

PATTERN JURY INSTRUCTIONS (Criminal Cases)

Prepared by the
Committee on Pattern
Jury Instructions
District Judges Association
Fifth Circuit
2012 Edition



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Dedication

This issue of the Fifth Circuit Pattern Jury Instructions, Criminal, is dedicated to the memory of the Honorable Adrian G. Duplantier, who served as a United States District Judge for the Eastern District of Louisiana from his appointment in 1978 until his passing in 2007. He was a member of our committee for the preparation of the 1990, 1997, and 2001 issues. Each time, his sharp mind, thorough preparation, and congenial personality made him a valuable contributor to our work sessions. We miss him.

Introduction

The 2012 edition of the Pattern Jury Instructions (Criminal) continues a project initiated by the Fifth Circuit District Judges Association more than twenty years ago. It reflects a collaborative effort of district judges appointed successively by the Association to provide jury instructions accurately reflective of the criminal law and useable by our judges and practitioners in the trial of criminal cases before juries in this circuit.

Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), provided an important focus of the 2001 edition to identify elements previously thought to be sentencing factors. In intervening years, the United States Supreme Court has issued significant opinions interpreting criminal statutes, including mail and wire fraud, *Skilling v. United States*, 130 S.Ct. 2896 (2010); obstruction of justice, *Fowler v. United States*, 131 S.Ct. 2045 (2011), and *Arthur Andersen LLP v. United States*, 125 S.Ct. 2129 (2005); Racketeer Influenced Corrupt Organizations Act, *Boyle v. United States*, 129 S.Ct. 2237 (2009); and money laundering, *Cuellar v. United States*, 128 S.Ct. 1994 (2008), and *United States v. Santos*, 128 S.Ct. 2020 (2008). This edition reflects those and other changes. Research is current through December 31, 2012.

In preparing an instruction, the Committee begins where you begin, that is, with an examination of the statute and United States Supreme Court opinions, as well as appellate opinions with obvious emphasis on the Fifth Circuit, interpreting the statute. Committee members submit proposed instructions. Review and discussion of these instructions continues until the judges reach a consensus.

While these pattern charges do not presume to be a legal treatise, the Committee has obviously attempted to make accurate statements of the law. These pattern charges should be used for what they are—an aid to guide your instructing the jury on each individual case. Notes are added to identify issues, offer explanations, or provide assurance of legal authority.

The Committee was able to re-enlist the excellent and unselfish services of Professor Susan R. Klein. We thank Dean Ward Farnsworth from the University of Texas School

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of Law for sharing her and her staff. We acknowledge the special efforts of many of our clerks and office staff whose work has been significant during the years of our work, especially Katie Griffin, John Deck, and Cené Abroms.

Our predecessors' work is the foundation of our efforts. They deserve our continued thanks.

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PRELIMINARY INSTRUCTIONS

Members of the jury:

Now that you have been sworn, I will give you some preliminary instructions to guide you in your participation in the trial.

Duty of the jury:

It will be your duty to find from the evidence what the facts are. You and you alone will be the judges of the facts. You will then have to apply to those facts the law as the court will give it to you. You must follow that law whether you agree with it or not.

Nothing the court may say or do during the course of the trial is intended to indicate, or should be taken by you as indicating, what your verdict should be.

Evidence:

The evidence from which you will find the facts will consist of the testimony of witnesses, documents and other items received into the record as exhibits, and any facts that the lawyers agree to or stipulate to or that the court may instruct you to find.

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

1. Statements, arguments, and questions by lawyers are not evidence.
2. Objections to questions are not evidence. Lawyers have an obligation to their clients to make objections when they believe evidence being offered is improper under the rules of evidence. You should not be influenced by the objection or by the court's

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ruling on it. If the objection is sustained, ignore the question. If it is overruled, treat the answer like any other. If you are instructed that some item of evidence is received for a limited purpose only, you must follow that instruction.

3. Testimony that the court has excluded or told you to disregard is not evidence and must not be considered.
4. Anything you may have seen, heard, or read outside the courtroom is not evidence and must be disregarded. You are to decide the case solely on the evidence presented here in the courtroom.

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is proof of facts from which you may infer or conclude that other facts exist. I will give you further instructions on these as well as other matters at the end of the case, but keep in mind that you may consider both kinds of evidence.

It will be up to you to decide which witnesses to believe, which witnesses not to believe, and how much of any witness's testimony to accept or reject. I will give you some guidelines for determining the credibility of witnesses at the end of the case.

Rules for criminal cases:

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

First: the defendant is presumed innocent until proven guilty. The indictment brought by the government against the defendant is only an accusation, noth-

ing more. It is not proof of guilt or anything else. The defendant therefore starts out with a clean slate.

Second: the burden of proof is on the government until the very end of the case. The defendant has no burden to prove his or her innocence, or to present any evidence, or to testify. Since the defendant has the right to remain silent, the law prohibits you from arriving at your verdict by considering that the defendant may not have testified.

Third: the government must prove the defendant's guilt beyond a reasonable doubt. I will give you further instructions on this point later, but bear in mind that in this respect a criminal case is different from a civil case.

Summary of applicable law:

In this case the defendant is charged with _____. I will give you detailed instructions on the law at the end of the case, and those instructions will control your deliberations and decision. But in order to help you follow the evidence, I will now give you a brief summary of the elements of the offense that the government must prove beyond a reasonable doubt to make its case. [Summarize the elements of the offense.]

Conduct of the jury:

During the course of the trial, do not speak with any witness, or with the defendant, or with any of the lawyers in the case. Please do not talk with them about any subject at all. You may be unaware of the identity of everyone connected with the case. Therefore, in order to avoid even the appearance of impropriety, do not engage in any conversation with anyone in or about the courtroom or courthouse. It is best that you remain in the jury room during breaks in the trial and do not lin-

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ger in the hall. In addition, during the course of the trial, do not talk about the trial with anyone else—not your family, not your friends, not the people with whom you work. Also, do not discuss this case among yourselves until I have instructed you on the law and you have gone to the jury room to make your decision at the end of the trial. Otherwise, without realizing it, you may start forming opinions before the trial is over. It is important that you wait until all the evidence is received and you have heard my instructions on rules of law before you deliberate among yourselves.

Let me add that during the course of the trial, you will receive all the evidence you properly may consider to decide the case. Please do not try to find out information from any source outside the confines of this courtroom. Do not seek or receive any outside information on your own which you think might be helpful. Do not engage in any outside reading about this case or the law involved. Do not attempt to visit any places mentioned in the case, whether in person or via maps or online resources such as Google Earth. You must not read about it in any publications or watch or listen to television or radio reports of what is happening here. Do not use the Internet or any other form of electronic communication to obtain or provide information to another, whether on a phone, computer, or other device. This includes, but is not limited to, the use of websites and search engines, such as Google or Yahoo, or other online resource or publication for the use of sending or receiving information on the case. Do not attempt to learn about the parties, the witnesses, the lawyers, or the judge. Do not send or receive emails or text messages relating to the case or your involvement. Do not read or post information on Facebook, or any other blog or social networking site, such as Twitter or MySpace. The reason for these rules, as I am certain you will understand, is that your decision in this case must be made solely on the evidence presented at the trial.

[Insert Instruction No. 1.02, Note-Taking By Jurors, here.]

Course of the trial:

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

The government will then present its witnesses, and counsel for the defendant may cross-examine them. Following the government's case, the defendant may, if he wishes, present witnesses whom the government may cross-examine. If the defendant decides to present evidence, the government may introduce rebuttal evidence.

After all the evidence is in, the attorneys will present their closing arguments to summarize and interpret the evidence for you, and the court will instruct you on the law. After that, you will retire to deliberate on your verdict.

Note

This instruction is largely based on the Federal Judicial Center's Benchbook for U.S. District Court Judges (5th ed. 2007). The Committee on Court Administration and Case Management of the Federal Judicial Center has drafted its Proposed Model Jury Instructions on The Use of Electronic Technology to Conduct Research on or Communicate about a Case. It is in the Appendix, No. 3.01.

1.02**NOTE-TAKING BY JURORS
(OPTIONAL ADDITION TO PRELIMINARY
INSTRUCTION)****ALTERNATIVE A**

You may not take notes during the course of the trial. There are several reasons for this. It is difficult to take notes and, at the same time, pay attention to what a witness is saying. Furthermore, in a group the size of yours, certain persons will take better notes than others, and there is the risk that the jurors who do not take good notes will depend upon the jurors who do take good notes. The jury system depends upon all jurors paying close attention and arriving at a unanimous decision. I believe that the jury system works better when the jurors do not take notes.

You will note that we do have an official court reporter making a record of the trial; however, we will not have typewritten transcripts of this record available for your use in reaching a decision in this case.

ALTERNATIVE B

If you would like to take notes during the trial, you may do so. On the other hand, you are not required to take notes if you prefer not to do so. Each of you should make your own decision about this.

If you do decide to take notes, be careful not to get so involved in the note-taking that you become distracted from the ongoing proceedings. Your notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of the evidence. If you do not take notes, you should rely upon your own independent recollection of the proceed-

ings and you should not be unduly influenced by the notes of other jurors.

Notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been. Whether you take notes or not, each of you must form and express your own opinion as to the facts of the case.

You will note that we do have an official court reporter making a record of the trial; however, we will not have typewritten transcripts of this record available for your use in reaching a decision in this case.

Note

Whether jurors take notes is a matter of discretion with the trial judge. *See Fortenberry v. Maggio*, 664 F.2d 1288, 1292 (5th Cir. 1982); *United States v. Rhodes*, 631 F.2d 43, 45–46 (5th Cir. 1980); *see also United States v. Aguilar*, 242 F. App'x 239, 248 (5th Cir. 2007). Note-taking could diminish potential prejudice to individual defendants in a joint trial. *See United States v. Posada-Rios*, 158 F.3d 832, 863 (5th Cir. 1998).

1.03

PATTERN JURY INSTRUCTIONS

1.03

INTRODUCTION TO FINAL INSTRUCTIONS

Members of the Jury:

In any jury trial there are, in effect, two judges. I am one of the judges; the other is the jury. It is my duty to preside over the trial and to decide what evidence is proper for your consideration. It is also my duty at the end of the trial to explain to you the rules of law that you must follow and apply in arriving at your verdict.

First, I will give you some general instructions which apply in every case, for example, instructions about burden of proof and how to judge the believability of witnesses. Then I will give you some specific rules of law about this particular case, and finally I will explain to you the procedures you should follow in your deliberations.

1.04

DUTY TO FOLLOW INSTRUCTIONS

You, as jurors, are the judges of the facts. But in determining what actually happened—that is, in reaching your decision as to the facts—it is your sworn duty to follow all of the rules of law as I explain them to you.

You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences.

It is also your duty to base your verdict solely upon the evidence, without prejudice or sympathy. That was the promise you made and the oath you took before being accepted by the parties as jurors, and they have the right to expect nothing less.

Note

See United States v. Smith, 296 F.3d 344, 348 n.2 (5th Cir. 2002) (approving trial judge’s jury charge that: “[I]t is your sworn duty to follow all the rules of law as I explain them to you”); *United States v. Meshack*, 225 F.3d 556, 580–81 (5th Cir. 2000) (no plain error in instructing jury, pursuant to Instruction No. 1.04, that: “[I]t is also your duty to base your verdict solely upon the evidence, without prejudice or sympathy”); *see also United States v. Gaudin*, 115 S.Ct. 2310, 2315 (1995) (“[T]he judge must be permitted to instruct the jury on the law and to insist that the jury follow his instructions.”); *United States v. Wofford*, 560 F.3d 341, 352 (5th Cir. 2009) (citing *Gaudin* for the same premise).

1.05

PRESUMPTION OF INNOCENCE, BURDEN OF PROOF, REASONABLE DOUBT

The indictment or formal charge against a defendant is not evidence of guilt. Indeed, the defendant is presumed by the law to be innocent. The defendant begins with a clean slate. The law does not require a defendant to prove his innocence or produce any evidence at all [and no inference whatever may be drawn from the election of a defendant not to testify].

The government has the burden of proving the defendant guilty beyond a reasonable doubt, and if it fails to do so, you must acquit the defendant. While the government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond all possible doubt. It is only required that the government's proof exclude any "reasonable doubt" concerning the defendant's guilt.

A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in making the most important decisions of your own affairs.

Note

Delete bracketed material if defendant testifies.

An instruction on the presumption of innocence protects "the accused's constitutional right to be judged solely on the basis of proof adduced at trial." *Taylor v. Kentucky*, 98 S.Ct. 1930, 1935 (1978). But "failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution." *Kentucky v. Whorton*, 99 S.Ct. 2088, 2090 (1979). Yet, while failure to instruct on the presumption of innocence may be harmless er-

ror, failure to instruct a jury on the reasonable doubt standard is not susceptible to the harmless error analysis. *See Arizona v. Fulminante*, 111 S.Ct. 1246, 1255 (1991).

To comply with due process, it must be proven that the defendant committed each element of the charged offense beyond a reasonable doubt. *See Sullivan v. Louisiana*, 113 S.Ct. 2078, 2080–83 (1993); *In re Winship*, 90 S.Ct. 1068 (1970); *see also United States v. Delgado*, 672 F.3d 320 (5th Cir. 2012). However, there is not a specific definition of reasonable doubt that must be used as long as the concept is correctly conveyed to the jury. *See Victor v. Nebraska*, 114 S.Ct. 1239, 1242 (1994); *Holland v. United States*, 75 S.Ct. 127, 138 (1954).

Additional “clean slate” language has been added. *See United States v. Walker*, 861 F.2d 810, 811, 813–14 (5th Cir. 1988) (panel recommended additional “clean slate” language in order to “absolutely assure the jurors’ understanding”). The Fifth Circuit has approved this instruction without the added “clean slate” language. *See United States v. Creech*, 408 F.3d 264, 268 (5th Cir. 2005); *United States v. Williams*, 20 F.3d 125, 128 n.1 (5th Cir. 1994); *United States v. Castro*, 874 F.2d 230, 233 (5th Cir. 1989); *United States v. Stewart*, 879 F.2d 1268, 1271 (5th Cir. 1989); *see also United States v. Arceneaux*, 432 F. App’x 335, 338 (5th Cir. 2011); *United States v. MacHauer*, 403 F. App’x 967 (5th Cir. 2010).

A panel of the Fifth Circuit has also commented, in dicta, on instructing the jury on the government’s burden of proof within this instruction. *See Williams*, 20 F.3d at 129 n.2, 132 n.5 (preferring the Federal Judicial Center’s instruction contrasting reasonable doubt and preponderance of the evidence); *United States v. Shaw*, 894 F.2d 689, 692–93 (5th Cir. 1990) (Fifth Circuit Pattern Jury Instruction on the presumption of innocence and the government’s burden of proof was adequate, but the instruction set forth in *Walker*, 861 F.2d at 811, 813, is preferable).

Although not automatic error, note that definitions of reasonable doubt that include the phrases “actual substantial doubt,” “moral certainty,” or “grave uncertainty”—without further explanation or instruction—may violate due process, depending on the understanding of the jury. *See Victor*, 114 S.Ct. at 1245–47; *Cage v. Louisiana*, 111 S.Ct. 28, 329–30 (1990); *Morris v. Cain*, 186 F.3d 581, 584–89 (5th Cir. 1999).

1.06**EVIDENCE—EXCLUDING WHAT IS NOT
EVIDENCE**

As I told you earlier, it is your duty to determine the facts. To do so, you must consider only the evidence presented during the trial. Evidence is the sworn testimony of the witnesses, including stipulations, and the exhibits. The questions, statements, objections, and arguments made by the lawyers are not evidence.

The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

During the trial I sustained objections to certain questions and exhibits. You must disregard those questions and exhibits entirely. Do not speculate as to what the witness would have said if permitted to answer the question or as to the contents of an exhibit. Also, certain testimony or other evidence has been ordered removed from the record and you have been instructed to disregard this evidence. Do not consider any testimony or other evidence which has been removed from your consideration in reaching your decision. Your verdict must be based solely on the legally admissible evidence and testimony.

Also, do not assume from anything I may have done or said during the trial that I have any opinion concerning any of the issues in this case. Except for the instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own verdict.

Note

While this instruction is appropriate as a final instruction on evidence, reliance solely on it to cure prejudicial comments, questions, or arguments during trial may be insufficient, depending on several factors. Stronger cautionary instructions should be given to the jury during trial to ameliorate prejudice to the defendant. See *United States v. Aguilar*, 645 F.3d 319, 326–27 (5th Cir. 2011) (looking at three factors: (1) the magnitude of the prejudice, (2) the effect of cautionary instructions, and (3) the inculpatory evidence); *United States v. McCann*, 613 F.3d 486, 496–98 (5th Cir. 2010) (generic instruction and little inculpatory evidence); *United States v. Gracia*, 522 F.3d 597, 604 (5th Cir. 2008) (generic instruction did not cure, only moderately reduced, the prejudicial taint of improper statements); *United States v. Thompson*, 482 F.3d 781, 786 (5th Cir. 2007) (repeated instruction that prosecutor’s putatively improper statements were not evidence was sufficient to eliminate any unfair prejudice); *United States v. Ramirez-Velasquez*, 322 F.3d 868, 873 n.4 (5th Cir. 2003); *United States v. Rocha*, 916 F.2d 219, 235 (5th Cir. 1990); see also *United States v. McClatchy*, 249 F.3d 348, 358 (5th Cir. 2001) (curative instruction regarding trial judge’s comment); *United States v. Inocencio*, 40 F.3d 716, 728–29 (5th Cir. 1994).

1.07**EVIDENCE—INFERENCES—DIRECT AND
CIRCUMSTANTIAL****ALTERNATIVE A**

In considering the evidence, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts which have been established by the evidence.

Do not be concerned about whether evidence is “direct evidence” or “circumstantial evidence.” You should consider and weigh all of the evidence that was presented to you.

The law makes no distinction between the weight to be given either direct or circumstantial evidence. But the law requires that you, after weighing all of the evidence, whether direct or circumstantial, be convinced of the guilt of the defendant beyond a reasonable doubt before you can find him guilty.

ALTERNATIVE B

In considering the evidence, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts which have been established by the evidence.

Do not be concerned about whether evidence is “direct evidence” or “circumstantial evidence.” You

should consider and weigh all of the evidence that was presented to you.

“Direct evidence” is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. “Circumstantial evidence” is proof of a chain of events and circumstances indicating that something is or is not a fact.

The law makes no distinction between the weight you may give to either direct or circumstantial evidence. But the law requires that you, after weighing all of the evidence, whether direct or circumstantial, be convinced of the guilt of the defendant beyond a reasonable doubt before you can find him guilty.

Note

Alternative B is provided for judges who prefer to explain the distinction between direct and circumstantial evidence.

A similar instruction was approved in *United States v. Clark*, 506 F.2d 416 (5th Cir. 1975) (“The law makes no distinction between the weight to be given either direct or circumstantial evidence. But the law requires that the jury, after weighing all of the evidence, whether direct or circumstantial, must be convinced of the guilt of the defendant beyond a reasonable doubt before he can be convicted.”). See also *United States v. Thomas*, 627 F.3d 146, 155 (5th Cir. 2010).

“The government may prove its case by direct or circumstantial evidence, and the jury is free to choose among reasonable constructions of the evidence.” *United States v. Porras-Burciaga*, 450 F. App’x 339, 340 (5th Cir. 2011) (citing *United States v. Mitchell*, 484 F.3d 762, 768 (5th Cir. 2007)). After a correct instruction is given on reasonable doubt, “the amplification of the charge to discuss circumstantial evidence [is] within the discretion of the court.” *Clark*, 506 F.2d at 418. Yet, further instruction beyond that in *Clark* “may [be] confusing and incorrect.” *Id.*; see also *United States v. Bright*, 630 F.2d 804, 823 (5th Cir. 1980); *United States v. Ransom*, 515 F.2d 885, 890 (5th Cir. 1975).

1.08**CREDIBILITY OF WITNESSES**

I remind you that it is your job to decide whether the government has proved the guilt of the defendant beyond a reasonable doubt. In doing so, you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or “believability” of each witness and the weight to be given to the witness’s testimony. An important part of your job will be making judgments about the testimony of the witnesses [including the defendant] who testified in this case. You should decide whether you believe all, some part, or none of what each person had to say, and how important that testimony was. In making that decision I suggest that you ask yourself a few questions: Did the witness impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness have any relationship with either the government or the defense? Did the witness seem to have a good memory? Did the witness clearly see or hear the things about which he testified? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness’s testimony differ from the testimony of other witnesses? These are a few of the considerations that will help you determine the accuracy of what each witness said.

[The testimony of the defendant should be weighed and his credibility evaluated in the same way as that of any other witness.]

Your job is to think about the testimony of each witness you have heard and decide how much you

believe of what each witness had to say. In making up your mind and reaching a verdict, do not make any decisions simply because there were more witnesses on one side than on the other. Do not reach a conclusion on a particular point just because there were more witnesses testifying for one side on that point. You will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Note

The language in brackets should be deleted if the defendant did not testify.

“Our legal system [] is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses.” *Kansas v. Ventris*, 129 S.Ct. 1841, 1847 n.* (2009); see *United States v. Bailey*, 100 S.Ct. 624, 637 (1980) (“[A] defendant is entitled to have the credibility of his testimony, or that of witnesses called on his behalf, judged by the jury.”); *United States v. El-Mezain*, 664 F.3d 467, 491 (5th Cir. 2011) (the Confrontation Clause requires “that defense counsel be permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness”) (citations omitted); see also *United States v. Guanepes-Portillo*, 514 F.3d 393, 405 (5th Cir. 2008) (standard jury instruction on the credibility of witnesses reduced potential prejudice in failure to give other instructions); *United States v. Munoz-Hernandez*, 94 F. App’x 243, 245 (5th Cir. 2004) (instruction mitigated prejudice of improper prosecutorial questioning); *United States v. Johnston*, 127 F.3d 380, 388 (5th Cir. 1997) (judge’s comment concerning witness mitigated by instructions).

This instruction has been cited with approval. See *United States v. Whittington*, 269 F. App’x 388, 410 (5th Cir. 2008) (no indication pattern instruction was not proper); *United States v. Ramirez-Velasquez*, 322 F.3d 868, 873 n.4 (5th Cir. 2003) (part of instructions); *United States v. Hernandez Leon*, 54 F. App’x 592, *1 (5th Cir. 2002) (no plain error for giving conforming instruction); *United States v. Tanios*, 82 F.3d 98, 101 (5th Cir. 1996) (middle paragraph of instruction was a sufficient response to defendant’s concern).

1.09

CHARACTER EVIDENCE

Where a defendant has offered evidence of good general reputation for [opinion testimony concerning]: truth and veracity, honesty and integrity, or character as a law-abiding citizen, you should consider such evidence along with all the other evidence in the case.

Evidence of a defendant's character, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt, since you may think it improbable that a person of good character with respect to those traits would commit such a crime.

Note

Character evidence is admissible in the form of reputation or opinion. Depending on the form of character evidence introduced, the appropriate bracketed language should be used. *See* Fed. R. Evid. 404(a)(1), 405(a); *United States v. John*, 309 F.3d 298 (5th Cir. 2002); *see also United States v. Wilson*, 408 F. App'x 798, 809 (5th Cir. 2010) (giving instructions to “consider such evidence along with all the other evidence in the case” and that character evidence “may give rise to a reasonable doubt, since you may think it improbable that a person of good character in respect to those traits would commit such a crime”); *United States v. Callahan*, 588 F.2d 1078, 1086 (5th Cir. 1979) (approving instruction); *United States v. Leigh*, 513 F.2d 784, 785–86 (5th Cir. 1975) (jury must be instructed that reputation evidence is considered along with—and not after—the other evidence in the case, and it cannot be instructed that such evidence is only to be used to “tip the scales” or “excuse” the defendant).

“A character instruction is warranted only if the defendant first introduces admissible character evidence.” *John*, 309 F.3d at 303. It is generally not error to refuse this instruction where character evidence is not “central or crucial.” *United States v. Baytank*, 934 F.2d 599, 614 (5th Cir. 1991); *see United States v. Hunt*, 794 F.2d 1095, 1099 (5th Cir. 1986) (not abuse of discretion to refuse to give the instruction because it did not prevent the jury

from considering the character evidence, nor did it seriously hinder the defendant's presentation of his defense). However, when the issue of character is "necessarily a vital part of [the] defense," failure to give the instruction warrants reversal. *John*, 309 F.3d at 304–05 (5th Cir. 2002) (refusing the above instruction was abuse of discretion "tantamount to impairing [defendant's] ability to present his defense" where character evidence was the central theory of the defense); *but see United States v. Osorio*, 288 F. App'x 971, 980 (5th Cir. 2008) (not abuse of discretion to refuse pattern instruction because character evidence was not crucial to the defense).

Also note that the Supreme Court has held, with respect to evidence of a defendant's good character, that "such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed." *Michelson v. United States*, 69 S.Ct. 213, 219 (1948) (citing *Edgington v. United States*, 17 S.Ct. 72 (1896)). This has led to disagreement among various courts of appeal as to the propriety of "standing alone" language in jury instructions. *See Spangler v. United States*, 108 S.Ct. 2884, 2884–85 (1988) (White, J., dissenting from denial of certiorari) (discussing the disagreement). This Circuit's instruction includes language that good character may give rise to reasonable doubt. *See John*, 309 F.3d at 303.

