between the circuits as to whether punishment under Section 2113(c) is measured by the value of the property received by the defendant or by the value of the property taken by the thief. In one circuit, the degree of punishment is determined by the value of the stolen property received or possessed by the defendant. *United States v. Evans*, 446 F.2d 998, 1001 (8th Cir. 1971). The predominant view allocates punishment according to the amount stolen from the bank. See *United States v. Ross*, 286 F.3d 1307 (11th Cir. 2002); *United States v. Bolin*, 423 F.2d 834, 835 (9th Cir. 1970); *United States v. Wright*, 540 F.2d 1247, 1248 (4th Cir. 1976); *United States v. McKenzie*, 441 F. Supp. 244, 247 (E.D. Pa. 1977), aff'd without opinion, 557 F.2d 729 (3d Cir. 1978). Under this majority view, the defendant possessing under $100 of the stolen money need not have knowledge that over $100 was stolen in order to be punished as a felon under Section 2113(b). The Seventh Circuit apparently agrees with the majority view. It cited *Bolin*, supra, with approval, stating: "The purpose behind statutes penalizing the knowing receipt of stolen goods is not only to discourage the actual receipt, but also to discourage the

initial taking that the receipt encourages." *United States v. Gardner*, 516 F.2d 334, 349 (7th Cir. 1975).

18 U.S.C. § 2113(d) ARMED BANK ROBBERY—ELEMENTS

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

1. The defendant took or attempted to take, from the person or presence of another [money; property; a thing of value] belonging to or in the [care; custody; control; management; possession] of [name bank, savings and loan, or credit union named in the indictment]; and

2. At the time the defendant [took; attempted to take] the [money; property; thing of value], the deposits of the [bank; savings and loan; credit union] were insured by the [Federal Deposit Insurance Corporation; Federal Savings and Loan Insurance Corporation; National Credit Union Administration]; and

3. The defendant took or attempted to take such [money; property; thing of value] by means of force and violence, or by means of intimidation; and

4. The defendant assaulted or put in jeopardy the life of [name person(s) named in the indictment] by the use of a dangerous weapon or device, while committing or attempting to commit the robbery.

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 consider-

ation 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 "any bank operating under the laws of the United States" regardless of the status of insurance. There are such banks, and the instruction should be tailored to the situation, if appropriate.

The phrase, "use of a dangerous weapon or device" modifies both the "assault" and the "jeopardy" portions of § 2113(d). *Simpson v. United States*, 435 U.S. 6, 11 n.6 (1978). If only the latter was modified, the "assault" would be equated with the "force or violence" aspect of § 2113(a) so as to justify the additional five year penalty of § 2113(d). When considering whether the defendant "assaulted" someone by the use of a dangerous weapon or device, the jury should consider the reasonable fears of the victims. *United States v. Simmons*, 581 F.3d 582, 586 (7th Cir. 2009); *United States v. Smith*, 103 F.3d 600, 605 (7th Cir. 1996).

For a definition of "intimidation" see Pattern Instruction 18 U.S.C. § 2113(a).

A defendant may be sentenced to a consecutive term pursuant to § 924(c) for using a firearm in a bank robbery in addition to the extra five years authorized under § 2113(d). *United States v. Gonzales*, 520 U.S. 1, 10 11 (1997); *United States v. Loniello*, 610 F.3d 488, 495 (7th Cir. 2010); *United State v. Harris*, 832 F.2d 88 (7th Cir. 1987).

18 U.S.C. § 2113(d) DEFINITION OF "ASSAULT"

"Assault" means to intentionally attempt or threaten to inflict bodily injury upon another person with the apparent and present ability to cause such injury that creates in the victim a reasonable fear or apprehension of bodily harm. An assault may be committed without actually touching, striking, or injuring the other person.

Committee Comment

See, *e.g.*, *United States v. Vallery*, 437 F.3d 626, 631 (7th Cir. 2006); *United States v. Smith*, 103 F.3d 600, 605 (7th Cir. 1996); *United States v. Rizzo*, 409 F.2d 400, 402–03 (7th Cir. 1969).

18 U.S.C. § 2113(d) DEFINITION OF "PUT IN JEOPARDY THE LIFE OF" A PERSON

"Put in jeopardy the life of" a person means to knowingly do an act which exposes another person to risk of death. In considering this element, you must focus on the actual risk of death created by the use of the dangerous weapon or device. This risk might include direct risk to bank employees and indirect risk through a violent response by a customer or the police.

Committee Comment

In *United States v. Smith*, 103 F.3d 600, 605 (7th Cir. 1996), the Seventh Circuit reviewed the "put in jeopardy" language and concluded that the focus of the analysis should be on the actual risk created by the robber's use of a dangerous weapon. See also *United States v. Simmons*, 581 F.3d 582, 586 (7th Cir. 2009).

18 U.S.C. § 2113(d) DEFINITION OF "DANGEROUS WEAPON OR DEVICE"

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)).

18 U.S.C. § 2113(e) KIDNAPPING OR MURDER DURING A BANK ROBBERY—ELEMENTS

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

1. The defendant [killed [specify person[s] named in the indictment]; forced [specify person[s] named in the indictment] to accompany the defendant without the consent of [specify person[s] named in the indictment]]; and

2. The defendant performed such act or acts during the course of [committing any offense defined in 18 U.S.C. § 2113; avoiding or attempting to avoid apprehension for the commission of such offense; freeing himself or attempting to free himself from arrest or confinement for such offense]; and

3. At the time the defendant acted, the deposits of [name bank, credit union, or savings and loan, named in the indictment] were insured by the [Federal Deposit Insurance Corporation; Federal Savings and Loan Insurance Corporation; National Credit Union Administration].

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 "any bank operating under the laws of the United States" regardless of the status of insurance. There are such banks, and the instruction should be tailored to the situation, if appropriate.

To satisfy the "forced accompaniment" aspect, a defendant need not make a victim travel a substantial distance, *Whitfield v. United States*, 574 U.S. 265, 270 (2015) (defendant forced victim to accompany him four to nine feet; "a bank robber 'forces a person to accompany him' for purposes of § 2113(e) when he forces that person to go somewhere with him, even if the movement occurs entirely within a single building or over a short distance.").

18 U.S.C. § 2114(a) ASSAULT WITH INTENT TO ROB MAIL MATTER, MONEY, OR OTHER PROPERTY OF THE UNITED STATES—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ___ of the indictment charge[s] the defendant[s] with] assault with intent to rob [mail matter; money of the United States; property of the United States]. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. The defendant assaulted the person of another having lawful [charge; control; custody] of [mail matter; money of the United States; property of the United States]; and

2. While committing the assault the defendant intended to rob or steal such property.

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 *United States v. Smithen*, 213 F.3d 1342, 1344 (11th Cir. 2000), the court held that a conviction under the statute does not require proof that defendant knew that the property belonged to the United States; the property ownership provision was merely a jurisdictional requirement. See also *United States v. Roundtree*, 527 F.2d 16, 18–19 (8th Cir. 1975) (holding that a conviction under

18 U.S.C. § 2112 does not require proof that the defendant knew that the money he had stolen belonged to the United States); *United States v. Boyd*, 446 F.2d 1267, 1274 (5th Cir. 1971) (18 U.S.C. § 641, which punishes theft, embezzlement, or knowing conversion of personal property belonging to the United States, does not require proof of knowledge that the property belongs to the United States to sustain a conviction).

For a definition of "assault" see Pattern Instruction 18 U.S.C. § 2113(d).

18 U.S.C. § 2114(a) ROBBERY OR ATTEMPTED ROBBERY OF MAIL MATTER, MONEY, OR OTHER PROPERTY OF THE UNITED STATES—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [robbery; attempted robbery] of [mail matter; money of the United States; property of the United States]. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. The defendant took [mail matter; money of the United States; property of the United States] from the person or presence of another having lawful [charge; control; custody] of such property; and

2. The defendant took such property by means of force and violence, or by means of intimidation.

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 Committee has drafted this instruction for cases where the defendant took mail matter, money or other property of the United States. The statute applies to attempts to rob as well. Where the charge is that the defendant attempted to rob, "attempted to take" should be substituted for "take" in the first and second elements.

In *United States v. Smithen*, 213 F.3d 1342, 1344 (11th Cir. 2000), the court held that a conviction under the statute does not require proof that defendant knew that the property belonged to the United States; the property ownership provision was merely a jurisdictional requirement. See also *United States v. Roundtree*, 527 F.2d 16, 18–19 (8th Cir. 1975) (holding that a conviction under 18 U.S.C. § 2112 does not require proof that the defendant knew that the money he had stolen belonged to the United States); *United States v. Boyd*, 446 F.2d 1267, 1274 (5th Cir. 1971) (holding that an analogous provision, 18 U.S.C. § 641, which punishes theft, embezzlement, or knowing conversion of personal property belonging to the United States, does not require proof of knowledge that the property belongs to the United States to sustain a conviction).

The possession of mail matter or any money or other property of the United States by the person whom the defendant attempts to rob is an essential element of § 2114(a). See *United States v. Salgado*, 519 F.3d 411, 413–14 (7th Cir. 2008). See also *United States v. Thornton*, 539 F.3d 741, 747 (7th Cir. 2008) (conviction for attempted bank robbery under 18 U.S.C. § 2113 requires proof of actual force and violence or intimidation).

For a definition of "intimidation," see Pattern Instruction 18 U.S.C. § 2113(a).

18 U.S.C. § 2114(a) WOUNDING OR PUTTING A LIFE IN JEOPARDY DURING A ROBBERY OR ATTEMPTED ROBBERY OF MAIL MATTER, MONEY, OR OTHER PROPERTY OF THE UNITED STATES—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ___ of the indictment charge[s] the defendant[s] with] [wounding; putting a life in jeopardy] during a [robbery; attempted robbery] of [mail matter; money of the United States; property of the United States]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant took [mail matter; money of the United States; property of the United States] from the person or presence of [name of person having lawful [charge; control; custody] of such property]; and

2. The defendant took such property by means of force and violence, or by means of intimidation; and

3. The defendant [wounded [name person having [charge; control; custody] of such [mail matter; money of the United States; property of the United States]]; put the life of [name of person who had [charge; control; custody] of such [mail matter; money of the United States; property of the United States]] in jeopardy by use of a dangerous weapon].

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 Committee has drafted this instruction for cases where the defendant took mail matter, money or other property of the United States, and in doing so, wounded a person who had charge, control or custody of the mail matter, etc. or put the life of that person in jeopardy by the use of a dangerous weapon. The statute applies to attempts to rob as well. Where the charge is that the defendant attempted to rob, "attempted to take" should be substituted for "took" in the first and second elements. Violations of this portion of § 2114(a) in an enhanced penalty, that is, imprisonment for up to 25 years.

In *United States v. Smithen*, 213 F.3d 1342, 1344 (11th Cir. 2000), the court held that a conviction under the statute does not require proof that defendant knew that the property belonged to the United States; the property ownership provision was merely a jurisdictional requirement. See also *United States v. Roundtree*, 527 F.2d 16, 18–19 (8th Cir. 1975) (holding that a conviction under 18 U.S.C. § 2112 does not require proof that the defendant knew that the money he had stolen belonged to the United States); *United States v. Boyd*, 446 F.2d 1267, 1274 (5th Cir. 1971) (holding that an analogous provision, 18 U.S.C. § 641, which punishes theft, embezzlement, or knowing conversion of personal property belonging to the United States, does not require proof of knowledge that the property belongs to the United States to sustain a conviction).

The possession of mail matter or any money or other property of the United States by the person whom the defendant attempts to rob is an essential element of § 2114(a). See *United States v. Salgado*, 519 F.3d 411, 413–14 (7th Cir. 2008); see also *United States v. Thornton*, 539 F.3d 741, 747 (7th Cir. 2008) (conviction for attempted bank robbery under § 2113 requires proof of actual force and violence or intimidation).

For a definition of "intimidation," see Pattern Instruction 18 U.S.C. § 2113(a).

18 U.S.C. § 2114(b) RECEIPT, POSSESSION, CONCEALMENT, OR DISPOSAL OF STOLEN MAIL MATTER, MONEY, OR OTHER PROPERTY OF THE UNITED STATES—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [receipt; possession; concealment; disposal] of stolen [mail matter; money of the United States; property of the United States]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant [received; possessed; concealed; disposed of] any [mail matter; money of the United States; property of the United States]; and

2. Such property was obtained by [assault; robbery]; and

3. The defendant had knowledge that the [mail matter; money of the United States; property of the United States] had been obtained unlawfully.

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].

18 U.S.C. § 2241(a) AGGRAVATED SEXUAL ABUSE—ELEMENTS

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

1. The defendant knowingly caused [the person named in the indictment] to engage in a sexual act:

(a) by using force against [the person named in the indictment]; or

(b) by [threatening [the person named in the indictment] that some person would be subject to death, serious bodily injury or kidnapping; placing [the person named in the indictment] in fear that some person would be subject to death, serious bodily injury or kidnapping]; and

2. The offense was committed at [location stated in indictment, *e.g.*, federal prison].

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

Acts that fall within the meaning of "sexual act" are listed in 18 U.S.C. § 2246(2).

"Sexual act" is defined in a Pattern Instruction related to 18 U.S.C. § 2246(2).

18 U.S.C. § 2241(b)(1) AGGRAVATED SEXUAL ABUSE—RENDERING VICTIM UNCONSCIOUS—ELEMENTS

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

1. The defendant knowingly rendered [the person identified in the indictment] unconscious; and

2. The defendant then engaged in a sexual act with [the person identified in the indictment]; and

3. The offense was committed at [location stated in indictment, *e.g.*, federal prison].

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

Acts that fall within the meaning of "sexual act" are listed in 18 U.S.C. § 2246(2).

"Sexual act" is defined in a Pattern Instruction related to 18 U.S.C. § 2246(2).

18 U.S.C. § 2241(b)(2) AGGRAVATED SEXUAL ABUSE—ADMINISTRATION OF DRUG, INTOXICANT OR OTHER SUBSTANCE—ELEMENTS

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

1. The defendant knowingly administered a drug, intoxicant or other similar substance to [the person named in the indictment] by [force; threat of force; without the knowledge or permission of [the person named in the indictment]]; and

2. As a result, [the person named in the indictment]'s ability to evaluate or control his own conduct was substantially impaired; and

3. The defendant then engaged in a sexual act with [the person named in the indictment]; and

4. The offense was committed at [location stated in indictment, *e.g.*, federal prison].

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

Acts that fall within the meaning of "sexual act" are listed in 18 U.S.C. § 2246(2).

"Sexual act" is defined in a Pattern Instruction related to 18 U.S.C. § 2246(2).

If the charged offense is an attempt, the Court should modify the elements instruction accordingly, and provide the general instructions regarding the definition of attempt.

18 U.S.C. § 2241(c) AGGRAVATED SEXUAL ABUSE OF CHILD—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ____ of the indictment charge[s] the defendant[s] with] aggravated sexual abuse of a child. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. The defendant traveled across a state line; and

2. The defendant did so with intent to engage in a sexual act with a person who had not attained the age of twelve 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

Subsection 2241(d) states that "[i]n a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years." At least one court, however, has held that this limitation does not apply in cases in which the government charges the defendant with crossing state lines with the intent to engage in a sexual act with a person under the age of twelve. See Report, *United States v. Vogel*, No. 3:16-cr-00045-wmc (W.D. Wis. Nov. 14, 2016), ECF No. 47. No court of appeals, including the Seventh Circuit, has squarely addressed the issue, and the Committee takes no view. But the parties and courts should consider whether the government must prove that the

defendant knew the age of the victim at the time the defendant crossed state lines and, if not, how to instruct the jury accordingly.

Acts that fall within the meaning of "sexual act" are listed in 18 U.S.C. § 2246(2).

"Sexual act" is defined in a Pattern Instruction related to 18 U.S.C. § 2246(2).

18 U.S.C. § 2241(c) AGGRAVATED SEXUAL ABUSE OF A MINOR TWELVE TO SIXTEEN—ELEMENTS

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

1. The defendant knowingly engaged in a sexual act with [the person named in the indictment]:

(a) by using force against [the person named in the indictment]; or

(b) by [threatening [the person named in the indictment]; placing [the person named in the indictment] in fear that any person would be subject to death, serious bodily injury, or kidnapping]; and

2. The offense was committed [location stated in indictment, *e.g.,* in the special maritime or territorial jurisdiction of the United States]; and

3. [The person identified in the indictment] was at least twelve years old but less than sixteen years old; and

4. The defendant was at least four years older than [the person identified in the indictment].

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

Acts that fall within the meaning of "sexual act" are listed in 18 U.S.C. § 2246(2).

"Sexual act" is defined in a Pattern Instruction related to 18 U.S.C. § 2246(2).

18 U.S.C. § 2241(c) AGGRAVATED SEXUAL ABUSE—RENDERING VICTIM UNCONSCIOUS, MINOR TWELVE TO SIXTEEN—ELEMENTS

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

1. The defendant knowingly rendered [the person identified in the indictment] unconscious; and

2. The defendant then engaged in a sexual act with [the person identified in the indictment]; and

3. The offense was committed at [location stated in indictment, *e.g.*, in the special maritime or territorial jurisdiction of the United States]; and

4. [The person identified in the indictment] was at least twelve years old but less than sixteen years old; and

5. The defendant was at least four years older than [the person identified in the indictment].

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

Acts that fall within the meaning of "sexual act" are listed in 18 U.S.C. § 2246(2).

"Sexual act" is defined in a Pattern Instruction related to 18 U.S.C. § 2246(2).

18 U.S.C. § 2241(c) AGGRAVATED SEXUAL ABUSE—ADMINISTRATION OF DRUG, INTOXICANT OR OTHER SUBSTANCE, MINOR TWELVE TO SIXTEEN—ELEMENTS

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

1. The defendant knowingly administered a drug, intoxicant or other similar substance to [the person named in the indictment] by [force; threat of force] [without the knowledge or permission of [the person named in the indictment]]; and

2. As a result, [the person named in the indictment]'s ability to evaluate or control conduct was substantially impaired; and

3. The defendant then engaged in a sexual act with [the person named in the indictment]; and

4. The offense was committed at [location stated in indictment, *e.g.*, in the special maritime or territorial jurisdiction of the United States]; and

5. [The person identified in the indictment] was at least twelve years old but less than sixteen years old; and

6. The defendant was at least four years older than [the person identified in the indictment].

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

Acts that fall within the meaning of "sexual act" are listed in 18 U.S.C. § 2246(2).

"Sexual act" is defined in a Pattern Instruction related to 18 U.S.C. § 2246(2).

18 U.S.C. § 2243(a) SEXUAL ABUSE OF MINOR—ELEMENTS

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

1. That the defendant knowingly engaged in a sexual act with [insert name of victim]; and

2. [Name of victim] had reached the age of twelve years but had not yet reached the age of sixteen years; and

3. [Name of victim] was at least four years younger than the defendant; and

4. That the defendant's actions took place [within the special maritime jurisdiction of the United States; within the territorial jurisdiction of the United States; in a Federal prison].

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].

18 U.S.C. §§ 2243(a), 2423(b) & 2241(c) CROSSING STATE LINE WITH INTENT TO ENGAGE IN SEXUAL ACT WITH MINOR—ELEMENTS

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

1. That the defendant crossed a state line with intent to engage in a sexual act with [name of victim]; and

2. [Name of victim] had reached the age of twelve years but had not yet reached the age of sixteen years; and

3. [Name of victim] was at least four years younger than the defendant.

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

It is not necessary for the government to prove that a criminal sexual act was the sole purpose for a defendant traveling from one state to another. A person may have more than one dominant purpose for traveling across a state line. Compare *United States v.*

Vang, 128 F.3d 1065, 1070–72 (7th Cir. 1997) (interpreting 18 U.S.C. § 2423(b), the sex act must be a dominant, but need not be the singular, purpose for travel), with *United States v. McGuire*, 627 F.3d 622 (7th Cir. 2010) (one purpose, among others, for travel must be to engage in the criminal sex act.); see also *United States v. Bonty*, 383 F.3d 575, 578 (7th Cir. 2005) ("a defendant may have more than one purpose" in engaging in the interstate travel).

18 U.S.C. § 2243(b) SEXUAL ABUSE OF PERSON IN OFFICIAL DETENTION—ELEMENTS

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

1. The defendant knowingly engaged in a sexual act with [name of victim]; and

2. At the time, [name of victim] was in official detention at the [insert name of institution];

3. At the time, [name of victim] was under the custodial, supervisory or disciplinary authority of the defendant.

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].