1.10

IMPEACHMENT BY PRIOR INCONSISTENCIES

The testimony of a witness may be discredited by showing that the witness testified falsely, or by evidence that at some other time the witness said or did something, or failed to say or do something, which is inconsistent with the testimony the witness gave at this trial.

Earlier statements of a witness were not admitted in evidence to prove that the contents of those statements are true. You may not consider the earlier statements to prove that the content of an earlier statement is true; you may only use earlier statements to determine whether you think the earlier statements are consistent or inconsistent with the trial testimony of the witness and therefore whether they affect the credibility of that witness.

If you believe that a witness has been discredited in this manner, it is your exclusive right to give the testimony of that witness whatever weight you think it deserves.

Note

This instruction is for use when a witness's prior statements are admitted only for impeachment purposes. *See* Fed. R. Evid. 613, 801(d)(1); *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 758–59 (5th Cir. 2008). A prior statement of the defendant is not hearsay and does not require a limiting instruction. *See* Fed. R. Evid. 801(d)(2)(A). Similarly, if the prior statement is not hearsay under Rule 801(d)(1) and is admitted as substantive evidence, a limiting instruction is not necessary. *See Fiber Sys. Int'l, Inc. v. Roehrs*, 470 F.3d 1150, 1160 (5th Cir. 2006) (deposition testimony); *see, e.g., Cisneros-Gutierrez*, 517 F.3d at 758–59; *United States v. Booty*, 621 F.2d 1291, 1298–99 (5th Cir. 1980).

A limiting instruction on the use of prior inconsistent statements is required upon request. *See Valentine v. United States*,

272 F.2d 777, 778 (5th Cir. 1959). In the absence of a request, failure to give a limiting instruction can sometimes be plain error. *See United States v. Newell*, 315 F.3d 510, 523 (5th Cir. 2002); *United States v. Waldrip*, 981 F.2d 799, 805 (5th Cir. 1993) (“Plain error appears only when the impeaching testimony is extremely damaging, the need for the instruction is obvious, and the failure to give it is so prejudicial as to affect the substantial rights of the accused.”).

1.11

**IMPEACHMENT BY PRIOR CONVICTION
(DEFENDANT'S TESTIMONY)**

You have been told that the defendant, _____, was found guilty in _____ of _____ (e.g., bank robbery). This conviction has been brought to your attention only because you may wish to consider it when you decide, as with any witness, how much of the defendant's testimony you will believe in this trial. The fact that the defendant was previously found guilty of that crime does not mean that the defendant committed the crime for which the defendant is on trial, and you must not use this prior conviction as proof of the crime charged in this case.

Note

This charge should be given when the prior conviction is used for impeachment purposes only. *See* Fed. R. Evid. 105, 609. If the conviction was admitted as a similar offense pursuant to Federal Rule of Evidence 404(b), use Instruction No. 1.30, Similar Acts. This instruction should not be given if a defendant's prior conviction is an essential element of the crime charged. *See, e.g.*, Instruction Nos. 2.47 and 2.90, Possession of a Firearm by a Convicted Felon and Continuing Criminal Enterprise, respectively.

See also United States v. Turner, 674 F.3d 420, 430 (5th Cir. 2012) (a similar limiting instruction was appropriate); *United States v. Bullock*, 71 F.3d 171, 175 n.2 (5th Cir. 1995) (pattern instruction cured possible prejudice); *but see United States v. Royal*, 972 F.2d 643, 647 n.6 (5th Cir. 1992) (substantially similar instruction with addition that allowed jury to consider prior conviction for Rule 404(b) purposes).

Regarding whether a Texas deferred adjudication is a conviction for impeachment purposes, see *United States v. Hamilton*, 48 F.3d 149 (5th Cir. 1995).

1.12

**IMPEACHMENT BY PRIOR CONVICTION
(WITNESS OTHER THAN DEFENDANT)**

You have been told that the witness, _____, was convicted in _____ of _____ (e.g., armed robbery). A conviction is a factor you may consider in deciding whether to believe that witness, but it does not necessarily destroy the witness's credibility. It has been brought to your attention only because you may wish to consider it when you decide whether you believe the witness's testimony. It is not evidence of anything else.

Note

See Fed. R. Evid. 105, 609; *United States v. Dong Dang Huynh*, 420 F. App'x 309, 316 (5th Cir. 2011) (“[A] jury charge instructing that evidence of witness’ prior convictions was to be considered ‘as reflecting on their credibility as witnesses only’ was ‘sufficient to avoid jury consideration of [the testifying witness’s] plea as relevant to [the defendant’s] guilt or innocence.’”) (quoting *United States v. King*, 505 F.2d 602, 606, 609 (5th Cir. 1974)); *United States v. Lucas*, 516 F.3d 316, 346 (5th Cir. 2008) (curative instruction substantially similar to pattern instruction). The last sentence addresses the issue raised in *United States v. West*, 22 F.3d 586 (5th Cir. 1994).

1.13**PATTERN JURY INSTRUCTIONS****1.13****IMPEACHMENT BY EVIDENCE OF
UNTRUTHFUL CHARACTER**

You have heard the testimony of _____. You also heard testimony from others concerning their opinion about whether that witness is a truthful person [the witness's reputation, in the community where the witness lives, for telling the truth]. It is up to you to decide from what you heard here whether _____ was telling the truth in this trial. In deciding this, you should bear in mind the testimony concerning the witness's [reputation for] truthfulness as well as all the other factors already mentioned.

Note

See Fed. R. Evid. 404(a)(3), 405, 608(a); *see also United States v. Pipkin*, 114 F.3d 528, 535 (5th Cir. 1997) (refusal to give this instruction was not grounds for reversal when the jury was given a general credibility instruction).

1.14

ACCOMPLICE—INFORMER—IMMUNITY

The testimony of an alleged accomplice, and/or the testimony of one who provides evidence against a defendant as an informer for pay, for immunity from punishment, or for personal advantage or vindication, must always be examined and weighed by the jury with greater care and caution than the testimony of ordinary witnesses. You, the jury, must decide whether the witness's testimony has been affected by these circumstances, by the witness's interest in the outcome of the case, by prejudice against the defendant, or by the benefits that the witness has received either financially or as a result of being immunized from prosecution. You should keep in mind that such testimony is always to be received with caution and weighed with great care.

You should never convict any defendant upon the unsupported testimony of such a witness unless you believe that testimony beyond a reasonable doubt.

Note

This instruction has been cited with approval. *See United States v. Ordonez*, 286 F. App'x 224, 237 (5th Cir. 2008) (no error to instruct jury to consider unsupported testimony of an accomplice or co-conspirator with great care and not to convict on their unsupported testimony “unless you believe that testimony beyond a reasonable doubt”); *United States v. Zavala*, 541 F.3d 562, 578 (5th Cir. 2008); *United States v. Garcia Abrego*, 141 F.3d 142, 153 (5th Cir. 1998); *United States v. Goff*, 847 F.2d 149, 161 n.13 (5th Cir. 1988); *United States v. D'Antignac*, 628 F.2d 428, 435 n.10 (5th Cir. 1980); *Wilkerson v. United States*, 591 F.2d 1046 (5th Cir. 1979) (approving an instruction that testimony of a co-conspirator must be weighed with caution).

“[T]he credibility of the compensated witness, like that of the witness promised a reduced sentence, is for a properly instructed jury to determine.” *United States v. Villafranca*, 260 F.3d 374, 379 (5th Cir. 2001) (citing *United States v. Cervantes-Pacheco*, 826

1.14

PATTERN JURY INSTRUCTIONS

F.2d 310, 315 (5th Cir. 1987)) (error to refuse a specific cautionary instruction on the credibility of a compensated witness and instead give a general instruction on witness credibility, unless testimony is thoroughly corroborated). It is not error to refuse to give a specific instruction as to the suspect credibility of a compensated witness where the jury is given an instruction substantially similar to the first sentence of this instruction. *See United States v. Narviz-Guerra*, 148 F.3d 530, 538 (5th Cir. 1998). The court must give specific instructions to the jury about the credibility of paid witnesses. *See Villafranca*, 260 F.3d at 379–80; *see also United States v. Dimas*, 108 F. App'x 927, 927–28 (5th Cir. 2004).

1.15

**ACCOMPLICE—CO-DEFENDANT—PLEA
AGREEMENT**

In this case the government called as one of its witnesses an alleged accomplice, named as a co-defendant in the indictment, with whom the government has entered into a plea agreement. This agreement provides for (e.g., the dismissal of some charges and a binding [non-binding] recommendation for a favorable sentence). Such plea bargaining, as it is called, has been approved as lawful and proper, and is expressly provided for in the rules of this court.

An alleged accomplice, including one who has entered into a plea agreement with the government, is not prohibited from testifying. On the contrary, the testimony of such a witness may alone be of sufficient weight to sustain a verdict of guilty. You should keep in mind that such testimony is always to be received with caution and weighed with great care. You should never convict a defendant upon the unsupported testimony of an alleged accomplice unless you believe that testimony beyond a reasonable doubt.

The fact that an accomplice has entered a plea of guilty to the offense charged is not evidence of the guilt of any other person.

Note

This instruction was approved by *United States v. Quiroz*, 137 F. App'x 667, 671–72 (5th Cir. 2005) and *United States v. Ramirez*, 106 F.3d 397, *9 (5th Cir. 1997) (unpublished). *See also United States v. Jackson*, 230 F. App'x 425, 426 (5th Cir. 2007) (instructing the jury on guilty pleas of co-defendants removed prejudice of improper prosecutorial remarks).

Portions of this instruction were approved in: *United States v. Tacker*, 434 F. App'x 399, 400 (5th Cir. 2011); *United States v.*

1.15

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Valuck, 286 F.3d 221, 228 (5th Cir. 2002); *United States v. Posada-Rios*, 158 F.3d 832, 872–73 (5th Cir. 1998); *United States v. Pettigrew*, 77 F.3d 1500, 1518 (5th Cir. 1996); *United States v. Stephens*, 62 F.3d 393, *1 (5th Cir. 1995) (unpublished); and *United States v. Pierce*, 959 F.2d 1297, 1304 (5th Cir. 1992).

1.16

WITNESS'S USE OF ADDICTIVE DRUGS

The testimony of a witness who is shown to have used addictive drugs during the period of time about which the witness testified must always be examined and weighed by the jury with greater care and caution than the testimony of ordinary witnesses.

You should never convict any defendant upon the unsupported testimony of such a witness unless you believe that testimony beyond a reasonable doubt.

Note

See United States v. Acosta, 763 F.2d 671, 689 (5th Cir. 1985) (finding instruction substantially similar to this instruction was “complete, emphatic and adequate”); *see also United States v. Laury*, 49 F.3d 145, 152 (5th Cir. 1995) (not reversible error to fail to give instruction when “general credibility/weight of the evidence instruction” was given and the defendant was able to argue the point to the jury); *United States v. Gadison*, 8 F.3d 186, 190 (5th Cir. 1993) (the fact that a witness is a recovering drug addict raises an issue of credibility, not admissibility); *United States v. Blankenship*, 923 F.2d 1110, 1117 (5th Cir. 1991).

1.17

EXPERT OPINION TESTIMONY

During the trial you heard the testimony of _____, who expressed opinions concerning _____. If scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified by knowledge, skill, experience, training, or education may testify and state an opinion concerning such matters.

Merely because such a witness has expressed an opinion does not mean, however, that you must accept this opinion. You should judge such testimony like any other testimony. You may accept it or reject it and give it as much weight as you think it deserves, considering the witness's education and experience, the soundness of the reasons given for the opinion, and all other evidence in the case.

Note

Judges should be aware that the admission of improper “profile testimony” by a law enforcement agent as an expert may be error. *See, e.g., United States v. Montes-Salas*, 669 F.3d 240, 250 (5th Cir. 2012); *United States v. Gonzalez-Rodriguez*, 621 F.3d 354, 366 (5th Cir. 2010); *United States v. Morin*, 627 F.3d 985, 998 (5th Cir. 2010); *United States v. Sanchez-Hernandez*, 507 F.3d 826, 831–33 (5th Cir. 2007).

The text of this instruction does not describe the witness as an “expert witness” to avoid influencing the jury by use of that description.

1.18

ON OR ABOUT

You will note that the indictment charges that the offense was committed on or about a specified date. The government does not have to prove that the crime was committed on that exact date, so long as the government proves beyond a reasonable doubt that the defendant committed the crime on a date reasonably near _____, the date stated in the indictment.

Note

This instruction was approved in *United States v. Skelton*, 514 F.3d 433, 445–46 (5th Cir. 2008).

“The prosecution is not required to prove the exact date alleged in the indictment; it suffices if a date reasonably near is established.” *United States v. Mata*, 491 F.3d 237, 243 (5th Cir. 2007) (quoting *United States v. Valdez*, 453 F.3d 252, 260 (5th Cir. 2006)).

If the defendant has raised an alibi defense dependent upon a particular day, this instruction should be coordinated with Instruction No. 1.35, Alibi. See *United States v. King*, 703 F.2d 119, 122–25 (5th Cir. 1983) (approved instructions substantially similar to Instruction Nos. 1.18 and 1.35, and held that the trial court did not err in giving both the “On or About” instruction and the “Alibi” instruction).

1.18A

VENUE—CONSPIRACY

The events presented at trial happened in various places. There is no requirement that the entire conspiracy take place in the _____ District of _____, but in order for you to return a guilty verdict, the government must prove by a preponderance of the evidence that either the agreement or an overt act took place in this district, even if the defendant never set foot in the district. An overt act is an act performed to effect the object of a conspiracy, although it remains separate and distinct from the conspiracy itself. Though the overt act need not be of a criminal nature, it must be done in furtherance of the object of the conspiracy.

Unlike the other elements of the offense, this is a fact that the government has to prove only by a preponderance of the evidence. This means the government has to convince you only that it is more likely than not that part of the conspiracy took place in the _____ District of _____. All other elements of the offense must be proved beyond a reasonable doubt. You are instructed that _____ (list County or Parish where government alleges agreement or overt act occurred) is located in the _____ District of _____.

Note

Unless “otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.” 18 U.S.C. § 3237(a); *see also United States v. Strain*, 396 F.3d 689, 693 (5th Cir. 2005).

“In cases involving conspiracy offenses, venue is proper in any district where the agreement was formed or where an overt act occurred.” *United States v. Thomas*, 690 F.3d 358, 369 (5th Cir. 2012) (internal quotation marks omitted); *United States v. Garcia Mendoza*, 587 F.3d 682, 686 (5th Cir. 2009); *see also Whitfield v.*

United States, 125 S.Ct. 687, 693 (2005) (stating that the “Court has long held that venue is proper in any district in which an overt act in furtherance of the conspiracy was committed”); *United States v. Pomranz*, 43 F.3d 156, 158–59 (5th Cir. 1995). This is true even if the defendant never “set foot” in that district. *See Pomranz*, 43 F.3d at 159 n.2; *United States v. Caldwell*, 16 F.3d 623, 624 (5th Cir. 1994).

“[T]he prosecution’s burden of proof in establishing venue differs from the burden of proving other elements. The prosecution need only show the propriety of venue by a preponderance of the evidence, not beyond a reasonable doubt.” *Strain*, 396 F.3d at 692 n.3 (citing *United States v. Winship*, 724 F.2d 1116, 1124 (5th Cir. 1984)); *see also Garcia Mendoza*, 587 F.3d at 686.

“The ‘failure to instruct on venue is reversible error when trial testimony puts venue in issue and the defendant requests the instruction’” *United States v. Zamora*, 661 F.3d 200, 208 (5th Cir. 2011) (quoting *United States v. White*, 611 F.2d 531, 536 (5th Cir. 1980)); *see Garcia Mendoza*, 587 F.3d at 687. “Venue is not put ‘in issue’ when the government presents adequate evidence of venue, and the defendant fails to contradict the government’s evidence.” *Zamora*, 661 F.3d at 208 (citing *Caldwell*, 16 F.3d at 625). “If venue is not put at issue, the district court’s failure to instruct on venue is, at worst, harmless error.” *Id.* Nevertheless, the Fifth Circuit has stated that “[w]hen a venue instruction is requested, the burden of giving an instruction weighs lightly against the value of safeguarding venue rights” and, therefore, “[t]he better procedure is to give the venue instruction when requested, regardless of whether the trial court believes trial testimony has put venue in issue.” *Caldwell*, 16 F.3d at 625 n.1.

1.19

CAUTION—CONSIDER ONLY CRIME CHARGED

You are here to decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant is not on trial for any act, conduct, or offense not alleged in the indictment. Neither are you called upon to return a verdict as to the guilt of any other person or persons not on trial as a defendant in this case, except as you are otherwise instructed.

Note

See United States v. Jones, 664 F.3d 966, 980–81 (5th Cir. 2011) (instruction that included the first two sentences “sufficiently articulated to the jury that they were only to consider the federal crimes charged and not any of the state rules and regulations that were discussed”); *United States v. Arceneaux*, 432 F. App’x 335, 339 (5th Cir. 2011) (approving substantially similar instruction); *United States v. Garcia*, 567 F.3d 721, 728–29 (5th Cir. 2009) (second sentence of pattern instruction guarded against unfair prejudice); *United States v. Naranjo*, 309 F. App’x 859, 867 (5th Cir. 2009) (first two sentences of this instruction cured potential prejudice); *United States v. Harris*, 205 F. App’x 230, 232 (5th Cir. 2006) (second sentence of this instruction constituted a general limiting instruction to cure prejudicial remark); *United States v. Chavez*, 151 F. App’x 302, 306 n.6, 309 (5th Cir. 2005) (approving this instruction as mitigating potential prejudice of improper evidence); *United States v. Stapleton*, 65 F. App’x 508, *5 (5th Cir. 2003) (first two sentences of this instruction mitigated introduction of prejudicial evidence); *United States v. Husain*, 244 F.3d 133, *9 n.8 (5th Cir. 2000) (unpublished) (same); *United States v. Cortinas*, 142 F.3d 242, 254 (5th Cir. 1998) (similar instruction contributed to remedy prejudice of joint trial); *United States v. Allie*, 978 F.2d 1401, 1409 (5th Cir. 1992) (first two sentences of this instruction mitigated introduction of prejudicial evidence); *United States v. Royal*, 972 F.2d 643, 647, 647 n.6 (5th Cir. 1992) (approving a substantially similar instruction); *United States v. Fotovich*, 885 F.2d 241 (5th Cir. 1989) (same).

1.20

CAUTION—PUNISHMENT

If a defendant is found guilty, it will be my duty to decide what the punishment will be. You should not be concerned with punishment in any way. It should not enter your consideration or discussion.

Note

See United States v. Buchner, 7 F.3d 1149, 1153–54 (5th Cir. 1993); *United States v. Del Toro*, 426 F.2d 181, 184 (5th Cir. 1970).

1.21

PATTERN JURY INSTRUCTIONS

1.21

SINGLE DEFENDANT—MULTIPLE COUNTS

A separate crime is charged in each count of the indictment. Each count, and the evidence pertaining to it, should be considered separately. The fact that you may find the defendant guilty or not guilty as to one of the crimes charged should not control your verdict as to any other.

Note

This instruction was approved in *United States v. Hickerson*, 489 F.3d 742, 746 (5th Cir. 2007) (“Prejudice from a failure to sever counts can be cured by proper jury instructions, and juries are generally presumed to follow their instructions.”). *See also* *United States v. Turner*, 674 F.3d 420, 429–30 (5th Cir. 2012); *United States v. Bennett*, 258 F. App’x 671, 682–83 (5th Cir. 2007) (this instruction mitigated “spill over” of elements of other charged crimes); *United States v. Butler*, 429 F.3d 140, 148 (5th Cir. 2005); *United States v. Reedy*, 304 F.3d 358, 368–69 (5th Cir. 2002).

In some cases, such as prosecutions under 18 U.S.C. § 1962 (Racketeer Influenced Corrupt Organizations Act) and 21 U.S.C. § 848 (Continuing Criminal Enterprise), a conviction on one or more counts (“predicate offense(s)”) are necessary to support a conviction on another count. In such cases, the last sentence of the instruction should be deleted or modified.

1.22**MULTIPLE DEFENDANTS—SINGLE COUNT**

The case of each defendant and the evidence pertaining to that defendant should be considered separately and individually. The fact that you may find one of the defendants guilty or not guilty should not control your verdict as to any other defendant.

Note

See United States v. Rubio, 321 F.3d 517, 526 (5th Cir. 2003) (instructions sufficient to prevent prejudice from joint trial); *see also United States v. Gallardo-Trapero*, 185 F.3d 307, 315 n.2 (5th Cir. 1999) (instruction safeguarded defendant from possibility of guilt transference).

1.23

MULTIPLE DEFENDANTS—MULTIPLE COUNTS

A separate crime is charged against one or more of the defendants in each count of the indictment. Each count, and the evidence pertaining to it, should be considered separately. The case of each defendant should be considered separately and individually. The fact that you may find one or more of the accused guilty or not guilty of any of the crimes charged should not control your verdict as to any other crime or any other defendant. You must give separate consideration to the evidence as to each defendant.

Note

This charge has been cited with approval by the Fifth Circuit. See *United States v. Bernegger*, 661 F.3d 232, 237 (5th Cir. 2011); *United States v. Whitfield*, 590 F.3d 325, 354 (5th Cir. 2009); *United States v. Fernandez*, 559 F.3d 303, 317 (5th Cir. 2009) (approving some of the language of this instruction).

In some cases, such as prosecutions under 18 U.S.C. § 1962 (Racketeer Influenced Corrupt Organizations Act) and 21 U.S.C. § 848 (Continuing Criminal Enterprise), a conviction on one or more counts (“predicate offense(s)”) are necessary to support a conviction on another count. In such cases, the fourth sentence of the instruction should be deleted or modified.

1.24

DUTY TO DELIBERATE

To reach a verdict, whether it is guilty or not guilty, all of you must agree. Your verdict must be unanimous on each count of the indictment. Your deliberations will be secret. You will never have to explain your verdict to anyone.

It is your duty to consult with one another and to deliberate in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to reexamine your own opinions and change your mind if convinced that you were wrong. But do not give up your honest beliefs as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are judges—judges of the facts. Your duty is to decide whether the government has proved the defendant guilty beyond a reasonable doubt.

When you go to the jury room, the first thing that you should do is select one of your number as your foreperson, who will help to guide your deliberations and will speak for you here in the courtroom.

A verdict form has been prepared for your convenience.

[Explain verdict form.]

The foreperson will write the unanimous answer of the jury in the space provided for each count of the indictment, either guilty or not guilty. At the conclu-

1.24

PATTERN JURY INSTRUCTIONS

sion of your deliberations, the foreperson should date and sign the verdict.

If you need to communicate with me during your deliberations, the foreperson should write the message and give it to the court security officer. I will either reply in writing or bring you back into the court to answer your message.

Bear in mind that you are never to reveal to any person, not even to the court, how the jury stands, numerically or otherwise, on any count of the indictment, until after you have reached a unanimous verdict.

Note

“In the routine case, a general unanimity instruction will ensure that the jury is unanimous on the factual basis for a conviction, even where an indictment alleges numerous factual bases for criminal liability.” *United States v. Creech*, 408 F.3d 264, 268 (5th Cir. 2005). Regarding the use of a specific unanimity instruction, see Note to Instruction No. 1.25, Unanimity of Theory.

Concerning the admonition against disclosure of the numerical division of the jury, see *Brasfield v. United States*, 47 S.Ct. 135, 135–36 (1926) (questioning jury on its numerical split constituted reversible error) and *United States v. Chanya*, 700 F.2d 192, 193 (5th Cir. 1983) (district court’s inquiry into numerical division of jury before giving “Allen” charge constituted reversible error).

1.25

UNANIMITY OF THEORY

You have been instructed that your verdict, whether it is guilty or not guilty, must be unanimous. The following instruction applies to the unanimity requirement as to Count _____.

Count _____ of the indictment accuses the defendant of committing the crime of _____ in _____ (e.g., three) different ways. The first is that the defendant _____. The second is that the defendant _____. The third is that the defendant _____.

The government does not have to prove all of these for you to return a guilty verdict on this charge. Proof beyond a reasonable doubt on one is enough. But in order to return a guilty verdict, all of you must agree that the same one has been proved. All of you must agree that the government proved beyond a reasonable doubt that the defendant _____; or, all of you must agree that the government proved beyond a reasonable doubt that the defendant _____; or all of you must agree that the government proved beyond a reasonable doubt that the defendant _____.

Note

In *Richardson v. United States*, 119 S.Ct. 1707, 1710 (1999), the Supreme Court confirmed that a jury must unanimously find each *element* of a crime beyond a reasonable doubt. But, “a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime.” *Id.* (citing *Schad v. Arizona*, 111 S.Ct. 2491 (1991)). The Court distinguished the requirement of jury unanimity on *elements* versus *means underlying* the element. *Id.* For example, because “an element of robbery is force or the threat of force, some jurors might conclude that the defendant used a knife to create the threat; others might conclude he used a gun.” *Id.* As this is a disagreement over “means” underlying a particular ele-

1.25

PATTERN JURY INSTRUCTIONS

ment of a crime, the jurors need not unanimously agree whether a knife or gun was used, as long as they unanimously agree “the defendant had threatened force.” *Id.* In *Richardson*, the statute at issue criminalized a continuing criminal enterprise, a violation of which occurs when there is a “continuing series of violations.” *Id.* at 1708. The Court had to decide whether the “series of violations” referred to one single element, made up of a certain number of drug crimes (the “means”), or whether each individual violation constituted a separate element. *Id.* at 1710. It found that each violation was an element, requiring jury unanimity as to each drug crime committed. *Id.* at 1713; see, e.g., *United States v. Talbert*, 501 F.3d 449, 451–52 (5th Cir. 2007) (unanimity not required for particular firearm under 18 U.S.C. § 922(g)(1)); see also *United States v. Patino-Prado*, 533 F.3d 304, 310–12 (5th Cir. 2008) (unanimity requirement discussed with regard to drug and other conspiracies).