18 U.S.C. § 2243(b) DEFINITION OF "OFFICIAL DETENTION"

"Official detention" means detention [custody] by [under the direction of] a Federal officer or employee, following [arrest; surrender in lieu of arrest; a charge or conviction of an offense].

Committee Comment

The Committee has selected the most frequently charged types of "official detention." The statute contains a more exhaustive list which should be consulted in particular cases.

18 U.S.C. § 2243(c)(1) DEFENSE OF REASONABLE BELIEF OF MINOR'S AGE

It is a defense to the charge of sexual abuse of a minor that the defendant reasonably believed that [name of victim] had attained the age of 16 years. The defendant has the burden of proving that it is more probably true than not true that he reasonably believed that [name of victim] had attained the age of 16 years.

If you find that the defendant reasonably believed that [name of victim] had attained the age of 16 years, you must find the defendant not guilty.

18 U.S.C. §§ 2242 & 2244(a) ABUSIVE SEXUAL CONTACT—ELEMENTS

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

1. That the defendant knowingly [engaged in; caused] sexual contact with [name of victim]; and

2. That the defendant did so by [force; threatening [name of victim]; placing [name of victim] in fear]; and

3. That the defendant's actions took place [within the special maritime jurisdiction of the United States; within the territorial jurisdiction of the United States; in a Federal prison].

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].

18 U.S.C. §§ 2244(a)(2) ABUSIVE SEXUAL CONTACT—INCAPACITATED VICTIM—ELEMENTS

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

1. That the defendant knowingly [engaged in; caused] sexual contact with [name of victim]; and

2. [Name of victim] was [incapable of recognizing the nature of the conduct; physically incapable of declining participation in that sexual contact; physically incapable of communicating unwillingness to engage in that sexual act]; and

3. That the defendant's actions took place [within the special maritime jurisdiction of the United States; within the territorial jurisdiction of the United States; in a Federal prison].

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].

18 U.S.C. § 2244(b) ABUSIVE SEXUAL CONTACT WITHOUT PERMISSION—ELEMENTS

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

1. The defendant knowingly had sexual contact with [name of victim] at [name of institution], and

2. The sexual contact was without [name of victim]'s permission.

3. The defendant's actions took place [within the special maritime jurisdiction of the United States; within the territorial jurisdiction of the United States; in a Federal prison].

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].

18 U.S.C. § 2246(2) DEFINITION OF "SEXUAL ACT"

As used in these instructions, the term "sexual act" means

- [penetration, however slight, of the [vulva; anus] by the penis]

- [contact between the mouth and the [penis; vulva; anus]]

- [penetration, however slight, of the [anal; genital] opening of another by [a hand; a finger; any object] with an intent to abuse, humiliate, harass, or degrade, arouse or gratify the sexual desire of any person]

- [the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, or degrade, or arouse or gratify the sexual desire of any person].

18 U.S.C. § 2246(3) DEFINITION OF "SEXUAL CONTACT"

As used in these instructions, the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, or degrade, or to arouse or gratify the sexual desire of any person.

18 U.S.C. § 2250(a) FAILURE TO REGISTER/ UPDATE AS SEX OFFENDER—ELEMENTS

[The indictment charges the defendant[s] with] [Count[s] __ of the indictment charge[s] the defendant[s] with] failing to register or update registration as a sex offender. In order for you to find [the; a] defendant guilty of this count, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant was required to register under the Sex Offender Registration and Notification Act; and

2. The defendant traveled in interstate or foreign commerce; and

3. The defendant then knowingly failed to [register; update his registration] as required by the Sex Offender Registration and Notification Act.

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 count you are considering], then you should find the defendant guilty [of that count].

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 count you are considering], then you should find the defendant not guilty [of that count].

Committee Comment

18 U.S.C. § 2250(a) provides an affirmative defense where uncontrollable circumstances prevented the individual from complying, the individual did not contribute to the creation of those circumstances, and the individual complied as soon as the circumstances ceased to exist.

The Supreme Court addressed Section 2250(a) in *Nichols v.*

United States, 136 S. Ct. 1113 (2016), where it found that the failure to register as a sex offender under the Sex Offender Registration and Notification Act *after* traveling was the focus of the offense. See also *United States v. Haslage*, 853 F.3d 331, 332 (7th Cir. 2017) ("the failure to register *after* traveling" is the focus of the crime). In *Haslage*, the court also addressed the question of the proper venue for charges under this statute. *Id.* at 335 (venue is proper "in the place of the new residence").

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

The interstate or foreign commerce travel element is satisfied by proof that the defendant has traveled from one state to another state or to a foreign country after having been convicted of a qualifying "sex offense." See 42 U.S.C. § 16911(5). The interstate or foreign travel may not precede the registration requirement. See *Carr v. United States*, 560 U.S. 438 (2010).

The court should instruct regarding requirements of the Sex Offender Registration and Notification Act. See 42 U.S.C. § 16901 *et seq*.

18 U.S.C. § 2251(a) SEXUAL EXPLOITATION OF CHILD—ELEMENTS

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

1. At the time, [the person identified in the indictment] was under the age of eighteen years; and

2. The defendant, for the purpose of [producing a visual depiction; transmitting a live visual depiction] of sexually explicit conduct:

(a) [employed; used; persuaded; induced; enticed; coerced] [the person identified in the indictment] to cause [the person identified in the indictment] to engage in sexually explicit conduct; or

(b) had [the person identified in the indictment] assist any other person to engage in sexually explicit conduct; or

(c) transported [the person identified in the indictment] [across state lines; in foreign commerce; in any Territory or Possession of the United States] with the intent that [the person identified in the indictment] engage in sexually explicit conduct; and

3.

(a) The defendant knew or had reason to know that such visual depiction would be mailed or transported across state lines or in foreign commerce; or

(b) The visual depiction was [produced; transmitted] using materials that had been mailed, shipped, transported across state lines or in foreign commerce by any means, including by computer; or

(c) The visual depiction was mailed or actually transported across state lines or in 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

It is not intended that this entire instruction would be given to the jury. The options set forth as subparts (a), (b) and (c) in each of the second and third elements are alternative means of setting forth the elements of the offense.

Acts that fall within the meaning of "sexually explicit conduct" are listed in 18 U.S.C. § 2256(2)(B).

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

"Producing" is defined in Pattern Instruction 18 U.S.C. § 2256(3).

"Visual depiction" is defined in Pattern Instruction 18 U.S.C. § 1466A(f)(1).

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

Knowledge of the age of the minor victim is not an element of

the offense. *United States v. Fletcher*, 634 F.3d 395 (7th Cir. 2011); *United States v. United States District Court*, 858 F.2d 534 (9th Cir. 1988); see also *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 76 n.5 (1994) ("[P]roducers may be convicted under 2251(a) without proof they had knowledge of age. . .") (*dicta*).

A defendant who simply possesses, transports, reproduces, or distributes child pornography does not sexually exploit a minor in violation of 18 U.S.C. 2251, even though the materials possessed, transported, reproduced, or distributed "involve" such sexual exploitation by the producer. See *United States v. Kemmish*, 120 F.3d 937, 942 (9th Cir. 1997).

In *United States v. Howard*, 968 F.3d 717 (7th Cir. 2020), the Seventh Circuit held that the word "use" in § 2251(a) does not cover productions in which the minor is the "object of sexual interest" of—but not engaged in—the sexually explicit conduct. As the court wrote: "The most natural and contextual reading of the statutory language requires the government to prove that the offender took one of the listed actions to cause the minor to engage in sexually explicit conduct for the purpose of creating a visual image of that conduct." *Id.* at 721. Cases involving Part 2(a) of this instruction therefore require that the government prove that the employment, use, persuasion, inducement or coercion was done "to cause" the minor to "engage in" the sexually explicit conduct.

18 U.S.C. § 2251(b) SEXUAL EXPLOITATION OF CHILD—PERMITTING OR ASSISTING BY PARENT OR GUARDIAN—ELEMENTS

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

1. At the time, [the person identified in the indictment] was under the age of eighteen years; and

2. The defendant was a [parent; legal guardian; person having custody or control] of [the person identified in the indictment]; and

3. For the purpose of producing a visual depiction of such conduct, the defendant knowingly permitted [the person identified in the indictment] to:

(a) engage in sexually explicit conduct; or

(b) assist any other person to engage in sexually explicit conduct; and

4.

(a) the defendant knew or had reason to know that the visual depiction would be mailed or transported across state lines or in foreign commerce; or

(b) The visual depiction was [produced; transmitted] using materials that had been mailed, shipped, transported across state lines or in foreign commerce; or

(c) The visual depiction was actually mailed

or transported across state lines or in 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

It is not intended that this entire instruction would be given to the jury. The options set forth as subparts (a), (b) and (c) in each of the third and fourth elements are alternative means of setting forth the elements of the offense.

Acts that fall within the meaning of "sexually explicit conduct" are listed in 18 U.S.C. § 2256(2)(B).

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

"Visual depiction" is defined in Pattern Instruction 18 U.S.C. § 1466A(f)(1).

"Custody or control" is defined in Pattern Instruction 18 U.S.C. § 2256(7).

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

18 U.S.C. § 2251(c) SEXUAL EXPLOITATION OF CHILD—CONDUCT OUTSIDE OF THE UNITED STATES—ELEMENTS

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

1. At the time, [the person identified in the indictment] was under the age of eighteen years; and

2. The defendant knowingly [[employed; used; persuaded; induced; enticed; coerced] [the person identified in the indictment] to engage in] [had [the person identified in the indictment] assist any other person to engage in] sexually explicit conduct outside of the United States; and

3. The defendant did so for the purpose of producing a visual depiction of such conduct; and

4.

(a) the defendant intended the visual depiction to be transported to the United States; or

(b) the defendant transported the visual depiction to the United States.

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

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

"Visual depiction" is defined in Pattern Instruction 18 U.S.C. § 1466A(f)(1).

"Coercion" is defined in Pattern Instruction 18 U.S.C. § 1591(e)(2).

18 U.S.C. § 2251(d) PUBLISHING OF CHILD PORNOGRAPHY—ELEMENTS

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

1. The defendant knowingly [made; printed; published; caused to be [made; printed; published]] a notice or advertisement; and

2. The notice or advertisement [sought; offered] to [receive; exchange; buy; produce; display; distribute; reproduce] a visual depiction; and

3.

(a) the production of the visual depiction involved the use of [the person identified in the indictment] engaging in sexually explicit conduct, and the visual depiction is of the sexually explicit conduct; or

(b) the defendant participated in any act of sexually explicit conduct by or with [the person identified in the indictment] for the purpose of producing a visual depiction of the conduct; and

4. The defendant knew that [the person identified in the indictment] was under the age of eighteen years; and

5.

(a) the defendant knew or had reason to know that the notice or advertisement would be transported using any means or facility of interstate or

foreign commerce, including by computer or by mail; or

(b) the notice or advertisement was transported using any means or facility of interstate or foreign commerce, including by computer or by mail.

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

It is not intended that this entire instruction would be given to the jury. The options set forth as subparts (a) and (b) in each of the third and fifth elements are alternative means of setting forth the elements of the offense.

Acts that fall within the meaning of "sexually explicit conduct" are listed in 18 U.S.C. § 2256(2)(B).

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

"Visual depiction" is defined in Pattern Instruction 18 U.S.C. § 1466A(f)(1).

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

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

18 U.S.C. § 2251A(a) SELLING OF CHILDREN—ELEMENTS

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

1. The defendant is the [parent; legal guardian; a person having custody or control] of [the person identified in the indictment] and

(a) sold [the person identified in the indictment]; or

(b) transferred custody or control of [the person identified in the indictment]; or

(c) offered to sell [the person identified in the indictment]; or

(d) offered to transfer custody of [the person identified in the indictment]; and

2.

(a) the defendant knew that [the person identified in the indictment] would be portrayed in a visual depiction [engaging in; assisting another person to engage in] sexually explicit conduct; or

(b) the defendant [sold; transferred; offered to sell; offered to transfer custody]

(i) intending to promote having [the person identified in the indictment] engage in sexually explicit conduct; and

(ii) the defendant did so for the purpose of producing a visual depiction of that conduct;

3. In the course of such conduct [[the person identified in the indictment; the defendant] traveled in interstate commerce; the offer to sell or transfer custody or control of the minor was communicated or transported in interstate commerce or by mail]; and

4. [The person identified in the indictment] at the time of the [sale; transfer; offer to sell; offer to transfer custody] 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

Acts that fall within the meaning of "sexually explicit conduct" are listed in 18 U.S.C. § 2256(2)(B).

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

"Producing" is defined in Pattern Instruction 18 U.S.C. § 2256(3).

"Custody or control" is defined in Pattern Instruction 18 U.S.C. § 2256(7).

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

"Visual depiction" is defined in Pattern Instruction 18 U.S.C. § 1466A(f)(1).

A defendant who simply possesses, transports, reproduces, or distributes child pornography does not sexually exploit a minor in violation of 18 U.S.C. § 2251, even though the materials possessed, transported, reproduced, or distributed "involve" such sexual exploitation by the producer. See *United States v. Kemmish*, 120 F.3d 937, 942 (9th Cir. 1997); see also *United States v. Angle*, 598 F.3d 352, 358 (7th Cir. 2010) (sexual exploitation does not include only possessing, accessing, receiving, or trafficking material).

18 U.S.C. § 2251A(b) PURCHASING OR OBTAINING CHILDREN

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

1. The defendant:

(a) purchased [the person identified in the indictment]; or

(b) obtained custody or control of [the person identified in the indictment]; or

(c) offered to purchase [the person identified in the indictment]; or

(d) offered to obtain custody or control of [the person identified in the indictment];

2.

(a) the defendant knew that [the person identified in the indictment] would be portrayed in a visual depiction [engaging in; assisting another person to engage in] sexually explicit conduct; or

(b) the defendant [purchased; obtained custody or control; offered to purchase; offered to obtain custody or control] [the person identified in the indictment]

(i) intending to promote having [the person identified in the indictment] engage in sexually explicit conduct; and

(ii) the defendant did so for the purpose

of producing a visual depiction of that conduct; and

3. In the course of such conduct [[the person identified in the indictment]; the defendant] traveled in interstate commerce; the offer to sell or transfer custody or control of the minor was communicated or transported in interstate commerce or by mail]; and

4. [The person identified in the indictment] at the time of the [purchase; obtaining custody or control; offer to purchase; offer to obtain custody or control] 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

Acts that fall within the meaning of "sexually explicit conduct" are listed in 18 U.S.C. § 2256(2)(B).

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

"Producing" is defined in Pattern Instruction 18 U.S.C. § 2256(3).

"Visual depiction" is defined in Pattern Instruction 18 U.S.C. § 1466A(f)(1).

"Custody or control" is defined in Pattern Instruction 18 U.S.C. § 2256(7).

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

A defendant who simply possesses, transports, reproduces, or distributes child pornography does not sexually exploit a minor in violation of 18 U.S.C. § 2251, even though the materials possessed, transported, reproduced, or distributed "involve" such sexual exploitation by the producer. See *United States v. Kemmish*, 120 F.3d 937, 942 (9th Cir. 1997).

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 [the; a] defendant guilty of this count, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly [mailed; transported or shipped using any means or facility of interstate or foreign commerce; transported or shipped in or affecting interstate or foreign commerce by any means, including by computer] the material identified in the indictment;

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

3. 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 count you are considering], then you should find the defendant guilty [of that count].

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 count you are considering], then you should find the defendant not guilty [of that count].

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 Pattern Instruction 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 Pattern Instruction 18 U.S.C. § 2256(1).

"Sexually explicit conduct" is defined in Pattern Instruction 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 F. App'x 463, 476–77 (7th Cir. 2012).

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 [the; a] defendant guilty of this count, 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 or transported using a means or facility of interstate or foreign commerce; shipped or transported in or affecting interstate or foreign commerce by any means, including by computer].

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 count you are considering], then you should find the defendant guilty [of that count].

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 count you are considering], then you should find the defendant not guilty [of that count].

Committee Comment

"Child pornography" is defined in Pattern Instruction 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 Pattern Instruction 18 U.S.C. § 2256(1).

"Sexually explicit conduct" is defined in Pattern Instruction 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 F. App'x 463, 476–77 (7th Cir. 2012).

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 [the; a] defendant guilty of this count, 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 or transported using a means or facility of interstate or foreign commerce; shipped or transported in or affecting interstate or foreign commerce by any means, including by computer].

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 count you are considering], then you should find the defendant guilty [of that count].

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 count you are considering], then you should find the defendant not guilty [of that count].

Committee Comment

"Child pornography" is defined in Pattern Instruction 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 Pattern Instruction 18 U.S.C. § 2256(1).

"Sexually explicit conduct" is defined in Pattern Instruction 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 F. App'x 463, 476–77 (7th Cir. 2012).

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 [the; a] defendant guilty of this count, 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] [through the mail; using a means or facility of interstate or foreign commerce; in or affecting interstate or foreign commerce by any means, including by computer].

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 count you are considering], then you should find the defendant guilty [of that count].

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 count you are considering], then you should find the defendant not guilty [of that count].

Committee Comment

"Child pornography" is defined in Pattern Instruction 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 Pattern Instruction 18 U.S.C. § 2256(1).

"Sexually explicit conduct" is defined in Pattern Instruction 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 F. App'x 463, 476–77 (7th Cir. 2012).

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 [the; a] defendant guilty of this count, 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 count you are considering], then you should find the defendant guilty [of that count].

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 count you are considering], then you should find the defendant not guilty [of that count].

Committee Comment

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

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

"Sexually explicit conduct" is defined in Pattern Instruction 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 F. App'x 463, 476–77 (7th Cir. 2012).

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 [the; a] defendant guilty of this count, 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 or transported using a means or facility of interstate or foreign commerce; shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; produced using materials that have been mailed, or using materials that have been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer].

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 count you are considering], then you should find the defendant guilty [of that count].

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 count you are considering], then you should find the defendant not guilty [of that count].

Committee Comment

"Child pornography" is defined in Pattern Instruction 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 Pattern Instruction 18 U.S.C. § 2256(1).

"Sexually explicit conduct" is defined in Pattern Instruction 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 F. App'x 463, 476–77 (7th Cir. 2012).

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 [the; a] defendant guilty of this count, 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] contained 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 count you are considering], then you should find the defendant guilty [of that count].

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 count you are considering], then you should find the defendant not guilty [of that count].

Committee Comment

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

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

"Sexually explicit conduct" is defined in Pattern Instruction 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 F. App'x 463, 476–77 (7th Cir. 2012).

Pursuant to 18 U.S.C. § 2252A(b)(2), if the offense involved any image of child pornography involving a prepubescent minor or a minor who had not attained 12 years of age, the defendant faces a maximum sentence of 20 years' imprisonment, rather than 10 years' imprisonment. If this is alleged in a count charged under 18 U.S.C. § 2252A(a)(5)(A), the parties should modify the elements instruction accordingly or provide the jury with a special verdict form. See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

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 [the; a] defendant guilty of this count, 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] contained 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 or transported using a means or facility of interstate or foreign commerce; shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; produced using materials that have been mailed, or using materials that have been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer].

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 count you are considering], then you should find the defendant guilty [of that count].

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 count you are considering], then you should find the defendant not guilty [of that count].

Committee Comment

"Child pornography" is defined in Pattern Instruction 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 Pattern Instruction 18 U.S.C. § 2256(1).

"Sexually explicit conduct" is defined in Pattern Instruction 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 F. App'x 463, 476–77 (7th Cir. 2012).

Pursuant to 18 U.S.C. § 2252A(b)(2), if the offense involved any image of child pornography involving a prepubescent minor or a minor who had not attained 12 years of age, the defendant faces a maximum sentence of 20 years' imprisonment, rather than 10 years' imprisonment. If this is alleged in a count charged under 18 U.S.C. § 2252A(a)(5)(B), the parties should modify the elements instruction accordingly or provide the jury with a special verdict form. See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

18 U.S.C. §§ 2252A(a)(6)(A), (B) & (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 [the; a] defendant guilty of this count, 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] for purposes of inducing or persuading a minor to participate in any activity that is illegal; 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; transported] using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means[, including by computer]; or

b. produced using materials that have been [mailed; shipped; transported] in or affecting interstate or foreign commerce by any means[, including by computer]; or

c. [distributed; offered; sent; provided] using [the mails] [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 count you are considering], then you should find the defendant guilty [of that count].

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 count you are considering], then you should find the defendant not guilty [of that count].

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 Pattern Instruction 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 Pattern Instruction 18 U.S.C. § 2256(1).

"Sexually explicit conduct" is defined in Pattern Instruction 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 F. App'x 463, 476–77 (7th Cir. 2012).