“ ‘In the routine case, a general unanimity instruction will ensure that the jury is unanimous on the factual basis for a conviction, even where an indictment alleges numerous factual bases for criminal liability.’ ” *United States v. Creech*, 408 F.3d 264, 268 (5th Cir. 2005); see *United States v. Meshack*, 225 F.3d 556, 579–80 (5th Cir. 2000). But, “such an instruction is insufficient if ‘there exists a genuine risk that the jury is confused or that a conviction may occur as the result of different jurors concluding that a defendant committed different acts.’ ” *Creech*, 408 F.3d at 268 (quoting *United States v. Holley*, 942 F.2d 916 (5th Cir. 1991)); see also *United States v. Villegas*, 494 F.3d 513, 515–16 (5th Cir. 2007); *United States v. Moreno*, 227 F. App’x 361, 362–63 (5th Cir. 2007). An instruction that was similar to this instruction was found sufficient to guard against a non-unanimous verdict in *United States v. Mauskar*, 557 F.3d 219, 226–27 (5th Cir. 2009).

See also *McKoy v. North Carolina*, 110 S.Ct. 1227 (1990); *United States v. Webster*, 162 F.3d 308 (5th Cir. 1998); *United States v. Dillman*, 15 F.3d 384 (5th Cir. 1994); *United States v. Correa-Ventura*, 6 F.3d 1070 (5th Cir. 1993); *Holley*, 942 F.2d at 926; *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977).

1.26

**CONFESSION—STATEMENT—VOLUNTARINESS
(SINGLE DEFENDANT)**

In determining whether any statement, claimed to have been made by the defendant outside of court and after an alleged crime has been committed, was knowingly and voluntarily made, you should consider the evidence concerning such a statement with caution and great care. You should give such weight to the statement as you feel it deserves under all the circumstances.

You may consider in that regard such factors as the age, sex, training, education, occupation, and physical and mental condition of the defendant, his treatment while under interrogation, and all the other circumstances in evidence surrounding the making of the statement.

Note

The Fifth Circuit has approved this instruction. *See United States v. Betancourt*, 586 F.3d 303, 307 (5th Cir. 2009); *United States v. Bell*, 367 F.3d 452, 461–62 (5th Cir. 2004); *see also* 18 U.S.C. § 3501(a) (if a confession is submitted to the jury, the trial judge “shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances”); *Corley v. United States*, 129 S.Ct. 1558, 1563–64, 1564 n.2 (2009); *but see United States v. Guanepén-Portillo*, 514 F.3d 393, 405 (5th Cir. 2008) (failure to give instruction not plain error).

1.27

**CONFESSION—STATEMENT—VOLUNTARINESS
(MULTIPLE DEFENDANTS)**

In determining whether any statement, claimed to have been made by a defendant outside of court and after an alleged crime was committed, was knowingly and voluntarily made, you should consider the evidence concerning such a statement with caution and great care. You should give such weight to the statement as you feel it deserves under all the circumstances.

You may consider in that regard such factors as the age, sex, training, education, occupation, and physical and mental condition of the defendant, his treatment while under interrogation, and all the other circumstances in evidence surrounding the making of the statement.

Any such statement should not be considered in any way whatsoever as evidence with respect to any other defendant on trial.

Note

This instruction is the same as Instruction No. 1.26, but adds a last sentence when there are multiple defendants. Although the instruction has been approved, *United States v. Watson*, 591 F.2d 1058 (5th Cir. 1979) (approving this instruction in substantially the same form), and is generally acceptable, the judge should be aware that an incurable *Bruton* problem can be created in submitting to the jury the name of a codefendant within the confession, even with a limiting instruction. *Bruton v. United States*, 88 S.Ct. 1620, 1627–28 (1968); see *United States v. Leal*, 74 F.3d 600, 605–06 (5th Cir. 1996) (limiting instruction adequate to prevent prejudice of co-defendant’s statement that did not name defendant by name).

Redaction has been recognized as adequate, but not always so. See *Gray v. Maryland*, 118 S.Ct. 1151, 1155–57 (1998); *Richardson v. Marsh*, 107 S.Ct. 1702, 1707–09 (1987); *United States v. Cantu-*

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1.27

Ramirez, 669 F.3d 619, 631–32 (5th Cir. 2012); *United States v. Stalnaker*, 571 F.3d 428, 434 n.4 (5th Cir. 2009); *United States v. Ramos-Cardenas*, 524 F.3d 600, 607–10 (2008).

1.28**ENTRAPMENT**

The defendant asserts that he was a victim of entrapment.

Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, that person is a victim of entrapment, and the law as a matter of policy forbids that person's conviction in such a case.

On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that government agents provide what appears to be a favorable opportunity is not entrapment. For example, it is not entrapment for a government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to engage in an unlawful transaction.

If you should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the defendant was ready and willing to commit such a crime as charged in the indictment, whenever opportunity was afforded, and that government officers or their agents did no more than offer the opportunity, then you should find that the defendant is not a victim of entrapment.

On the other hand, if the evidence in the case should leave you with a reasonable doubt whether the defendant had the previous intent or purpose to commit an offense of the character charged, apart from the inducement or persuasion of some officer or agent of the government, then it is your duty to find the defendant not guilty.

The burden is on the government to prove beyond a reasonable doubt that the defendant was not entrapped.

You are instructed that a paid informer is an “agent” of the government for purposes of this instruction.

Note

This instruction has been cited and approved in a number of cases. *See, e.g., United States v. Hidalgo*, 226 F. App’x 391, 397 (5th Cir. 2007); *United States v. Wise*, 221 F.3d 140, 154 (5th Cir. 2000); *United States v. Brace*, 145 F.3d 247, 256–57 (5th Cir. 1998); *United States v. Hernandez*, 92 F.3d 309, 311 (5th Cir. 1996).

Note that *United States v. Thompson*, 130 F.3d 676, 689 n.29 (5th Cir. 1997), argues that this jury instruction misstates the law, suggesting, between the requirements of predisposition and lack of inducement, the word “and” in the fourth paragraph be replaced with “or.” This change was not made above.

See also Jacobson v. United States, 112 S.Ct. 1535, 1540 (1992) (where the government “has induced an individual to break the law, and the defense of entrapment is at issue, the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by government agents.”); *Hernandez*, 92 F.3d at 310–11 (affirming the adequacy of this instruction with respect to the requirement expressed in *Jacobson*).

Generally, it is reversible error to refuse to submit a requested entrapment instruction to the jury if there is sufficient evidence for a reasonable jury to rule in favor of the defendant on that theory. *See United States v. Theagene*, 565 F.3d 911, 918–24 (5th Cir. 2009); *United States v. Smith*, 481 F.3d 259, 262–63 (5th Cir. 2007); *United States v. Ogle*, 328 F.3d 182, 185 (5th Cir. 2003); *United States v. Gutierrez*, 343 F.3d 415, 419 (5th Cir. 1993). “The question is whether the defendant identified or produced ‘evidence from which a reasonable jury *could* derive a reasonable doubt as to the origin of criminal intent and, thus, entrapment.’” *Theagene*, 565 F.3d at 918 (discussing the required two prongs of predisposition and inducement).

An issue may arise in a case in which a defendant denies the requisite intent to commit the crime in question or denies that he

was involved in one or more of the acts essential to the commission of the charged crime and alternatively contends that he was in any event entrapped. In *Mathews v. United States*, 108 S.Ct. 883, 886 (1988), the Supreme Court held that “even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment.” In *United States v. Collins*, 972 F.2d 1385, 1413 (5th Cir. 1992), the trial judge declined to give a requested instruction to the effect that the defendant has a right to deny participation in the crime and alternatively plead entrapment. The Fifth Circuit held that there was no reversible error, but stressed that “the jury repeatedly was told that the defendants were denying culpability for the crime.” *Id.* Considering the unusual nature of such an alternative contention, on request of a defendant, the judge should consider giving a specific instruction to the effect that a defendant may deny that he engaged in the activity constituting the charged offense and alternatively plead entrapment.

A related defense is entrapment by estoppel, which is “applicable when a government official or agent actively assures a defendant that certain conduct is legal and the defendant reasonably relies on that advice and continues or initiates the conduct.” *United States v. Jones*, 664 F.3d 966, 979 (5th Cir. 2011). Similarly, a requested instruction on this defense should be given if there is “an evidentiary basis in the record which would lead to acquittal.” *United States v. Spires*, 79 F.3d 464, 466 (5th Cir. 1996).

1.29

IDENTIFICATION TESTIMONY

In any criminal case the government must prove not only the essential elements of the offense or offenses charged, as hereafter defined, but must also prove, beyond a reasonable doubt, the identity of the defendant as the perpetrator of the alleged offense[s].

In evaluating the identification testimony of a witness you should consider all of the factors already mentioned concerning your assessment of the credibility of any witness in general, and should also consider whether the witness had an adequate opportunity to observe the person in question at the time or times about which the witness testified. You may consider all matters, including the length of time the witness had to observe the person in question, the prevailing conditions at that time in terms of visibility or distance and the like, and whether the witness had known or observed the person at earlier times.

You may also consider the circumstances surrounding the identification itself including, for example, the manner in which the defendant was presented to the witness for identification, and the length of time that elapsed between the incident in question and the next opportunity the witness had to observe the defendant.

If, after examining all of the testimony and evidence in the case, you have a reasonable doubt as to the identity of the defendant as the perpetrator of the offense charged, you must find the defendant not guilty.

Note

Barber v. United States, 412 F.2d 775, 777 n.1 (5th Cir. 1969), approved a similar instruction. See also *United States v. Ramirez-Rizo*, 809 F.2d 1069, 1071–72 (5th Cir. 1987) (not reversible error to refuse this requested identification instruction); *Johnson v.*

1.29

PATTERN JURY INSTRUCTIONS

Blackburn, 778 F.2d 1044, 1052 (5th Cir. 1985); *United States v. Banks*, 485 F.2d 545, 549 (5th Cir. 1973).

See generally Perry v. New Hampshire, 132 S.Ct. 716 (2012); *Watkins v. Sowders*, 101 S.Ct. 654 (1981).

1.30

SIMILAR ACTS

You have heard evidence of acts of the defendant which may be similar to those charged in the indictment, but which were committed on other occasions. You must not consider any of this evidence in deciding if the defendant committed the acts charged in the indictment. However, you may consider this evidence for other, very limited, purposes.

If you find beyond a reasonable doubt from other evidence in this case that the defendant did commit the acts charged in the indictment, then you may consider evidence of the similar acts allegedly committed on other occasions to determine:

Whether the defendant had the state of mind or intent necessary to commit the crime charged in the indictment;

or

whether the defendant had a motive or the opportunity to commit the acts charged in the indictment;

or

whether the defendant acted according to a plan or in preparation for commission of a crime;

or

whether the defendant committed the acts for which he is on trial by accident or mistake.

These are the limited purposes for which any evidence of other similar acts may be considered.

1.30

PATTERN JURY INSTRUCTIONS

Note

See Fed. R. Evid. 105, 404(b). *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) sets out the test. *United States v. Pompa*, 434 F.3d 800, 806 (5th Cir. 2005), cites this instruction with approval. See also *United States v. Duffaut*, 314 F.3d 203, 209–10 (5th Cir. 2002), *United States v. Hernandez-Guevara*, 162 F.3d 863, 868 (5th Cir. 1998), and *United States v. Chiak*, 137 F.3d 252, 258 n.3 (5th Cir. 1998), approving partial or similar instructions.

A limiting instruction may minimize the prejudicial effect of the introduction of similar act evidence at trial. See *Huddleston v. United States*, 108 S.Ct. 1496, 1502 (1988); *United States v. Ebron*, 683 F.3d 105, 132 (5th Cir. 2012); *United States v. Finley*, 477 F.3d 250, 263 (5th Cir. 2007); *United States v. Walters*, 351 F.3d 159, 166–67 (5th Cir. 2003); *United States v. Taylor*, 210 F.3d 311, 318 (5th Cir. 2000).

In *United States v. Peterson*, 244 F.3d 385 (5th Cir. 2001), several defendants were tried jointly and Rule 404(b) evidence was introduced only as to one defendant. In reviewing a claim by the other defendants that they were prejudiced, the Fifth Circuit commented that “it might [be] better to use the actual names rather than ‘those defendants’ in the instructions in order to make crystal clear to the jury that Rule 404(b) evidence against” one defendant “could not be considered, even for ‘other, very limited purposes,’ against” other codefendants. *Id.* at 395.

Ordinarily, a court need not issue a specific instruction, *sua sponte*, on the limits of Rule 404(b) evidence. See *United States v. Garcia*, 567 F.3d 721, 728–29 (5th Cir. 2009); *United States v. Waldrip*, 981 F.2d 799, 805–06 (5th Cir. 1993). The court “need not provide a limiting instruction each and every time a prior bad act is introduced into evidence.” *Hernandez-Guevara*, 162 F.3d at 874 (no error to fail to issue, *sua sponte*, a limiting instruction after each piece of similar act evidence is introduced when it was included in the final jury instructions); see *United States v. Brugman*, 364 F.3d 613, 621 (5th Cir. 2004).

However, under some circumstances, the failure to give an instruction *sua sponte* regarding a defendant’s prior convictions may constitute plain error. See, e.g., *United States v. Gibson*, 55 F.3d 173, 180 (5th Cir. 1995); *Waldrip*, 981 F.2d at 805–06; *United States v. Diaz*, 585 F.2d 116, 117 (5th Cir. 1978); *United States v. Garcia*, 530 F.2d 650, 656 (5th Cir. 1976).

1.31

POSSESSION

Possession, as that term is used in this case, may be of two kinds: actual possession and/or constructive possession.

A person who knowingly has direct physical control over a thing, at a given time, is in actual possession of it.

A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, is in constructive possession of it.

Possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

You may find that the element of possession is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others.

Note

A number of Fifth Circuit cases continue to cite this instruction with approval. *See United States v. Lewis*, 265 F. App'x 255, 257 (5th Cir. 2008); *United States v. Horace*, 227 F. App'x 350, 352–53 (5th Cir. 2007); *United States v. Gross*, 142 F. App'x 829, 830 (5th Cir. 2005); *United States v. Bradford*, 54 F. App'x 592, *3 (5th Cir. 2002); *United States v. Cano-Guel*, 167 F.3d 900, 905–06 (5th Cir. 1999); *United States v. Prudhome*, 13 F.3d 147, 149–50 (5th Cir. 1994).

The instruction on actual or constructive possession can be given when the evidence supports a finding of actual and constructive possession. *See United States v. Melancon*, 662 F.3d 708, 713

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(5th Cir. 2011) (no reversible error to include constructive possession instruction when evidence supported constructive possession, even when the case was primarily an actual possession case); *United States v. Loudd*, 2009 WL 122561, *1 (5th Cir. 2009) (unpublished) (“[A] constructive possession instruction is not improper if the evidence supports it, even if the Government is seeking to prove actual possession.”); *United States v. Horace*, 227 F. App’x 350, 352 (5th Cir. 2007) (evidence lent permissible inference to theory of constructive possession); *United States v. Diaz-Rivera*, 229 F. App’x 330 (5th Cir. 2007); *United States v. Munoz*, 150 F.3d 401, 416 (5th Cir. 1998); *United States v. Fields*, 72 F.3d 1200, 1212 (5th Cir. 1996); *United States v. Ortega*, 859 F.2d 327, 329–31 (5th Cir. 1988).

“ ‘[G]uilty knowledge may not be inferred solely from the defendant’s control’ ” of a vehicle. *United States v. Rivera*, 444 F. App’x 774, 781 (5th Cir. 2011) (quoting *United States v. Gonzales-Rodriguez*, 621 F.3d 354, 361 (5th Cir. 2010)). When a controlled substance is “hidden”—not “clearly visible or readily accessible”—in a vehicle and the defense is lack of knowledge, a “knowledge” instruction more specific than Instruction No. 1.37, “Knowingly”—To Act, is required. *United States v. Pennington*, 20 F.3d 593, 598 (5th Cir. 1994). In these cases, there must be “additional circumstantial evidence that is suspicious in nature and demonstrates guilty knowledge.” *Gonzalez-Rodriguez*, 621 F.3d at 361; see *United States v. Sanchez*, 432 F. App’x 371, 375 (5th Cir. 2011); *United States v. Fellove*, 402 F. App’x 957, 959 (5th Cir. 2010) (listing indicators of guilty knowledge).

If an unlawful drug is hidden from view in a vehicle, a charge such as the following should be considered:

The government may not rely only upon a defendant’s ownership and control of the vehicle to prove the defendant knew that he possessed a controlled substance. While these are factors you may consider, the government must prove that there is other evidence indicating the defendant’s guilty knowledge of a controlled substance hidden in the vehicle.

See *Pennington*, 20 F.3d at 598.

1.32

ATTEMPT

It is a crime for anyone to attempt to commit a violation of certain specified laws of the United States. In this case, the defendant is charged with attempting to _____ (describe the substantive offense alleged in the indictment, e.g., possess with intent to distribute a controlled substance).

The elements of _____ (describe substantive offense) are: _____ (give required elements unless they are already given elsewhere in the charge).

For you to find the defendant guilty of attempting to commit _____ (describe substantive offense), you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant intended to commit _____ (describe the substantive offense); and

Second: That the defendant did an act that constitutes a substantial step towards the commission of that crime and that strongly corroborates the defendant's criminal intent and amounts to more than mere preparation.

Note

This instruction was cited approvingly in *United States v. Redd*, 355 F.3d 866, 875 n.9 (5th Cir. 2003).

The elements of the offense are discussed in *United States v. Resendiz-Ponce*, 127 S.Ct. 782, 788 (2007) (accepting Model Penal Code's "substantial step" test, and holding that indictment sufficiently alleged attempted reentry into the United States by the use of the word "attempts" coupled with the specification of the time and place of the attempted illegal reentry); *United States v. Crow*, 164 F.3d 229, 235 (5th Cir. 1999) (no plain error in jury instructions for attempted violations of 18 U.S.C. §§ 2251(a) and

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(d) where trial court neglected to instruct on the language concerning “substantial step” where evidence established that defendant sent and requested sexually explicit videos via the Internet from a person he believed to be a minor); and *United States v. Thompson*, 130 F.3d 676, 688 (5th Cir. 1997) (finding sufficient evidence of substantial step in attempt to kill a federal judge in violation of 18 USC § 1114 established by payment of funds for hit).

“Our prior case law makes clear that a ‘substantial step’ must both (1) be an act strongly corroborative of the actor’s criminal intent and (2) amount to more than mere preparation.” *United States v. Sanchez*, 667 F.3d 555, 563 (5th Cir. 2012); *see also United States v. Oviedo*, 525 F.2d 881, 885 (5th Cir. 1976); *United States v. Mandujano*, 499 F.2d 370, 376 (5th Cir. 1974). For example, the “affirmative act of collecting a substantial part of the equipment and ingredients for manufacturing methamphetamine [or other controlled substances] can constitute action beyond ‘mere preparation’ sufficient to constitute a substantial step.” *United States v. Jessup*, 305 F.3d 300, 303 (5th Cir. 2002).

Attempt is usually a lesser included offense of the completed crime. A defendant, however, may be convicted of a substantive offense in addition to attempting to commit the same kind of substantive offense, so long as there is a different factual basis for the two separate crimes. *See United States v. Anderson*, 987 F.2d 251, 254–56 (5th Cir. 1993) (affirming convictions for manufacturing one batch of methamphetamine and attempting to manufacture a second batch).

Impossibility is not a defense to a criminal attempt charge. *See United States v. Rankin*, 487 F.3d 229, 231 (5th Cir. 2007); *see also Redd*, 355 F.3d at 875–76 (approving instruction in attempted violation of 21 U.S.C. §§ 841(a) and 846 that the “fact that the object of the attempt was impossible to accomplish because the officers had removed the box containing cocaine from the tractor-trailer rig is not a defense to this charge”); *United States v. Farner*, 251 F.3d 510 (5th Cir. 2001) (holding that the distinction between legal and factual impossibility is generally elusive and affirming conviction where defendant intended to engage in sexual acts with a 14-year-old girl and took substantial steps towards doing so).

1.33

LESSER INCLUDED OFFENSE

We have just talked about what the government has to prove for you to convict the defendant of the crime charged in the indictment, [e.g., committing a bank robbery in which someone was exposed to risk of death by the use of a dangerous weapon]. Your first task is to decide whether the government has proved, beyond a reasonable doubt, that the defendant committed that crime. If your verdict on that is guilty, you are finished.

But if your verdict is not guilty, or if after all reasonable efforts, you are unable to reach a verdict, you should go on to consider whether the defendant is guilty of _____ (the lesser crime, e.g., simple bank robbery). You should find the defendant guilty of _____ (the lesser crime) if the government has proved, beyond a reasonable doubt, the following elements: _____ (list all elements of the lesser crime).

The difference between these two crimes is that to convict the defendant of _____ (the lesser crime), the government does not have to prove _____ (describe missing element of greater crime, e.g., that defendant exposed someone to risk of death by use of a dangerous weapon). This is an element of the greater crime, but not the lesser crime.

Of course, if the government has not proved beyond a reasonable doubt that the defendant committed _____ (the lesser crime), your verdict must be not guilty of all of the charges.

Note

Rule 31(c) of the Federal Rules of Criminal Procedure provides: "A defendant may be found guilty of any of the following: (1) an of-

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fense necessarily included in the offense charged; (2) an attempt to commit the offense charged; or (3) an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right.”

In *Schmuck v. United States*, 109 S.Ct. 1443, 1450 (1989), the Supreme Court concluded that “one offense is not ‘necessarily included’ in another [under Rule 31(c)] unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c).” Thus, under the “elements only” test, an offense is a lesser included offense only if all of its statutory elements can be demonstrated without proof of any fact or element in addition to those that must be proved for the greater offense. An offense is not a lesser included offense if it contains an additional statutory element that is not included in the greater offense.

See *Carter v. United States*, 120 S.Ct. 2159 (2000) (holding that 18 U.S.C. § 2113(b) requires three elements not required by 18 U.S.C. § 2113(a) and therefore is not a lesser included offense of 18 U.S.C. § 2113(a)); *United States v. Mays*, 466 F.3d 335, 341 (5th Cir. 2006) (possession of a controlled substance is a lesser included offense of possession with intent to distribute, but failure to give instruction was not plain error where defense counsel made strategic choice not to request it); *United States v. Avants*, 367 F.3d 433, 450 (5th Cir. 2004) (neither misprision of a felony nor accessory after the fact are lesser included offenses of aiding and abetting murder); *United States v. Estrada-Fernandez*, 150 F.3d 491, 494 (5th Cir. 1998) (lesser included offense instruction may be given only if (1) elements of offense are a subset of the elements of the charged offense, and (2) the evidence at trial permits a jury to rationally find the defendant guilty of the lesser offense and acquit him of the greater offense); see also *United States v. McElwee*, 646 F.3d 328, 341 (5th Cir. 2011); *United States v. Finley*, 477 F.3d 250, 255 (5th Cir. 2007).

The phrase “after all reasonable efforts” has been included in the second paragraph to address the concerns raised in *United States v. Buchner*, 7 F.3d 1149, 1153 n.5 (5th Cir. 1993).

1.34

INSANITY

The defendant claims that he was insane at the time of the events alleged in the indictment. If you conclude that the government has proved beyond a reasonable doubt that the defendant committed the crime as charged, you must then consider whether the defendant should be found “not guilty only by reason of insanity.”

For you to find the defendant not guilty only by reason of insanity, you must be convinced that the defendant has proven the following by clear and convincing evidence: First, that at the time of the crime, defendant suffered from a severe mental disease or defect; Second, that because of a severe mental disease or defect, the defendant was unable to appreciate the nature and quality of his acts, or was unable to appreciate that his acts were wrong. Mental disease or defect does not otherwise constitute a defense.

On the issue of insanity, it is the defendant who must prove his insanity by clear and convincing evidence. You should render a verdict of “not guilty only by reason of insanity” if you are persuaded by clear and convincing evidence that the defendant was insane when the crime was committed.

Clear and convincing evidence is evidence that makes it highly probable that defendant had a severe mental disease and as a result was unable to appreciate the nature and quality or the wrongfulness of his acts. Such proof must be sufficient to produce a firm belief or conviction as to the truth of both elements of the defense.

Remember, then, that there are three possible verdicts in this case: guilty, not guilty, and not guilty

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only by reason of insanity. No matter which verdict you choose, your vote must be unanimous as to this verdict.

Note

The Fifth Circuit affirmed a district court's use of a similar instruction on insanity in *United States v. Shannon*, 981 F.2d 759, 761 (5th Cir. 1993). In *Shannon*, the Fifth Circuit also held that a defendant is not entitled to a jury instruction which describes mandatory commitment procedures accompanying a verdict of not guilty by reason of insanity. *Id.* at 764.

The Supreme Court affirmed the Fifth Circuit's decision and held that "the IDRA [Insanity Defense Reform Act of 1984, 18 U.S.C. §§ 4241–4247] does not require an instruction concerning the consequences of a not guilty by reason of insanity verdict, and that such an instruction is not to be given as a matter of general practice." *Shannon v. United States*, 114 S.Ct. 2419, 2428 (1994).

The Supreme Court did recognize that an instruction "of some form may be necessary under certain limited circumstances," e.g., if a witness or prosecutor states to the jury that a defendant would go free after a not guilty by reason of insanity verdict, a district court might need to "intervene with an instruction to counter such misstatement." *Id.*

In *United States v. Barton*, 992 F.2d 66, 69 & n.6 (5th Cir. 1993), following *In re Medrano*, 956 F.2d 101, 102 (5th Cir. 1992), the court defined clear and convincing evidence in the context of an insanity defense as "that weight of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the cause."

See *United States v. Long*, 562 F.3d 325 (5th Cir. 2009), *United States v. Eff*, 524 F.3d 712 (5th Cir. 2008), *United States v. Dixon*, 185 F.3d 393 (5th Cir. 1999), and *United States v. Levine*, 80 F.3d 129 (5th Cir. 1996), for Fifth Circuit decisions on the insanity defense.

See 18 U.S.C. § 4242(b), providing that the jury shall be instructed to find the defendant guilty, not guilty, or not guilty only by reason of insanity.

1.35**ALIBI**

One of the issues in this case is whether the defendant was present at the time and place of the alleged crime.

Evidence has been introduced raising the issue of an alibi that the defendant was not present at the time when, or at the place where, the defendant is alleged to have committed the offense charged in the indictment.

It is the government's burden to establish beyond a reasonable doubt each of the essential elements of the offense, including the involvement of the defendant; and if, after consideration of all the evidence in the case, you have a reasonable doubt as to whether the defendant was present at the time or place as alleged in the indictment, you must find the defendant not guilty.

Note

United States v. Brown, 49 F.3d 135 (5th Cir. 1995), approved an instruction in substantially the same form.

1.36

JUSTIFICATION, DURESS, OR COERCION

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

The defendant’s actions were justified, and therefore he is not guilty, only if the defendant has shown by a preponderance of evidence that each of the following four elements is true. To prove a fact by a preponderance of the evidence means to prove that the fact is more likely so than not so. This is a lesser burden of proof than to prove a fact beyond a reasonable doubt.

The four elements which the defendant must prove by a preponderance of the evidence are as follows:

First: That the defendant was under an unlawful present, imminent, and impending threat of such a nature as to induce a well-grounded fear of death or serious bodily injury to himself [to a family member];

Second: That the defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct;

Third: That the defendant had no reasonable legal alternative to violating the law, that is, he had no reasonable opportunity to avoid the threatened harm; and

Fourth: That a reasonable person would believe that by committing the criminal action he would directly avoid the threatened harm.

Note

The Supreme Court in *Dixon v. United States*, 126 S.Ct. 2437 (2006), recognized that there is no due process violation by placing the burden on the defendant to establish a defense of duress. Fifth Circuit cases set forth the elements of this defense in essentially the same terms as this instruction. See *United States v. Wyly*, 193 F.3d 289, 300 (5th Cir. 1999); *United States v. Posada-Rios*, 158 F.3d 832, 873 (5th Cir. 1998); see also *United States v. Francisco*, 2012 WL 5872589, *7 (5th Cir. Nov. 21, 2012); *United States v. Montes*, 602 F.3d 381, 389 (5th Cir. 2010); *United States v. Willis*, 38 F.3d 170, 179 (5th Cir. 1994).

The test of whether the defense of duress exists is an objective one, not a subjective one. See *Posada-Rios*, 158 F.3d at 873; *Willis*, 38 F.3d at 176.

As with any affirmative defense, the trial court may refuse to give the justification instruction if the defendant fails to submit sufficient evidence for a reasonable juror to find duress. See *Posada-Rios*, 158 F.3d at 873; *United States v. Liu*, 960 F.2d 449, 455 (5th Cir. 1992); *United States v. Harvey*, 897 F.2d 1300 (5th Cir. 1990), *overruled in part on other grounds by United States v. Lambert*, 984 F.2d 658 (5th Cir. 1993) (en banc).

1.36A

PATTERN JURY INSTRUCTIONS

1.36A

SELF-DEFENSE—DEFENSE OF THIRD PERSON

The defendant has offered evidence that he acted in self-defense [defense of another]. The use of force is justified when a person reasonably believes that force is necessary for the defense of oneself or another against the immediate use of unlawful force. However, a person must use no more force than appears reasonably necessary under the circumstances.

[Force likely to cause death or great bodily injury is justified in self-defense [defense of another] only if a person reasonably believes such force is necessary to prevent death or great bodily harm.]

The government must prove beyond a reasonable doubt that the defendant did not act in [reasonable] self-defense [defense of another].

Note

The Fifth Circuit approved this instruction in *United States v. Ramos*, 537 F.3d 439, 465 (5th Cir. 2008) (“The jury instructions did explain the law relating to self-defense and defense of others, as well as the objective reasonableness standard necessary for the use of force [T]hese instructions were not erroneous and certainly do not rise to the level of plain error.”). While the Fifth Circuit approved of this instruction in *Ramos*, the opinion did not specifically scrutinize the phrasing of the third paragraph, namely, that the “government must prove beyond a reasonable doubt that the defendant did not act in reasonable self-defense.” See also *United States v. Keiser*, 57 F.3d 847, 850–52 (9th Cir. 1995) (finding the same instruction adequate). The word “reasonable” could be construed as superfluous or as an improper qualifier such that the defendant is justified in defending himself only where he acts in reasonable self-defense, rather than plain self-defense (which already calls for a defendant’s reasonable belief). In *United States v. Branch*, the Fifth Circuit stated that the government’s burden was to “negate self-defense beyond a reasonable doubt” (not to negate reasonable self-defense beyond a reasonable doubt). 91 F.3d 699, 714 n.1 (5th Cir. 1996).

In *Branch*, the court described “[s]elf-defense [as] an affirmative defense on which the defendant bears the initial burden of production.” 91 F.3d at 714 n.1. “If and only if the defendant has met his burden of production, the Government bears the burden of persuasion and must negate self-defense beyond a reasonable doubt.” *Id.*

As a general proposition, a defendant is entitled to any instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. *Id.*; *United States v. Stone*, 960 F.2d 426, 432 (5th Cir. 1992).

It is a necessary precondition to the claim of self-defense that the defendant be free from fault in prompting the use of force. *See Branch*, 91 F.3d at 717 (citing *Wallace v. United States*, 16 S.Ct. 859, 861–62 (1896)).

1.37

“KNOWINGLY”—TO ACT

The word “knowingly,” as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally, not because of mistake or accident.

Note

See United States v. Aggrawal, 17 F.3d 737, 744 (5th Cir. 1994) (this instruction is the “correct” definition of “knowingly”).

Refusal to give this “knowingly” instruction may not be error if the substantive offense instruction adequately covers the element of knowledge. *See United States v. Cano-Guel*, 167 F.3d 900 (5th Cir. 1999); *United States v. Sanchez-Sotelo*, 8 F.3d 202 (5th Cir. 1993).

A judge is cautioned that, in instructing on a statute which punishes “otherwise innocent conduct,” the knowledge requirement applies to each element. *See United States v. Ahmad*, 101 F.3d 386, 390 (5th Cir. 1996).

1.37A

DELIBERATE IGNORANCE

You may find that a defendant had knowledge of a fact if you find that the defendant deliberately closed his eyes to what would otherwise have been obvious to him. While knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact.

Note

The Fifth Circuit has instructed that “if a deliberate ignorance instruction is given, a ‘balancing’ instruction should be considered upon request of defendant.” *United States v. Vasquez*, 677 F.3d 685, 695–96 (5th Cir. 2012).

See also United States v. Brooks, 681 F.3d 678, 701–03 (5th Cir. 2012); *United States v. Jones*, 664 F.3d 966, 978 (5th Cir. 2011); *United States v. McElwee*, 646 F.3d 328 (5th Cir. 2011); *United States v. Miller*, 588 F.3d 897, 906 (5th Cir. 2009); *United States v. Arledge*, 553 F.3d 881, 889 (5th Cir. 2008); *United States v. Orji-Nwosu*, 549 F.3d 1005, 1009 (5th Cir. 2008); *United States v. Nguyen*, 493 F.3d 613 (5th Cir. 2007); *United States v. Ricardo*, 472 F.3d 277 (5th Cir. 2006); *United States v. Freeman*, 434 F.3d 369 (5th Cir. 2005); *United States v. Mendoza-Medina*, 346 F.3d 121 (5th Cir. 2003); *United States v. Saucedo-Munoz*, 307 F.3d 344 (5th Cir. 2002); *United States v. Wells*, 262 F.3d 455 (5th Cir. 2001); *United States v. Peterson*, 244 F.3d 385 (5th Cir. 2001); *United States v. Sharpe*, 193 F.3d 852 (5th Cir. 1999); *United States v. Moreno*, 185 F.3d 465 (5th Cir. 1999); *United States v. Threadgill*, 172 F.3d 357 (5th Cir. 1999); *United States v. Lara-Velasquez*, 919 F.2d 946 (5th Cir. 1990).

The deliberate ignorance instruction should be used sparingly—only when the facts and statute under which the defendant is being prosecuted justify it. *See United States v. Chen*, 913 F.2d 183 (5th Cir. 1990). The instruction is properly given if the evidence shows that: “[T]he defendant (1) was subjectively aware of a high probability of the existence of the illegal conduct, and (2) purposefully contrived to avoid learning of the illegal conduct.”

1.37A

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Vasquez, 677 F.3d at 697; *Miller*, 588 F.3d at 906 (citing *United States v. Connor*, 537 F.2d 480, 486 (5th Cir. 2008)).

The deliberate ignorance instruction “does not lessen the government’s burden to show, beyond a reasonable doubt, that the knowledge elements of the crimes have been satisfied.” *United States v. Reveles*, 190 F.3d 678, 686 (5th Cir. 1999).

When a deliberate ignorance instruction is appropriate only with respect to one of a group of co-defendants, the Fifth Circuit has approved the giving of the instruction accompanied by a statement that the instruction may not apply to all of the defendants. See *United States v. Bieganowski*, 313 F.3d 264, 288–91 (5th Cir. 2002); *United States v. Reissig*, 186 F.3d 617, 619–20 (5th Cir. 1999).

1.38

“WILLFULLY”—TO ACT**Note**

An instruction defining “willfully” should be given only when, by statute or court decision, “willfully” is made a mental state element of the offense charged. An instruction on “willfully” should not be given just because willfully is alleged in the indictment, unless it is a legal element of the offense charged.

Prosecutors frequently include the word “willfully” in the indictment, even when not required by statute or case law. *See United States v. Hunt*, 794 F.2d 1095 (5th Cir. 1986) (instructing on “willfully” in mail fraud prosecution). This practice should be discouraged. Historically, the usual definition of that term was:

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

Court decisions indicate, however, that this definition is not accurate in every situation. *See United States v. Kay*, 513 F.3d 461, 463 n.1 (5th Cir. 2008). As stated in *United States v. Granda*, 565 F.2d 922, 924 (5th Cir. 1978), the term “willfully” has “defied any consistent interpretation by the courts.” In *United States v. Bailey*, 100 S.Ct. 624, 631 (1980), the Court stated: “[F]ew areas of criminal law pose more difficulty than the proper definition of the mens rea required for any particular crime.” In *Ratzlaf v. United States*, 114 S.Ct. 655, 659 (1994), the Supreme Court, quoting from *Spies v. United States*, 63 S.Ct. 364, 367 (1943), recognized that “willful is a word of many meanings, and its construction is often influenced by its context.” *See also United States v. Arditti*, 955 F.2d 331, 340 (5th Cir. 1992) (stating that the meaning of “willfully” varies depending upon the context).

“Willfully” connotes a higher degree of criminal intent than knowingly. “Knowingly” requires proof of knowledge of the facts that constitute the offense. *See Bryan v. United States*, 118 S.Ct. 1939, 1945 (1998). “Willfully” requires proof that the defendant acted with knowledge that his conduct violated the law. *See Ratzlaf*, 114 S.Ct. at 657; *United States v. Fountain*, 277 F.3d 714 (5th Cir. 2001) (Congress chose “knowingly” as the mens rea requirement

for submitting false records in connection with the purchase or sale of fish, therefore the district court properly refused to instruct on “willfully”).

In *Cheek v. United States*, 111 S.Ct. 604 (1991), the Supreme Court defined “willful” for prosecutions under the Internal Revenue Code. Because of the complexity of the tax laws, “willful” criminal tax offenses are treated as an exception to the general rule that “ignorance of the law or a mistake of law is no defense to criminal prosecution.” *Id.* at 609. “Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses.” *Id.* “The standard for the statutory willfulness requirement is the ‘voluntary, intentional violation of a known legal duty.’” *Id.* at 610 (quoting *United States v. Pomponio*, 97 S.Ct. 22, 23 (1976), and *United States v. Bishop*, 93 S.Ct. 2008, 2017 (1973)). The Court reversed a conviction because the trial court instructed the jury that the defendant’s good faith belief that he was not violating the law must have been objectively reasonable. *Id.* However, a good faith belief that the law is unconstitutional does not negate the willfulness requirement. *Id.* Thus it is not error to instruct a jury not to consider a defendant’s claims that a tax law is unconstitutional. *Id.* at 612–13; *see also United States v. Simkanin*, 420 F.3d 397, 409–410 (5th Cir. 2005) (no error in failing to include specific jury instruction on good faith defense to a 26 U.S.C. § 7202 charge where court instructed the jury that “to act willfully means to act voluntarily and deliberately and intending to violate a known legal duty”); *United States v. Townsend*, 31 F.3d 262, 267 (5th Cir. 1994) (stating that “[t]he U.S. Supreme Court has recognized that the term ‘willfully’ connotes a voluntary, intentional violation of known legal duty” in a case involving evasion of federal excise taxes); *United States v. Charroux*, 3 F.3d 827, 831 (5th Cir. 1993) (defining willfulness as “‘voluntary, intentional violation of a known legal duty’” in a gasoline excise tax evasion case). In *United States v. Masat*, the Fifth Circuit stated that in a tax evasion case, “willfulness simply means a voluntary, intentional violation of a known legal duty” and that the jury instruction defining “willfully” does not have to include any language about bad purpose or evil motive. 948 F.2d 923, 931–32 (5th Cir. 1991).

In *Bryan*, 118 S.Ct. at 1944, the Supreme Court addressed whether the term “willfully” in 18 U.S.C. §§ 922(a)(1)(A) and 924(a)(1)(D) requires proof that the defendant knew that his conduct was unlawful, or whether it also requires proof that the defendant knew of the specific federal licensing requirement. The Court noted that a “willful” act, as a general matter, is one under-

taken with a “bad purpose.” *Id.* at 1945. For a “willful” violation of a statute, the government must prove that the defendant acted with the knowledge that his conduct was unlawful. *Id.* In this case, the defendant argued that “willfully” in the context of § 924(a)(1)(D) required knowledge of the law because of the Court’s previous interpretation of “willfully” in violations of tax laws and in violations involving structuring of cash transactions to avoid a reporting requirement. *Id.* at 1946. The Court distinguished these two types of cases because they involved highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct. *Id.* at 1946–47. As a result, the Court held “that these statutes carve out an exception to the traditional rule that ignorance of the law is no excuse and require that the defendant have knowledge of the law.” *Id.* at 1947. In this case, under 18 U.S.C. § 924 (a)(1)(D), the danger of convicting individuals engaged in apparently innocent activity is not present because the jury found that the defendant knew that his conduct was unlawful. *Id.* Thus, the Court held that “the willfulness requirement of § 924(a)(1)(D) does not carve out an exception to the traditional rule that ignorance of the law is no excuse; knowledge that the conduct is unlawful is all that is required.” *Id.*

The Supreme Court has cautioned that the required mental state may be different even for different elements of the same crime, and that the mental element encompasses more than just the two possibilities of “specific” and “general” intent. *See Liparota v. United States*, 105 S.Ct. 2084, 2087 n.5 (1985). The Committee has therefore abandoned the indiscriminate use of the term “willfully” accompanied by an inflexible definition of that term. Instead, we have attempted to define clearly what state of mind is required, i.e., what the defendant must know and intend to be guilty of the particular crime charged. This approach finds support in *United States v. Jobe*, 101 F.3d 1046, 1059 (5th Cir. 1996), which found no error when the trial court declined to separately define “willfulness” but did give the pattern jury definition of “knowingly” and otherwise “correctly charged the jurors on the element of intent in each offense.” *See also United States v. Gonzales*, 436 F.3d 560, 570 & n.6 (5th Cir. 2006) (court correctly instructed on “willfully” in deprivation of civil rights case by conforming to Instruction No. 2.18).

Nevertheless, the historical definition of “willfully,” quoted above, was given and approved in a money laundering and misapplication of bank funds case, *United States v. Giraldi*, 86 F.3d 1368, 1376 (5th Cir. 1996), and a prosecution for unlawfully pay-

1.38

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ing inducements for referrals of Medicare patients, *United States v. Davis*, 132 F.3d 1092, 1094 (5th Cir. 1998).

See also United States v. Kay, 513 F.3d 432, 447 (5th Cir. 2007) (“The FCPA does not define ‘willfully,’ and we therefore look to the common law interpretation of this term to determine the sufficiency of the jury instructions pertaining to the mens rea element. The definition of ‘willful’ in the criminal context remains unclear despite numerous opinions addressing this issue. Three levels of interpretation have arisen that help to clear the haze. Under all three, a defendant must have acted intentionally—not by accident or mistake.”).

1.39

INTERSTATE COMMERCE—DEFINED

Interstate commerce means commerce or travel between one state, territory or possession of the United States and another state, territory or possession of the United States, including the District of Columbia.

Note

In cases involving statutes that have as an element of the offense a requirement that activity takes place in interstate commerce or has an effect on interstate commerce, the issue of whether the activity takes place in interstate commerce or has an effect on interstate commerce should be submitted to the jury. *See United States v. Gaudin*, 115 S.Ct. 2310 (1995) (“materiality” is a jury issue in a prosecution under 18 U.S.C. § 1001). Fifth Circuit cases have implicitly accepted that the interstate commerce effect is a jury question and have dealt with instructions that a jury finding of certain specified acts beyond a reasonable doubt constitutes “an effect on interstate commerce as a matter of law.” *United States v. Hebert*, 131 F.3d 514, 521–22 (5th Cir. 1997); *United States v. Miles*, 122 F.3d 235, 239–40 (5th Cir. 1997).

1.40**PATTERN JURY INSTRUCTIONS****1.40****FOREIGN COMMERCE—DEFINED**

Foreign commerce means commerce or travel between any part of the United States, including its territorial waters, and any other country, including its territorial waters.

Note

See United States v. Montford, 27 F.3d 137 (5th Cir. 1994); *United States v. De La Rosa*, 911 F.2d 985 (5th Cir. 1990); Note to Instruction No. 1.39, Interstate Commerce.

1.41

COMMERCE—DEFINED

Commerce includes travel, trade, transportation, and communication.

Note

The Fifth Circuit approved this definition in *United States v. Jennings*, 195 F.3d 795, 800 (5th Cir. 1999), and *United States v. Robinson*, 119 F.3d 1205 (5th Cir. 1997).

1.42

**CAUTIONARY INSTRUCTION DURING TRIAL—
TRANSCRIPT OF TAPE RECORDED
CONVERSATION**

Exhibit ____ has been identified as a typewritten transcript of the oral conversation which can be heard on the tape recording received in evidence as Exhibit _____. The transcript also purports to identify the speakers engaged in such conversation.

I have admitted the transcript for the limited and secondary purpose of aiding you in following the content of the conversation as you listen to the tape recording, and also to aid you in identifying the speakers.

You are specifically instructed that whether the transcript correctly or incorrectly reflects the content of the conversation or the identity of the speakers is entirely for you to determine based upon your own evaluation of the testimony you have heard concerning the preparation of the transcript, and from your own examination of the transcript in relation to your hearing of the tape recording itself as the primary evidence of its own contents; and, if you should determine that the transcript is in any respect incorrect or unreliable, you should disregard it to that extent. It is what you hear on the tape that is evidence, not the transcripts.

[In this case there are two transcripts because there is a difference of opinion as to what is said on the tape. You may disregard any portion of either or both transcripts if you believe they reflect something different from what you hear on the tape. It is what you hear on the tape that is evidence, not the transcripts.]

Note

This instruction should be given when the tape is played and again in the final charge.

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See United States v. Murray, 988 F.2d 518, 525–27 (5th Cir. 1993); *United States v. Rena*, 981 F.2d 765, 767–70 (5th Cir. 1993).

The showing of a transcript-assisted video recording to the jury without the contemporaneous playing of the underlying audio recording represented in the transcript “may constitute error.” *United States v. Thompson*, 482 F.3d 781, 788 (5th Cir. 2007).

1.42A

PATTERN JURY INSTRUCTIONS

1.42A

**TRANSCRIPT OF FOREIGN LANGUAGE—TAPE
RECORDED CONVERSATION**

Among the exhibits admitted during the trial were recordings that contained conversations in the _____ language. You were also provided English transcripts of those conversations. The transcripts were provided to you by the government [defendant] so that you can consider the content of the conversations on the recordings. Whether a transcript is an accurate translation, in whole or in part, is for you to decide. You should not rely in any way on any knowledge you may have of the language spoken on the recording; your consideration of the transcripts should be based on the evidence introduced in the trial.

In considering whether the transcript[s] accurately describes the meaning of a conversation, you should consider the testimony presented to you regarding how, and by whom, the transcript was made. You may consider the knowledge, training, and experience of the translator, as well as the nature of the conversation and the reasonableness of the translation in light of all the evidence in the case.

[In this case there are two transcripts because there is a difference of opinion as to what is said on the tape. You may disregard any portion of either or both transcripts if you believe they reflect something different from what you hear on the tape. It is what you hear on the tape that is evidence, not the transcripts.]

Note

See United States v. Booker, 334 F.3d 406, 412 (5th Cir. 2003) (“Poor quality and partial unintelligibility do not render tapes inadmissible unless the unintelligible portions are ‘so substantial as to render the recording as a whole untrustworthy.’ [citation omitted]. In *United States v. White* [219 F.3d 442, 448 (5th Cir.

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1.42A

2000)], this Court affirmed the use of a transcript of the translation of a Spanish language tape, half of which was conceded to be unintelligible. [citation omitted]. Because there was testimony from an FBI agent regarding the accuracy of the translation and a cautionary instruction given to the jury, we found no abuse of discretion in admitting the transcript of the tape.”); *United States v. Gonzalez-Balderas*, 11 F.3d 1218, 1124 (5th Cir. 1994).

1.43

SUMMARIES AND CHARTS NOT RECEIVED IN EVIDENCE

Certain charts and summaries have been shown to you solely as an aid to help explain the facts disclosed by evidence (testimony, books, records, and other documents) in the case. These charts and summaries are not admitted evidence or proof of any facts. You should determine the facts from the evidence that is admitted.

Note

“If a summary or chart is introduced solely as a pedagogical device [not received into evidence], the court should instruct the jury that the chart or summary is not to be considered as evidence, but only as an aid in evaluating evidence.” *United States v. Harms*, 442 F.3d 367, 375 (5th Cir. 2006); *see* Fed. R. Evid. 611(a); *United States v. Buck*, 324 F.3d 786, 790–92 (5th Cir. 2003) (differentiating Fed. R. Evid. 611 and 1006).

United States v. Ogba, 526 F.3d 214, 225 (5th Cir. 2008) approved this instruction. *United States v. Bishop*, 264 F.3d 535, 548 (5th Cir. 2001) and *United States v. Winn*, 948 F.2d 145, 157–58, 157 n.30 (5th Cir. 1991), approved similar instructions. *See also* *United States v. Ollison*, 555 F.3d 152, 161 (5th Cir. 2009) (no error in allowing demonstrative exhibits as “pedagogical” devices to present the government’s version of the case when they were not admitted into evidence and instructions were given to the jury not to treat them as evidence).

This instruction is not appropriate when the summaries and charts have been introduced into evidence under Rule 1006. *See* Fed. R. Evid. 1006; *United States v. Williams*, 264 F.3d 561, 575 (5th Cir. 2001) (“A summary chart that meets the requirements of Rule 1006 is itself evidence and no instruction is needed. Such charts are distinguishable from pedagogical aids, which are merely to assist the jury in understanding the evidence and should be accompanied by an appropriate limiting instruction.”).

1.44

SUMMARIES AND CHARTS RECEIVED IN EVIDENCE

Certain charts and summaries have been received into evidence. You should give them only such weight as you think they deserve.

Note

The Fifth Circuit, in *United States v. Williams*, 264 F.3d 561, 575 (5th Cir. 2001), wrote:

A summary chart that meets the requirements of Rule 1006 is itself evidence and no instruction is needed. *United States v. Smyth*, 556 F.2d 1179, 1184 (5th Cir. 1977). Such charts are distinguishable from pedagogical aids, which are merely to assist the jury in understanding the evidence and should be accompanied by an appropriate limiting instruction. *United States v. Stephens*, 779 F.3d 232, 238 (5th Cir. 1985). In the present case, the summary charts were entered into evidence pursuant to Rule 1006 and thus no instruction was needed.