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 [the; a] defendant guilty of this count, 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, including a computer, 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 count you are considering], then you should find the defendant guilty [of that count].

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 count you are considering], then you should find the defendant not guilty [of that count].

Committee Comment

"Child pornography" is defined in Pattern Instruction 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 Pattern Instruction 18 U.S.C. § 2256(9).

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

"Sexually explicit conduct" is defined in Pattern Instruction 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 F. App'x 463, 476–77 (7th Cir. 2012).

18 U.S.C. § 2252A(c) AFFIRMATIVE DEFENSE TO CHARGES UNDER 18 U.S.C. §§ 2252A(a)(1), (a)(2), (a)(3)(A), (a)(4) or (a)(5)

If the defendant proves that either of the following is more likely true than not true, then you should find the defendant not guilty of [Count __].

1. The [alleged child pornography] was produced using [an actual person; actual persons] engaging in sexually explicit conduct and [that person; each such person] was an adult at the time the material was produced; or

2. The [alleged child pornography] was not produced using any actual [minor; minors].

Committee Comment

"Child pornography" is defined broadly in 18 U.S.C. § 2256(8) to include visual depictions that are "indistinguishable from" that of a minor engaging in sexually explicit conduct and visual depictions adapted or modified "to appear" that an "identifiable minor" is engaging in sexually explicit conduct. It may therefore be an affirmative defense that the visual depictions were produced using only actual adults and/or no minors. As § 2252A(c) is an affirmative defense, the instruction is intended for cases in which the defendant presents evidence that does not exclusively challenge an element of the offense—namely, whether the depictions constitute "child pornography" as defined in § 2256(8). See *United States v. Jumah*, 493 F.3d 868, 873–75 (7th Cir. 2007) (explaining that a defendant bears the burden of proving an affirmative defense when the challenge does not negate an element of the offense) (citing *Dixon v. United States*, 126 S. Ct. 2437 (2006)).

In prosecutions involving child pornography that depicts an apparent "identifiable minor," the second, alternative § 2252A(c) defense, 18 U.S.C. § 2252A(c)(2), is not available. *Id.* § 2252A(c).

Section 2252A(c) contains a pretrial notice provision for defendants who intend to put on this affirmative defense.

The alternative defenses under § 2252A(c) are somewhat "redundant," in that the "second includes the first." *United States v. Peel*, 595 F.3d 763, 770 (7th Cir. 2010). But as *Peel* explained:

"[T]he second [clause] is broader because it includes the case in which no person was used in the creation of the pornographic depiction; it might be a painting of an imaginary person or a computer simulation." *Id.* See *Peel* for a discussion of the defense's history, potential applications, and the effect of *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

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

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

18 U.S.C. § 2252A(d) AFFIRMATIVE DEFENSE TO CHARGE UNDER 18 U.S.C. § 2252A(a)(5)

If the defendant proves that it is more likely than not that

(a) he possessed fewer than three images of child pornography;

(b) he promptly and in good faith [took reasonable steps to destroy each image; reported the matter to a law enforcement agency and afforded the agency access to the image[s]];

(c) he did not retain any image; and

(d) he did not allow any person other than law enforcement to access or copy any image, then you should find him not guilty of possessing child pornography.

Committee Comment

The defendant has the burden of proof with respect to this affirmative defense because it does not negate an element of the offense; instead it requires proof of additional facts that mitigate the circumstances of the offense. *United States v. Davenport*, 519 F.3d 940, 945 (9th Cir. 2008).

The language in this instruction should be added to the elements instruction for 18 U.S.C. § 2252A(a)(5) in appropriate cases.

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

18 U.S.C. § 2256(1) DEFINITION OF "MINOR"

"Minor" means any person under the age of eighteen (18) years.

18 U.S.C. § 2256(2)(A) DEFINITION OF "SEXUALLY EXPLICIT CONDUCT"

"Sexually explicit conduct" includes actual or simulated –

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

2. bestiality;

3. masturbation;

4. sadistic or masochistic abuse; or

5. lascivious exhibit of the anus, genitals, or pubic area of any person.

Committee Comment

Only the applicable terms within this definition should be used.

In some cases charging violations of 18 U.S.C. § 2252A involving allegations of the use of computer-generated images that are, or are indistinguishable from, that of a minor engaging in sexually explicit conduct, this definition should be modified as set forth in 18 U.S.C. § 2256(2)(B).

In 2018, Congress passed the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, which added the term "anus," to 18 U.S.C. § 2256(2)(A)(v).

18 U.S.C. § 2256(3) DEFINITION OF "PRODUCING"

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

18 U.S.C. § 2256(6) DEFINITION OF "COMPUTER"

"Computer" as used in this instruction means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.

Committee Comment

"Computer" in connection with this range of offenses has the same meaning as provided in 18 U.S.C. § 1030. This instruction should only be given in cases where there is an issue regarding whether a particular device is a computer.

18 U.S.C. § 2256(7) DEFINITION OF "CUSTODY OR CONTROL"

"Custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained.

18 U.S.C. § 2256(8) DEFINITION OF "CHILD PORNOGRAPHY"

"Child pornography" means a visual depiction of sexually explicit conduct, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, if:

1. The production of the visual depiction involves the use of a minor engaged in sexually explicit conduct; and

2. The visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

3. Such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

18 U.S.C. § 2256(9) DEFINITION OF "IDENTIFIABLE MINOR"

"Identifiable minor" means a person who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature, and

1. who was a minor at the time the visual depiction was created, adapted, or modified; or

2. whose image as a minor was used in creating, adapting, or modifying the visual depiction.

The Government is not required to prove the actual identity of the identifiable minor.

18 U.S.C. § 2256(11) DEFINITION OF "INDISTINGUISHABLE"

"Indistinguishable" used with respect to a depiction, means virtually indistinguishable such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.

18 U.S.C. § 2260(a) PRODUCTION OF SEXUALLY EXPLICIT DEPICTIONS OF A MINOR—IMPORTATION—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] producing sexually explicit depictions of a minor for importation into the United States. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. At the time, [the person identified in the indictment] was under the age of eighteen years;

2. The defendant, outside the United States, for the purpose of [producing a visual depiction of such conduct; transmitting a live visual depiction of such conduct]:

(a) [employed; used; persuaded; induced; enticed; coerced] [the person identified in the indictment] to take part in sexually explicit conduct; or

(b) caused [the person identified in the indictment] to assist another person to engage in sexually explicit conduct; or

(c) transported [the person identified in the indictment] with the intent that [the person identified in the indictment] engage in sexually explicit conduct; and

3. The defendant intended that such visual depiction be [imported; transmitted] into the [United States; waters within a distance of twelve miles of the coast of the United States].

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

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

"Producing" is defined in Pattern Instruction 18 U.S.C. § 2256(3).

"Visual depiction" is defined in Pattern Instruction 18 U.S.C. § 1466A(f)(1).

18 U.S.C. § 2260(b) USE OF A VISUAL DEPICTION—IMPORTATION—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [receiving; transporting; shipping; distributing; selling; possession with intent to [transport; ship; sell; distribute]] visual depictions of a minor engaged in sexually explicit conduct for importation into the United States. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. At the time, [the person identified in the indictment] was under the age of eighteen years; and

2. The defendant, while outside the United States, knowingly [received; transported; shipped; distributed; sold; possessed with intent to [transport; ship; sell; distribute]] a visual depiction of [the person identified in the indictment]; and

3. The production of the visual depiction involved [the person identified in the indictment] engaging in sexually explicit conduct; and

4. The defendant intended that the visual depiction be [imported] into the [United States; waters within a distance of twelve miles of the coast of the United States].

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

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

"Producing" is defined in Pattern Instruction 18 U.S.C. § 2256(3).

"Visual depiction" is defined in Pattern Instruction 18 U.S.C. § 1466A(f)(1).

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

18 U.S.C. § 2312 TRANSPORTATION OF STOLEN VEHICLE—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] transporting a stolen [car; truck; motorcycle; airplane; helicopter] in [interstate; foreign] commerce. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The [name vehicle charged in the indictment] was stolen; and

2. The defendant transported the [name vehicle charged in the indictment] in [interstate; foreign] commerce; and

3. The defendant knew at the time the defendant transported the [name vehicle charged in the indictment] that it was stolen.

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 uses the terms "motor vehicle," "vessel," and "aircraft" in describing the articles to which the transportation prohibition pertains. Rather than using the statutory terms, we suggest using a generic description of the vehicle which is the subject of the prosecution.

To constitute a "motor vehicle," the vehicle must be self-propelled. 18 U.S.C. § 2311. Thus, a trailer, without the capability of self-propulsion and absent a tractor to pull it, would not fall within the proscription of the transportation prohibition. In this instance, however, the trailer could constitute a "good" for purposes of 18 U.S.C. § 2315. On the other hand, if the trailer were connected to a tractor or other vehicle capable of self-propulsion, both vehicles would be subject to a single charge of unlawful transportation. *United States v. Kidding*, 560 F.2d 1303, 1308 (7th Cir. 1977).

To fall within the meaning of the term "aircraft," the vehicle must be capable of air navigation. 18 U.S.C. § 2311.

The statute also uses the phrase "transports in interstate or foreign commerce" and the term "stolen." For a definition of interstate or foreign commerce see Pattern Instruction 18 U.S.C. § 2315. For a definition of "stolen" see Pattern Instruction 18 U.S.C. § 2312.

18 U.S.C. § 2312 DEFINITION OF "STOLEN"

An object is "stolen" if it was taken with the intent to deprive the owner of his rights and benefits of ownership. [The taking may be accomplished through the seizure of the [name vehicle] or through the use of false pretenses, trickery, or misrepresentation in obtaining possession.] [It is not necessary, however, that the taking be initially unlawful. Even if possession is first acquired lawfully, the taking falls within the meaning of "stolen" if the defendant thereafter forms the intent to deprive the owner of his ownership interests.]

Committee Comment

The meaning of the word "stolen" was, in part, resolved by the United States Supreme Court in *United States v. Turley*, 352 U.S. 407, 417 (1957). There, the Court found that the term included all takings performed with the intent to deprive the owner of the rights and benefits of ownership regardless of whether the initial taking was authorized. Thus, the statute proscribes the transportation of a vehicle in interstate or foreign commerce which initially was obtained by lawful means, such as through a rental contract, and thereafter converted entirely to the defendant's use without the permission of the owner, *United States v. Baker*, 429 F.2d 1344, 1346 (7th Cir. 1970), or which was obtained unlawfully through the use of a bogus check or stolen credit card in purportedly purchasing or renting the vehicle, *United States v. Ellis*, 428 F.2d 818, 820 (8th Cir. 1970).

The taking does not need to be done with the intent to permanently deprive the owner of the vehicle. *United States v. Bruton*, 414 F.2d 905, 908 (8th Cir. 1969). It is enough that the defendant intends to use the vehicle as long as it serves his convenience and thereafter intends to abandon it or dispose of it. *United States v. Dillinger*, 341 F.2d 696, 697–98 (4th Cir. 1965); see also *United States v. Epperson*, 451 F.2d 178, 179 (9th Cir. 1971) (intent to permanently deprive owner of ownership interest not an element of the offense); *United States v. Berlin*, 472 F.2d 13, 14 n.2 (9th Cir. 1973) (defendant must have intent to permanently or temporarily deprive the owner of the rights and benefits of ownership).

The Seventh Circuit has found that Pattern Instruction 4.14 (Possession of Recently Stolen Property), which discusses inferring

knowledge that property was stolen when it had recently been stolen, may be appropriate to use in conjunction with this pattern instruction. *United States v. Tantchev*, 916 F.3d 645, 655 (7th Cir. 2019). The jury can then decide "whether the surrounding circumstances supported the inference of knowledge." *Id.*

18 U.S.C. § 2313 SALE OR RECEIPT OF STOLEN VEHICLES—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [selling; possessing; receiving; concealing; disposing of] a stolen [car; truck; motorcycle; airplane; helicopter] in [interstate; foreign] commerce. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The [name vehicle charged in the indictment] was stolen; and

2. After the [name vehicle charged in the indictment] was stolen, it was moved across a [state line; United States border]; and

3. The defendant [sold; possessed; received; concealed; disposed of] the [name vehicle charged in the indictment]; and

4. At the time the defendant [sold; possessed; received; concealed; disposed of] the [name vehicle charged in the indictment], the defendant knew that it had been stolen.

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

See Committee Comment to 18 U.S.C. § 2312—Elements, above.

18 U.S.C. § 2314 TRANSPORTATION OF STOLEN OR CONVERTED GOODS OR GOODS TAKEN BY FRAUD—ELEMENTS

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

1. The defendant [[caused to be] transported; transmitted; transferred] [name goods, wares, merchandise, securities, or money charged in the indictment] in [interstate; foreign] commerce; and

2. The [name goods, wares, merchandise, securities, or money charged in the indictment] had a value of at least $5,000; and

3. The [name goods, wares, merchandise, securities, or money charged in the indictment] had been [stolen; converted; taken by fraud]; and

4. At the time the defendant [[caused to be]; transported; transmitted; transferred] [name goods, wares, merchandise, securities, or money charged in the indictment], the defendant knew they had been [stolen; converted; taken by fraud].

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 is for use when the defendant has been charged with the offense set out in the first paragraph of 18 U.S.C. § 2314.

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

18 U.S.C. § 2314 INTERSTATE TRAVEL TO EXECUTE OR CONCEAL FRAUD—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [transporting a person; causing a person to be transported; inducing a person to travel or be transported] in interstate commerce in the execution or concealment of a scheme or artifice to defraud. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant devised or intended to devise a scheme to [defraud; obtain money by false or fraudulent pretenses, representations, or promises] as charged in the indictment; and

2. The defendant [transported a person; caused a person to be transported; induced a person to travel or be transported] in [interstate; foreign] commerce; and

3. The defendant acted in the execution or concealment of the scheme or artifice to defraud that person of money or property; and

4. The money or property had a value of $5,000 or more.

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 is for use when the defendant has been charged with the offense set out in the second paragraph of 18 U.S.C. § 2314.

It is suggested that the name of the person or persons transported, caused to be transported or induced to travel or be transported referred to in the indictment and proved at trial be listed in the second element. The second paragraph of § 2314 requires that the person traveling (or being transported) be the fraud victim referred to in the third element.

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

18 U.S.C. § 2314 INTERSTATE TRANSPORTATION OF FALSELY MADE, FORGED, ALTERED OR COUNTERFEITED SECURITIES OR TAX STAMPS—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] interstate transportation of [falsely made; forged; altered; counterfeited] securities or tax stamps. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant [transported; caused to be transported], in [interstate; foreign] commerce, the [securities; tax stamps] described in the indictment; and

2. The [securities; tax stamps] were [falsely made; forged; altered; counterfeited]; and

3. At the time the defendant [transported; caused to be transported] the [securities; tax stamps], the defendant knew they were [falsely made; forged; altered; counterfeited]; and

4. The defendant acted with unlawful or fraudulent intent.

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 is for use when the defendant has been charged with the offense set out in the third paragraph of 18 U.S.C. § 2314.

In *McElroy v. United States*, 455 U.S. 642 (1982), the Supreme Court held that this statute does not require proof that the forgery occurred before the securities were transported across state lines. The Court's holding was based on a reading of the statutory phrase "interstate commerce" to include transportation within the state or destination if such transportation is part of a movement that began out of state. Accordingly, in some cases, an instruction incorporating the Court's holding in *McElroy* will be appropriate.

The elements of this offense do not require proof that the defendant knew the securities moved in interstate commerce. See, *e.g.*, *United States v. Squires*, 581 F.2d 408, 410 (4th Cir. 1978). Nor does the statute require proof that the interstate transportation was for the purpose of executing the scheme to defraud. See, *e.g.*, *United States v. Gundersen*, 518 F.2d 960, 961 (9th Cir. 1975); *United States v. Vaccaro*, 816 F.2d 443, 455 (9th Cir. 1987).

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

The statute does not define the word "unlawful" in the fourth element. Nor have appellate cases interpreted the meaning of it or set forth a context in which it would be properly used in the instruction.

18 U.S.C. § 2314 INTERSTATE TRANSPORTATION OF A TRAVELER'S CHECK BEARING A FORGED COUNTERSIGNATURE—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] interstate transportation of a traveler's check bearing a forged countersignature. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant [transported; caused to be transported], in [interstate; foreign] commerce, the traveler's check described in the indictment; and

2. The traveler's check bore a forged countersignature; and

3. At the time the defendant [transported; caused to be transported], the traveler's check, the defendant knew it bore a forged countersignature; and

4. The defendant acted with unlawful or fraudulent intent.

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 is for use when the defendant has been charged with the offense set out in the fourth paragraph of 18 U.S.C. § 2314.

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

In the fourth element, the Committee has been unable to ascertain the meaning of the statutory term "unlawful" or a context in which it would be properly used in the instruction.

18 U.S.C. § 2314 INTERSTATE TRANSPORTATION OF TOOLS USED IN MAKING, FORGING, ALTERING, OR COUNTERFEITING ANY SECURITY OR TAX STAMPS—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] transportation of any [tool; implement; item described in the indictment] in [falsely making; forging; altering; counterfeiting] any security. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant [transported; caused to be transported] the [tool; implement; item described in the indictment] in [interstate; foreign] commerce; and

2. At the time the defendant transported the [tool; implement; item described in the indictment], it could be [used; fitted for use] in [falsely making; forging; altering; counterfeiting] any security or tax stamps, or any part thereof; and

3. At the time the defendant transported the [tool; implement; item described in the indictment], the defendant knew that it could be [used; fitted for use] in [falsely making; forging; altering; counterfeiting] any security or tax stamps or any part thereof; and

4. The defendant acted with unlawful or fraudulent intent.

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 is for use when the defendant has been charged with the offense set out in the fifth paragraph of 18 U.S.C. § 2314.

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

18 U.S.C. § 2315 RECEIPT OF STOLEN PROPERTY—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [receiving; possessing; concealing; storing; bartering; selling; disposing of] stolen property. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant [received; possessed; concealed; stored; bartered; sold; disposed of] the property described in the indictment; and

2. The property had been [stolen; unlawfully converted; unlawfully taken] and the defendant knew the property had been [stolen; unlawfully converted; unlawfully taken]; and

3. After the property was [stolen; unlawfully converted; unlawfully taken] it was moved across the boundary line of [a state; the United States]; and

4. The property had a value of $5,000 or more.

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 is for use when the defendant has been

charged with the offense set out in the first part of the first paragraph of 18 U.S.C. § 2315.

The third element, that the property "moved across the boundary line of the United States or a State" is found only in the first paragraph of 18 U.S.C. § 2315.

18 U.S.C. § 2315 RECEIPT OF COUNTERFEIT SECURITIES OR TAX STAMPS—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [receiving; possessing; concealing; storing; bartering; selling; disposing of; pledging as security for a loan; accepting as security for a loan], in [interstate; foreign] commerce, any [falsely made; forged; altered; counterfeited] [securities; tax stamps]. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant [received; possessed; concealed; stored; bartered; sold; disposed of; pledged as security for a loan; accepted as security for a loan] [securities; tax stamps]; and

2. The [securities; tax stamps] had been [falsely made; forged; altered; counterfeited]; and

3. At the time the [securities; tax stamps] were [received; possessed; concealed; stored; bartered; sold; disposed of; pledged as security for a loan; accepted as security for a loan], the defendant knew the [securities; tax stamps] had been [falsely made; forged; altered; counterfeited]; and

4. At the time the [securities; tax stamps] were [received; concealed; stored; bartered; sold; disposed of; pledged as security for a loan; accepted as security for a loan], they were moving in, were a part of, or constituted [interstate; 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

This instruction is for use when the defendant has been charged with the offense set out in the second paragraph of 18 U.S.C. § 2315.

For a definition of interstate or foreign commerce see the following instruction.

18 U.S.C. § 2315 DEFINITION OF INTERSTATE OR FOREIGN COMMERCE

The term "[interstate; foreign] commerce" means the movement across [state; territorial] lines, including any movement before or after the crossing of [state; territorial] lines which constitutes a part of the [interstate; foreign] travel. [Property that was [received; concealed; stored; bartered; sold; disposed of] some period of time after it crossed state lines still may constitute interstate commerce if the [receipt; concealment; storage; barter; sale; disposition] is a continuation of the movement that began out of state.]

18 U.S.C. § 2325 DEFINITION OF "TELEMARKETING" APPLICABLE TO ENHANCED PENALTIES UNDER 18 U.S.C. § 2326

In order to find that the offense involved "telemarketing," you must find that the offense involved a plan, program, promotion, or campaign that was conducted to induce 1) purchases of goods or services, 2) participation in a contest or sweepstakes, or 3) a charitable contribution, donation, or gift of value or any other thing of value. Either the person conducting the plan, program, promotion or campaign or a prospective purchaser, participant, or contributor must have initial at least one interstate telephone call during the offense.