This was in response to claimed error that there was no instruction given.

Yet, in *United States v. Whitfield*, when the trial court gave an instruction similar to this instruction, the Fifth Circuit panel wrote, “Rule 1006 allows admission of summaries . . . Summary evidence must have an adequate foundation in evidence that is already admitted, and should be accompanied by a cautionary instruction.” 590 F.3d 325, 364–65 (5th Cir. 2009) (quoting *United States v. Bishop*, 264 F.3d 535, 547 (5th Cir. 2001)).

The above charge is consistent with *Whitfield* because it assumes the judge has insured there is other record evidence upon which the basis of the chart can be made, but it is inconsistent with *Williams*, which says no instruction is necessary. The Committee advises the judge to determine whether the proponent of the summary evidence is seeking its admission as evidence itself. If so, and if Rule 1006 conditions are met, an instruction may not be necessary. *See* Fed. R. Evid. 1006.

In *United States v. Jones*, 664 F.3d 966, 975–76 (5th Cir. 2011), the Fifth Circuit stated:

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The Appellants' objection was that for a summary to be admitted, all of the evidence that the summary intends to summarize must also be admitted. This is incorrect. *United States v. Valencia*, 600 F.3d 389, 417 (5th Cir. 2010) (explaining that evidence underlying a summary need not actually be admitted). Therefore, the district court's admission of the summaries of the Appellants' bank records was not error.

1.45

MODIFIED “ALLEN” CHARGE

Members of the Jury:

I am going to ask that you continue your deliberations in an effort to agree upon a verdict and dispose of this case; and I have a few additional comments I would like for you to consider as you do so.

This is an important case. If you should fail to agree on a verdict, the case is left open and may be tried again.

Any future jury must be selected in the same manner and from the same source as you were chosen, and there is no reason to believe that the case could ever be submitted to twelve men and women more conscientious, more impartial, or more competent to decide it, or that more or clearer evidence could be produced.

Those of you who believe that the government has proved the defendant guilty beyond a reasonable doubt should stop and ask yourselves if the evidence is really convincing enough, given that other members of the jury are not convinced. And those of you who believe that the government has not proved the defendant guilty beyond a reasonable doubt should stop and ask yourselves if the doubt you have is a reasonable one, given that other members of the jury do not share your doubt.

Remember at all times that no juror is expected to yield a conscientious opinion he or she may have as to the weight or effect of the evidence. But remember also that, after full deliberation and consideration of the evidence in the case, it is your duty to agree upon a verdict if you can do so without surrendering your conscientious opinion. You must also remember that if the evi-

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dence in the case fails to establish guilt beyond a reasonable doubt, the accused should have your unanimous verdict of Not Guilty.

You may be as leisurely in your deliberations as the occasion may require and should take all the time which you may feel is necessary.

I will ask now that you retire once again and continue your deliberations with these additional comments in mind to be applied, of course, in conjunction with all of the instructions I have previously given to you.

Note

Although no Fifth Circuit decisions have reversed use of the prior pattern instruction, this instruction has been modified. “District courts have broad discretion to give *Allen* charges when the jury indicates deadlock.” *United States v. Hitt*, 473 F.3d 146, 153 (5th Cir. 2006). “Courts ‘may give modified versions of the *Allen* charge, so long as the circumstances under which the district court gives the instruction are not coercive, and the content of the charge is not prejudicial.’” *Id.* (quoting *United States v. McClatchy*, 249 F.3d 348, 359 (5th Cir. 2001)); see also *United States v. Fields*, 483 F.3d 313, 339–40 (5th Cir. 2007).

See also *United States v. Allard*, 464 F.3d 529, 535–36 (5th Cir. 2006); *United States v. Nguyen*, 28 F.3d 477, 483–84 (5th Cir. 1994); *United States v. Pace*, 10 F.3d 1106, 1125 (5th Cir. 1993) (discussing the 1990 version of this instruction).

II. SUBSTANTIVE OFFENSE INSTRUCTIONS

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Requirements

2.02

BRINGING ALIENS INTO THE UNITED STATES

8 U.S.C. § 1324(a)(1)(A)(i)

Title 8, United States Code, Section 1324(a)(1)(A)(i) makes it a crime for anyone knowingly to bring [attempt to bring] an alien into the United States at a place other than a designated port of entry.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly brought [knowingly attempted to bring] an alien into the United States;

Second: That the defendant knew that the person was an alien; and

Third: That entry was [attempted] at a place other than at a designated port of entry.

An alien is any person who is not a natural-born or naturalized citizen of the United States.

Note

The government need not prove the defendant had the specific intent to violate the immigration laws. *See United States v. De Jesus Batres*, 410 F.3d 154, 162 (5th Cir. 2005) (a subsection (iii) case).

For a discussion of the first element, that defendant “brought” aliens into the country, see *United States v. Garcia-Paulin*, 627 F.3d 127, 133 (5th Cir. 2010) (discussing whether the defendant had an active role in an alien’s entry).

Section 1324(a)(1)(A)(i) prohibits bringing an alien into the United States at a place other than a designated port of entry or a

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PATTERN JURY INSTRUCTIONS

place other than as designated by the Commissioner, meaning “the Commissioner of the Immigration and Naturalization Service.” 8 U.S.C. § 1101(8). The functions of that position have now been transferred to the Department of Homeland Security (DHS). *See* 6 U.S.C. §§ 251, 271(b). It is unlikely that any case in the Fifth Circuit would involve entry at a place designated by DHS, but not a formally designated port of entry.

The definition of “alien” in 8 U.S.C. § 1101(3) also includes someone who is not a “national.” A “national” is a person who “owes permanent allegiance to the United States.” 18 U.S.C. § 1101(22). The only non-citizen “nationals” who fit within this definition are residents of American Samoa and Swains Island. *See United States v. Jimenez-Alcala*, 353 F.3d 858, 861 (10th Cir. 2003); *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 967–70 (9th Cir. 2003). In the rare instance in which a defendant claims to be a “national,” the definition found in 18 U.S.C. § 1101(22) may be given. *See Omolo v. Gonzales*, 452 F.3d 404, 408 (5th Cir. 2006).

The statute describes aggravating factors that raise the statutory maximum penalty, and that must be submitted as additional elements or special interrogatories, if charged in the indictment. These include: whether the offense was done for the purpose of commercial advantage or private gain, 8 U.S.C. § 1324(a)(1)(B)(i); whether the defendant caused serious bodily injury, 8 U.S.C. § 1324(a)(1)(B)(iii); or whether death resulted, 8 U.S.C. § 1324(a)(1)(B)(iv). *See Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000). In *United States v. Williams*, 449 F.3d 635, 646 (5th Cir. 2006), the Fifth Circuit specifically approved a jury instruction that included financial gain as an element. “The ‘financial gain’ fact is an ‘element’ of a separate, greater aggravated offense.” *Id.* For a defendant charged with aiding and abetting under 8 U.S.C. § 1324(a)(1)(v)(A)(II), the statute does not provide an enhanced sentence based on financial gain. *See* 8 U.S.C. § 1324(a)(1)(B)(I).

Pursuant to 8 U.S.C. § 1324(a)(1)(A)(v)(I), defendants may be convicted for conspiring to commit §§ 1324(a)(1)(A)(i), 1324(a)(1)(A)(ii), 1324(a)(1)(A)(iii), or 1324(a)(1)(A)(iv). It is unclear whether the government must prove an overt act in order to prove conspiracy under this section. *See United States v. Lopez*, 392 F. App’x 245 (5th Cir. 2010) (declined to decide the issue). For aiding and abetting and unanimity requirements, see *United States v. Williams*, 449 F.3d 635, 648 (5th Cir. 2006).

2.03

**TRANSPORTING ALIENS INTO OR WITHIN
THE UNITED STATES****8 U.S.C. § 1324(a)(1)(A)(ii)**

Title 8, United States Code, Section 1324(a)(1)(A)(ii), makes it a crime for anyone to transport an alien within the United States, knowing or in reckless disregard of the fact that the alien is here illegally, and in furtherance of the alien's violation of the law.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That an alien had entered or remained in the United States in violation of the law;

Second: That the defendant knew [recklessly disregarded] the fact that the alien was in the United States in violation of the law; and

Third: That the defendant transported the alien within the United States with intent to further the alien's unlawful presence.

[A person acts with "reckless disregard" when he is aware of, but consciously disregards, facts and circumstances indicating that the person transported was an alien who had entered or remained in the United States in violation of the law.]

An alien is any person who is not a natural-born or naturalized citizen of the United States.

In order for transportation to be in furtherance of the alien's unlawful presence, there must be a direct

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PATTERN JURY INSTRUCTIONS

and substantial relationship between the defendant's act of transportation and its furtherance of the alien's presence in the United States. In other words, the act of transportation must be more than merely incidental to a furtherance of the alien's violation of the law.

Note

The statute does not contain the term “willfully.” Nevertheless, a series of Fifth Circuit decisions, while reciting the elements of this offense, state that the defendant must have acted “willfully in furtherance of the alien's violation of law.” *United States v. Romero-Cruz*, 201 F.3d 374, 378 (5th Cir. 2000); *United States v. Williams*, 132 F.3d 1055, 1059 (5th Cir. 1999); *United States v. Diaz*, 936 F.2d 786, 788 (5th Cir. 1991); *United States v. Morales-Rosales*, 838 F.2d 1359, 1361 (5th Cir. 1988), *overruled on other grounds by United States v. Longoria*, 298 F.3d 367, 372 n.6 (5th Cir. 2002) (en banc). However, in *United States v. Rivera*, 879 F.2d 1247, 1251 (5th Cir. 1989), *overruled on other grounds by United States v. Cotton*, 122 S.Ct. 1781 (2002), the court specifically rejected an argument that “willful transportation” was an element of this crime, explaining that the essential element was whether there is a “direct and substantial relationship between the transportation and its furtherance of the alien's presence in the United States.” Moreover, the *Williams* opinion, despite reciting “willfully” as an element, approved a jury instruction “substantially the same” as the 1997 Fifth Circuit Pattern Jury Instruction, and which did not use the term “willfully” as part of the elements of the offense. 132 F.3d at 1061–62.

For a discussion of the term “national,” the aggravating factors raising the statutory maximum penalty for this offense, and conspiracy to commit this offense, see Note to Instruction No. 2.02, 8 U.S.C. § 1324(a)(1)(A)(i), Bringing Aliens into the United States.

2.04

CONCEALING OR HARBORING ALIENS

8 U.S.C. § 1324(a)(1)(A)(iii)

Title 8, United States Code, Section 1324(a)(1)(A)(iii), makes it a crime for anyone to conceal [harbor] [shield from detection] [attempt to conceal, harbor, or shield from detection] an alien, knowing or in reckless disregard of the fact that the alien has entered, come to, or remained in the United States in violation of law.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the alien entered [came to] [remained in] the United States in violation of law;

Second: That the defendant concealed [harbored] [shielded from detection] [attempted to conceal, harbor or shield from detection] the alien within the United States;

Third: That the defendant knew [acted in reckless disregard of the fact that] the alien entered [came to] [remained in] the United States in violation of law; and

Fourth: That the defendant's conduct tended to substantially facilitate the alien entering [coming to] [remaining in] the United States illegally.

[A person acts with "reckless disregard" when he is aware of, but consciously disregards, facts and circumstances indicating that the person concealed [harbored] [shielded from detection] was an alien who entered [came to] [remained in] the United States in violation of the law.]

2.04

PATTERN JURY INSTRUCTIONS

An alien is any person who is not a natural-born or naturalized citizen of the United States.

To “substantially facilitate” means to make an alien’s illegal presence in the United States substantially easier or less difficult.

Note

In *United States v. Shum*, the Fifth Circuit held that to “substantially facilitate” means “to make an alien’s illegal presence in the United States substantially ‘easier or less difficult.’” 496 F.3d 390, 392 (5th Cir. 2007) (citing *United States v. Dixon*, 132 F.3d 192, 200 (5th Cir. 1997)). See *United States v. De Jesus Batres*, 410 F.3d 154, 162 (5th Cir. 2005) (discussing elements of the offense); *United States v. Rubio-Gonzalez*, 674 F.2d 1067 (5th Cir. 1982); *United States v. Varkonyi*, 645 F.2d 453 (5th Cir. 1981); *United States v. Cantu*, 557 F.2d 1173 (5th Cir. 1977).

For a discussion of the term “national,” the aggravating factors raising the statutory maximum penalty for this offense, and conspiracy to commit this offense, see Note to Instruction No. 2.02, 8 U.S.C. § 1324(a)(1)(A)(i), Bringing Aliens into the United States.

2.05

**ILLEGAL REENTRY FOLLOWING
DEPORTATION****8 U.S.C. § 1326(a)**

Title 8, United States Code, Section 1326(a), makes it a crime for an alien to enter [to be found in] [attempt to enter] the United States without consent of the Secretary of the Department of Homeland Security [Attorney General of the United States] to apply for readmission after being deported, removed, excluded or denied admission.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant was an alien at the time alleged in the indictment;

Second: That the defendant had previously been deported [denied admission] [excluded] [removed] from the United States;

Third: That thereafter the defendant knowingly entered [was found in] [attempted to enter] the United States; and

Fourth: That the defendant had not received the consent of the Secretary of the Department of Homeland Security [Attorney General of the United States] to apply for readmission to the United States since the time of the defendant's previous deportation.

An alien is any person who is not a natural-born or naturalized citizen of the United States.

Note

Specific intent is not an element of this crime; it is a general

2.05

PATTERN JURY INSTRUCTIONS

intent crime. *See United States v. Jara-Favela*, 686 F.3d 289, 302 (5th Cir. 2012); *United States v. Berrios-Centeno*, 250 F.3d 294, 297–98 (5th Cir. 2001); *United States v. Guzman-Ocampo*, 236 F.3d 233 (5th Cir. 2000). The government must show that the defendant had the general intent to reenter, i.e., he is here voluntarily. *See Berrios-Centeno*, 250 F.3d at 297–98; *United States v. Ortegon-Uvalde*, 179 F.3d 956 (5th Cir. 1999); *United States v. Trevino-Martinez*, 86 F.3d 65 (5th Cir. 1996); *see also United States v. Tovias-Marroquin*, 218 F.3d 455 (5th Cir. 2000). Attempted illegal re-entry into the United States is also a general intent offense and the government does not need to prove that the defendant had a specific intent to violate the immigration laws. *See United States v. Morales-Palacios*, 369 F.3d 442 (5th Cir. 2004).

The Fifth Circuit has adopted the following standard for determining when an alien is “found in” the United States: “when his physical presence is discovered and noted by the immigration authorities, and the knowledge of the illegality of his presence, through the exercise of diligence typical of law enforcement authorities, can reasonably be attributed to immigration authorities.” *United States v. Santana-Castellano*, 74 F.3d 593, 598 (5th Cir. 1996); *see also United States v. Gunera*, 479 F.3d 373, 376 (5th Cir. 2007). An alien within the United States is not “found in” the United States if he approaches a recognized port of entry and presents his identity card to immigration officials, seeking admission. *See United States v. Angeles-Mascote*, 206 F.3d 529 (5th Cir. 2000).

Actual reentry requires physical presence and freedom from official restraint, while attempted reentry only requires a previously deported alien to approach a port of entry and make a false claim of citizenship or non-resident alien status. *See Morales-Palacios*, 369 F.3d at 446.

An alien is considered “removed” for purposes of this statute even if the order of removal is entered *in absentia* after the alien physically departs the United States. *See United States v. Ramirez-Carcamo*, 559 F.3d 384, 389 (5th Cir. 2009).

The Secretary of the Department of Homeland Security, acting through the Under Secretary for Border and Transportation Security, is responsible for granting permission to aliens not otherwise lawfully admitted. *See* 6 U.S.C. § 202. As of March 1, 2003, the consent function of the Attorney General was transferred to the Department of Homeland Security. *See United States v. Fajardo-Fajardo*, 594 F.3d 1005, 1008 (8th Cir. 2010) (listing the consent

element of the offense as “the defendant did not receive the consent of the Attorney General of the United States before March 1, 2003, or the Secretary of Homeland Security after February 28, 2003, to apply for readmission to the United States”). An instruction similar to the one in *Fajardo-Fajardo* may be appropriate if the government is relying on multiple deportation dates that occurred before and after March 1, 2003, or if the government alleges a deportation date in the indictment that is prior to March 1, 2003.

A certificate of nonexistence of record is sufficient evidence to prove a lack of consent to reapply for reentry. *See United States v. Martinez-Rios*, 595 F.3d 581, 586 (5th Cir. 2010). The certificate is considered testimonial evidence that is subject to the Confrontation Clause. *Id.* In contrast, “items in an alien immigration file [are] non-testimonial in nature and . . . the Confrontation Clause [does] not bar their admission.” *United States v. Lopez-Moreno*, 420 F.3d 420, 437 (5th Cir. 2005); *see also United States v. Berreca-Valdez*, 448 F. App’x 457, 459 (5th Cir. 2011) (holding that documents contained in an alien’s immigration file were non-testimonial and their admission did not violate the Confrontation Clause).

2.06**AIDING AND ABETTING (AGENCY)****18 U.S.C. § 2**

The guilt of a defendant in a criminal case may be established without proof that the defendant personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by him through the direction of another person as his or her agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.

If another person is acting under the direction of the defendant or if the defendant joins another person and performs acts with the intent to commit a crime, then the law holds the defendant responsible for the acts and conduct of such other persons just as though the defendant had committed the acts or engaged in such conduct.

Before any defendant may be held criminally responsible for the acts of others, it is necessary that the accused deliberately associate himself in some way with the crime and participate in it with the intent to bring about the crime.

Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

In other words, you may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and

that the defendant voluntarily participated in its commission with the intent to violate the law.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the offense of _____ was committed by some person;

Second: That the defendant associated with the criminal venture;

Third: That the defendant purposefully participated in the criminal venture; and

Fourth: That the defendant sought by action to make that venture successful.

“To associate with the criminal venture” means that the defendant shared the criminal intent of the principal. This element cannot be established if the defendant had no knowledge of the principal’s criminal venture.

“To participate in the criminal venture” means that the defendant engaged in some affirmative conduct designed to aid the venture or assist the principal of the crime.

Note

If the evidence supports submitting this instruction, and absent a showing of unfair surprise, this instruction can be given whether or not the indictment charges aiding and abetting. *See United States v. Lombardi*, 138 F.3d 559 (5th Cir. 1998); *United States v. Sorrells*, 145 F.3d 744 (5th Cir. 1998); *United States v. Casilla*, 20 F.3d 600 (5th Cir. 1994); *United States v. Botello*, 991 F.2d 189 (5th Cir. 1993); *United States v. Neal*, 951 F.2d 630 (5th Cir. 1992). This is still true post-*Apprendi*. *See United States v. Creech*, 408 F.3d 264 (5th Cir. 2005); *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000).

2.06

PATTERN JURY INSTRUCTIONS

The requirements of liability under the aiding and abetting theory are set forth in *United States v. Turner*, 674 F.3d 420 (5th Cir. 2012); *United States v. McDowell*, 498 F.3d 308, 313–14 (5th Cir. 2007); *United States v. Garcia*, 242 F.3d 593, 596 (5th Cir. 2001); *United States v. Montgomery*, 210 F.3d 446 (5th Cir. 2000); *United States v. Meshack*, 225 F.3d 556 (5th Cir. 2000), *amended on reh’g in part* 244 F.3d 367 (5th Cir. 2001); *United States v. De La Rosa*, 171 F.3d 215 (5th Cir. 1999); and *United States v. Stewart*, 145 F.3d 273 (5th Cir. 1998). *See also* *United States v. Garcia*, 567 F.3d 721, 731 (5th Cir. 2009); *United States v. Percel*, 553 F.3d 903, 911 (5th Cir. 2008); *United States v. Rojas Alvarez*, 451 F.3d 320, 333 (5th Cir. 2006); *United States v. Infante*, 404 F.3d 376, 385 (5th Cir. 2005); *United States v. Tenorio*, 360 F.3d 491, 495 (5th Cir. 2004); *United States v. Hernandez-Bautista*, 293 F.3d 845, 853 (5th Cir. 2002).

Neither misprision of a felony nor accessory after the fact are lesser-included offenses of aiding and abetting a felony. *See United States v. Avants*, 367 F.3d 433, 450 (5th Cir. 2004).

Any defendant in a multi-defendant case may be punished as a principal under 18 U.S.C. § 2, regardless of the conviction of the other(s). *See United States v. Cooks*, 589 F.3d 173, 183–85 (5th Cir. 2009).

For aiding and abetting and unanimity requirements, see *United States v. Williams*, 449 F.3d 635, 648 (5th Cir. 2006).

2.07

ACCESSORY AFTER THE FACT

18 U.S.C. § 3

Title 18, United States Code, Section 3, makes it a crime for anyone who, knowing that a crime has been committed, obstructs justice by giving comfort or assistance to the principal in order to hinder or prevent apprehension or punishment.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the principal had committed the crime of _____ (list the elements of the offense[s] alleged in the indictment);

Second: That the defendant knew of the commission of the above crime by the principal and thereafter comforted [assisted] the principal by _____ (describe the acts alleged in the indictment); and

Third: That the defendant did the above act[s] intending to hinder [prevent] the principal's apprehension [trial] [punishment].

The government is not required to prove that any act of the defendant influenced the investigation or was relied upon by the authorities.

The government is not required to prove that the principal has been indicted for or convicted of the crime of _____ (list the offense[s] alleged in the indictment).

2.07

PATTERN JURY INSTRUCTIONS

Note

The court must charge on the elements of the underlying offense if those elements are not set forth in another count.

The elements of this offense are set forth in *United States v. De La Rosa*, 171 F.3d 215 (5th Cir. 1999), and *United States v. Harris*, 104 F.3d 1465 (5th Cir. 1997).

Accessory after the fact is not a lesser-included offense of aiding and abetting a felony. See *United States v. Avants*, 367 F.3d 433 (5th Cir. 2004).

2.08

MISPRISION OF A FELONY

18 U.S.C. § 4

Title 18, United States Code, Section 4, makes it a crime for anyone to conceal from the authorities the fact that a federal felony has been committed. _____ (list predicate offense from indictment) is a federal felony.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That a federal felony was committed, as charged in Count ____ of the Indictment (list elements of the underlying offense);

Second: That the defendant had knowledge of the commission of the felony;

Third: That the defendant failed to notify an authority as soon as possible. An “authority” includes a federal judge or some other federal civil or military authority, such as a federal grand jury, Secret Service or FBI agent; and

Fourth: That the defendant did an affirmative act, as charged, to conceal the crime.

Mere failure to report a felony is not a crime. The defendant must commit some affirmative act designed to conceal the fact that a federal felony has been committed.

Note

The elements of this offense are set forth in *United States v. Adams*, 961 F.2d 505 (5th Cir. 1992), and *United States v. Salinas*, 956 F.2d 80 (5th Cir. 1992).

2.08

PATTERN JURY INSTRUCTIONS

The court must charge on the elements of the underlying offense if it is not set forth in another count.

Misprision of a felony is not a lesser included offense of aiding and abetting a felony. *See United States v. Avants*, 367 F.3d 433 (5th Cir. 2004).

2.09

ASSAULTING A FEDERAL OFFICER

18 U.S.C. § 111

Title 18, United States Code, Section 111, makes it a crime for anyone to forcibly assault a federal officer while the officer is engaged in the performance of his official duties.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant forcibly assaulted [resisted] [opposed] [impeded] [intimidated] [interfered with] the person described in the indictment;

Second: That the person assaulted was a federal officer as described below, who was then engaged in the performance of his [her] official duty, as charged; and

Third: That the defendant did such acts intentionally.

[*Fourth:* That in doing such acts, the defendant used a deadly or dangerous weapon or inflicted bodily injury.]

[*Fourth:* That such acts involved physical contact with the victim or the intent to commit another felony.]

The term “forcible assault” means any intentional attempt or threat to inflict injury upon someone else, when coupled with an apparent present ability to do so, and includes any intentional display of force that would give a reasonable person cause to expect immediate bodily harm, whether or not the threat or attempt is actually carried out or the victim is injured.

2.09

PATTERN JURY INSTRUCTIONS

[The term “deadly or dangerous weapon” includes any object capable of inflicting death or serious bodily injury. For such a weapon to have been “used,” it must be proved that the defendant not only possessed the weapon but that the defendant intentionally displayed it in some manner while carrying out the forcible assault. The term “bodily injury” means an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought.]

You are instructed that _____ (list title of federal official, e.g., Special Agent of the Federal Bureau of Investigation) is a federal officer, and that it is a part of the official duty of such an officer to _____ (list official duty being performed, e.g., execute arrest warrants issued by a judge or magistrate of this court).

It is not necessary to show that the defendant knew the person being forcibly assaulted was, at that time, a federal officer carrying out an official duty so long as it is established beyond a reasonable doubt that the victim was, in fact, a federal officer acting in the course of his duty and that the defendant intentionally committed a forcible assault upon that officer.

[On the other hand, the defendant would not be guilty of an assault if the evidence leaves you with a reasonable doubt concerning whether the defendant knew the victim to be a federal officer and only committed such act because of a reasonable, good faith belief that the defendant needed to defend himself against an assault by a private citizen.]