Telemarketing does not include the solicitation of sales through the mailing of a catalog that contains a written description or illustration of the goods or services offered for sales, includes the business address of the seller, includes multiple pages of written material or illustrations, and has been issued not less frequently than once a year, as long as the person making the solicitation does not solicit customers by telephone. The person making the solicitation can only receive calls initiated by customers in response to the catalog and during those calls take orders without further solicitation.

Committee Comment

This definition of "telemarketing" comes from 18 U.S.C. § 2325. Section 2326 provides for enhanced penalties for violations of 18 U.S.C. §§ 1028, 1029, 1341, 1342, 1343 or 1344, or conspiracies to commit any of those offenses, that occur "in connection with the conduct of telemarketing."

18 U.S.C. § 2339A DEFINITION OF "MATERIAL SUPPORT OR RESOURCES"

"Material support or resources" means any property, tangible or intangible, or service, including: currency or monetary instruments or financial securities; financial services; lodging; training; expert advice or assistance; safehouses; false documentation or identification; communications equipment; facilities; weapons; lethal substances; explosives; personnel (one or more individuals who may be or include oneself); and transportation.

As used in this definition, the term "training" means instruction or teaching designed to impart a specific skill, as opposed to general knowledge.

As used in this definition, the term "expert advice or assistance" means advice or assistance derived from scientific, technical, or other specialized knowledge.

Medicine and religious materials are not "material support or resources."

Committee Comment

See 18 U.S.C. § 2339A(b)(1) to (3). This instruction applies to offenses under 18 U.S.C. §§ 2339A and 2339B.

In *Holder v. Humanitarian Law Project*, two United States citizens and six domestic non-profit organizations challenged Section 2339B as unconstitutional under the First and Fifth Amendments, arguing that they "wished to provide support for the humanitarian and political activities" of the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE), both designated foreign terrorist organizations, "in the form of money contributions other tangible aid, legal training, and political advocacy." See 561 U.S. 1, 10 (2010). The Supreme Court upheld the constitutionality of Section 2339B and specifically the inclusion of "training," "expert advice or assistance," "service" and "personnel" in the definition of "material support or resources" against the plaintiffs' as-applied challenge based on vagueness. See *id.* at 20–21.

18 U.S.C. § 2339A PROVIDING MATERIAL SUPPORT TO TERRORISTS—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ____ of the indictment charge[s] the defendant[s] with] providing material support to terrorists. In order for you to find [the; a] defendant guilty of this charge, the government must prove the following two elements beyond a reasonable doubt:

1. The defendant [provided; attempted to provide; conspired to provide] material support or resources and/or [concealed or disguised; attempted to conceal or disguise; conspired to conceal or disguise] the nature, location, source, or ownership of material support or resources in the manner described in the indictment; and

2. The defendant knew or intended that the material support or resources were to be used to prepare for or carry out [a violation of [describe applicable federal terrorism offense listed in 18 U.S.C. § 2339A(a)]] [the concealment of an escape after violating [describe applicable federal terrorism offense listed in 18 U.S.C. § 2339A(a)]].

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

If the indictment alleges that a death resulted, the jury must separately find this fact because the finding has the effect of rais-

ing the statutory maximum penalty to life imprisonment. See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). Where relevant, provide an additional instruction to this effect:

> The government has alleged that the death of a person resulted from this offense, a fact that it must prove beyond a reasonable doubt. If you conclude beyond a reasonable doubt that a death resulted, you should separately note this finding on the verdict form. If you find the elements of the crime beyond a reasonable doubt but not the resulting death, you should also note that finding on the verdict form.

Section 2339A(a) lists the following federal terrorism offenses that a defendant is prohibited from providing material support or resources to further:

- 18 U.S.C. § 32 (sabotaging aircraft or aircraft facilities), § 37 (violence at international airports), § 1992 (attacks on mass transportation systems), § 2280 (violence against maritime navigation), § 2281 (violence against maritime fixed platforms), and 49 U.S.C. § 46502 (aircraft piracy);

- 18 U.S.C. § 81 (arson of structures, vessels, machinery or supplies), § 844(f), (i) (damage by fire or explosives to federal property or property used in interstate or foreign commerce), § 930(c) (death in the course of attack on federal facility), § 1361 (damage to government property or contracts), § 1362 (injury to communication lines), § 1363 (malicious injury to structures or property), § 1366 (destruction of energy facilities), § 2155 (destruction of national defense property), § 2156 (obstruction of national defense), and 49 U.S.C. § 60123(b) (damaging interstate pipelines);

- 18 U.S.C. § 175 (biological weapons), § 229 (chemical weapons), § 831 (unlawful transactions of nuclear material), § 842(m), (n) (unlawful transactions of plastic explosives), § 2332a (use of weapons of mass destruction), and 42 U.S.C. § 2284 (sabotaging nuclear facilities);

- 18 U.S.C. § 351 (assassination, kidnapping or assault of government officials), § 1114 (killing of federal officers and employees), § 1116 (killing of foreign officials or internationally protected persons), and § 1751 (assassination, kidnapping or assault of Presidential staff);

- 18 U.S.C. § 956 (conspiracy to kidnap or injure persons or damage property in foreign country), § 1091 (genocide), § 1203 (taking hostages), § 2332 (homicide of a national outside of the United States), § 2340A (torture), § 2332b (international acts of terrorism), § 2332f (bombings), and § 2442 (recruiting child soldiers); and

- Any offense listed in 42 U.S.C. § 2332b(g)(5)(B) (federal crimes of terrorism), except offenses under Sections 2339A and 2339B.

In *Holder v. Humanitarian Law Project*, the Supreme Court contrasted the mental state requirement in Section 2339A with Section 2339B. See 561 U.S. 1, 16–17 (2010). To be convicted under Section 2339A, a defendant must have possessed the specific intent that the material support or resources provided would be used to further unlawful terrorist activity. See *id.* at 16–17 ("Congress plainly spoke to the necessary mental state for a violation of § 2339B, and it chose knowledge about the organization's connection to terrorism, not specific intent to further the organization's terrorist activities."). Note the difference between Section 2339A and Section 2339B: in Section 2339A, the object of the intent or knowledge requirement is the terrorist activity itself; in contrast, the mental state for a conviction under Section 2339B requires only that the defendant seek to further the terrorist organization, not necessarily its specific acts.

18 U.S.C. § 2339B PROVIDING MATERIAL SUPPORT OR RESOURCES TO DESIGNATED FOREIGN TERRORIST ORGANIZATIONS—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ____ of the indictment charge[s] the defendant[s] with] providing material support or resources to a foreign terrorist organization. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the three following elements beyond a reasonable doubt:

1. The defendant knowingly [provided; attempted to provide; conspired to provide] material support or resources to [the organization described in the indictment]; and

2. The defendant knew that [the organization described in the indictment] [is a designated terrorist organization; has engaged or engages in terrorist activity; has engaged or engages in terrorism]; and

3. One of the following additional requirements is satisfied:

(a) The defendant is a national or permanent resident alien of United States; or

(b) The defendant is a stateless person with habitual residence in the United States; or

(c) After the charged conduct occurred, the defendant was brought into or found in the United States; or

(d) The offense occurred in whole or in part in the United States; or

(e) The offense occurred in or affected interstate or foreign commerce; or

(f) The defendant aided or abetted or conspired with any person over whom jurisdiction exists.

[The term "designated terrorist organization" means an organization designated by the Secretary of State as a foreign terrorist organization pursuant to Section 219 of the Immigration and Nationality Act, 8 U.S.C. § 1189. I hereby instruct you as a matter of law that [organization described in the indictment which has been listed as a Foreign Terrorist Organization] was designated as a "foreign terrorist organization" during the alleged conduct.]

[An organization is "engaged in terrorist activity" if it:

(a) Commits or incites to commit, under circumstances indicating an intent to cause death or serious bodily injury, a terrorist activity; or

(b) Prepares or plans a terrorist activity; or

(c) Gathers information on potential targets for terrorist activity; or

(d) Solicits funds or things of value for a terrorist activity or a terrorist organization; or

(e) Solicits any individual to engage in terrorist activity or for membership in a terrorist organization; or

(f) Commits an act that the actor knows, or reasonably should know, affords material support [for the commission of a terrorist activity; to any individual the actor knows, or reasonably should know, has committed or plans to commit a terrorist

activity; to a terrorist organization or any member of such organization].]

[The term "terrorist activity" means any activity that is unlawful under the laws of the United States or the place it was committed, and which involves any of the following actions:

(a) Hijacking or sabotaging an aircraft, vessel, vehicle, or other conveyance; or

(b) Seizing or detaining and threatening to kill, injure, or further detain a person to compel a third party (including a government entity) to take or abstain from taking a specific action as a condition for releasing the seized or detained person; or

(c) A violent attack on an internationally protected person, including employees and officials of governments and international organizations; or

(d) An assassination; or

(e) Using biological or chemical agents, nuclear weapons or devices, explosives, firearms, or other weapons or dangerous devices with intent to endanger the safety of one or more individuals or to cause substantial property damage; or

(f) Threatening, attempting, or conspiring to take any of the preceding actions.]

[The term "terrorism" means premeditated, politically-motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.]

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

Section 2339B does not prohibit mere association or membership with a foreign terrorist organization; it only prohibits the provision of material support or resources. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 39 (2010). Likewise, Section 2339B does not prohibit mere praise, independent advocacy, or voicing support for a foreign terrorist organization. See *Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief and Dev.*, 291 F.3d 1000, 1026 (7th Cir. 2002); see also *Holder*, 561 U.S. at 25–26.

If the alleged material support or resources is the provision of personnel, provide an additional instruction:

> You may only find the defendant guilty for providing support in the form of "personnel" if the defendant knowingly [provided; attempted to provide; conspired to provide] the foreign terrorist organization [identified in Count ____] with one or more individuals (who may be or include the defendant [himself; herself]) to work under the organization's direction or control, or to organize, manage, supervise or otherwise direct the operation of the organization.
>
> You may not find the defendant guilty for providing "personnel" that act entirely independently of the foreign terrorist organization to advance the organization's goals or objectives. For example, if the defendant worked to advance the goals and objectives of the terrorist organization but did so entirely independently, the defendant cannot be found guilty [of Count ____].

See 18 U.S.C. § 2339B(h). The prohibition of support in the form of "personnel" does not include independent advocacy entirely disconnected from the foreign terrorist organization. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 23 (2010).

If the indictment alleges that a death resulted, the jury must

separately find this fact because the finding has the effect of raising the statutory maximum penalty to life imprisonment. See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). Where relevant, provide an additional instruction to this effect:

> The government has alleged that the death of a person resulted from this offense, a fact that it must prove beyond a reasonable doubt. If you conclude beyond a reasonable doubt that a death resulted, you should separately note this finding on the verdict form. If you find the elements of the crime beyond a reasonable doubt but not the resulting death, you should also note that finding on the verdict form.

The term "material support or resource" has the same meaning in Section 2339B as the term is accorded in 18 U.S.C. § 2339A. See 18 U.S.C. §§ 2339A(b)(1), 2339B(g)(4). For a definition of "material support or resource," see the pattern instruction regarding that term as used in Section 2339A.

The terms "terrorist activity" and "engage in terrorist activity" are defined in 8 U.S.C. § 1182(a)(3)(B)(iii) to (iv).

The definition of "terrorism" comes from Section 140(d)(2) of the Foreign Relations Authorization Act, 22 U.S.C. § 2656f(d)(2).

In *Holder v. Humanitarian Law Project*, the Supreme Court clarified the mental state requirement in Section 2339B that a defendant "knowingly" provided material support. 561 U.S. 1, 16–17 (2010). A conviction under Section 2339B does not require the defendant to have the specific intent to further the organization's terrorist activities; rather, Section 2339B only requires a defendant's knowledge of the organization's connection to terrorism. See *id.*

In *Holder*, the Supreme Court also rejected an as-applied constitutional challenge to Section 2339B. See *id.* at 7–8. Two United States citizens and six domestic non-profit organizations claimed they "wished to provide support for the humanitarian and political activities" of two designated foreign terrorist organizations "in the form of monetary contributions, other tangible aid, legal training, and political advocacy, but that they could not do so for fear of prosecution under § 2339B." *Id.* at 10. The Court ruled that Section 2339B, as applied to these plaintiffs' intended actions, did not violate their freedom of speech or association under the

First Amendment. See *id.* at 39–40.

18 U.S.C. § 2421 TRANSPORTATION FOR PROSTITUTION/SEXUAL ACTIVITY—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ___ of the indictment charge[s] the defendant[s] with] transportation for [prostitution; sexual activity]. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. The defendant knowingly [transported; attempted to transport] [the person identified in the indictment] in interstate commerce; and

2. At the time of [transportation; the attempted transportation], the defendant intended that [the person identified in the indictment] would engage in [prostitution; sexual activity for which [the defendant; any other person identified in the indictment] could have been charged with a criminal offense [as charged in the indictment]].

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

"Sexual activity" is not fully defined by the statute. See 18 U.S.C. § 2427. There is no current authority addressing whether "sexual activity" includes conduct other than conduct included within "sexually explicit conduct" (see 18 U.S.C. § 2256(2)(A)), "il-

licit sexual conduct" (see 18 U.S.C. § 2423(f)), and "sexual act" (see 18 U.S.C. § 2246(2)), such as misdemeanor offenses involving flashing or masturbation.

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 Pattern Instruction 4.09.

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

18 U.S.C. § 2422(a) ENTICEMENT—ELEMENTS

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

1. The defendant knowingly [persuaded; induced; enticed; coerced] [the person identified in the indictment] to travel in interstate commerce to engage in [prostitution; sexual activity]; and

2. [The defendant; any other person identified in the indictment] could have been charged with a criminal offense [as charged in the indictment] for the sexual activity.

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

"Sexual activity" is not fully defined by statute. See 18 U.S.C. § 2427. There is no current authority addressing whether the term includes conduct other than conduct included within "sexually explicit conduct" (see 18 U.S.C. § 2256(2)(A)), "illicit sexual conduct" (see 18 U.S.C. § 2423(f)), and "sexual act" (see 18 U.S.C. § 2246(2)), such as misdemeanor offenses involving flashing or masturbation.

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 define attempt, see Pattern Instruction 4.09. "Coercion" is defined at Pattern Instruction for 18 U.S.C. § 1581(E)(2). For a definition of interstate or foreign commerce see Pattern Instruction 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.

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 [the; a] defendant guilty of this count, 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 [name criminal offense].

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 count you are considering], then you should find the defendant guilty [of that count].

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 count you are considering], then you should find the defendant not guilty [of that count].

Committee Comment

United States v. Berg, 640 F.3d 239 (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*, 640 F.3d 255 (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 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 Pattern Instruction 18 U.S.C. § 2256(1).

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

It is well-established that a jury in a federal criminal case may not convict unless it unanimously finds that the government has proved each element of the offense beyond a reasonable doubt. *Richardson v. United States*, 526 U.S. 813, 817 (1999). A federal jury need not always decide unanimously the means the defendant used to commit an element of the crime. *Id.* The Seventh Circuit has not yet decided whether, in the context of 18 U.S.C. § 2422(b), unanimity regarding the manner of persuasion, inducement, enticement, or coercion is required, and the Committee takes no position.

18 U.S.C. § 2423(a) TRANSPORTATION OF MINORS WITH INTENT TO ENGAGE IN CRIMINAL SEXUAL ACTIVITY—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] transportation of [a] minor[s] with the intent to engage in criminal sexual activity. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly transported [the person identified in the indictment] in [interstate commerce; foreign commerce]; and

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

3. The defendant intended that [the person identified in the indictment] engage in [prostitution; sexual activity] which if it had occurred [the defendant; any other person identified in the indictment] would have committed the criminal offense of [name criminal offense].

The government does not have to prove that the defendant believed or knew [the person identified in the indictment] was less than 18 years of age.

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 need not prove the defendant knew or believed of the minor status of the person transported. *United States v. Cox*, 577 F.3d 833 (7th Cir. 2009).

"Sexual activity" is not fully defined by the statute. See 18 U.S.C. § 2427. There is no current authority addressing whether "sexual activity" includes conduct other than conduct included within "sexually explicit conduct" (see 18 U.S.C. § 2256(2)(A)), "illicit sexual conduct" (see 18 U.S.C. § 2423(f)), and "sexual act" (see 18 U.S.C. § 2246(2)), such as misdemeanor offenses involving flashing or masturbation.

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 Pattern Instruction 4.09

"Sexual activity" is not fully defined by the statute. See 18 U.S.C. § 2427.

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

18 U.S.C. § 2423(b) INTERSTATE TRAVEL WITH INTENT TO ENGAGE IN A SEXUAL ACT WITH A MINOR—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ____ of the indictment charge[s] the defendant[s] with] traveling in [interstate commerce; foreign commerce] to engage in illicit sexual conduct with a minor. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. The defendant traveled in [interstate commerce; foreign commerce]; and

2. The defendant's purpose in traveling in [interstate commerce; foreign commerce] was to engage in illicit sexual conduct with a minor.

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

"Illicit Sexual Conduct" is defined in Pattern Instruction 18 U.S.C. § 2423(f).

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

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

18 U.S.C. § 2423(c) FOREIGN TRAVEL WITH INTENT TO ENGAGE IN A SEXUAL ACT WITH A MINOR—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] traveling in foreign commerce to engage in illicit sexual conduct with a minor. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant is a [United States citizen; alien admitted for permanent residence]; and

2. The defendant traveled in foreign commerce; and

3. The defendant engaged in illicit sexual conduct with a minor.

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

"Illicit Sexual Conduct" is defined in Pattern Instruction 18 U.S.C. § 2423(f).

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

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

18 U.S.C. § 2423(f) DEFINITION OF "ILLICIT SEXUAL CONDUCT"

"Illicit sexual conduct" means:

1. a sexual act with a person under eighteen years of age; or

2. any commercial sex act with a person under eighteen years of age; or

3. production of child pornography

Committee Comment

"Sexual act" is defined in Pattern Instruction 18 U.S.C. § 2246(2).

"Commercial sex act" is defined in Pattern Instruction 18 U.S.C. § 1591(e)(3).

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

18 U.S.C. § 2423(g) DEFENSE

If the defendant establishes with clear and convincing evidence that the defendant reasonably believed [the person identified in the indictment with whom the defendant engaged in a commercial sex act] was at least eighteen years of age at the time of the charged offense, then you should find the defendant not guilty of [Count __].

Committee Comment

This defense applies to defendants accused of "engag[ing] in [a] . . . commercial sex act" as defined in 18 U.S.C. § 2423(f)(2). *Id.* § 2423(g). Because (b) and (c) are the subsections of § 2423 that prohibit the defendant from engaging in such acts (as opposed to transportation acts, § 2423(a), or ancillary offenses, § 2423(d)), the Committee suggests that this instruction should only be given in cases charging violations of § 2423(b) or (c) in which the illicit sexual conduct involves a commercial sex act under § 2423(f)(2).

"Commercial sex act" is defined in 18 U.S.C. § 1591(e)(3) and the related Pattern Instruction.

18 U.S.C. § 2425 USE OF INTERSTATE FACILITIES TO TRANSMIT INFORMATION ABOUT A MINOR—ELEMENTS

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

1. The defendant knowingly initiated the transmission of the [name; address; telephone number; social security number; electronic mail address] of [the person identified in the indictment] [by [mail; a facility or means of interstate or foreign commerce]] [within the special maritime or territorial jurisdiction of the United States]; and

2. The defendant knew that [the person identified in the indictment] was less than sixteen years of age at the time; and

3. The defendant intended to [entice; encourage; offer; solicit] [the person identified in the indictment] to engage in any sexual activity for which [the defendant; any other person identified in the indictment] could have been charged with a criminal offense [as charged in the indictment].

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

"Sexual activity" is not fully defined by the statute. See 18 U.S.C. § 2427. There is no current authority addressing whether "sexual activity" includes conduct other than conduct included within "sexually explicit conduct" (see 18 U.S.C. § 2256(2)(A)), "illicit sexual conduct" (see 18 U.S.C. § 2423(f)), and "sexual act" (see 18 U.S.C. § 2246(2)), such as misdemeanor offenses involving flashing or masturbation.

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

"Sexual activity" is not fully defined by the statute. See 18 U.S.C. § 2427.