Note

This statute has been interpreted as creating three separate offenses: (1) simple assault; (2) more serious assaults not involving a dangerous weapon; and (3) assaults with a deadly or dangerous weapon. *See United States v. Ramirez*, 233 F.3d 318 (5th Cir. 2000). The fourth element above, concerning a deadly weapon, and the accompanying bracketed definitions, constitutes the third offense

carrying a maximum penalty of twenty years' confinement. Without that element, the above instruction defines the first offense of "simple assault," a misdemeanor. The second offense is under the category of "all other cases," and carries a maximum penalty of eight years' imprisonment. This crime does not require use of a deadly weapon, nor bodily harm, nor the creation of apprehension in the victim. It does, however, require forcible physical contact. See *Ramirez*, 233 F.3d at 322 (holding that hurling a cup at the victim, striking him and spilling its contents on him, fell in the intermediate category of "all other cases"). The alternative fourth element above, involving physical contact, would have to be given in this situation.

In *United States v. Nunez*, 180 F.3d 227 (5th Cir. 1999), the indictment charged an assault "by means and use of a dangerous weapon." The jury was instructed that it could also find the defendant guilty of forcible assault without a dangerous weapon. The *Nunez* court found reversible error, rejecting the Government's claim that the jury found a lesser included offense. It held that the instruction impermissibly broadened the indictment from "a specific and narrow accusation" to one "far more general and broad." 180 F.3d at 233. An earlier decision, *United States v. Williamson*, 482 F.2d 508, 513 (5th Cir. 1973), apparently reached a contrary result but was not cited in *Nunez*.

This circuit has indicated that the first of the three separate offenses—simple assault—would be given its common law meaning of "an attempted battery" or the "placing of another in reasonable apprehension of a battery." *United States v. Hazlewood*, 526 F.3d 862, 865 (5th Cir. 2008) (quoting *Ramirez*, 233 F.3d at 321–22). The court in *Hazlewood* found that resisting arrest, though without any physical contact, met the definition of simple assault. *Id.* In *United States v. Williams*, 520 F.3d 414 (5th Cir. 2008), the court noted that the visible possession of a shank during a fistfight comprised the "assault with a deadly weapon" element of the third offense "assault with a dangerous weapon," despite the fact that the shank did not strike the official. *Id.* at 421 (noting that merely brandishing a dangerous weapon, even if it is not put to use in the assault, is considered "use" under § 111(b)).

The last paragraph of the instruction is appropriate only when self-defense, or other justifiable action, is raised by the evidence. See *United States v. Feola*, 95 S.Ct. 1255, 1264 (1975); *United States v. Moore*, 958 F.2d 646 (5th Cir. 1992); *United States v. Ochoa*, 526 F.2d 1278 (5th Cir. 1976).

A state officer "acting in cooperation with and under control of

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PATTERN JURY INSTRUCTIONS

federal officers” is considered a federal agent under 18 U.S.C. §§ 111 and 1114. *See United States v. Hooker*, 997 F.2d 67 (5th Cir. 1993). In that case, the third from the last paragraph would have to be changed accordingly. *See United States v. Reed*, 375 F.3d 340 (5th Cir. 2004) (statute requires contemporaneous involvement between state and federal officers); *United States v. Jacquez-Beltran*, 326 F.3d 661 (5th Cir. 2003) (cooperation can exist even though the federal officer is not actually present at the time of the assault).

There is no requirement that the defendant knew of the official status of the victim. *See Feola*, 95 S.Ct. at 1261; *United States v. Moore*, 958 F.2d 646 (5th Cir. 1992).

The definitions of “deadly or dangerous weapon” and “bodily injury,” are derived from the United States Sentencing Guidelines. *See* U.S. Sentencing Guidelines Manual § 1B1.1 cmt. n.1 (2012). Virtually any object can be a dangerous weapon depending on the manner in which it is used. For illustrations of objects that have been used in a manner that would render them “deadly or dangerous,” e.g., desk, garden rake, and wine bottle, see *United States v. Murphy*, 35 F.3d 143 (4th Cir. 1994) and cases cited therein.

A misdemeanor conviction under § 111(a)(1) does not require underlying assaultive conduct. *See United States v. Williams*, 602 F.3d 313, 318 (5th Cir. 2010).

2.10

**BANKRUPTCY: CONCEALMENT OF ASSETS
(BANKRUPTCY PROCEEDING PENDING)****18 U.S.C. § 152
(First Paragraph)**

Title 18, United States Code, Section 152, makes it a crime for anyone to conceal property belonging to the estate of a debtor in bankruptcy.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That there existed a proceeding in bankruptcy;

Second: That certain property belonged to the bankrupt estate;

Third: That defendant concealed such property from the creditors [custodian] [trustee] [marshal] [some person] charged with control or custody of such property; and

Fourth: That the defendant did so knowingly and fraudulently.

The word “conceal” means to secrete, falsify, mutilate, fraudulently transfer, withhold information or knowledge required by law to be made known, or to take any action preventing discovery. Since the offense of concealment is a continuing one, the acts of concealment may have begun before as well as after the bankruptcy proceeding began.

It is no defense that the concealment may have proved unsuccessful. Even though the property in ques-

2.10

PATTERN JURY INSTRUCTIONS

tion may have been recovered for the debtor's estate, the defendant still may be guilty of the offense charged.

Similarly, it is no defense that there was no demand by any officer of the court or creditor for the property alleged to have been concealed. Demand on the defendant for such property is not necessary in order to establish concealment.

An act is done fraudulently if done with intent to deceive or cheat any creditor, trustee, or bankruptcy judge.

Note

The elements of this offense are listed in *United States v. Spurlin*, 664 F.3d 954, 960 (5th Cir. 2011).

The definitions of “conceal” and “fraudulently” may also apply to prosecution under the other paragraphs of § 152.

Section 152(1) “does not have as an element proof of a scheme, conspiracy, or pattern of criminal activity.” *United States v. Maturin*, 488 F.3d 657, 662 (5th Cir. 2007) (holding that none of the elements of § 152 constitute “a scheme, conspiracy, or pattern” that, under the Mandatory Victims Restitution Act, 18 U.S.C. § 3663(a)(2), would broaden the scope of restitution).

With respect to jury instructions for prosecutions under the seventh paragraph of 18 U.S.C. § 152, see *United States v. West*, 22 F.3d 586 (5th Cir. 1994); *United States v. Moody*, 923 F.2d 341 (5th Cir. 1991).

2.11

**BANKRUPTCY: PRESENTING OR USING A
FALSE CLAIM
(BANKRUPTCY PROCEEDING PENDING)**

**18 U.S.C. § 152
(Fourth Paragraph)**

Title 18, United States Code, Section 152, makes it a crime for anyone to present [use] a false claim in any bankruptcy proceeding.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That there existed a proceeding in bankruptcy;

Second: That the defendant personally [by or as agent, proxy, attorney] presented [used] a claim for proof against the estate of a debtor;

Third: That such claim was false; and

Fourth: That such claim was presented [used] knowingly and fraudulently.

An act is done “fraudulently” if done with intent to deceive or cheat any creditor, trustee, or bankruptcy judge.

2.12

PATTERN JURY INSTRUCTIONS

2.12

BRIBING A PUBLIC OFFICIAL

18 U.S.C. § 201(b)(1)

Title 18, United States Code, Section 201(b)(1), makes it a crime for anyone to bribe a public official.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant directly or indirectly gave [offered] [promised] something of value to _____ (insert name of public official or person selected to be a public official), a public official [person who has been selected to be a public official]; and

Second: That the defendant did so corruptly with intent to influence an official act by the public official [persuade the public official to omit an act in violation of his lawful duty] [persuade the public official to do an act in violation of his lawful duty].

The term “public official” means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee of or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror.

[The term “person selected to be a public official” means any person who has been nominated or appointed to be a public official, or has been officially

informed that such person will be nominated or appointed.]

[The term “official act” means any decision or action on any matter, question, cause, suit, proceeding, or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.]

An act is “corruptly” done if it is done intentionally with an unlawful purpose.

Note

Similar instructions were used in *United States v. Franco*, 632 F.3d 880 (5th Cir. 2011), *United States v. Whitfield*, 590 F.3d 325, 348 (5th Cir. 2009), and *United States v. Tomblin*, 46 F.3d 1369, 1379–80 n.16 (5th Cir. 1995). *United States v. Pankhurst*, 118 F.3d 345, 351 (5th Cir. 1997), describes the elements.

“The federal bribery statute ‘has been accurately characterized as a comprehensive statute applicable to all persons performing activities for or on behalf of the United States, whatever the form of delegation of authority.’” *United States v. Baymon*, 312 F.3d 725, 728 (5th Cir. 2002) (quoting *Dixson v. United States*, 104 S.Ct. 1172 (1984)). This instruction charges a violation of § 201(b)(1)(A) or (C), but does not charge § 201(b)(1)(B). The second element should be modified in such a case.

“Public official” and “official act” are defined by 18 U.S.C. §§ 201(a)(1) and 201(a)(3). *See also Franco*, 632 F.3d at 886 (finding no plain error to define “public official” to include “an employee of a private corporation who acts for or on behalf of the federal government pursuant to a contract”). The term “person who has been selected to be a public official” is defined by 18 U.S.C. § 201(a)(2). For a useful discussion of “public official,” see *Baymon*, 312 F.3d at 728–29 (the fact that a supervisory cook at a federal correctional facility was a federal employee with official functions was sufficient to support a finding, under a plain error standard, that he was a “public official”), and *United States v. Thomas*, 240 F.3d 445, 446–48 (5th Cir. 2001) (holding that a guard employed by a private company operating a detention facility under a contract with the Immigration and Naturalization Service is a

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“public official”). For a discussion of the scope of “official act,” see *United States v. Parker*, 133 F.3d 322, 325–26 (5th Cir. 1998).

2.13

RECEIVING BRIBE BY A PUBLIC OFFICIAL**18 U.S.C. § 201(b)(2)**

Title 18, United States Code, Section 201(b)(2), makes it a crime for a public official to demand [seek] [receive] [accept] [agree to receive or accept] a bribe.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant, a public official [person selected to be a public official] directly or indirectly demanded [sought] [received] [accepted] [agreed to receive or accept] personally [for another person] [for an entity] something of value; and

Second: That the defendant did so corruptly in return for being influenced in his performance of an official act [persuaded to omit any act in violation of his official duty] [persuaded to do any act in violation of his official duty].

The term “public official” means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee of or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror.

[The term “person selected to be a public official” means any person who has been nominated or appointed to be a public official, or has been officially

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informed that such person will be nominated or appointed.]

[The term “official act” means any decision or action on any matter, question, cause, suit, proceeding, or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.]

An act is “corruptly” done if it is done intentionally with an unlawful purpose.

Note

“Public official” and “official act” are defined by 18 U.S.C. §§ 201(a)(1) and 201(a)(3). “Person selected to be a public official” is defined by 18 U.S.C. § 201(a)(2). For a useful discussion of “public official,” see *United States v. Baymon*, 312 F.3d 725, 728–29 (5th Cir. 2002) (the fact that a supervisory cook at a federal correctional facility was a federal employee with official functions was sufficient to support a finding, under a plain error standard, that he was a “public official”), and *United States v. Thomas*, 240 F.3d 445, 446–48 (5th Cir. 2001) (holding that a guard employed by a private company operating a detention facility under a contract with the Immigration and Naturalization Service is a “public official”). For a discussion of the scope of “official act,” see *United States v. Parker*, 133 F.3d 322, 325–26 (5th Cir. 1998).

To find bribery, the jury is required to find that a public official accepted a thing of value in return for being influenced in the performance of an official act. See *United States v. Bustamante*, 45 F.3d 933, 938 (5th Cir. 1995) (finding the evidence sufficient to support the bribery conviction).

For the meaning of “corruptly,” see *United States v. Brunson*, 882 F.2d 151, 154 (5th Cir. 1989) (discussing the meaning of “corruptly” in the context of “receipt of commissions or gifts for procuring loans,” 18 U.S.C. § 215).

2.14

ILLEGAL GRATUITY TO A PUBLIC OFFICIAL**18 U.S.C. § 201(c)(1)(A)**

Title 18, United States Code, Section 201(c)(1)(A), makes it a crime for anyone to give [offer] [promise] anything of value to a public official for [because of] an official act performed [to be performed] by that official.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant directly or indirectly gave [offered] [promised] something of value to _____ (name of official), a public official [former public official] [person selected to be a public official]; and

Second: That the defendant did so for [because of] an official act performed [to be performed] by the public official, other than as provided by law for the proper discharge of his official duty.

The term “public official” means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee of or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror.

[The term “person selected to be a public official” means a person who has been nominated or appointed to be a public official, or has been officially informed that such person will be nominated or appointed.]

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[The term “official act” means any decision or action on any matter, question, cause, suit, proceeding, or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.]

Note

“Public official” and “official act” are defined by 18 U.S.C. §§ 201(a)(1) and 201(a)(3). The term “person selected to be a public official” is defined by 18 U.S.C. § 201(a)(2). For a useful discussion of “public official,” see *United States v. Baymon*, 312 F.3d 725, 728–29 (5th Cir. 2002) (the fact that a supervisory cook at a federal correctional facility was a federal employee with official functions was sufficient to support a finding, under a plain error standard, that he was a “public official”), and *United States v. Thomas*, 240 F.3d 445, 446–48 (5th Cir. 2001) (holding that a guard employed by a private company operating a detention facility under a contract with the Immigration and Naturalization Service is a “public official”). For a discussion of the scope of “official act,” see *United States v. Parker*, 133 F.3d 322, 325–26 (5th Cir. 1998).

The term “corruptly” is not used here because, unlike the crimes covered by 18 U.S.C. § 201(b), those covered by 18 U.S.C. § 201(c) do not include “corruptly” as an element. For the intent element required for crimes covered by § 201(c), see *United States v. Sun-Diamond Growers of Cal.*, 119 S.Ct. 1402, 1411 (1999) (“[T]he Government must prove a link between a thing of value conferred upon a public official and a specific ‘official act’ for or because of which it was given.”).

2.15

**RECEIVING ILLEGAL GRATUITY BY A PUBLIC
OFFICIAL****18 U.S.C. § 201(c)(1)(B)**

Title 18, United States Code, Section 201(c)(1)(B), makes it a crime for a public official to demand [seek] [receive] [accept] [agree to receive or accept] anything of value personally for [because of] an official act performed [to be performed] by that official.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant was a public official [former public official] [person selected to be a public official];

Second: That the defendant directly or indirectly demanded [sought] [received] [accepted] [agreed to receive or accept] something of value personally other than as provided by law for the proper discharge of his official duty; and

Third: That the defendant did so for [because of] an official act performed [to be performed] by the defendant.

The term “public official” means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee of or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror.

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[The term “person selected to be a public official” means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be nominated or appointed.]

[The term “official act” means any decision or action on any matter, question, cause, suit, proceeding, or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.]

Note

See Note to Instruction No. 2.14, Illegal Gratuity to a Public Official, 18 U.S.C. § 201(c)(1)(A).

2.16

BRIBERY OR REWARD OF A BANK OFFICER

18 U.S.C. § 215(a)(1)

Title 18, United States Code, Section 215(a)(1), makes it a crime for anyone to corruptly give [offer] [promise] anything of value to any person with intent to influence [reward] an officer [director] [employee] [agent] [attorney] of a financial institution in connection with any business [transaction] of such institution.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant gave [offered] [promised] something of value in excess of \$1,000 to _____; and

Second: That the defendant did so corruptly with the intent to influence [reward] _____, an officer [director] [employee] [agent] [attorney] of the financial institution, in connection with any business [transaction] of that institution.

An act is “corruptly” done if it is done intentionally with an unlawful purpose.

A _____ (refer to particular type of institution listed in § 215(b), as charged in the indictment) is a financial institution.

Note

See *United States v. Brunson*, 882 F.2d 151 (5th Cir. 1989), for a discussion of the meaning of the term “corruptly.”

If the prosecution seeks a felony conviction, the jury must determine that the value exceeds \$1,000. If there is an issue as to

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whether the value exceeds \$1,000, a lesser included offense instruction may have to be given. *See Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000).

2.17

CONSPIRACY TO DEPRIVE PERSON OF CIVIL RIGHTS**18 U.S.C. § 241**

Title 18, United States Code, Section 241, makes it a crime for two or more persons to conspire to injure [oppress] [threaten] [intimidate] any person in the free exercise or enjoyment of any right or privilege secured to the person by the Constitution or laws of the United States.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant entered into a conspiracy to injure [oppress] [threaten] [intimidate] one or more persons; and

Second: That the defendant specifically intended by the conspiracy to hinder [prevent] [interfere with] _____'s enjoyment of a right secured by the Constitution or laws of the United States.

[*Third:* That bodily injury resulted from the defendant's conduct.]

[*Third:* That the defendant's conduct included the use [attempted use] [threatened use] of a dangerous weapon [explosive].]

[*Third:* That _____ died as a result of acts committed in furtherance of the conspiracy. The government need not prove that the defendant intended for the person to die. It must prove that the person's death was a foreseeable result of the defendant's conduct.]

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[*Third*: That the defendant's conduct included kidnapping [an attempt to kidnap] [aggravated sexual abuse] [an attempt to commit aggravated sexual abuse] [an attempt to kill].]

The indictment charges that the defendant conspired to deprive _____ of the following right: _____ (describe, e.g., right to travel, to vote, to enjoy equal access to public accommodations). You are instructed that this right is one secured by the Constitution and laws of the United States.

Note

Certain constitutional rights, e.g., those under the Fourteenth Amendment, protect an individual only against state action, not against wrongs by individuals. If these rights are the subject of the 18 U.S.C. § 241 case, the instruction must also require the jury to find that the defendant acted "under color of law." See *United States v. Guest*, 86 S.Ct. 1170 (1966) (state action required for equal protection violation but not for violation of right to travel); *Wilkins v. United States*, 376 F.2d 552, 561 (5th Cir. 1967) (interfering with assembly to protest denial of voting rights violates § 241, even absent state action). See definition under Instruction No. 2.18, Deprivation of Civil Rights, 18 U.S.C. § 242.

See also *United States v. Guidry*, 456 F.3d 493, 507 (5th Cir. 2006) (intent to interfere with victim's due process right to bodily integrity); *United States v. Hayes*, 589 F.2d 811 (5th Cir. 1979) (intent - death).

Section 241 "would not reach every conspiracy that affected a federal right, but only a conspiracy whose 'predominant purpose' was to deter or punish the exercise of the federal right." See *Kinney v. Weaver*, 367 F.3d 337, 355 n.22 (5th Cir. 2004) (citing *Guest*, 86 S.Ct. at 1179).

This instruction should be accompanied by an instruction on conspiracy. Several circuits have squarely held that for conspiracy under 18 U.S.C. § 241, the government need not prove an overt act. See, e.g., *United States v. Colvin*, 353 F.3d 569, 576 (7th Cir. 2003); *United States v. Whitney*, 229 F.3d 1296, 1301 (10th Cir. 2000). The Fifth Circuit has rendered conflicting dicta on this point. Compare *United States v. Morado*, 454 F.2d 167, 169 (5th

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Cir. 1972) (not required) with *United States v. Greer*, 939 F.2d 1076, 1099 (5th Cir. 1991) (required).

The statute provides for enhancement of punishment if a death results from the acts committed or if such acts 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 alleges any enhancement element, it should be submitted to the jury. *See* 18 U.S.C. § 241. For instructions related to these enhancements, see Instruction No. 2.18.

2.18

DEPRIVATION OF CIVIL RIGHTS

18 U.S.C. § 242

Title 18, United States Code, Section 242, makes it a crime for anyone, acting under color of law, willfully to deprive any person of a right secured by the Constitution or laws of the United States.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant deprived the person of a right secured by the Constitution or laws of the United States by committing one or more of the acts charged in the indictment;

Second: That the defendant acted willfully, that is, that the defendant committed such act or acts with a bad purpose or evil motive to disobey or disregard the law, specifically intending to deprive the person of that right; and

Third: That the defendant acted under color of law.

[*Fourth:* That bodily injury resulted from the defendant's conduct.]

[*Fourth:* That the defendant's conduct included the use, attempted use, or threatened use of a dangerous weapon, explosive, or fire.]

[*Fourth:* That _____ died as a result of defendant's conduct.]

[*Fourth:* That the defendant's conduct included kidnapping [an attempt to kidnap] [aggravated sexual

abuse] [an attempt to commit aggravated sexual abuse]
[an attempt to kill].]

The indictment charges that the defendant deprived _____ of the following right:
_____ (describe, e.g., right to vote, to enjoy equal access to public accommodations, to due process of law). You are instructed that this right is one secured by the Constitution and laws of the United States.

To find that the defendant was acting willfully, it is not necessary for you to find that the defendant knew the specific Constitutional provision or federal law that his conduct violated. But the defendant must have a specific intent to deprive the person of a right protected by the Constitution or federal law.

Acting “under color of law” means acts done under any state law, county or city ordinance, or other governmental regulation, and acts done according to a custom of some governmental agency. It means that the defendant acted in his official capacity or else claimed to do so, but abused or misused his power by going beyond the bounds of lawful authority. [If a private citizen is charged, substitute the following: A private person acts “under color of law” if that person willfully participates in joint activity with someone that person knows to be a public official].

["Bodily injury" means (A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of a function of a bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary.]

[The government need not prove that the defendant intended for the person to die. The government must prove that the death was a foreseeable result of

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the defendant's willful deprivation of the person's constitutional rights.]

[In the event of an enhancement for aggravated sexual abuse or an attempt to commit aggravated sexual abuse, include the following:

A person commits "aggravated sexual abuse" if defendant knowingly causes another person to engage in a sexual act (1) by using force against that other person; or (2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping.

The term "sexual act" means: (A) contact between the penis and the vulva or the penis and the anus; (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or (D) 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, degrade, or arouse or gratify the sexual desire of any person.

To find that the defendant used force, you need not find that the defendant was violent. A defendant uses force within the meaning of "aggravated sexual abuse" when defendant employs restraint sufficient to prevent the alleged victim from escaping sexual conduct, or the use of a threat of harm sufficient to coerce or compel submission by the alleged victim. Force can also be implied from a disparity in size and coercive power between the defendant and the alleged victim. It is not necessary to find that the defendant used actual violence against defendant's alleged victim. Consent

that is the product of official intimidation, harassment, or coercion is not true consent at all.]

Note

Possible language for inclusion into the paragraph describing the constitutional right allegedly violated may be found in the Fifth Circuit Pattern Jury Instructions (Civil Cases) §§ 10.1 and 10.2 (excessive force), § 10.5 (Eighth Amendment excessive force), § 10.6 (Eighth Amendment inadequate medical care), § 10.7 (Eighth Amendment conditions of confinement).

The test for determining which rights are encompassed by this statute is the same as the test for qualified immunity in civil cases. In *United States v. Lanier*, 117 S.Ct. 1219 (1997), the Supreme Court held that the defendant was entitled to “fair warning” that his conduct deprived his victim of a constitutional right, and that the standard for determining the adequacy of that warning was the same as the standard for determining whether a constitutional right was “clearly established” under § 1983. *See also Hope v. Pelzer*, 122 S.Ct. 2508, 2515 (2002). Therefore, the statute covers rights that have been “made specific” either by the express terms of the Constitution or laws of the United States or by decisions interpreting them. This is generally a question of law.

The trial judge should be careful to identify the precise constitutional or statutory right that is being deprived before instructing. The substantive due process “shocks the conscience” test should be offered only in the absence of a more particular constitutional infringement, as this latter test is quite difficult to satisfy. *See, e.g., Graham v. Connor*, 109 S.Ct. 1865, 1870 (1989) (where constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process); *United States v. Guidry*, 456 F.3d 493, 506 n.8 (5th Cir. 2006) (noting that because victim was in police custody at time of sexual assault, “this civil rights violation may have been more appropriately analyzed using the Fourth Amendment,” with its balancing test, rather than the Fourteenth Amendment, with its heightened inquiry into whether the police behavior shocked the conscience).

In *United States v. Kerley*, 643 F.2d 299, 303 (5th Cir. 1981), the court reversed a conviction where the jury had been instructed that it must find the defendant “knowingly and intentionally

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exerted force that he knew to be unlawful” because it had not also been instructed that willfully means acting “with a bad purpose or motive.” The Committee believes that the combination of the definition of the word “willfully” provided in the second element of the instruction and the explanation of “willfully” as not requiring particular knowledge of the Constitution adequately covers all case law. *See also United States v. Gonzales*, 436 F.3d 560, 570 (5th Cir. 2006) (approving “willfulness” instruction in 18 U.S.C. § 242 case derived from case law and Instruction No. 1.38).

The definition of bodily injury is derived from *Gonzales*, 436 F.3d at 575 (adopting the definition of bodily injury provided in 18 U.S.C. §§ 831(f)(5), 1365(h)(4), 1515(a)(5), and 1864(d)(2) in cases in which use of force is not part of the underlying constitutional violation). For a charge in which excessive force was part of the underlying constitutional violation, the *Gonzales* Court followed *United States v. Brugman*, 364 F.3d 613 (5th Cir. 2004), and used the same “bodily injury” requirement as for the constitutional excessive force violation.

For a discussion of “aggravated sexual abuse,” see *United States v. Simmons*, 470 F.3d 1115, 1120–21 (5th Cir. 2006); *United States v. Lucas*, 157 F.3d 998, 1002 (5th Cir. 1998); *United States v. Holly*, 488 F.3d 1298, 1301–04 (10th Cir. 2007). The definition of “aggravated sexual abuse” in these cases is derived from 18 U.S.C. § 2241(a).

The definition of “sexual act” is derived from 18 U.S.C. § 2246(2) and should be modified to fit the facts of a particular case.

2.19

FALSE CLAIMS AGAINST THE GOVERNMENT**18 U.S.C. § 287**

Title 18, United States Code, Section 287, makes it a crime to knowingly make a false [fraudulent] claim against any department or agency of the United States.

The _____ (name of department or agency) is a department [agency] of the United States within the meaning of that law.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly presented to a department [agency] of the United States a false [fraudulent] claim against the United States;

Second: That the defendant knew that the claim represented was false [fraudulent]; and

Third: That the false [fraudulent] claim was material.

A claim is “material” if it has a natural tendency to influence, or is capable of influencing, the agency to which it was addressed. It is not necessary to show, however, that the government agency was in fact deceived or misled.

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

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Note

The issue of whether materiality is an element of the offense is unsettled. The term is not included in the statute. The Fifth Circuit has previously not included materiality as an element of this offense. *See United States v. Burns*, 162 F.3d 840, 850 (5th Cir. 1998); *United States v. Upton*, 91 F.3d 677 (5th Cir. 1996). The continued vitality of that holding, however, is called into question by *Neder v. United States*, 119 S.Ct. 1827, 1841 (1999).

A panel of the Fifth Circuit recommended, in dicta, that a materiality instruction be included. *See United States v. Foster*, 229 F.3d 1196 & n.1 (5th Cir. 2000); *see also United States v. Clark*, 577 F.3d 273 (5th Cir. 2009).

2.20

CONSPIRACY TO COMMIT OFFENSE

18 U.S.C. § 371

Title 18, United States Code, Section 371, makes it a crime for anyone to conspire with someone else to commit an offense against the laws of the United States.

The defendant is charged with conspiring to _____ (describe the object of the conspiracy as alleged in the indictment).

A “conspiracy” is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of “partnership in crime” in which each member becomes the agent of every other member.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant and at least one other person made an agreement to commit the crime of _____ (describe), as charged in the indictment;

Second: That the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose; and

Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the indictment, in order to accomplish some object or purpose of the conspiracy.

One may become a member of a conspiracy without knowing all the details of the unlawful scheme or the

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identities of all the other alleged conspirators. If a defendant understands the unlawful nature of a plan or scheme and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him for conspiracy even though the defendant had not participated before and even though the defendant played only a minor part.

The government need not prove that the alleged conspirators entered into any formal agreement, nor that they directly stated between themselves all the details of the scheme. Similarly, the government need not prove that all of the details of the scheme alleged in the indictment were actually agreed upon or carried out. Nor must it prove that all of the persons alleged to have been members of the conspiracy were such, or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

Mere presence at the scene of an event, even with knowledge that a crime is being committed, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of a conspiracy, does not thereby become a conspirator.

Note

For the elements of the offense, see *United States v. Brooks*, 681 F.3d 678, 698 (5th Cir. 2012) (discussing this instruction); *United States v. Coleman*, 609 F.3d 699, 704 (5th Cir. 2010); *United States v. Peterson*, 244 F.3d 385, 389 (5th Cir. 2001); *United States v. Richards*, 204 F.3d 177, 208 (5th Cir. 2000); and *United States v. Soape*, 169 F.3d 257, 264 (5th Cir. 1999).

The third element should be deleted for alleged conspiracies not requiring proof of overt acts. See Instruction No. 2.89, Controlled Substances—Conspiracy, 21 U.S.C. § 846; see also 8 U.S.C. §§ 1324(a)(1)(A)(5) and 1327; 18 U.S.C. § 1956(h).

Conspiracy to commit a particular substantive offense requires at least the degree of criminal intent necessary to commit the substantive offense itself. *See Peterson*, 244 F.3d at 389; *Soape*, 169 F.3d at 264; *United States v. Bordelon*, 871 F.2d 491 (5th Cir. 1989); *United States v. Massey*, 827 F.2d 995, 1001 (5th Cir. 1987). Because “[t]he two states of mind are almost always one, or tend to collapse into one,” *United States v. Chagra*, 807 F.2d 398, 401 (5th Cir. 1986), the proposed instruction will adequately cover the vast majority of cases. If the substantive offense requires “a special state of mind (such as malice aforethought or premeditation),” further instruction on intent would be necessary. *United States v. Thomas*, 768 F.2d 611, 618 n.5 (5th Cir. 1985); *see United States v. Harrelson*, 754 F.2d 1153, 1171–74 (5th Cir. 1985).

Failure to instruct on the “object” crime of a conspiracy is at least “serious” error, if not plain error. *United States v. Smithers*, 27 F.3d 142, 144–45 (5th Cir. 1994). If the object is charged in another count of the indictment, the instruction can be by reference to that portion of the charge. *See United States v. Armstrong*, 619 F.3d 380, 386 (5th Cir. 2010). Otherwise, the court must charge on the elements of the object crime along with the conspiracy charge.

This instruction has been quoted with approval in *Coleman*, 609 F.3d at 705 n.2, and *United States v. Whitfield*, 590 F.3d 325, 354 (5th Cir. 2009).

For multiple conspiracies or a conspirator’s liability for a substantive count, see Instruction Nos. 2.21 and 2.22. For discussion of potential issues, see Instruction No. 1.18A.

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CONSPIRACY TO DEFRAUD

**18 U.S.C. § 371
(Second Clause)**

Title 18, United States Code, Section 371, makes it a crime for anyone to conspire with someone else to defraud the United States or any agency thereof in any manner or for any purpose.

The defendant is charged with conspiring to defraud the United States by _____ (describe means, e.g., impairing, obstructing, or defeating the lawful function of the Internal Revenue Service in the ascertainment, assessment or collection of income taxes due).

The word “defraud” here is not limited to its ordinary meaning of cheating the government out of money or property; it also includes impairing, obstructing, defeating, or interfering with the lawful function of the government or one of its agencies by dishonest means.

A “conspiracy” is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of “partnership in crime,” in which each member becomes the agent of every other member.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant and at least one other person made an agreement to defraud the government or one of its agencies, as charged in the indictment;

Second: That the defendant knew that the purpose of the agreement was to defraud the government and joined in it willfully, that is, with the intent to defraud; and

Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the indictment, in order to accomplish some object or purpose of the conspiracy.

One may become a member of a conspiracy without knowing all the details of the unlawful scheme or the identities of all the other alleged conspirators. If a defendant understands the unlawful nature of a plan or scheme on one occasion, that is sufficient to convict him for conspiracy even though the defendant had not participated before and even though the defendant played only a minor part.

The government need not prove that the alleged conspirators entered into any formal agreement, nor that they directly stated between themselves all the details of the scheme. Similarly, the government need not prove that all of the details of the scheme alleged in the indictment were actually agreed upon or carried out. Nor must it prove that all the persons alleged to have been members of the conspiracy were such, or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

Mere presence at the scene of an event, even with knowledge that a crime is being committed, or the mere fact that certain persons may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way that advances some purpose of a conspiracy, does not thereby become a conspirator.

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Note

For the scope of the conspiracy to defraud the government clause, see *Dennis v. United States*, 86 S.Ct. 1840, 1844 (1966); *United States v. Johnson*, 86 S.Ct. 749, 751 (1966); *Hammer-schmidt v. United States*, 44 S.Ct. 511 (1924); *Haas v. Henkel*, 30 S.Ct. 249, 254 (1910); *United States v. Martin*, 332 F.3d 827, 834–35 (5th Cir. 2003); and *United States v. Montalvo*, 820 F.2d 686, 689 (5th Cir 1987).

The definition of “defraud” is derived from *United States v. Clark*, 139 F.3d 485, 488–89 (5th Cir. 1998).

For discussion of potential issues, see Instruction No. 1.18A.

2.21

MULTIPLE CONSPIRACIES

You must determine whether the conspiracy charged in the indictment existed, and, if it did, whether the defendant was a member of it. If you find that the conspiracy charged did not exist, then you must return a not guilty verdict, even though you find that some other conspiracy existed. If you find that a defendant was not a member of the conspiracy charged in the indictment, then you must find that defendant not guilty, even though that defendant may have been a member of some other conspiracy.

Note

A multiple conspiracies instruction is generally required where the indictment charges several defendants with one overall conspiracy, but the proof at trial indicates that some of the defendants were only involved in separate conspiracies unrelated to the overall conspiracy charged in the indictment. See *United States v. Carbajal*, 290 F.3d 277, 291 (5th Cir. 2002); *United States v. Neal*, 27 F.3d 1035, 1052 (5th Cir. 1994); *United States v. Castaneda-Cantu*, 20 F.3d 1325, 1333 (5th Cir. 1994). When evidence arguably raises a question of multiple conspiracies, a defendant, upon request, is entitled to an instruction on that theory. See *United States v. Cavin*, 39 F.3d 1299, 1310 (5th Cir. 1994); *United States v. Stowell*, 947 F.2d 1251, 1258 (5th Cir. 1991); see also *United States v. Cyprian*, 197 F.3d 736, 741 (5th Cir. 1999) (stating that because the defendant made no request, the absence of a multiple conspiracies jury instruction is not “plain error”); *Castaneda-Cantu*, 20 F.3d at 1334 (reviewing under an abuse of discretion standard when defendant timely makes the request, but it is denied).

For a discussion of the primary factors in determining whether a single conspiracy or multiple conspiracies has been proven, see *United States v. Mitchell*, 484 F.3d 762, 770–71 (5th Cir. 2007); *United States v. Gallardo-Trapero*, 185 F.3d 307, 315–17 (5th Cir. 1999); *United States v. Morgan*, 117 F.3d 849, 858–59 (5th Cir. 1997); *United States v. Fields*, 72 F.3d 1200, 1210–11 (5th Cir. 1996); and *United States v. Morris*, 46 F.3d 410, 415–17 (5th Cir. 1995).

This instruction was cited with approval in *United States v.*

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Castillo, 77 F.3d 1480, 1491–92 (5th Cir. 1996), and *United States v. Thomas*, 12 F.3d 1350, 1357 n.4 (5th Cir. 1994). A similar but longer jury instruction on multiple conspiracies was quoted with approval in *Gallardo-Trapero*, 185 F.3d at 316 n.2; *United States v. Pena-Rodriguez*, 110 F.3d 1120, 1128–29, 1129 n.9 (5th Cir. 1997); and *United States v. Puig-Infante*, 19 F.3d 929, 936–37 (5th Cir. 1994).

In view of the trial court’s multiple conspiracies charge, it was not error to refuse a requested instruction that the jury must unanimously agree that the defendant participated in one particular conspiracy out of several. *See United States v. Royal*, 972 F.2d 643, 648 (5th Cir. 1992).

2.22

**CONSPIRATOR'S LIABILITY FOR
SUBSTANTIVE COUNT**

A conspirator is responsible for offenses committed by another [other] conspirator[s] if the conspirator was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of, or as a foreseeable consequence of, the conspiracy.

Therefore, if you have first found the defendant guilty of the conspiracy charged in Count — and if you find beyond a reasonable doubt that during the time the defendant was a member of that conspiracy, another [other] conspirator[s] committed the offense[s] in Count[s] — in furtherance of and as a foreseeable consequence of that conspiracy, then you may find the defendant guilty of Count[s] —, even though the defendant may not have participated in any of the acts which constitute the offense[s] described in Count[s] —.

Note

This instruction charges the jury on the *Pinkerton* principle. *Pinkerton v. United States*, 66 S.Ct. 1180, 1184 (1946). This instruction was cited with approval in *United States v. Thomas*, 348 F.3d 78, 84–85 (5th Cir. 2003).

Proof of a conspiracy will not support a conviction on substantive counts in the absence of a *Pinkerton* instruction informing the jury that the defendant could be deemed guilty of substantive counts committed by a co-conspirator in furtherance of a conspiracy in which the defendant participated. *See United States v. Polk*, 56 F.3d 613, 619 (5th Cir. 1995).

This disjunctive instruction was approved against a challenge that the government should have to prove *both* that the offense was committed “in furtherance of” the conspiracy *and* that it was “a foreseeable consequence of” the conspiracy. *See United States v. Armstrong*, 619 F.3d 380, 387 (5th Cir. 2010) (holding that instruction was proper, but noting that the First Circuit requires that both be proven); *United States v. Dean*, 59 F.3d 1479, 1490 n.18

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(5th Cir. 1995) (“[A]t a minimum, a proper *Pinkerton* instruction should at least state clearly that the defendant can be convicted of a substantive crime committed by his co-conspirator in furtherance of the conspiracy.”). The Committee warns the trial judge that there is a circuit split on this issue.

A defendant is not liable under the *Pinkerton* theory for an additional conspiracy offense committed by his confederates, but only for a substantive offense. *See Armstrong*, 619 F.3d at 387 (finding no plain error because the prosecutor made it plain in closing argument that *Pinkerton* liability applies only to substantive crimes).

2.23

CONSPIRACY—WITHDRAWAL

The defendant has raised the affirmative defense of withdrawal from the conspiracy.

A member of a conspiracy remains in the conspiracy unless he can show that at some point he completely withdrew from the conspiracy. A partial or temporary withdrawal is not sufficient. The defense of withdrawal requires the defendant to make a substantial showing that he took some affirmative step to terminate or abandon his participation in the conspiracy. In other words, the defendant must demonstrate some type of affirmative action that disavowed or defeated the purpose of the conspiracy. This would include, for example, voluntarily going to the police or other law enforcement officials and telling them about the plan; telling the other conspirators that he did not want to have anything more to do with it; or any other affirmative acts that were inconsistent with the object of the conspiracy and communicated in a way reasonably likely to reach the other members. Merely doing nothing or just avoiding contact with other members is not enough.

The defendant has the burden of proving withdrawal from the conspiracy by a preponderance of evidence. To prove something by a preponderance of the evidence means to prove that it is more likely so than not so. This is a lesser burden of proof than to prove something beyond a reasonable doubt. “Preponderance of the evidence” is determined by considering all the evidence and deciding what evidence is more convincing. You should consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced them. If the evidence appears to be equally balanced, or if you cannot

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say upon which side it weighs heavier, you must resolve this question against the defendant.

The fact that the defendant has raised this defense, however, does not relieve the government of its initial burden of proving beyond a reasonable doubt that there was an unlawful agreement and that the defendant knowingly and voluntarily joined it.

Note

Withdrawal is typically raised in the following situations: (1) as a defense to *Pinkerton* liability, when the defendant claims he withdrew from the conspiracy prior to the commission of substantive offenses by other conspirators; (2) as a defense based on the statute of limitations, when the defendant claims that his involvement in the conspiracy ended beyond the limitations period; or (3) as a defense to the conspiracy charge itself, when the defendant claims withdrawal prior to the commission of any overt act and the charged conspiracy requires an overt act. The third situation would not apply to conspiracies charged under 21 U.S.C. §§ 846 and 963, which do not require proof of an overt act. See *United States v. Shabani*, 115 S.Ct. 382, 383 (1994). The judge might wish to add language to the opening paragraph explaining which situation applies in the case.

The components of withdrawal are stated in the following cases: *United States v. Schorovsky*, 202 F.3d 727, 729 (5th Cir. 2000); *United States v. Mann*, 161 F.3d 840, 859–60 (5th Cir. 1998); *United States v. Torres*, 114 F.3d 520, 525 (5th Cir. 1997).

A defendant's incarceration, by itself, does not constitute withdrawal or abandonment. See *United States v. Puig-Infante*, 19 F.3d 929, 945 (5th Cir. 1994) (noting that the defendant is presumed to continue as conspirator unless he makes a "substantial affirmative showing of withdrawal"); see also *United States v. Davis*, 226 F.3d 346, 353 (5th Cir. 2000). Further, a conspiracy does not automatically terminate when the government, unbeknownst to some of the conspirators, has defeated the object of the conspiracy. See *United States v. Jimenez Recio*, 123 S.Ct. 819, 822–24 (2003).

The defendant has the burden of proof on this affirmative defense. See *Smith v. United States*, No. 11-8976, 2013 WL 85299 (U.S. Jan. 9, 2013); *United States v. Freeman*, 434 F.3d 369, 383 (5th Cir. 2005); *Schorovsky*, 202 F.3d at 729. As with any affirma-

tive defense, the trial court may refuse to give the withdrawal instruction if the defendant fails to submit sufficient evidence to warrant a reasonable juror finding that the defendant withdrew. See *United States v. Pettigrew*, 77 F.3d 1500, 1514 (5th Cir. 1996); *United States v. MMR Corp.*, 907 F.2d 489, 500 (5th Cir. 1990).

2.24

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2.24

COUNTERFEITING

18 U.S.C. § 471

Title 18, United States Code, Section 471, makes it a crime for anyone to falsely make or counterfeit any United States money.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant made counterfeit _____ (describe money or other security, e.g., United States money); and

Second: That the defendant did so with intent to defraud, that is, intending to cheat someone by making that person think the _____ was real.

It is not necessary, however, to prove that the defendant intended to cheat a particular person, or that the United States or anyone else was in fact cheated so long as it is established that the accused acted with intent to cheat someone.

Note

If there is an issue as to whether the money involved is so unlike the genuine that it may not be considered “counterfeit,” the court should consider defining “counterfeit.” Although the Fifth Circuit has not expressly defined “counterfeit” for purposes of 18 U.S.C. § 471, it has, with respect to 18 U.S.C. § 473 (dealing in counterfeit obligations or securities), defined the term as follows:

A document is considered a counterfeit obligation or security of the United States if the fraudulent obligation bears such a likeness or resemblance to any of the genuine obligations or securities issued under the authority of the United States as is calculated to deceive an honest,

sensible, and unsuspecting person of ordinary observation and care dealing with a person who is supposed to be upright and honest.

United States v. Scott, 159 F.3d 916, 920–21 (5th Cir. 1998) (citing *United States v. Turner*, 586 F.2d 395, 397 (5th Cir. 1978)). *Turner* involved an offense under 18 U.S.C. § 474 (plates or stones for counterfeiting obligations or securities). *Turner* cited *United States v. Smith*, 318 F.2d 94, 95 (4th Cir. 1963), among other cases, for the definition of “counterfeit.” *Smith* involved an offense under 18 U.S.C. § 472. The trial judge may wish to instruct on the definition of “counterfeit” in the appropriate case.

In *United States v. Porter*, 542 F.3d 1088 (5th Cir. 2008), the Fifth Circuit recognized its failure to define “counterfeit” for purposes of § 471, and upheld the trial court’s use of a Ninth Circuit pattern jury instruction. *Id.* at 1094.

2.25

**PASSING COUNTERFEIT SECURITIES OR
OBLIGATIONS****18 U.S.C. § 472**

Title 18, United States Code, Section 472, makes it a crime for anyone to possess [pass] [utter] [publish] [sell] [attempt to pass] [attempt to utter] [attempt to publish] [attempt to sell] counterfeit United States money with intent to defraud.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant possessed [passed] [uttered] [published] [sold] [attempted to pass] [attempted to utter] [attempted to publish] [attempted to sell] counterfeit money;

Second: That the defendant knew at the time that the money was counterfeit; and

Third: That the defendant possessed [passed] [uttered] [published] [sold] [attempted to pass] [attempted to utter] [attempted to publish] [attempted to sell] the counterfeit money with intent to defraud, that is, intending to cheat someone by making that person think the money was real.

It is not necessary, however, to prove that the defendant intended to cheat a particular person, or that the United States or anyone else was in fact cheated so long as it is proved beyond a reasonable doubt that the defendant acted with intent to cheat someone.

Note

United States v. Acosta, 972 F.2d 86 (5th Cir. 1992), describes

the elements. If there is an issue as to whether the money involved is so unlike the genuine that it may not be “counterfeit,” the court should consider defining “counterfeit.” Although the Fifth Circuit has not expressly defined “counterfeit” for purposes of 18 U.S.C. § 472, it has, with respect to 18 U.S.C. § 473 (dealing in counterfeit obligations or securities), defined the term as follows:

A document is considered a counterfeit or security of the United States if the fraudulent obligation bears such a likeness or resemblance to any of the genuine obligations or securities issued under the authority of the United States as is calculated to deceive an honest, sensible, and unsuspecting person of ordinary observation and care dealing with a person who is supposed to be upright and honest.

United States v. Scott, 159 F.3d 916, 920–21 (5th Cir. 1998) (citing *United States v. Turner*, 586 F.2d 395, 397 (5th Cir. 1978)). *Turner* involved an offense under 18 U.S.C. § 474 (plates or stones for counterfeiting obligations or securities). *Turner* cited *United States v. Smith*, 318 F.2d 94, 95 (4th Cir. 1963), among other cases, for the definition of “counterfeit.” *Smith* involved an offense under 18 U.S.C. § 472, the statute covered by this instruction. The trial judge may wish to instruct on the definition of “counterfeit” in the appropriate case.

In *United States v. Porter*, 542 F.3d 1088 (5th Cir. 2008), the Fifth Circuit recognized its failure to define “counterfeit” for purposes of § 472, and upheld the trial court’s use of a Ninth Circuit pattern jury instruction. *Id.* at 1094.

2.26

FORGERY AGAINST THE UNITED STATES**18 U.S.C. § 495
(First Paragraph)**

Title 18, United States Code, Section 495, makes it a crime for anyone falsely to make, alter, forge, or counterfeit a written instrument for the purpose of obtaining money from the United States.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant _____ (describe conduct, e.g., forged a power of attorney); and

Second: That the defendant did so for the purpose of obtaining or receiving money from the United States when the defendant knew he had no right to have it.

[*Second:* That the defendant did so for the purpose of directly or indirectly enabling another to receive money from the United States when the defendant knew the other person had no right to receive it.]

The evidence does not have to show that anyone actually received any money as a result of the _____ (e.g., forgery).

Note

The statute can be used to prosecute forgery of a Treasury check as a felony even if the case would be a misdemeanor under 18 U.S.C. § 510. *See United States v. Cavada*, 821 F.2d 1046 (5th Cir. 1987).

If the defendant claims to have authority to sign for another, the government must prove that the defendant lacked such authority. *See United States v. Forbes*, 816 F.2d 1006, 1012 n.9

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2.26

(5th Cir. 1987).

2.27

**UTTERING A FORGED WRITING TO DEFRAUD
THE UNITED STATES****18 U.S.C. § 495
(Second Paragraph)**

Title 18, United States Code, Section 495, makes it a crime for anyone to utter or pass as true any false, forged, or altered written instrument, with intent to defraud the United States.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant _____ (e.g., cashed a forged United States Treasury check) and in doing so stated or implied, directly or indirectly, that the _____ (e.g., check) was genuine;

Second: That the defendant knew at the time that _____ (e.g., the check) was forged; and

Third: That the defendant _____ (e.g., cashed the forged United States Treasury check) with intent to defraud, that is, intending to cheat the United States government. The evidence does not have to show that anyone actually received any money as a result of _____ (e.g., the cashing of the forged United States Treasury check).

Note

See *United States v. Hall*, 845 F.2d 1281, 1284–85 (5th Cir. 1988), and *United States v. Smith*, 631 F.2d 391, 396 (5th Cir. 1980), for the elements of the offense.

2.28

**FORGING ENDORSEMENT ON A TREASURY
CHECK, BOND, OR SECURITY OF THE UNITED
STATES****18 U.S.C. § 510(a)(1)**

Title 18, United States Code, Section 510(a)(1), makes it a crime for anyone with intent to defraud to falsely make or forge any endorsement or signature on a Treasury check, bond, or security of the United States.

For you to find the defendant guilty of this crime, you must be convinced that the government has proven each of the following beyond a reasonable doubt:

First: That the defendant _____ (describe conduct, e.g., forged the signature of another on the Treasury check[s]);

Second: That the defendant did so with intent to defraud, that is, intending to cheat or deceive someone.

The evidence does not have to show that anyone actually received any thing of value as a result of the forged signature; and

Third: That the face value of the check [aggregate face value of the checks if more than one] was more than \$1,000.00.

The “payee” of a check [bond] [security] is the person to whom the check [bond] [security] is payable.

To “forge” means to write a payee’s endorsement or signature on a Treasury check [bond] [security] without the payee’s permission or authority.

Note

If a disputed issue under subsection (c) of the statute is

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whether the face value of the check(s) exceeds a sum of \$1,000, the court should consider giving a lesser included offense instruction.

See *United States v. Taylor*, 869 F.2d 812 (5th Cir. 1989), on aggregation of face value.

See *Bobb v. Attorney General of the United States*, 458 F.3d 213 (3d Cir. 2006), for the distinction between the mens rea required for § 510(a)(1) and that required for § 510(b)—the former requires one act with “intent to defraud” while the latter requires only knowledge that the instrument has been stolen or forged.

2.29

**UTTERING A FORGED TREASURY CHECK,
BOND, OR SECURITY OF THE UNITED STATES****18 U.S.C. § 510(a)(2)**

Title 18, United States Code, Section 510(a)(2), makes it a crime for anyone with intent to defraud to pass, utter, or publish any Treasury check, bond, or security of the United States bearing a falsely made or forged endorsement or signature.