21 U.S.C. § 841(a)(1) DISTRIBUTION OF A CONTROLLED SUBSTANCE—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] distribution of [identify controlled substance alleged in charge]. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. The defendant knowingly distributed [identify controlled substance alleged in charge]; and

2. The defendant knew the substance [was; contained] some kind of a controlled substance. The government is not required to prove that the defendant knew the substance was [identify the controlled substance alleged in charge.]

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

Section 841 of Title 21 U.S.C. prohibits knowing or intentional distribution of a controlled substance. Knowing distribution is sufficient. See*, e.g., United States v. Graham*, 315 F.3d 777, 781 (7th Cir. 2003).

The second element explains both what the government must prove and what it need not prove. Because the concept is simple, there is no need for a separate instruction what the government

need not prove, as in the former pattern instructions. If there is no evidence that might suggest the defendant could have thought the substance something other than what the government alleges, it may be prudent to omit the sentence concerning what the government need not prove.

In every case the government must prove that "the defendant knew that he was dealing with a 'controlled substance.' " *McFadden v. United States*, 576 U.S. 186, 188–89 (2015). If the charge involves a controlled substances analogue, *see* 21 U.S.C. § 802(32)(A), then this knowledge requirement is met if the defendant knew that the substance was controlled under the Controlled Substances Act or the Analogue Act, even if he did not know its identity. The knowledge requirement is also met if the defendant knew the specific features of the substance that make it a 'controlled substance analogue.' *Id.* See also *United States v. Hamdan*, 910 F.3d 351, 356 (7th Cir. 2018). Therefore, in an analogue prosecution, the second sentence of the second element should be deleted, and the court should instruct the jury that:

> the government can satisfy this knowledge requirement in one of two ways: first, knowledge can be established by evidence that the defendant knew that the substance charged in count [*n*] was some controlled substance—that is, one actually listed on the federal drug schedules or treated as such by operation of the Analogue Act—regardless whether he knew the particular identity of the substance. Second, knowledge can be established by evidence that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue. To prove knowledge the second way, the government must show that the defendant knew that the substance he is charged with distributing had (1) a chemical structure substantially similar to that of an already-scheduled controlled substance and (2) a physiological effect substantially similar to or greater than the effect of an already-scheduled controlled substance.

United States v. Novak, 841 F.3d 721, 728–29 (7th Cir. 2016) (quoting *McFadden*, 576 U.S. at 194).

The government may prove such knowledge circumstantially. *United States v. Hamdan*, 910 F.3d at 356. However, what became known as "the *Turcotte* inference," which allowed an inference of chemical similarities from awareness of similar physiological effects, *see United States v. Turcotte*, 405 F.3d 515, 527 (7th Cir. 2005), no longer is good law. *See Novak*, 841 F.3d at 728.

21 U.S.C. § 841(a)(1) DEFINITION OF "DISTRIBUTION"

A person "distributes" a controlled substance if he [delivers or transfers possession of the controlled substance to someone else; causes a person to deliver or transfer possession of the controlled substance to another person].

21 U.S.C. § 841(a)(1) POSSESSION WITH INTENT TO DISTRIBUTE—ELEMENTS

[The indictment charges defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] possession of [identify controlled substance alleged in charge] with intent to distribute. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly possessed [identify controlled substance alleged in charge]; and

2. The defendant intended to distribute the substance to another person; and

3. The defendant knew the substance [was; contained] some kind of a controlled substance. The government is not required to prove that the defendant knew the substance was [identify the controlled substance alleged in charge.]

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 Committee modified this instruction to track the instruction for distribution of a controlled substance under 21 U.S.C. § 841(a)(1). See *United States v. Irby*, 558 F.3d 651, 654 (7th Cir. 2009).

If the charge involves a controlled substance analogue, then the third element must be modified in the same manner as the second element of the instructions for distribution.

21 U.S.C. § 841(a)(1) DEFINITION OF "CONTROLLED SUBSTANCE"

[Identify the controlled substance] is a "controlled substance."

Committee Comment

See 21 U.S.C. §§ 802(6) & 812.

21 U.S.C. §§ 841(b)(1)(A), (B) or (C) DEFINITION OF "SERIOUS BODILY INJURY"

The term "serious bodily injury" means bodily injury that involves—

(a) A substantial risk of death;

(b) Extreme physical pain;

(c) Long-lasting and obvious disfigurement; or

(d) Long-lasting loss or impairment of the function of a bodily member, organ, or mental faculty.

Committee Comment

See 18 U.S.C. §§ 113(b)(2) and 1365(h)(3).

21 U.S.C. §§ 841(b)(1)(A), (B) or (C) WHERE DEATH OR SERIOUS BODILY INJURY RESULTS—SPECIAL VERDICT FORM

If you find the defendant guilty of the offense charged in [Count[s] ____ of] the indictment, you must then determine whether the government has proven that the defendant's distribution of [identify the charged controlled substance] resulted in the [death of; serious bodily injury to] [name of victim].

To prove that [name of victim] died as a result of the defendant's distribution of [identify the controlled substance], the government must prove beyond a reasonable doubt that [name of victim] would not have [died; been seriously injured] if [he; she] had not used the [identify the controlled substance] distributed by defendant. It is not enough to prove that the defendant's conduct merely contributed to [name of victim's] death.

[This does not require the government to prove that the [identify the controlled substance] was present in an amount sufficient to [kill; cause serious bodily injury] on its own.]

[The government is not required to prove that the defendant intended to cause [name of victim]'s death.]

You will see on the verdict form a question concerning this issue. You should consider that question only if you have found that the government has proven the defendant guilty as charged in [Count[s] ____ of] the indictment.

If you find that the government has proven beyond a reasonable doubt that the defendant's distribution of [identify the charged controlled substance] resulted in the [death of; serious bodily injury to] [name of victim], then you should answer that question "Yes."

If you find that the government has not proven beyond a reasonable doubt that the defendant's distribution of [identify the charged controlled substance] resulted in the [death of; serious bodily injury to] [name of victim], then you should answer that question "No."

Committee Comment

See *Burrage v. United States*, 571 U.S. 204, 210-11 (2014); *Krieger v. United States*, 842 F.3d 490, 499-500 (7th Cir. 2016). In *Burrage*, the Court held that the "death results" enhancement in drug cases ordinarily requires the government to prove that the victim would have lived but for the unlawfully distributed drugs. In adopting the "but-for" causation standard, the Court emphasized that the "language Congress enacted requires death to 'result from' use of the unlawfully distributed drug, not from a combination of factors to which drug use merely contributed." *Burrage*, 571 U.S. at 216. Thus, "at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. s. 841(b)(1)(C) unless such use is a but-for cause of the death or injury." *Id.* at 218-19.

In *Perrone v. United States*, 889 F.3d 898 (7th Cir. 2018), the Seventh Circuit elaborated on the meaning of "but for" causation in the context of an overdose death:

> This dispute is about causation, so we will begin by clearly stating what "but for" causation requires. It does not require proof that the distributed drug was present in an amount sufficient to kill on its own. The Court explained in *Burrage* that death can "result[ ] from" a particular drug when it is the proverbial "straw that broke the camel's back." 134 S. Ct. at 888. As the Court put it: "if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived." *Id.* Here, then, the fact that other substances in [the victim's] bloodstream played a part in her death does not defeat the government's claim that her death resulted from the cocaine Perrone gave her. A jury could have found him guilty of causing her death if it concluded beyond a reasonable doubt that Perrone's cocaine pushed her over the edge.

Id. at 906.

It is an open question in this Circuit whether strict "but-for"

causation is required if the government proves that the defendant's conduct was an independently sufficient cause of the victim's death. See *Perrone*, 889 F.3d at 906. In *Perrone*, the Seventh Circuit indicated that "strict 'but-for' causation might not be required when " 'multiple sufficient causes independently, but concurrently, produce a result,' " but declined to decide the issue. *Id.*

The Seventh Circuit has held that the government does not have to prove proximate causation—i.e., that the death was a reasonably foreseeable result of the drug offense—to establish the "death results" enhancement for drug distribution. *United States v. Harden*, 893 F.3d 434, 447-49 (7th Cir. 2018). The other eight circuits to address this issue in the drug offense context are in agreement. See, e.g., *United States v. Jeffries*, 958 F.3d 517, 520 (6th Cir. 2020) (citing cases). *Burrage* granted certiorari on whether the jury must find that the victim's death by drug overdose was a foreseeable result of the defendant's drug-trafficking offense, but declined to reach that issue.

In cases where the death may have resulted from the actions of co-conspirators rather than the defendant himself, the court may need to tailor the instructions to ensure that the jury makes the findings necessary to hold the defendant liable for the death. See *United States v. Walker*, 721 F.3d 828, 833–36 (7th Cir. 2013), *vacated on other grounds*, 572 U.S. 1111 (2014) (recognizing that "the scope of a defendant's relevant conduct for determining sentencing liability may be narrower than the scope of criminal liability"); *United States v. Hamm*, 952 F.3d 728 (6th Cir. 2020) (holding that the death-or-injury enhancement "applies only to defendants who were part of the distribution chain that placed the drugs into the hands of the overdose victim" and that "*Pinkerton* liability could only apply to the substantive offense, not the sentencing enhancement").

The optional sentence in the third paragraph of the instruction comes from *Perrone*, 889 F.3d at 906, which refers to situations where the drug was the "straw that broke the camel's back. "It will not be appropriate in every case.

21 U.S.C. § 841(c)(1) POSSESSION OF LISTED CHEMICAL WITH INTENT TO MANUFACTURE—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] possession of [identify chemical alleged in charge] with intent to manufacture a controlled substance. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly possessed [identify the chemical alleged in charge]; and

2. The defendant intended to use [identify the chemical] to manufacture a controlled substance; and

3. [Identify the chemical] is a listed chemical.

4. The defendant knew [identify the chemical] was a listed chemical.

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 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 previous version of this instruction included in the third element the following sentence: "The government is not required to prove that the defendant knew [identify the chemical] was a listed chemical." In *United States v. Estrada*, 453 F.3d 1208 (9th Cir.

2006), the Ninth Circuit held that the government is not required to prove that the defendant knew the chemical was a listed chemical. The Seventh Circuit has not yet addressed this argument in any reported case. However, in light of *McFadden v. United States*, 576 U.S. 186, 188–89 (2015), it is likely that the government must prove that the defendant knew the charged substance was a listed chemical within the meaning of 21 U.S.C. § 802(33). See Committee Comment to Distribution of a Controlled Substance, *supra* at ____. *See also United States v. Turcotte*, 405 F.3d 515, 527 (7th Cir. 2005) (requiring proof that defendant knew the substance he possessed was a controlled substance analogue as defined by statute), *overruled on other grounds*, *United States v. Novak*, 841 F.3d 721, 729 (7th Cir. 2016). The Committee has modified the instruction accordingly.

21 U.S.C. § 841(c)(2) POSSESSION/ DISTRIBUTION OF LISTED CHEMICAL FOR USE IN MANUFACTURE—ELEMENTS

[The indictment charges defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] possess of [identify chemical alleged in charge] for use in the manufacture of a prohibited drug. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly [possessed; distributed] [identify the chemical alleged in charge]; and

2. The defendant knew or had reasonable cause to believe the [identify the chemical] would be used to manufacture a prohibited drug; and

3. [Identify the chemical] is a listed chemical.

4. The defendant knew [identify the chemical] was a listed chemical.

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 *United States v. Khattab*, 536 F.3d 765, 769 (7th Cir. 2008), the court noted a circuit split on what level of *mens rea* the government is required to prove as to the second element, with some

courts concluding that "reasonable cause to believe" to be "akin to actual knowledge," *United States v. Truong*, 425 F.3d 1282, 1289 (10th Cir. 2005), while other courts require the government only to prove objective knowledge, *See, e.g.*, *United States v. Kaur*, 382 F.3d 1155, 1157 (9th Cir. 2004). The Seventh Circuit has not had occasion since then to revisit this issue. In light of *McFadden v. United States*, 576 U.S. 186, 188–89 (2015), it would seem more prudent to require the government to prove a defendant's subjective knowledge (which was the case in *United States v. Khattab*), but none of the courts that have approved the lower objective standard has reversed its position.

As for the third element, the Court's holding in *McFadden* indicates that the government must prove that the defendant knew the charged substance was a listed chemical within the meaning of 21 U.S.C. § 802(33). See the Committee Comment to Distribution of a Controlled Substance, *supra* at ____.

21 U.S.C. § 841(a)(1) & (c) DEFINITION OF "POSSESSION"

Committee Comment

Pattern Instruction 4.13 should be used in narcotics cases in which a definition of possession is required.

INTRODUCTORY FORFEITURE INSTRUCTION

Members of the Jury, you have one more task to perform before you are discharged.

In this case, a portion of the Indictment not previously discussed seeks to forfeit [certain] money or property. The law provides that when a defendant is convicted of _____, he may be required to forfeit to the United States certain property. I will explain the specific property that may be subject to forfeiture in a moment. But first, I will give you some general instructions that apply to your consideration of the forfeiture allegations. [Each of you will be given a copy of these instructions for your deliberations.]

"Forfeiture" means to give up ownership or interest in property, as a penalty for committing [a] violation[s] of certain federal laws.

The instructions previously given to you concerning your consideration of the evidence, the credibility of the witnesses, [separate consideration of each defendant], your duty to deliberate together, and the necessity of a unanimous verdict apply during your forfeiture deliberations. The burden of proof, however, is different, as I will describe more fully below.

In your forfeiture deliberations, you may consider any evidence admitted before [or after your previous] deliberations, including witness testimony, exhibits, and stipulations [and anything I took judicial notice of]. I remind you that the lawyers' statements to you are not evidence.

You should not reconsider whether [a] defendant[s] [is; are] guilty or not guilty. Your previous verdict[s] [is; are] final and conclusive.

Committee Comment

Fed. R. Crim. P. 32.2(b)(5) provides that upon a party's request, "a jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant. Because forfeiture is an element of sentencing, *United States v. Libretti*, 516 U.S. 29, 38–39 (1995), the forfeiture proceedings take place only if the jury has found the defendant guilty of an offense that gives rise to forfeiture.

Rule 32.2(a), modified as of December 1, 2009, provides that the government does not have to identify in the indictment the property subject to forfeiture or specify the amount of any forfeiture money judgment that it seeks. The government need only provide notice in the indictment or information that it intends to seek the forfeiture of property. Accordingly, the draft instructions have included language in brackets for those cases where the notice in the indictment identifies specific property.

FORFEITURE ALLEGATIONS INSTRUCTION

The Indictment contains [____] Forfeiture Allegations. The Forfeiture Allegation[s] [is; are] not evidence and [do; does] not create any inference that the property is subject to forfeiture. The Defendant has denied that the property is subject to forfeiture.

Committee Comment

Because forfeiture is an element of sentencing, *United States v. Libretti*, 516 U.S. 29, 38–39 (1995), and the jury has already found the defendant guilty, the Committee concluded that the presumption of innocence instruction is not appropriate. The Committee has included as part of this instruction the statement that the defendant denies that the property is subject to forfeiture.

FORFEITURE BURDEN OF PROOF INSTRUCTION

In this phase of the trial, the government has the burden of proving that the property it seeks to forfeit is subject to forfeiture. The government must establish its forfeiture allegation[s] by a preponderance of the evidence, that is, it must be more probably true than not true.

The burden of proof stays with the government throughout this phase of the trial. The defendant[s] [does; do] not have the burden of proof, and [is; are] not required to produce any evidence.

Committee Comment

Because forfeiture is an element of sentencing, *United States v. Libretti*, 516 U.S. 29, 38–39 (1995), "the government need only establish its right to forfeiture by a preponderance of the evidence." *United States v. Patel*, 131 F.3d 1195, 1200 (7th Cir. 1997); see also *United States v. Melendez*, 401 F.3d 851, 856 (7th Cir. 2005); *United States v. Swanson*, 394 F.3d 520, 526 (7th Cir. 2005); *United States v. Messino*, 382 F.3d 704, 713–14 (7th Cir. 2004); *United States v. Vera*, 278 F.3d 672, 673 (7th Cir. 2002); *United States Messino*, 122 F.3d 427, 428 (7th Cir. 1997); *United States v. Ben-Hur*, 20 F.3d 313, 317 (7th Cir. 1994); *United States v. Simone*, 931 F.2d 1186, 1199 (7th Cir. 1991). The Seventh Circuit has held that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), "does not disturb the rule that forfeiture is constitutional when supported by the preponderance of the evidence." *Vera*, 278 F.3d at 672; see also *Messino*, 382 F.3d at 713–14.

FORFEITURE—THIRD PARTY INTERESTS

You are to determine only if a defendant's rights, title and interests, if any, in the specified property should be forfeited. You are not called upon to determine whether or not any other person has any right, title or interest in this money or property, or whether or not their interest should be forfeited. This is a matter to be determined by the court in further proceedings, if necessary. You need only determine whether or not the government has proved by a preponderance of the evidence that the defendant's interest in this property, if any, is forfeitable.

SEPARATE CONSIDERATION—FORFEITURE ALLEGATIONS

You must give separate consideration to each [property; interest; forfeiture allegation], and return a separate finding as to each. Your finding as to one [property; interest; forfeiture allegation] should not control your decision as to any other.

SEPARATE CONSIDERATION—MULTIPLE DEFENDANTS

The Forfeiture Allegation[s] allege[s] that the same property is subject to forfeiture as to more than one defendant. You must consider the question of forfeiture separately for each defendant. The fact that property is forfeited as to one defendant does not necessarily mean that the property should be forfeited as to another defendant.

Committee Comment

In *Honeycutt v. United States*, ___ U.S. ___, 137 S. Ct. 1626, 1635 (2017), the Court held that "[f]orfeiture pursuant to § 853 is limited to property the defendant himself actually acquired as the result of the crime." In other words, "a defendant cannot be held jointly and severally liable for property that a co-conspirator derived from a crime, if the defendant himself did not acquire it." *United States v. Bogdanov*, 863 F.3d 630, 635 (7th Cir. 2017).

The Committee takes no position on whether this instruction is necessary where no property is involved and where the government only seeks a money judgment order of forfeiture.

21 U.S.C. § 843(b) USE OF COMMUNICATION FACILITY IN AID OF NARCOTICS OFFENSE—ELEMENTS

[The indictment charges defendant[s] with; Count __ of the indictment charges the defendant[s] with] [using; causing the use of] a [telephone; other communication facility] to facilitate a narcotics crime. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the [two] following elements beyond a reasonable doubt:

1. [The offense of [insert predicate drug offense, e.g, possession of a controlled substance with intent to distribute] was committed, as charged in Count __ of the indictment.] [Alternatively, insert all elements of predicate offense.]

2. The defendant used a [telephone; other type of communication facility] to facilitate or cause the commission of, [insert predicate drug offense, e.g., possession with intent to distribute, and, if applicable, the Count number].

3. The defendant did so knowingly.

If you find from your consideration of all the evidence that the government has proved both 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

A defendant violates Section 843 if he knowingly and intention-

ally uses a communications facility, such as a telephone, to facilitate the commission of a narcotics offense. *United States v. Campbell*, 534 F.3d 599, 605 (7th Cir. 2008). Proof of a predicate drug offense is an element of a Section 843(b) conviction. *See United States v. Alvarez*, 860 F.2d 801, 813 (7th Cir. 1988) (cited with approval in *Campbell*, 534 F.3d at 605). A defendant cannot be convicted of using a telephone to facilitate a drug offense unless he commits the drug offense, attempts to commit the drug offense, or aids and abets another's commission of the drug offense. *Id.*

For this reason, the instruction for a charged offense under § 843(b) must require proof of the predicate drug offense. In cases in which the predicate drug offense is also one of the charges at issue during the trial, the instruction for the § 843(b) count may meet this requirement by making reference to the count in which the predicate drug offense is charged. In cases in which the predicate drug offense is not one of the charges at issue during the trial, the instruction for the § 843(b) count must itself require proof of the elements of the predicate drug offense, in order to satisfy the requirements of *Campbell*.

A sample instruction of the latter type is as follows:

1. [The defendant; *insert name of alleged offender*] knowingly distributed [identify controlled substance alleged in charge].

2. [The defendant; *insert name of alleged offender*] knew the substance [was; contained] some kind of a controlled substance. The government is not required to prove that the defendant knew the substance was [identify the controlled substance alleged in charge.]

3. The defendant used a [telephone; other type of communication facility] to facilitate or cause the commission of the distribution of the controlled substance.

4. The defendant did so knowingly.

21 U.S.C. § 843(b) DEFINITION OF "FACILITATE"

A [call; transmission] "facilitates" an offense if it makes the offense easier, or if it assists in committing the offense.

Committee Comment

See *United States v. Mojica*, 984 F.2d 1426, 1440 (7th Cir. 1993); *United States v. Aquilla*, 976 F.2d 1044, 1049 (7th Cir. 1992).

21 U.S.C. § 844 SIMPLE POSSESSION—ELEMENTS

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

1. The defendant knowingly possessed [at least (specify amount) of] [identify the controlled substance]; and

2. The defendant knew the substance was some kind of a controlled substance. The government is not required to prove that the defendant knew the substance was [identify the controlled substance in charge].

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 some cases a conviction for possession may require a quantity threshold. In such a case, an element incorporating that requirement should be added to the first element of the instruction.

21 U.S.C. § 846 ATTEMPTED DISTRIBUTION OF CONTROLLED SUBSTANCE—ELEMENTS

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

1. The defendant intended to distribute a controlled substance to another person; and

2. The defendant believed that the substance was some kind of a controlled substance. [The government is not required to prove that the substance was actually a controlled substance.]; and

3. The defendant knowingly took a substantial step toward distributing [a substance that he believed to be] a controlled substance, intending to distribute it. The substantial step must be an act that strongly corroborates that the defendant intended to distribute a controlled substance.

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 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

See *United States v. Lopez*, 907 F.3d 537, 543–44 (7th Cir.

2018) (to sustain a conviction for attempted possession with intent to distribute a controlled substance, the government must prove beyond a reasonable doubt that the defendant acted with the specific intent to commit the underlying offense and took a substantial step toward completion of that offense). The definition of "attempt" is taken from Pattern Instruction 4.09.

The sale of a non-controlled substance that the defendant subjectively believes to be a controlled substance can constitute an attempt to distribute. See *United States v. Stallworth*, 656 F.3d 721, 728–29 (7th Cir. 2011). In a case that does not involve an actual controlled substance—such as a case in which government agents supply "sham" narcotics for use in a transaction—it may be appropriate to use the bracketed language in the second and third elements.

21 U.S.C. § 846 ATTEMPTED POSSESSION WITH INTENT TO DISTRIBUTE—ELEMENTS

[The indictment charges defendant[s] with; Count __ of the indictment charges the defendant[s] with] attempted possession of [identify the controlled substance] with intent to distribute. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant intended to possess a controlled substance and intended to distribute it to another person; and

2. The defendant believed that the substance was some kind of a controlled substance. [The government is not required to prove that the defendant knew the substance was actually a controlled substance.]; and

3. The defendant knowingly took a substantial step toward possessing [a substance he believed to be] a controlled substance, intending to possess it. The substantial step must be an act that strongly corroborates that the defendant intended to distribute a controlled substance.

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 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

See *United States v. Lopez*, 907 F.3d 537, 543–44 (7th Cir. 2018) (to sustain a conviction for attempted possession with intent to distribute a controlled substance, the government must prove beyond a reasonable doubt that the defendant acted with the specific intent to commit the underlying offense and took a substantial step toward completion of that offense). The definition of "attempt" is taken from Instruction 4.09.

The sale of a non-controlled substance that the defendant subjectively believes to be a controlled substance can constitute an attempt to distribute. See *United States v. Dominguez*, 992 F.2d 678, 682 (7th Cir. 1992). In a case that does not involve an actual controlled substance—such as a case in which government agents supply "sham" narcotics for use in a transaction—it may be appropriate to use the bracketed language in the second and third elements.

DRUG QUANTITY/SPECIAL VERDICT INSTRUCTIONS

If you find the defendant guilty of the offense charged in [Count ____ of] the indictment, you must then determine the amount of [identify the controlled substance] the government has proven was involved in the offense.

In making this determination, you are to consider any type and amount of controlled substances for which the government has proven beyond a reasonable doubt that [: (1)] the defendant [possessed with intent to distribute; distributed; conspired to possess with intent to distribute; conspired to distribute; etc.] [while the defendant was a member of the conspiracy charged in Count __] [; plus (2) the defendant's co-conspirators [distributed; possessed with intent to distribute; conspired to possess with intent to distribute; conspired to possess with intent to distribute; etc.] in furtherance of the conspiracy during the defendant's membership in the conspiracy and reasonably foreseeable to the defendant.]

You will see on the verdict form a question concerning the amount of narcotics involved in the offense charged in [Count __ of] the indictment. You should consider this question only if you have found that the government has proven the defendant guilty of the offense charged in [Count ____ of] the indictment.

If you find that the government has proven beyond a reasonable doubt that the offense involved [insert quantity as alleged in indictment; e.g., 5 kilograms or more of a substance containing cocaine; 50 grams or more of methamphetamine], then you should answer the [first] question "Yes." [If you answer "Yes," then you need not answer the remaining question[s] regarding drug quantity for that count.]

If you find that the government has not proven beyond a reasonable doubt that the offense involved [insert quantity as alleged in indictment; e.g., 5 kilograms or more of a mixture or substance containing cocaine; 50 grams or more of methamphetamine], then you should answer the [first] question "No."

[If you answer the first question "No," then you must answer the next question. That question asks you to determine whether the government has proven beyond a reasonable doubt that the offense involved [insert lesser quantity consistent with charge in indictment; e.g., 500 grams or more of a mixture or substance containing cocaine; 5 grams or more of methamphetamine.] If you find that the government has proven beyond a reasonable doubt that the offense involved [insert lesser quantity; e.g., 500 grams or more of a mixture or substance containing cocaine; 5 grams or more of methamphetamine], then you should answer the second question "Yes."]

If you find that the government has not proven beyond a reasonable doubt that the offense involved [insert lesser quantity consistent with charge in indictment; *e.g.*, 500 grams or more of a substance containing cocaine], then you should answer the second question "No."

Committee Comment

Based on the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this instruction should be given whenever the drug quantity may affect the statutory maximum sentence. The jury need only find the threshold quantity that triggers the increased statutory maximum penalty; it need not find the exact quantity involved. See *United States v. Kelly*, 519 F.3d 355, 363 (7th Cir. 2005); *United States v. Washington*, 558 F.3d 716, 719–20 (7th Cir. 2009).

For many controlled substances, the statutory language does not require calculation of the amount of the pure form of the controlled substance but rather references, for example, "1 kilogram

or more *of a mixture or substance containing a detectable amount of heroin*." 21 U.S.C. § 841(b)(1)(A)(i) (emphasis added). For others the statutory language references either the controlled substance itself or a mixture or substance (in different quantities), for example, "50 grams or more of methamphetamine . . . or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine . . ." 21 U.S.C. § 841(b)(1)(A)(viii), The instruction given to the jury should track the way in which the pertinent quantity is charged in the indictment.

The Seventh Circuit approved the methodology of this instruction in *United States v. Saunders*, 826 F.3d 363, 373–74 & 374 n.1. (7th Cir. 2016).

The part of the instruction regarding inclusion of amounts distributed by other co-conspirators is worded in accordance with *Pinkerton v. United States*, 328 U.S. 640, 647–48 (1946), as discussed in *United States v. Cruse*, 805 F.3d 795, 817 (7th Cir. 2015).

21 U.S.C. § 848 CONTINUING CRIMINAL ENTERPRISE—ELEMENTS

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

1. That the defendant committed a continuing series of at least three or more of the narcotics offenses alleged in Count __; and

2. The defendant committed the offenses acting in concert with five or more other persons; and

3. The defendant acted as an organizer, supervisor or manager of those five or more other persons; and

4. The defendant obtained substantial income or resources from the offenses.

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

See *United States v. Gibbs*, 61 F.3d 536, 537 (7th Cir. 1995); *United States v. Herrera-Rivera*, 25 F.3d 491, 498 (7th Cir. 1994). In a continuing criminal enterprise case, the jury must unanimously agree not only that the defendant committed a "continuing

series of violations", but also about which specific violations make up that "continuing series." *Richardson v. United States*, 526 U.S. 813 (1999).

21 U.S.C. § 848 CONTINUING CRIMINAL ENTERPRISE—CONTINUING SERIES OF OFFENSES

The narcotics offenses you may consider in determining whether the defendant committed a continuing series of at least three offenses include:

[List possible predicate offenses (including those charged in the indictment), *e.g.*, distribution of a controlled substance, possession of a controlled substance with the intent to distribute, or use of telephones to facilitate the commission of a narcotics offense.]

In determining whether the defendant engaged in a continuing series of at least three narcotics offenses, you may consider the offenses alleged in the indictment [as well as other alleged offenses of these types.] You must find that the government has proved that the defendant committed an offense beyond a reasonable doubt in order to consider it to be part of a continuing series.

Committee Comment

See *Garrett v. United States*, 471 U.S. 773 (1985); *United States v. Baker*, 905 F.2d 1100, 1103 (7th Cir. 1990). *Baker* has been criticized in other Circuits for holding that a drug conspiracy cannot be used as one of the series of three predicate offenses to a CCE. See, *e.g.*, *United States v. Van Nguyen*, 602 F.3d 886, 900 (8th Cir. 2010); *United States v. Young*, 745 F.2d 733 (2nd Cir. 1984); cf. *United States v. Markowski*, 772 F.2d 358, 361 n.1 (7th Cir. 1985). The jury must unanimously agree not only that the defendant committed a "continuing series of violations," but also on which specific violations make up that "continuing series." *Richardson v. United States*, 526 U.S. 813 (1999).

The bracketed language should only be used if the indictment charges a continuing series of offenses consisting of specified acts, as opposed to a series of acts consisting of statutory categories of offenses such as "multiple acts of possession of controlled substances with intent to distribute and distribution of controlled substances."

21 U.S.C. § 848 CONTINUING CRIMINAL ENTERPRISE—FIVE OR MORE PERSONS

If you find that the defendant committed a continuing series of narcotics offenses, you must also decide whether the defendant committed this series of offenses in concert with five or more persons whom he organized, supervised or managed. [Those persons do not have to be named in the indictment.]

In order to find that the defendant acted in concert with five or more persons, you must unanimously agree that the defendant organized, supervised or managed five or more persons in committing the series of offenses. However, you do not have to agree on the identity of five or more persons with whom the defendant acted. [You do not have to find that the five or more persons acted together at the same time, or that the defendant personally dealt with them, or that all five persons were present at the same time.] [It is not required that the defendant acted in concert with five or more persons in the commission of any single offense that is one of the series of offenses constituting the continuing criminal enterprise.] [You do not have to find that the defendant had the same relationship with each of the five or more persons.]

Committee Comment

See *United States v. Gibbs*, 61 F.3d 536, 538, 539 n.1 (7th Cir. 1995); *United States v. Bafia*, 949 F.2d 1465, 1470–71 (7th Cir. 1991); *United States v. Markowski*, 772 F.2d 358, 364 (7th Cir. 1985). In *Richardson v. United States*, 526 U.S. 813 (1999), the Supreme Court assumed, without deciding the issue, that jury unanimity is not required as to the identity of the "five or more persons" supervised by the defendant pursuant to the statute because the "five or more persons" provision is "significantly different" from the "continuing series of violations" provision.

The bracketed instructions should be given only where the question addressed is raised.

21 U.S.C. § 848 CONTINUING CRIMINAL ENTERPRISE—ORGANIZING, MANAGING, SUPERVISING

The terms "organizer," "supervisory position," and "any other position of management" are used in their ordinary meaning. As to each of the five or more people, the government must prove that the defendant organized or supervised or managed them in accomplishing the activities that contribute to the continuing enterprise.

The defendant need not have had personal contact with each of the five or more persons whom he organized, supervised or managed. [The defendant may still be considered an organizer, supervisor or manager even if he delegated the authority to personally hire those whom he is alleged to have organized, supervised or managed.]

Committee Comment

See *United States v. Gibbs*, 61 F.3d 536, 538 (7th Cir. 1995); see also *United States v. Mannino*, 635 F.2d 110, 116–17 (2nd Cir. 1980); *United States v. Ray*, 731 F.2d 1361, 1367 (9th Cir. 1984); *United States v. Dickey*, 736 F.2d 571, 587 (10th Cir. 1984); *United States v. Rhodes*, 779 F.2d 1019, 1026 (4th Cir. 1985). The bracketed language should be used only if evidence is presented that would support a jury's finding that such a delegation took place.

21 U.S.C. § 848 CONTINUING CRIMINAL ENTERPRISE—SUBSTANTIAL INCOME OR RESOURCES

The term "substantial" means of real worth and importance, or of considerable value. The term "resources" includes money, drugs or other items of material value.

The element of "substantial income or resources" can be proved circumstantially. For example, evidence of substantial gross receipts, substantial gross income or expenditures, receipt or possession of a large amount of narcotics, a large cash flow, a substantial amount of money changing hands, or anticipated profits from future sales may be considered by you in determining whether defendant obtained "substantial income and resources" from the continuing criminal enterprise. [Substantial income or resources is not limited to substantial "net" income or profit.]

Committee Comment

See *United States v. Herrera-Rivera*, 25 F.3d 491, 499 (7th Cir. 1994); *United States v. Dickey*, 736 F.2d 571, 588 (10th Cir. 1984) (substantial gross receipts, gross income, or gross expenditures); *United States v. Graziano*, 710 F.2d 691, 698 (11th Cir. 1983) (receipt of narcotics constitutes income); *United States v. Chagra*, 669 F.2d 241, 257–58 (5th Cir. 1982) ("accounts receivable" from drug transaction constitutes income; circumstantial evidence permissible; lavish personal expenditures with no legitimate source of income); *United States v. Thomas*, 632 F.2d 837, 847 (10th Cir. 1980) (large cash flow); *United States v. Bolts*, 558 F.2d 316, 321 (5th Cir. 1977) (substantial amounts of money changing hands); *United States v. Jeffers*, 532 F.2d 1101, 1116–17 (7th Cir. 1976) (gross receipts), rev'd in part on other grounds, 432 U.S. 137 (1977).

21 U.S.C. § 853 DRUG FORFEITURE—ELEMENTS

The Forfeiture Allegation[s] in the Indictment allege that the following property is subject to forfeiture under Title 21, United States Code, Section 853:

[LIST PROPERTY]

In order for you to find that this property is subject to forfeiture, the government must prove both of the following by a preponderance of the evidence:

1. [That the property constituted or was derived from the proceeds obtained personally by the defendant, directly or indirectly, as a result of the defendant's[s'] participation in the drug offense[s] charged in Count[s];] [That the property was used or intended to be used by the defendant, in any manner or part, to commit, or to facilitate the commission of, [that] [those] drug offense[s];]

2. If you find from your consideration of all the evidence that the government has proved this by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove this by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

In *Honeycutt v. United States*, the Supreme Court held that

under 21 U.S.C. § 853(a)(1) a defendant may not be held "jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." 137 S. Ct. 1626, 1632 (2017). The pattern instruction has been revised to make clear that the property subject to forfeiture under § 853(a)(1) must be found to be property the defendant himself obtained as a result of the crime.

21 U.S.C. § 853(b) DEFINITION OF "PROPERTY"

Property that is subject to forfeiture includes [real property, including things growing on, affixed to, and found in land] [; and] [tangible and intangible personal property, including rights, privileges, interests, claims and securities].

21 U.S.C. § 853(d) REBUTTABLE PRESUMPTION

If you find that the government has proven by a preponderance of the evidence:

1. That the property at issue was acquired by a person convicted of [name violation] during the time period of this offense or within a reasonable time after such period; and

2. That there was no likely source for the property at issue other than the violation of [name violation], then there is a rebuttable presumption that any property of a person convicted of [name violation] is subject to forfeiture.

Committee Comment

See *Honeycutt v. United States*, __ U.S. __, 137 S. Ct. 1626, 1633 (2017). This instruction leaves a place for the Court to fill in the violation under Title 21, Subchapter I or Subchapter II. It is based on the language of 18 U.S.C. § 853(d).

21 U.S.C. § 856(a)(1) MAINTAINING DRUG-INVOLVED PREMISES—ELEMENTS

[The indictment charges defendant[s] with; Count __ of the indictment charges the defendant[s] with] maintaining a drug-involved premises. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. The defendant knowingly [opened; leased; rented; used; maintained] a place; and

2. The defendant did so for the purpose of [manufacturing; distributing; using] a controlled substance. The government is not required to prove that was the defendant's sole purpose.

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

See generally *United States v. Flores-Olague*, 717 F.3d 526, 531–32 (7th Cir. 2013); *United States v. Acosta*, 534 F.3d 574, 591 (7th Cir. 2008). The statute requires that the defendant maintain (etc.) the premises "for the purpose of" manufacturing (etc.) a controlled substance. In *United States v. Church*, 970 F.2d 401, 405–06 (7th Cir. 1992), the Seventh Circuit held that the government need not prove that drug use/distribution was the sole purpose for which the defendant maintained the premises at issue. Beyond this, however, the Seventh Circuit has not defined or specified degree of illegal usage of the premises that is required to violate the statute.

Indeed, in *Church*, the court stated that "[r]ather than judicially modify the phrase 'for the purpose,' we agree that the meaning of that phrase lies within the common understanding of jurors and needs no further elaboration." *Id.* at 406 n.1. Some of the other Circuits that have considered this issue have required that the illegal purpose to be "a significant purpose" or "one of the primary or principal uses" of the premises. See *United States v. Russell*, 595 F.3d 633, 643 (6th Cir. 2010); *United States v. Soto-Silva*, 129 F.3d 340, 346 n.4 (5th Cir. 1997); *United States v. Verners*, 53 F.3d 291, 296 (10th Cir. 1995). Others have rejected a "primary use" standard. See*, e.g., United States v. Roberts*, 913 F.2d 211, 220 (5th Cir. 1990). But the Fifth Circuit also agreed with *Church* that the statutory phrase "for the purpose of" requires no elaboration. *Id.*; see also *United States v. Payton*, 636 F.3d 1027, 1042 (8th Cir. 2011).

The Committee has followed the admonition in *Church* and has not attempted to define the "purpose" requirement beyond what *Church* itself holds, namely that the illegal purpose need not be the sole purpose for which the defendant maintains the premises.

The "purpose" must be that of the defendant; it is not enough to open or maintain a place that is used by others for proscribed purposes. The defendant must maintain the place for his own goal of manufacturing, distributing or using controlled substances. *United States v. Banks*, 987 F.2d 463, 466 (7th Cir. 1993). One way to tell whether a defendant had the requisite mental purpose under subsection (a)(1) is to decide whether he acted as a supervisor, manager, or entrepreneur. *Id.*

21 U.S.C. § 856(a)(1) MAINTAINING DRUG-INVOLVED PREMISES—LIMITING INSTRUCTION

A person "maintains a drug-involved premises" if he owns or rents the premises, or exercises control over them, and for a sustained period, uses those premises to manufacture, store, or sell drugs, or directs others to those premises to obtain drugs. The mere fact that the defendant lived in a [house; premises] used for [manufacturing; distributing; using] a controlled substance is insufficient to prove that he maintained the house for the purpose of [manufacturing; distributing; using] a controlled substance.

[A defendant's mere personal use of a controlled substance in a [house; premises] is insufficient to prove that he maintained the house for the purpose of [manufacturing; distributing; using] a controlled substance.]

Committee Comment

See *United States v. Flores-Olague*, 717 F.3d 526, 531–32 (7th Cir. 2013); *United States v. Acosta*, 534 F.3d 574, 591 (7th Cir. 2008), as to the provision on merely living in a drug house.

The second sentence of this instruction is not supported by any existing case law. However, because personal possession, ordinarily a misdemeanor or a lesser felony, often occurs in a defendant's own home, the Committee believes that allowing a conviction under the "drug house" statute based only on personal use in one's own home would produce an absurd result.

21 U.S.C. § 856(a)(2) MAINTAINING DRUG-INVOLVED PREMISES—ELEMENTS

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

1. The defendant [managed; controlled] the place specified in Count ____ as an [owner; lessee; agent; employee; occupant; mortgagee]; and

2. The defendant knowingly [rented this place; leased this place; profited from this place; made this place available for use, with or without compensation] for the purpose of unlawfully [manufacturing; storing; distributing; using] a controlled substance. The government is not required to prove that was the defendant's sole purpose.

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

See generally *United States v. Flores-Olague*, 717 F.3d 526, 531–32 (7th Cir. 2013); *United States v. Acosta*, 534 F.3d 574, 591 (7th Cir. 2008). The statute requires that the defendant manage or control the premises "for the purpose of" manufacturing (etc.) a controlled substance. In *United States v. Church*, 970 F.2d 401,

405–06 (7th Cir. 1992), a case under § 856(a)(1), the Seventh Circuit held that the government need not prove that drug use/distribution was the sole purpose for which the defendant maintained the premises at issue. Beyond this, however, the Seventh Circuit has not defined or specified the degree of illegal usage of the premises that is required to violate § 856. Indeed, in *Church*, the court stated that "[r]ather than judicially modify the phrase 'for the purpose,' we agree that the meaning of that phrase lies within the common understanding of jurors and needs no further elaboration." *Id.* at 406 n. 1. Some of the other circuits that have considered this issue have required that the illegal purpose to be "a significant purpose" or "one of the primary or principal uses" of the premises. See *United States v. Russell*, 595 F.3d 633, 643 (6th Cir. 2010); *United State v. Soto-Silva*, 129 F.3d 340, 346 n.4 (5th Cir. 1997); *United States v. Verners*, 53 F.3d 291, 296 (10th Cir. 1995). Others have rejected a "primary use" standard. That same court, however, agreed with *Church*, that the statutory phrase "for the purpose" requires no elaboration. *Id.*; see also *United States v. Payton*, 636 F.3d 1027, 1042 (8th Cir. 2011).

The Committee has followed the admonition of *Church* and has not attempted to define the "purpose" requirement beyond what *Church* itself holds, namely that the illegal purpose need not be the sole purpose for which the defendant maintains the premises.

In a case under § 856(a)(2), the limitation that *United States v. Acosta*, 534 F.3d 574, 591 (7th Cir. 2008) suggests for offenses under § 856(a)(1) (see Comment to previous instruction) does not appear to apply, because § 856(a)(2) necessarily implies invited activities of others if it has any application beyond the scope of § 856(a)(1).

21 U.S.C. § 859 DISTRIBUTION OF CONTROLLED SUBSTANCE TO PERSON UNDER 21—ELEMENTS

[The indictment charges defendant[s] with; Count __ of the indictment charges the defendant[s] with] distributing [identify the controlled substance in charge] to a person under 21 years of age. In order for you to find [the; a] defendant guilty of this charge, the government must prove the following [five] elements beyond a reasonable doubt:

1. The defendant distributed [identify the controlled substance]; and

2. The defendant did so knowingly; and

3. The defendant knew that the substance was a controlled substance. The government is not required to prove that the defendant knew the substance was [identify the controlled substance in charge]; and

4. The defendant was at least 18 years of age; and

5. The person to whom the defendant distributed the controlled substance was under 21 years of age. The government is not required to prove that the defendant knew that the person to whom he distributed the substance was under 21 years of age.

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 should be used in conjunction with the instruction under 21 U.S.C. § 841 defining "distribution" and the general instruction defining "knowingly."

With regard to the fifth element, it remains an open question in this Circuit whether the government must prove that the defendant knew that the person to whom he distributed the substance was under 21 years of age. The Eleventh Circuit has held that the government need not prove this fact, see *United States v. Pruitt*, 763 F.2d 1256, 1261–62 (11th Cir. 1985) and the Seventh Circuit cited this holding with approval when deciding whether U.S.S.G. § 2K2.1(b)(4) has a *mens rea* requirement. See *United States v. Schnell*, 982 F.2d 216, 220 (7th Cir. 1992). Other courts have held that federal drug trafficking statutes impose strict liability with regard to a minor's age. See, *e.g.*, *United States v. Cook*, 76 F.3d 596, 601–02 (4th Cir. 1996) (collecting cases); *cf. United States v. Chin*, 981 F.2d 1275, 1280 (D.C. Cir. 1992) ("We join our sister circuits in holding that a defendant's knowledge of the juvenile's age is not an element of the crime of using a juvenile to commit or conceal a drug offense"). It does not appear that any court has held otherwise.

21 U.S.C. § 951(a)(2) DEFINITION OF CUSTOMS TERRITORY OF THE UNITED STATES

The "customs territory of the United States" includes only the United States, the District of Columbia, and Puerto Rico.

Committee Comment

Section 951(a)(2) defines this term by reference to general headnote 2 to the Tariff Schedules of the United States. As of 1984, this headnote defined "customs territory" as set out in this instruction.

21 U.S.C. § 952(a) DEFINITION OF "CONTROLLED SUBSTANCE"

[Identify the controlled substance] is a [controlled substance; narcotic drug; non-narcotic drug].

Committee Comment

If the defendant challenges the government's proof that the substance in question falls within the statutory definition of the substance charged, a more detailed instruction may be required. That instruction should make clear that the government must prove beyond a reasonable doubt that the substance in question was in fact the substance charged as defined in the appropriate Schedule of 21 U.S.C. § 812. The instructions may also need to include a definition of the substance as articulated in § 802(16) (definition of "narcotic" drug) and § 812. For examples of such instructions, see *United States v. Luschen*, 614 F.2d 1164, 1169 n.2 (8th Cir. 1980); *United States v. Umentum*, 547 F.2d 987, 992 n.3 (7th Cir. 1976); *United States v. Orzechowski*, 547 F.2d 978, 982–83 n.3, 983 n.4 (7th Cir. 1976).

21 U.S.C. §§ 952(a) & (b); 960(a) IMPORTATION OF CONTROLLED SUBSTANCES—ELEMENTS

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

1. The defendant brought [identify the controlled substance alleged in the charge] from a point outside the United States into [the United States; customs territory of the United States]; and

2. The defendant did so knowingly; and

3. The defendant knew the substance [was; contained] some kind of a controlled substance. The government is not required to prove that the defendant knew the substance was [identify the controlled substance.] [; and]

[4. The [identify the controlled substance] was not imported or exported pursuant to regulations prescribed by the Attorney General.]

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 incorporates the definition of importation into an element rather than using that term and then defining it separately. Because the definition is simple, this provides for clearer instruction. The term import is defined at 21 U.S.C. § 951(a)(1) and has been interpreted to require the government to prove that the substance emanated from a point outside the United States and was then brought into the United States or a United States customs territory. See, *e.g., United States v. Seni*, 662 F.2d 277, 286–87 (4th Cir. 1981); *United States v. Watkins*, 662 F.2d 1090, 1098 (4th Cir. 1981).

The prior (1999) pattern instructions for 21 U.S.C. § 952(a) erroneously omitted the requirement that the government prove that the defendant acted knowingly. The likely reason for this omission was that the prior instruction was based solely upon § 952(a). That subsection makes it unlawful to import a controlled substance, but it does not create the crime of importation. The statute creating the crime is 21 U.S.C. § 960(a), which states that anyone who "knowingly or intentionally" violates section 952 commits a crime. A conviction for importation under § 960 thus requires that a defendant act knowingly or intentionally. See, *e.g., United States v. Osideko*, 201 F. App'x 366 (7th Cir. 2006).

22 U.S.C. § 2778 IMPORTING/EXPORTING WEAPONS WITHOUT A LICENSE

[The indictment charges the defendant[s] with; Count[s] ____ of the indictment charge[s] the defendant[s] with] willfully [[attempting to] import; export] a [defense article; service; name the specific item] which appears on the United States Munitions List without first [obtaining a license; receiving written approval]. In order for you to find [the; a] defendant guilty of this charge, the government must prove the following beyond a reasonable doubt:

1. The defendant [[attempted to] import[ed]; export[ed]] [defense article; service; name the specific item];

2. The [name the specific item] was listed on the United States Munitions List at the time of the [[attempted] import; export];

3. The defendant did not first [obtain a license; receive written approval] for the [[attempted] import; export] of [defense article; service; name the specific item]; and,

4. The defendant acted willfully.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

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

Committee Comment

The United States Munitions List is found at 22 CFR § 1.21.1. See also Fifth Circuit Pattern Criminal Instruction 2.101 (2019).

Title 22 U.S.C. § 2778(c) applies, in theory, to a broad range of statutory and regulatory activity. The provision broadly punishes violation of "any provision of [section 2778], section 2779 of this title, a treaty referred to in subsection (j)(1)(C)(i), or any rule or regulation issued under this section or section 2779 of this title, including any rule or regulation issued to implement or enforce a treaty referred to in subsection (j)(1)(C)(i) or an implementing arrangement pursuant to such treaty." 22 U.S.C. § 2778(c). However, in practice, the statute has been used to prohibit the import/export of "defensive articles" and, more specifically, items found on the United States Munitions List. See *United States v. Dobek*, 789 F.3d 698 (7th Cir. 2015); see also *United States v. Pulungan*, 569 F.3d 326 (7th Cir. 2009).

22 U.S.C. § 2778(c) WILLFULLY—DEFINITION

A defendant acts willfully if they [[attempted] imported; exported] a [defense article; service; name the specific item] knowing that the law forbade [[attempting] importing; exporting] the [defense article; service; name the specific item] into [name of jurisdiction].

Committee Comment

This instruction defines the requirement of "willful" conduct as used in the fourth element of the section 2778 instruction. The Seventh Circuit has approved the definition of "willful" conduct under section 2778 as set forth in this instruction. The Seventh Circuit has held that a finding of willfulness for purpose of section 2778 requires proof that the defendant knew the specific item at issue was being imported/exported in violation of the law. *United States v. Dobek*, 789 F.3d 698, 701 (7th Cir. 2015) ("the defendant acted willfully if he exported military aircraft parts to Venezuela knowing that the law forbade exporting those parts to that country"); see also *United States v. Pulungan*, 569 F.3d 326, 331 (7th Cir. 2009) (willfulness in the context of section 2778 requires knowledge of the specific regulation, not merely violation of some regulation).

26 U.S.C. § 5845 DEFINITIONS OF FIREARM-RELATED TERMS

Committee Comment

The terms "firearm," "machinegun," "rifle," "shotgun," "any other weapon," "destructive device," "antique firearm," "unserviceable firearm," "make," "transfer," "dealer," "importer," and "manufacturer" are defined in 26 U.S.C. § 5845. The definitions of those terms for the jury should, if necessary, be taken from the statute.

26 U.S.C. § 5861(a) FAILURE TO PAY TAX OR REGISTER—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] engaging as a [manufacturer of; importer of; dealer in] firearms [without having paid the special tax; without having registered] as required by law. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. The defendant was engaged in business as a [manufacturer of; importer of; dealer in] firearms; and

2. The defendant did so [without having first paid the special tax; without having registered] as required by law.

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].

26 U.S.C. § 5861(d) RECEIVING OR POSSESSING AN UNREGISTERED FIREARM—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [receiving; possessing] a firearm which is not registered in the National Firearms Registration and Transfer Record. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly [possessed; received] a firearm [as described in the indictment] that had [a] characteristic[s] which required it to be registered in the National Firearms Registration and Transfer Record, specifically, that it [list characteristic[s]]; and

2. The defendant knew that the firearm had [that; those] characteristic[s]; and

3. The firearm was not registered in the National Firearms Registration and Transfer Record.

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 term "knowingly" is defined in Pattern Instruction 4.10.

In the first element, the court should provide a list of all the

characteristics in the appropriate statutory definition of the particular firearm or firearms which are the subject of the prosecution. These definitions are found at 26 U.S.C. § 5845. See *Staples v. United States*, 511 U.S. 600, 619 (1994) (§ 5861(d) requires proof that a defendant knew of the characteristics of his weapon that made it a "firearm" under the National Firearms Act); *United States v. Meadows*, 91 F.3d 851 (7th Cir. 1996).

For purposes of this statute, the term "firearm" is defined by 26 U.S.C. § 5845(a).

26 U.S.C. § 5861(h) RECEIPT OR POSSESSION OF A FIREARM WITH AN OBLITERATED, REMOVED, CHANGED, OR ALTERED SERIAL NUMBER—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] unlawful [receipt; possession] of a firearm with a[n] [obliterated; removed; changed; altered] serial number. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly [received; possessed] a firearm [as described in the indictment]; and

2. The firearm had a[n] [obliterated; removed; changed; altered] serial number; and

3. The defendant knew that the serial number had been [obliterated; removed; changed; altered].

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 third element of this instruction requires that the government prove that the defendant knew the serial number had been obliterated, removed, changed, or altered. In *Staples v. United States*, 511 U.S. 600 (1994), the Court held that 26 U.S.C. § 5861(d) requires the government to prove that the defendant knew of the

characteristics that brought his weapon within the statutory definition of a firearm. *Id.* at 602, 604, 609, 619. Specifically, the Court held that the government had to prove that the defendant knew the weapon he possessed had automatic firing capability, which made it a "machine gun" within the meaning of the firearms statute. *Id.* at 602. The rifle at issue was manufactured as a semi-automatic weapon (which is not a "firearm" within the scope of the National Firearms Act), but was modified to have automatic firing capability. *Id.* at 603. Although the Committee has found no authority deciding whether knowledge of the obliteration, removal, change or alteration is an element of a § 5861(h) offense, *Staples* may be read as requiring such knowledge. Thus, the Committee has included that requirement as an element of the offense. The Eleventh Circuit pattern instruction also includes such a requirement, see Pattern Crim. Jury Instr. 11th Cir. 0106.2, Possession of Firearm Having Altered Or Obliterated Serial Number—26 USC § 5861(h)(2020).

The term "knowingly" is defined in Pattern Instruction 4.10.

For purposes of this statute, the term "firearm" is defined by 26 U.S.C. § 5845(a).

26 U.S.C. § 5861(j) TRANSPORTING, DELIVERING OR RECEIVING AN UNREGISTERED FIREARM—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [transporting; delivering; receiving] an unregistered firearm. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant knowingly [transported; delivered; received] a firearm [as described in the indictment] in interstate commerce that had [a] characteristic[s] which required it to be registered in the National Firearms Registration and Transfer Record, specifically, that it [list characteristic[s]]; and

2. The firearm was unregistered; and

3. The defendant knew that the firearm had [that; those] characteristic[s] that caused it to be required to be registered.

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 term "knowingly" is defined in Pattern Instruction 4.10.

In the first element, the court must provide a list of all the

characteristics in the appropriate statutory definition of the particular firearm or firearms which are the subject of the prosecution. These definitions are found at 26 U.S.C. § 5845. See *Staples v. United States*, 511 U.S. 600, 619 (1994) (26 U.S.C. § 5861(d) requires proof that a defendant knew of the characteristics of his weapon that made it a "firearm" under the National Firearms Act); see also *United States v. Meadows*, 91 F.3d 851 (7th Cir. 1996). While Staples involved a violation of § 5861(d), because § 5861(j) also requires proof that a firearm was unregistered, the Court's holding that the defendant have knowledge of the characteristics of the weapon that required it to be registered would appear to apply with equal force to a violation of this subsection.

While the term "interstate commerce" is not defined under § 5861(j), the definition set forth in 18 U.S.C. § 921(a)(2) may be instructive.

For purposes of this statute, the term "firearm" is defined by 26 U.S.C. § 5845(a).

26 U.S.C. § 7201 ATTEMPT TO EVADE OR DEFEAT TAX—ELEMENTS

[The indictment charges defendant[s] with; Count ____ of the indictment charges the defendant[s] with] attempting to evade or defeat his [individual income] tax. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. On the date for filing a federal [income] tax return, federal [income] tax was due and owing by the defendant. [If the defendant owed tax for a particular year, then the tax was due and owing as of [April 15; other date pursuant to extension] of the following year.]; and

2. The defendant knew he had a legal duty to pay the tax; and

3. The defendant did some affirmative act to evade [payment of; assessment of; computation of] the tax. Any conduct that is likely to have a misleading or concealing effect can constitute an affirmative act. A lawful act can serve as an affirmative act if it is done with the intent to evade income tax. [The mere failure to file a tax return is not an affirmative act.]; and

4. In doing so, the defendant acted [willfully, that is,] with the intent to violate his legal duty to pay the tax.

The government is not required to prove the precise amount of additional tax alleged in the indictment or the precise amount of [additional] tax owed.

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

See *Sansone v. United States*, 380 U.S. 343, 351 (1965); *Spies v. United States*, 317 U.S. 492, 499 (1943); *United States v. King*, 126 F.3d 987, 989–90 (7th Cir. 1997) This section covers both attempts to avoid payment of taxes and attempts to avoid assessment of taxes. *United States v. Voorhies*, 658 F.2d 710, 713 (9th Cir. 1981).

Willfully is defined in the instruction as acting with the intent to violate a legal duty to pay a tax. *Cheek v. United States*, 498 U.S. 192 (1991). See *United States v. Murphy*, 469 F.3d 1130, 1137 (7th Cir. 2006) ("proof of a specific intent to do something which the law forbids; more than a showing of careless disregard for the truth is required"); *United States v. Patridge*, 507 F.3d 1092, 1093–94 (7th Cir. 2007).

"Any conduct that is likely to have a misleading or concealing effect can constitute an affirmative act." A lawful act can thus serve as an affirmative act if it is done with the intent to evade income tax. *United States v. Valenti*, 121 F.3d 327, 333 (7th Cir. 1997) (citing *United States v. Jungles*, 903 F.2d 468, 474 (7th Cir. 1990)). However, the mere failure to file a tax return is not an affirmative act. *Valenti*, 121 F.3d at 333. Contrary to what was said in a prior Committee Comment, a "substantial" deficiency is not required. *United States v. Daniels*, 387 F.3d 636 (7th Cir. 2004).

26 U.S.C. § 7201 UNANIMITY AS TO ACTS OF EVASION

Committee Comment

The Committee recommends the use of a unanimity instruction modeled on Pattern Instruction 4.04, which should require the jury to agree unanimously on at least one of the specific acts of evasion charged in the indictment.

26 U.S.C. § 7201 NO NEED FOR TAX ASSESSMENT

If the defendant has incurred a tax liability, then it exists from the date the return is due. The government need not prove that there was an administrative assessment of tax or that the defendant received a tax assessment.

Committee Comment

This instruction should be given only if the contrary position is argued by the defendant.

26 U.S.C. §§ 7201, 7203 & 7206 KNOWLEDGE OF CONTENTS OF RETURN

You may infer that a tax return was, in fact, signed by the person whose name appears to be signed to it. You are not required, however, to infer this.

If you find that the government has proved beyond a reasonable doubt that the defendant signed [the; a] tax return, then you may infer that the defendant knew of the contents of the return. You are not required, however, to infer this.

Committee Comment

Under 26 U.S.C. § 6064, "[t]he fact that an individual's name is signed to a return, statement or other document shall be prima facie evidence for all purposes that the return, statement or other document was actually signed by him."

This instruction's reference to a "signature" may require modification in a case involving an electronically-filed tax return.

26 U.S.C. §§ 7201, 7203 & 7206 FUNDS OR PROPERTY FROM UNLAWFUL SOURCES

In determining the defendant's taxable income, income received from unlawful activities is treated in the same manner as income from lawful activities.

Committee Comment

See 26 U.S.C. § 61; *James v. United States*, 366 U.S. 213 (1961); *Rutkin v. United States*, 343 U.S. 130 (1952)

26 U.S.C. § 7203 FAILURE TO FILE TAX RETURN—ELEMENTS

[The indictment charges defendant[s] with; Count of the indictment charges the defendant[s] with] willful failure to file an [individual; partnership; corporate; trust] [income; [name other type]] tax return. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant was required by law to file an [individual; partnership; corporate; trust] [income; name other] tax return for [insert calendar or fiscal year in question]. [I will explain in a moment when [a person; other form of entity] is required by law to file a tax return.]; and

2. The defendant failed to file the return as required by law; and

3. The defendant [acted willfully, that is, he] knew that he was required by law to file an income tax return and intentionally failed to do so.

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

Willfulness is defined within the instruction, as in the instruc-

tion for 26 U.S.C. § 7201.

26 U.S.C. § 7203 WHEN PERSON IS OBLIGATED TO FILE RETURN

[Use only the paragraph(s) that apply.]

A [single individual, married individual filing separately, etc.] [under; over] 65 years old was required to make and file an individual income tax return if that individual had a gross income of $_____ or more. "Gross income" means all income from any source, including [wages and compensation for services, tips, compensation in the form of personal expenses paid for by defendant's corporation, income from fraud, embezzlement, etc.]

A married individual was required to file a federal income tax return if he had a separate gross income in excess of $_____ and a total gross income, when combined with that of his spouse, in excess of $_____ where [either; both] [is; are] [over; under] 65 years old.

Any person who received more than $_____ net income from business (Schedule C), was required to make and file an individual income tax return.

If the defendant had the required gross income in [insert year], then he was required to file a tax return on or before [insert date return was due].

For the years [name years] a corporation [partnership; trust] was required to make and file a corporate [partnership; trust] income tax return, whether or not that corporation had income.

Committee Comment

This instruction should be adapted for the particular years at issue, as filing requirements may change from year to year.

"The definition of gross income under the Internal Revenue Code sweeps broadly." *United States v. Burke*, 504 U.S. 229, 233

(1992); see also *United States v. Benson*, 67 F.3d 641 (7th Cir. 1995) (citing *Burke*).

26 U.S.C. § 7203 TAX RETURN MUST CONTAIN SUFFICIENT INFORMATION

Submitting a tax form that does not contain sufficient financial information to enable the Internal Revenue Service to determine the individual's tax liability does not qualify as the filing of a tax return under the law. It is up to you to determine whether the tax form the defendant filed contained enough information to enable the Internal Revenue Service to determine the defendant's tax liability.

Committee Comment

See *United States v. Verkuilen*, 690 F.2d 648, 654 (7th Cir. 1982).

26 U.S.C. § 7206 DEFINITION OF "MATERIAL"

A false matter is "material" if the matter was capable of influencing the Internal Revenue Service.

Committee Comment

See *United States v. Pree*, 408 F.3d 855, 873 (7th Cir. 2005) ("[a] false statement is material when it has the potential for hindering the IRS's efforts to monitor and verify the tax liability of the taxpayer.") (citations omitted); *United States v. Peters*, 153 F.3d 445 (7th Cir. 1998) (defining materiality).

26 U.S.C. § 7206(1) FRAUD AND FALSE STATEMENTS—ELEMENTS

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

1. The defendant [prepared an [income] tax return; caused someone to prepare an [income] tax return]; and

2. The income tax return was false [or incomplete] as to a material matter, as charged in the Count; and

3. The defendant signed the income tax return, which contained a written declaration that it was made under penalties of perjury; and

4. The defendant [acted willfully, that is, he] knew that he had a legal duty to file a truthful [and complete] tax return, but when he signed the return, he did not believe that it was truthful [or complete] as to a material matter; and

5. The defendant [filed; caused someone to file] the [income] tax return with the Internal Revenue Service.

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

A charge of filing a false tax return does not, unlike a charge of evasion, require proof of a tax deficiency. *United States v. Peters*, 153 F.3d 445, 461 (7th Cir. 1998).

Willfulness is defined within the instruction, as in the instruction for 26 U.S.C. § 7201. See *United States v. Pree*, 408 F.3d 855, 867 (7th Cir. 2005) (willfulness as element).

26 U.S.C. § 7206(2) AIDING AND ABETTING IN SUBMITTING FALSE AND FRAUDULENT RETURN—ELEMENTS

[The indictment charges defendant[s] with; Count[s] ____ of the indictment charge[s] the defendant[s] with] aiding and abetting in the [preparation; presentation] of a false tax return. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant [aided; assisted in; procured; counseled; advised] the [preparation; presentation] of an [income] tax return that was false as to a material matter. There must be some affirmative participation which at least encourages the perpetrator. The return must be filed with the Internal Revenue Service. [The government is not required to prove that the defendant [prepared; signed] the tax return.]; and

2. The defendant knew that the income tax return was false, that is, that the income tax return was untrue when it was made.; and

3. The defendant acted willfully, that is, with the intent to violate the law.

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

See *United States v. Dunn*, 961 F.2d 648, 651 (7th Cir. 1992) (issue of willfulness); *United States v. Hooks*, 848 F.2d 785, 791–92 (7th Cir. 1988) (application of 26 U.S.C. § 7206(2) "has a broad sweep, making all forms of willful assistance in preparing a false return an offense"); *United States v. Palivos*, 486 F.3d 250, 258–59 (7th Cir. 2007) (return must be filed with the Internal Revenue Service); *United States v. Hooks*, 848 F.2d 785, 789 (7th Cir. 1988) ("there must exist some affirmative participation which at least encourages the perpetrator").

26 U.S.C. § 7206(2) KNOWLEDGE OF TAXPAYER IRRELEVANT

The government is not required to prove that the taxpayer [who filed the false tax return; for whom the false tax return was filed] knew the return was false.

Committee Comment

See *United States v. Motley*, 940 F.2d 1079, 1084 (7th Cir. 1991); *United States v. Hooks*, 848 F.2d 785, 791 (7th Cir. 1988) (defendant willfully caused tax preparer to file a false estate tax return and therefore violated Section 7206(2), regardless of whether tax preparer knew of falsity or fraud).

26 U.S.C. § 7212 CORRUPTLY ENDEAVORING TO OBSTRUCT OR IMPEDE DUE ADMINISTRATION OF INTERNAL REVENUE LAWS—ELEMENTS

[The indictment charges defendant[s] with; Count ____ of the indictment charges the defendant[s] with] corruptly endeavoring to obstruct or impede the due administration of the internal revenue laws. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. The defendant [made an effort; acted] with the purpose to obstruct or impede the due administration of the internal revenue laws, which includes the Internal Revenue Service's lawful functions to [ascertain income; compute, assess and collect income taxes; audit tax returns and records; and investigate possible criminal violations of the internal revenue laws]; and

2. The defendant's [effort; act] had a reasonable tendency to obstruct or impede the due administration of the internal revenue laws. The effort need not be successful; and

3. The defendant acted knowingly; and

4. The defendant acted [corruptly, that is,] with the purpose to obtain an unlawful benefit for himself or someone else.

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

See *United States v. Valenti*, 121 F.3d 327 (7th Cir. 1997).

26 U.S.C. § 7212 GOOD FAITH

If the defendant believes in good faith that he is acting within the law or that his actions comply with the law, he cannot be said to have acted [corruptly, or] with the purpose to obtain an unlawful benefit for himself or someone else. This is so even if the defendant's belief was not objectively reasonable. However, you may consider the reasonableness of the defendant's belief together with all the other evidence to determine whether the defendant held the belief in good faith.

Committee Comment

See *Cheek v. United States*, 498 U.S. 192, 202, 204–06 (1991); *United States v. Becker*, 965 F.2d 383, 388 (7th Cir. 1992).

31 U.S.C. § 5324(a)(3) STRUCTURING FINANCIAL TRANSACTIONS—ELEMENTS

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

1. [Defendant's name] had knowledge that [financial institutions; name(s) of financial institution(s) involved] are required to report currency transactions in amounts greater than $10,000; and

2. [Defendant's name] [structured; attempted to structure] a currency transaction for the purpose of evading this reporting requirement; and

3. The transaction involved one or more domestic financial institutions.

I will define some of these terms in a moment.

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

See 31 U.S.C. § 5324(a)(3); 31 C.F.R. § 103.11(gg); *United States v. Van Allen*, 524 F.3d 814, 819–20 (7th Cir. 2008); *United States v. Cassano*, 372 F.3d 868, 878 (7th Cir. 2004), vacated on

other grounds 543 U.S. 1109 (2005). This instruction uses the most common example of structuring, specifically the offense described in section 5324(a)(3). If the defendant is charged under a different subsection of the statute, the instruction should be modified accordingly.

A previous version of the criminal prohibition against structuring required proof of willfulness. In *Ratzlaf v. United States*, 510 U.S. 135 (1994), the Supreme Court held that this required proof that the defendant acted with knowledge that his conduct was unlawful. *Id.* at 137. Congress responded by eliminating the statutory requirement of willfulness. See *United States v. Griffin*, 84 F.3d 912, 925 (7th Cir. 1996) (citing Pub. L. No. 103-325, § 411, 108 Stat. 2160, 2253 (1994)). Note, though, that § 5324(a) still requires proof that the defendant acted "for the purpose of evading the [currency transaction] reporting requirements." 31 U.S.C. § 5324(a). The Seventh Circuit has determined that to convict, the government must prove that the defendant had knowledge of the reporting requirements and acted to avoid them. See *Van Allen*, 524 F.3d at 820; *Cassano*, 372 F.3d at 878.

The instruction does not use the phrase "had knowledge of the reporting requirements" because it is somewhat opaque regarding the extent of knowledge required. The instruction is adapted from language approved in *United States v. MacPherson*, 424 F.3d 183, 189 (2d Cir. 2005). Though the Seventh Circuit's decisions in *Van Allen* and *Cassano* use the term "avoid," the Committee has used the statutory term "evade" because it is believed to be more descriptive of what is required. "Evade" is a commonly understood term that is used elsewhere in these instructions. See, *e.g.*, Pattern Instruction for 26 U.S.C. § 7201.

31 U.S.C. § 5324(a)(3) DEFINITION OF STRUCTURING FINANCIAL TRANSACTIONS

A financial institution must file a currency transaction report with the Internal Revenue Service every time a customer engages in a currency transaction of more than $10,000.00.

[Commercial banks; Banks that are insured by the Federal Deposit Insurance Corporation; Credit Unions; Insert other] are financial institutions.

A currency transaction is the physical transfer of currency from one [person; entity] to another [person; entity].

A person structures a currency transaction when he[, by himself or on behalf of others,] conducts one or more currency transactions at one [or more] financial institution[s] [or different branches of the same financial institution], on one [or more] day[s], with the purpose of evading currency transaction reporting requirements. Structuring may include breaking down a single sum of currency over $10,000 into smaller sums, or conducting a series of cash transactions all at or below $10,000, with the purpose of evading currency transaction reporting requirements.

You may find [defendant's name] guilty of unlawfully structuring a transaction regardless of whether the financial institution filed a true and accurate currency transaction report.

Committee Comment

See 31 U.S.C. 5312 & 31 C. F. R. § 103.11(n) ("financial institution"); 31 U.S.C. § 103.11(ii) ("transaction in currency"); 31 U.S.C. § 103.11(gg) ("structuring"); 31 U.S.C. § 103.22(b)(i) (obligation to file currency transaction report). This instruction uses the most common example of currency structuring. If it does not fit the particular case, a more applicable example should be devised.

42 U.S.C. § 408(a)(3) MAKING OR CAUSING TO BE MADE A FALSE STATEMENT OR REPRESENTATION OF MATERIAL FACT FOR USE IN DETERMINING A FEDERAL BENEFIT—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ___ of the indictment charge[s] the defendant[s] with] [making; causing to be made] a false statement or representation for use in determining federal benefits. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the [three] following elements beyond a reasonable doubt:

1. The defendant [made; caused to be made] the false statement or representation [as charged in the indictment]; and

2. The statement or representation was for use in determining the right to a federal benefit; and

3. The statement or representation was of a material fact.

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

A fact is material for purposes of § 408(a)(3) if it has "a natural tendency to influence or was capable of influencing the government agency or official." *United States v. Phythian*, 529 F.3d 807,

813 (8th Cir. 2008) (quotation omitted). See also *United States v. Moore*, 446 F.3d 671, 681 (7th Cir. 2006) (defining "material statement" under 18 U.S.C. § 1001).

The statute does not appear to contain any *mens rea* requirement. The Eighth and Eleventh Circuits (and the Western District of Virginia, in the Fourth Circuit) have read a requirement into the statute that the defendant make the false statement with some form of the "intent to deceive." *United States v. Henderson*, 416 F.3d 686, 692 (8th Cir. 2005); *United States v. Youngblood*, 263 F. App'x 829 (11th Cir. 2008); *United States v. Miller*, 621 F. Supp. 2d 323, 333 (W.D. Va. 2009). The Committee takes no position on such a requirement.

42 U.S.C. § 408(a)(7)(A) USE OF A FALSELY OBTAINED SOCIAL SECURITY NUMBER—ELEMENTS

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

1. The defendant willfully used for any purpose a social security account number assigned by the Commissioner of Social Security; and

2. The social security account number was obtained based on false information provided to the Commissioner of Social Security by any person; and

3. The defendant knew the social security account number he was using had been obtained based on false information; and

4. The defendant used the social security account number with the intent to deceive.

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 inclusion of the term "willfully" in a jury instruction is

generally frowned upon as confusing unless the statute at issue uses the word, see Pattern Instructions 4.11 (comment). Here, willfully is listed in the statute (along with knowingly and with intent to deceive) as part of the *mens rea* for the crime of using a falsely obtained social security number. All three terms overlap, but the proposed instruction attempts to separate the terms so that a jury can give meaningful consideration to each as a conceptually distinct state of mind, thus giving effect to each word Congress used in the statute.

Few cases in the Seventh Circuit or elsewhere have addressed the intent requirement of this statute, and those that have did not address the way the three *mens rea* terms interact in the statute. See *United States v. Pryor*, 32 F.3d 1192, 1194 (7th Cir. 1994) (applying willfully, knowingly, and with intent to deceive only to the "use" of the fraudulent social security account number); see also *United States v. Rastegar*, 472 F.3d 1032, 1037 (8th Cir. 2007) (focusing on the intent to deceive prong of the analysis).

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.

42 U.S.C. § 408(a)(7)(A) & (B) DEFINITION OF "INTENT TO DECEIVE"

"Intent to deceive" means to act for the purpose of misleading someone. It is not necessary for the government to prove, however, that anyone was in fact misled or deceived.

Committee Comment

See *United States v. Sirbel*, 427 F.3d 1155, 1159–60 (8th Cir. 2005).

42 U.S.C. § 408(a)(7)(B) USE OF A FALSE SOCIAL SECURITY NUMBER—ELEMENTS

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

1. The defendant represented for any purpose a particular social security account number to be his [or another person's];

2. The representation was false; and

3. The defendant acted with intent to deceive.

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

Most of the cases that have reached the appellate level have involved a challenge to the "purpose" for which the social security number was used. Courts have unanimously held that the language "any other purpose" in the statute means exactly what it says. See *United States v. Johnson-Wilder*, 29 F.3d 1100, 1103 (7th Cir. 1994); see also *United States v. Herrera-Martinez*, 525 F.3d 60, 65–66 (1st Cir. 2008); *United States v. Barel*, 939 F.2d 26, 34 (3d Cir. 1991); *United States v. Holland*, 880 F.2d 1091, 1095 (9th Cir. 1989). The false representation need not be made for the purpose of pecuniary gain. *Johnson-Wilder*, 29 F.3d at 1103.

While mere possession of a social security number cannot sustain a conviction under this section, see *United States v. Porter*, 409 F.3d 910, 916 (8th Cir. 2005), the Eighth Circuit found that at least in some cases possession of an official document with a false social security number is sufficient evidence for a jury to determine that the possessor misrepresented a number to be his. *United States v. Teitloff*, 55 F.3d 391, 394 (8th Cir. 1995).

The consent of the person to whom the social security number is actually assigned is not a defense to the crime of false use. *United States v. Soape*, 169 F.3d 257, 269 (5th Cir. 1999).

42 U.S.C. § 408(a)(7)(C) SOCIAL SECURITY CARD VIOLATIONS—ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] a violation of this statute regarding social security cards. In order for you to find [the; a] defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. The defendant altered a social security card; and

2. The defendant did so knowingly.

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

Aside from alteration there are four other ways by which a person may violate this statute. If one of the other alternatives is relevant to the case on trial, one of the following should be substituted for or added to the first element as appropriate:

[1. The defendant bought a card that [is; purports to be] a social security card; and]

- or -

[1. The defendant sold a card that [is; purports to be] a social security card; and]

- or -

[1. The defendant counterfeited a social security card; and]

- or -

[1. The defendant possessed a [counterfeit] social security card with intent to sell or alter it].

The First Circuit has held that social security cards that lack a name and number are not sufficiently complete to be "counterfeited" for purposes of this offense. *United States v. Gomes*, 969 F.2d 1290, 1294 (1st Cir. 1992).

The term "knowingly" is defined at Pattern Instruction 4.10.

42 U.S.C. § 408(a)(7)(C) DEFINITION OF "COUNTERFEIT"

"Counterfeit[ed]" means that the social security card bears [or was made to bear] such a likeness or resemblance to something genuine that it is calculated to deceive an honest, sensible, and unsuspecting person of ordinary observation and using care when dealing with an individual who is presumed to be honest and upright.

Committee Comment

See *United States v. Brunson*, 657 F.2d 110, 114 (7th Cir. 1981); *United States v. Gomes*, 969 F.2d 1290, 1293–94 (1st Cir. 1992).

42 U.S.C. § 1320a-7b(b) CRIMINAL PENALTIES FOR ACTS INVOLVING FEDERAL HEALTH CARE PROGRAMS—ILLEGAL REMUNERATIONS

[The indictment charges the defendant[s] with; Count[s] ____ of the indictment charge[s] the defendant[s] with] [solicitation; receipt; offer; payment] of remuneration in whole or in part from a federal health care program—namely _____. In order for you to find [the; a] defendant guilty of this charge, the government must prove each of the four following elements beyond a reasonable doubt:

1. The defendant knowingly [solicited; received; offered; paid] the remuneration, which took the form of a [kickback; bribe; rebate] in cash or in kind;

2. The defendant did so willfully;

3. The defendant did so [in return for [referring an individual to a person for the furnishing or arranging of any item or service; purchasing, leasing, ordering, or arranging for any good, facility, service, or item; recommending purchasing, leasing, or ordering any good, facility, service, or item]; to induce such person [to refer an individual to a person for the furnishing or arranging of any item or service; to purchase, lease, order, or arrange for any good, facility, service, or item; to recommend purchasing, leasing, or ordering any good, facility, service, or item]]; and

4. The [item; service; good; facility] was one for which payment may be made in whole or in part under a federal health care program.

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

Section 1320a-7b(b) uses both "knowingly" and "willfully" to define the *mens rea* element. When interpreting this provision, practitioners should consider the potential application of *United States v. Schaul*, 962 F.3d 917 (7th Cir. 2020). In *Schaul*, the Seventh Circuit held that, in the context of 18 U.S.C. § 1347, "knowingly" and "willfully" have separate meanings and must be proven in the conjunctive. The *Schaul* court also strongly implied that, under section 1347, "willfully" means to act with an "intent to defraud," which was already considered an element of section 1347. *Id.* at 924. The Committee notes, however, that section 1320a-7b(b) does not require an intent to defraud. In fact, section 1320a-7b(h) clarifies that "a person need not have actual knowledge of [the Anti-Kickback Statute] or specific intent to commit a violation" of it in order to be found guilty. In the absence of controlling law, litigants may also refer to the definition of "willfully" under 18 U.S.C. § 1035, which similarly has no "intent to defraud" requirement. There, "willfully" is defined as acting "voluntarily and intentionally and with the intent to do something he knows is illegal." See *United States v. Natale*, 719 F.3d 719, 741–42 (7th Cir. 2013).

"Once the government establishes the elements of a violation of the Anti-Kickback Statute, the burden shifts to a defendant to demonstrate by a preponderance of the evidence that her conduct fell within the safe harbor provision of the statute." *United States v. George*, 900 F.3d 405, 413 (7th Cir. 2018) (citing *United States v. Jumah*, 493 F.3d 868, 873 (7th Cir. 2007)). Those safe harbor provisions are laid out in section 1320a-7b(b)(3). See also 42 C.F.R. § 1001.952(b) (the statute's corresponding regulations).

In cases involving Medicare certifications and recertifications, practitioners should consider *U.S. v. Patel*, 778 F.3d 607, 612–18 (7th Cir. 2015). In *Patel*, the Seventh Circuit interpreted the term "referring" (which is not defined in the statute) to extend to both certifications and recertifications.

To the extent that a case involves a partial payment, *U.S. v.*

Borrasi, 639 F.3d 774, 782 (7th Cir. 2011) is instructive. In that case, the Seventh Circuit joined the Third, Fifth, Ninth, and Tenth Circuits in holding that "if part of the payment compensated past referrals or induced future referrals, that portion of the payment violates 42 U.S.C. § 1320a-7b(b)(1)."

In cases in which the defendant is not a physician, *U.S. v. Polin*, 194 F. 3d 863 (7th Cir. 1999) is instructive. In that case, which involved a Medicare kickback scheme perpetrated by a medical device sales representative, the Seventh Circuit recognized that "[t]he different subsections do not distinguish between physicians and lay-persons"—both can be found guilty under section 1320a-7b(b). *Id.* at 866–67.

If the success of an alleged kickback scheme requires the recommendation, certification, or permission of a third party (such as a doctor), practitioners should look to *United States v. George*, 900 F.3d 405 (7th Cir. 2018). In *George*, the Seventh Circuit rejected the argument that section 1320a-7b(b)'s application is limited to persons who could be deemed "relevant decisionmakers." *Id.* at 413. *George* involved an alleged scheme whereby the defendant (the owner of a referral agency) received payments from a home healthcare entity for each Medicare patient she referred. On appeal, the defendant argued that, because the persons she referred had to be certified by a physician before they could be admitted to the home healthcare entity, she was not the relevant decisionmaker, and therefore could not be convicted for a violation of the Anti-Kickback statute. The court rejected this argument, reiterating that the statute's focus is on "imposing liability on operatives who 'leverage fluid, informal power and influence.' " *Id.* at 411 (quoting *United States v. Shoemaker*, 746 F.3d 614, 629–30 (5th Cir. 2014)); see also *id.* at 412 ("[P]ayments were made in this case to refer a Medicare patient to a service provider, and such conduct is prohibited under the plain language of the statute.").