For you to find the defendant guilty of this crime, you must be convinced that the government has proven each of the following beyond a reasonable doubt:

First: That the defendant _____ (e.g., cashed a forged United States Treasury check);

Second: That the defendant knew at the time that the check was forged. A forged endorsement or signature is one placed on a check by someone other than the payee without the payee's permission or authority;

Third: That the defendant _____ (e.g., cashed a forged United States Treasury check) with intent to defraud, that is, intending to cheat or deceive someone. The evidence does not have to show that anyone actually received any thing of value as a result of _____ (e.g., the cashing of the forged United States Treasury check); and

Fourth: That the face value of the check was more than \$1,000.

The "payee" of a check [bond] [security] is the person to whom the check [bond] [security] is payable.

To "utter" means putting a check [bond] [security]

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in circulation by means of an assertion or misrepresentation that the instrument is genuine.

“Forgery” means a signature or endorsement made without the true payee’s permission or authority.

Note

See Note to Instruction No. 2.28, 18 U.S.C. § 510(a)(1), Forging Endorsement on a Treasury Check.

See *Bobb v. Attorney General of the United States*, 458 F.3d 213 (3d Cir. 2006), for the distinction between the mens rea required for § 510(a) and that required for § 510(b)—the former requires one act with “intent to defraud” while the latter requires only knowledge that the instrument has been stolen or forged.

2.30

SMUGGLING

18 U.S.C. § 545
(First Paragraph)

Title 18, United States Code, Section 545, makes it a crime for anyone to knowingly and willfully smuggle [introduce clandestinely] [attempt to smuggle] [attempt to introduce clandestinely] merchandise into the United States, with an intent to defraud the United States, in violation of the customs laws and regulations of the United States.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant brought [attempted to bring] _____ (describe merchandise) into the United States;

Second: That the defendant knew that the _____ (describe merchandise) should have been declared to United States customs authorities as required by law; and

Third: That, intending to defraud the United States by avoiding the United States customs laws, the defendant did not report the _____ (describe merchandise) to the customs authorities. [It is not necessary, however, to prove that any tax or duty was owed on the merchandise].

To act with “intent to defraud” means to act with intent to deceive or cheat the United States.

“Merchandise” means goods, wares, and chattels of every description, and includes merchandise the

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importation of which is prohibited [monetary instruments].

Note

The fourth paragraph of § 545 establishes a presumption of guilt from the unexplained possession of undeclared imported goods. The presumption has not been included here. This presumption has been held unconstitutional. *See United States v. Kenaan*, 496 F.2d 181, 184 (1st Cir. 1974). The Fifth Circuit held it was not plain error to instruct on the presumption in 18 U.S.C. § 545 where there was sufficient evidence to convict the defendant, independently of the presumption. *See United States v. Bentley*, 875 F.2d 1114, 1119 (5th Cir. 1989). Relying upon Supreme Court jurisprudence critical of these types of presumptions, the Committee recommends that it not be charged. *See Carella v. California*, 109 S.Ct. 2419 (1989); *Turner v. United States*, 90 S.Ct. 642 (1970); *Leary v. United States*, 89 S.Ct. 1532 (1969).

The definition of “merchandise” found in 19 U.S.C. § 1401(c) is included in the instructions. *See United States v. Garcia-Paz*, 282 F.3d 1212 (9th Cir. 2002). The term “monetary instruments” is defined in 31 U.S.C. § 5312(a)(3).

With respect to whether it must be shown that a tax or duty was owed on the merchandise, a majority of circuits have expressly held that 18 U.S.C. § 545 does not require as an element of the crime that the defendant specifically intended to deprive the government of revenue. *See United States v. Ahmad*, 213 F.3d 805 (4th Cir. 2000); *United States v. Robinson*, 147 F.3d 851 (9th Cir. 1998); *United States v. Borello*, 766 F.2d 46 (2d Cir. 1985); *United States v. Kurfess*, 426 F.2d 1017 (7th Cir. 1970). The Third Circuit, in *United States v. Menon*, 24 F.3d 550 (3d Cir. 1994), disagreed and concluded that an intent to deprive the government of revenue is an essential element and the failure to charge the jury in this manner is plain error. The Fifth Circuit has not met the issue directly. In *United States v. One 1976 Mercedes*, 450 SLC, 667 F.2d 1171, 1175 (5th Cir. 1982), however, the Fifth Circuit spoke of § 545 as prohibiting the smuggling of goods “that ought to have been declared or invoiced.”

2.31

ILLEGAL IMPORTATION OF MERCHANDISE

18 U.S.C. § 545
(Second Paragraph)

Title 18, United States Code, Section 545, makes it a crime for anyone knowingly [fraudulently] to import [bring] merchandise into the United States contrary to law.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly [fraudulently] imported _____ (describe merchandise) into the United States;

Second: That the defendant's importation was contrary to _____ (describe law[s] in detail); and

Third: That the defendant knew the importation of _____ (describe merchandise) was contrary to law.

"Merchandise" means goods, wares, and chattels of every description, and includes merchandise the importation of which is prohibited.

Note

See Babb v. United States, 252 F.2d 702, 707 (5th Cir. 1958) (holding that failure to follow cattle reporting requirement in 19 U.S.C. § 1484(a) subjected defendant to liability under 18 U.S.C. § 545 even where underlying cattle regulation itself contained no penalty for its violation); *United States v. Mitchell*, 39 F.3d 465 (4th Cir. 1994).

The term "law" includes not only statutes, but substantive agency regulations having the force and effect of law. *See Mitchell*, 39 F.3d at 476 (holding that importation of animal hides and horns

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contrary to reporting regulations of the Fish and Wildlife Service and Department of Agriculture subjected defendant to criminal liability under 18 U.S.C. § 545). In instructing the jury on the “contrary to law” element, the court should specify which law or laws the defendant’s act of importation is alleged to have violated. *See, e.g., Babb v. United States*, 218 F.2d 538, 540 (5th Cir. 1955).

The definition of “merchandise” found in 19 U.S.C. § 1401(c) is included in the instructions. *See United States v. Garcia-Paz*, 282 F.3d 1212 (9th Cir. 2002).

With respect to the knowledge element, it is not necessary for the defendant to have known the specific statute violated. It is enough if he acts knowing that his conduct is illegal in some respect. *See Babb*, 252 F.2d at 708.

Congress has written the second paragraph of § 545 in the disjunctive. Accordingly, the instruction should be modified to conform to the allegations in the indictment.

With respect to the fourth paragraph of § 545, regarding the presumption of guilt from the unexplained possession of undeclared imported goods, see Note to Instruction No. 2.30, 18 U.S.C. § 545, Smuggling.

If the indictment alleges either use of fraudulent documents or transportation, concealment, or sale of goods after their illegal importation into the United States, the jury should be charged accordingly.

2.32

EXPORTATION OF STOLEN VEHICLES**18 U.S.C. § 553(a)(1)
(First Paragraph)**

Title 18, United States Code, Section 553(a)(1), makes it a crime for anyone knowingly to export [import] [attempt to import] [attempt to export] any motorized vehicle knowing that the vehicle had been stolen.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly exported [imported] [attempted to import] [attempted to export] a motor vehicle [off-highway mobile equipment] [vessel] [aircraft] [a part of any motor vehicle] [a part of an off-highway mobile equipment] [a part of a vessel] [a part of an aircraft] as described in the indictment; and

Second: That the defendant knew the motor vehicle [off-highway mobile equipment] [vessel] [aircraft] [a part of any motor vehicle] [a part of an off-highway mobile equipment] [a part of a vessel] [a part of an aircraft] had been stolen.

To “export” [“import”] means to send or carry from one country to another.

To have been “stolen” means a person wrongfully took property belonging to another with the intent to deprive the owner of its use and benefit either temporarily or permanently.

Note

“Motor vehicle” means a vehicle driven or drawn by mechani-

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cal power and manufactured primarily for use on public streets, roads, and highways, but does not include a vehicle operated only on a rail line. 49 U.S.C. § 32101(7).

“Off-highway mobile equipment” means any self-propelled agricultural equipment, self-propelled construction equipment, or self-propelled special use equipment, used or designed for running on land but not on rail or highway. 18 U.S.C. § 553(c)(2).

“Vessel” includes every description of water craft or other contrivance used, or capable of being used, as a means of transportation in water, but does not include aircraft. 19 U.S.C. § 1401(a).

“Aircraft” means any contrivance invented, used, or designed to navigate, or fly in, the air. 49 U.S.C. § 40102(a)(6).

2.33

**THEFT OF GOVERNMENT MONEY OR
PROPERTY****18 U.S.C. § 641
(First Paragraph)**

Title 18, United States Code, Section 641, makes it a crime for anyone to embezzle [steal] [knowingly convert] any money, property, or thing of value belonging to the United States having an aggregate value of more than \$1,000.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the money [property] [thing of value] described in the indictment belonged to the United States government and had a value in excess of \$1,000 at the time alleged;

Second: That the defendant embezzled [stole] [knowingly converted] such money [property] [thing of value] to the defendant's own use [to the use of another]; and

Third: That the defendant did so knowing the money [property] [thing of value] was not his, and with intent to deprive the owner of the use [benefit] of the money [property] [thing of value].

The word "value" means the face, par, or market value, or cost price, either wholesale or retail, whichever is greater, of all such things of value that you find the defendant has embezzled [stolen] [knowingly converted].

It is not necessary to prove that the defendant

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knew that the United States government owned the property at the time of the wrongful taking.

To “embezzle” means to wrongfully, intentionally take money, property, or thing of value of another after the money, property, or thing of value has lawfully come within the possession or control of the person taking it.

[To “steal” or “knowingly convert” means to wrongfully take money, property, or thing of value belonging to another with intent to deprive the owner of its use or benefit either temporarily or permanently. Any appreciable change of the location of the property with the intent to deprive constitutes a stealing whether or not there is an actual removal of it from the owner’s premises.]

No particular type of movement or carrying away is required to constitute a taking.

Note

Amendments to 18 U.S.C. § 641 in 2004, pursuant to the Identity Theft Protection Penalty Enhancement Act, Pub. L. 108-2754, 118 Stat. 833, make clear that a defendant’s acts of theft should be considered in the aggregate. That is, the amounts for all the counts for which the defendant is convicted in a single case should be combined. The addition of the term “thing of value” in describing government property is consistent with a broader desire to prohibit the theft of intangible property and conforms to the original and amended statutory language. This statute has long been interpreted as having a broader meaning than larceny at common law. *See Crabb v. Zurst*, 99 F.2d 562 (5th Cir. 1938) (modern theft statutes should be construed more broadly than the common law crime of larceny in order to cover situations not envisioned at common law).

See United States v. Aguilar, 967 F.2d 111 (5th Cir. 1992) (quoting portions of the instruction and holding that a “hot” check can constitute a violation of the statute as long as the prosecution proves that the defendant intended not to honor the check when he wrote it), quoting portions of the instruction. This instruction was also approved in *United States v. Pruett*, 681 F.3d 232, 247

(5th Cir. 2012), and *United States v. Dowl*, 619 F.3d 494, 501 (5th Cir. 2010) (holding that intent to repay is not a defense because to “steal” means the wrongful taking of property with the intent to deprive the owner temporarily or permanently). *But see United States v. Jones*, 664 F.3d 966, 976 (5th Cir. 2011) (stating without discussion that the government must prove in a § 641 prosecution that the defendant converted Medicare funds with the intent to permanently deprive the United States).

For a discussion of whether federal funds given to state programs retain their federal character, see *United States v. Long*, 996 F.2d 731 (5th Cir. 1993) (holding that funds a university received from state agency retained their federal character, as the federal government exercised control over the ultimate disposition of funds).

See *United States v. Sanders*, 793 F.2d 107 (5th Cir. 1986) (clothing that employee of Army and Air Force Exchange Service sought to remove from exchange premises without paying for it constituted a “thing of value of the United States within the meaning of the statute”); *United States v. Barnes*, 761 F.2d 1026 (5th Cir. 1985) (government does not have to prove that it suffered actual property loss in a § 641 prosecution, declining to follow dictum in *United States v. Evans*, 572 F.2d 455 (5th Cir. 1978)).

If a disputed issue is whether the property stolen had a value of more than \$1,000, the court should consider giving a lesser included offense instruction. See *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000).

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**THEFT OR EMBEZZLEMENT BY BANK
OFFICER OR EMPLOYEE****18 U.S.C. § 656**

Title 18, United States Code, Section 656, makes it a crime for an employee of a federally insured bank to embezzle [misapply] the money, funds, or credits of the bank.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant was an officer [director] [agent] [employee] of [someone connected in any capacity with] the bank described in the indictment;

Second: That the bank was a national bank [federally insured bank] at the time alleged;

Third: That the defendant knowingly embezzled [willfully misapplied] funds [credits] belonging to [entrusted to the care of] the bank;

Fourth: That the defendant acted with intent to injure or defraud the bank; and

Fifth: That the amount of money taken was more than \$1,000.

“National bank” means a bank organized under the national banking law. “Federally insured bank” means any bank, state or national, the deposits of which are insured by the Federal Deposit Insurance Corporation.

To “embezzle” means to wrongfully, intentionally take money or property of another after the money or property has lawfully come within the possession or

control of the person taking it. No particular type of moving or carrying away is required.

[To “willfully misapply” a bank’s money or property means to intentionally convert such money or property for one’s own use and benefit, or for the use and benefit of another, knowing that one had no right to do so.]

To act with “intent to defraud” means to act with intent to deceive or cheat someone.

Note

This instruction deals with the two most common § 656 cases: embezzlement by a bank employee and misapplication by someone connected with the bank.

The Fifth Circuit has held repeatedly that “intent to injure or defraud” is a necessary element of the offense. *See United States v. McCord*, 33 F.3d 1434, 1448 (5th Cir. 1994); *United States v. Saks*, 964 F.2d 1514, 1519 (5th Cir. 1992); *United States v. Shaid*, 937 F.2d 228 (5th Cir. 1991). In *United States v. Adamson*, 700 F.2d 953 (5th Cir. 1983), the en banc Fifth Circuit rejected as improper a § 656 jury instruction that equated a “reckless disregard of the interest of the bank” with an intent to injure or defraud the bank. The Fifth Circuit viewed this as an improper lowering of the standard of intent/knowledge required for conviction. *Id.* Other circuits disagree. *See, e.g., Willis v. United States*, 87 F.3d 1004 (8th Cir. 1996); *United States v. Crabtree*, 979 F.2d 1261 (7th Cir. 1992); *United States v. Hoffman*, 918 F.2d 44 (6th Cir. 1990). In *United States v. Kington*, 875 F.2d 1091, 1097 (5th Cir. 1989), the Fifth Circuit stated it was “undesirable” for a judge to instruct the jury that intent to injure/defraud exists “if the defendant acts knowingly and if the natural consequences of his conduct [are] or may be to injure the bank.” The court cited *United States v. Adamson*, 700 F.2d 953 (5th Cir. 1983) (en banc), noting that the jury could make such inferences from the evidence, if taken out of context, which “may appear to mean that the defendant need only know that he is voluntarily engaging in transactions for his own benefit, rather than, as *Adamson* requires, that the defendant knew he was participating in a deceptive or fraudulent transaction.” *Id.*

In *United States v. Meeks*, 69 F.3d 742 (5th Cir. 1995), the Fifth Circuit discussed the meaning of “connected in any capacity”

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with a bank and concluded that the government does not need to prove that the defendant occupied a position of trust. See also *United States v. Hogue*, 132 F.3d 1087 (5th Cir. 1998), regarding whether an independent contractor hired to do work at a bank may be “connected” with the bank for purposes of this statute.

If the charge involved is misapplication of funds, as opposed to embezzlement or theft, some causal connection is required between the defendant’s actions as an officer, director, agent or employee of the institution and the misapplication, such as a loan. For example, misapplication requires that the defendant made, or influenced in a significant way, as an officer of the institution, the decision to extend the loan. See *United States v. McCright*, 821 F.2d 226 (5th Cir. 1987) (holding that bank officer’s advocacy for extending a prior loan was not sufficient to show that he had causal connection to a later loan absent the demonstration of a formal link between the two).

If the indictment charges more than one defendant and alleges aiding and abetting, then it is not necessary to prove that each defendant had such a causal connection, as long as one defendant had a causal connection and all defendants willfully participated in the criminal venture and desired that it succeed. See *United States v. Parks*, 68 F.3d 860 (5th Cir. 1995).

The causation standard for §§ 656 and 657 is the same. See *Parks*, 68 F.3d at 863.

If a disputed issue is whether the property stolen has a value of more than \$1,000, the court should consider giving a lesser included offense instruction. See *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000).

2.35

**THEFT FROM LENDING, CREDIT, AND
INSURANCE INSTITUTIONS****18 U.S.C. § 657**

Title 18, United States Code, Section 657, makes it a crime for a person connected with a federally insured lending [credit] [insurance] institution to embezzle [mis-apply] money [funds] [securities] [things of value] belonging to that institution.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant was an officer [agent] [employee] of [someone connected in any capacity with] the specified lending [credit] [insurance] institution;

Second: That the accounts of the lending [credit] [insurance] institution were federally insured at the time alleged;

Third: That the defendant knowingly embezzled [willfully misapplied] funds [monies] [securities] [credits] [other things of value] belonging to [entrusted to the care of] such institution;

Fourth: That the defendant acted with intent to injure or defraud the institution; and

Fifth: That the amount of money taken was more than \$1,000.

To “embezzle” means to wrongfully, intentionally take money or property of another after the money or property has lawfully come within the possession or control of the person taking it. No particular type of moving or carrying away is required.

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[To “willfully misapply” money or property of the lending, credit, or insurance institution means to intentionally convert such money or property to one’s own use and benefit, or to the use and benefit of another, knowing that one had no right to do so.]

To act with “intent to defraud” means to act with intent to deceive or cheat someone.

Note

The elements of the offense are set forth in *United States v. Parks*, 68 F.3d 860, 863 (5th Cir. 1995), and *United States v. Tullos*, 868 F.2d 689, 693 (5th Cir. 1989), including the requirement of an intent to injure or defraud the institution. See Note to Instruction No. 2.34, regarding the intent requirement for 18 U.S.C. § 656.

If the charge involved is misapplication of funds, as opposed to embezzlement or theft, some causal connection is required between the defendant’s actions as an officer, agent or employee of the institution and the misapplication, such as a loan. For example, misapplication requires that the defendant made, or influenced in a significant way, as an officer of the institution, the decision to extend the loan. See *Parks*, 68 F.3d at 864; *United States v. Rochester*, 898 F.2d 971 (5th Cir. 1990) (holding that evidence was sufficient to support conviction for misapplication of funds where defendant, an influential businessman, encouraged lending institution to extend the loan in question).

If the indictment charges more than one defendant and alleges aiding and abetting, then it is not necessary to prove that each defendant had such a causal connection, as long as one defendant had a casual connection and all defendants willfully participated in the criminal venture and desired that it succeed. See *Parks*, 68 F.3d at 864.

The causation standard for §§ 656 and 657 is the same. *Id.*

For a discussion of the distinction between before-the-fact authorization, which is a defense to the charge, and after-the-fact ratification, which is not, see *United States v. Mmahat*, 106 F.3d 89, 96–97 (5th Cir. 1997) (holding that instruction stating that after-the-fact authorization was not a defense to misapplication was not plain error), *overruled in part on other grounds by United States v. Estate of Parsons*, 367 F.3d 409 (5th Cir. 2004) (en banc).

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If a disputed issue is whether the property stolen had a value of more than \$1,000, the court should consider giving a lesser included offense instruction. *See Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000).

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THEFT FROM INTERSTATE SHIPMENT**18 U.S.C. § 659
(First Paragraph)**

Title 18, United States Code, Section 659, makes it a crime for anyone to steal [embezzle] [unlawfully take, carry away, or conceal] goods that are being shipped from one state to another state [to a foreign country].

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant stole [embezzled] [unlawfully took, carried away, or concealed] the property described in the indictment from a _____ (describe location, e.g., railroad car, aircraft, motor truck) as alleged in the indictment;

Second: That at the time alleged such property was then moving as [was a part of] an interstate [a foreign] shipment of freight;

Third: That the defendant knew the property was not his and had the intent to deprive the owner of the use and benefit of the property; and

Fourth: That such property then had a value in excess of \$1,000.

The word “value” means the face, par, market value, or cost price, either wholesale or retail, whichever is greater.

[To “embezzle” means to wrongfully, intentionally take money or property of another after the money or property has lawfully come within the possession or control of the person taking it.]

[To “steal” means to wrongfully take money or property belonging to another with intent to deprive the owner of its use or benefit either temporarily or permanently. Any appreciable change of the location of the property with the intent to deprive constitutes a stealing whether or not there is actual removal of it from the owner’s premises.]

An “interstate [foreign] shipment” means goods or property which are moving as a part of interstate [foreign] commerce. The interstate [foreign] character of a shipment begins when the property is first identified and set aside for the shipment and comes into the possession of those who commence its movement in the course of its interstate [foreign] transportation. The interstate [foreign] character of the shipment continues until the shipment arrives at its destination and is there delivered; temporary stops between the point of origin and the final destination should not be construed as removing goods from “interstate [foreign] shipment.”

While the interstate [foreign] character of the shipment must be proved, it is not necessary to show that the defendant knew that the goods constituted a part of such a shipment at the time of the alleged theft, only that the defendant stole [embezzled] them.

Note

The 2006 amendments to 18 U.S.C. § 659, Pub. L. 109-177, § 307(a)(1), include additional facilities from which theft constitutes a violation of the statute. These include intermodal containers, trailers, container freight stations, warehouses, and freight consolidation facilities. The amendments also raise the maximum prison sentence for theft of less than \$1,000 from one year to three.

The eighth paragraph of the statute provides that waybills or other shipping documents “shall be prima facie evidence of the place from which and to which such shipment was made.” A suggested instruction on this issue is:

“Prima facie evidence” means sufficient evidence. In other

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words, waybills, or bills of lading, or other shipping document such as invoices, if proved beyond a reasonable doubt, are sufficient for you to find the interstate or foreign nature of the shipment, but you need not so find.

Definitions of “Interstate Commerce,” “Foreign Commerce,” and “Commerce” are in Instruction Nos. 1.39, 1.40, and 1.41, respectively.

If a disputed issue is whether the property stolen had a value of more than \$1,000, the court should consider giving a lesser included offense instruction. *See Apprendi v. New Jersey*, 120 S.Ct 2348 (2000).

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**BUYING OR RECEIVING GOODS STOLEN
FROM INTERSTATE SHIPMENT****18 U.S.C. § 659
(Second Paragraph)**

Title 18, United States Code, Section 659, makes it a crime for anyone knowingly to buy [receive] stolen goods that have been shipped from one state to another [to a foreign country].

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That someone stole [embezzled] the property described in the indictment from a _____ (describe location, e.g., railroad car, aircraft, motor truck) as alleged in the indictment, while such property was moving as [was a part of] an interstate [a foreign] shipment of freight;

Second: That the defendant thereafter bought [received] [possessed] such property knowing that it had been stolen [embezzled] as charged; and

Third: That such property then had a value in excess of \$1,000.

The word “value” means the face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

An “interstate [foreign] shipment” means goods or property which are moving as [are a part of] interstate [foreign] commerce.

The interstate [foreign] nature of a shipment begins

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when the property is first identified and set aside for the shipment, and comes into the possession of those who start its movement in the course of its interstate [foreign] transportation. The interstate [foreign] nature of the shipment then continues until the shipment arrives at its destination and is there delivered; temporary stops between the point of origin and the final destination should not be construed as removing goods from “an interstate [foreign] shipment.”

While the interstate [foreign] nature of the shipment must be proved, it is not necessary to show that either the person who stole the property or the defendant knew that the goods were a part of such a shipment at the time they were stolen. But it is necessary for the government to prove that the defendant knew the property was stolen property at the time the defendant bought, received, or possessed it.

To “steal” means to wrongfully take money or property belonging to another with intent to deprive the owner of its use and benefit either temporarily or permanently. Any appreciable change of the location of the property with the intent to deprive constitutes a stealing whether or not there is an actual removal of it from the owner’s premises.

[To “embezzle” means to wrongfully, intentionally take money or property of another after the money or property has lawfully come within the possession or control of the person taking it.]

Note

The 2006 amendments to 18 U.S.C. § 659, Pub. L. 109-177, § 307(a)(1), include additional facilities from which theft constitutes a violation of the statute. These include intermodal containers, trailers, container freight stations, warehouses, and freight consolidation facilities. The amendments also raise the maximum prison sentence for theft of less than \$1,000 from one year to three. *United States v. Daniel*, 957 F.2d 162 (5th Cir. 1992), cites the elements of the offense.

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With respect to the eighth paragraph of § 659 regarding “prima facie evidence,” see Note to Instruction No. 2.36, Theft From Interstate Shipment.

Definitions of “Interstate Commerce,” “Foreign Commerce,” and “Commerce” are in Instruction Nos. 1.39, 1.40, and 1.41.

If a disputed issue is whether the property stolen had a value of more than \$1,000, the court should consider giving a lesser included offense instruction. *See Apprendi v. New Jersey*, 120 S.Ct 2348 (2000).

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THEFT CONCERNING PROGRAMS RECEIVING FEDERAL FUNDS

18 U.S.C. § 666(a)(1)(A)

Title 18, United States Code, Section 666(a)(1)(A), makes it a crime for anyone who is an agent of an organization, or of a State, local or Indian tribal government, or any agency thereof, that receives more than \$10,000 in federal assistance in any one year period, to embezzle, steal, obtain by fraud, knowingly convert without authority, or intentionally misapply property that is valued at \$5,000 or more, and is owned by, or is under the care, custody, or control of, such organization, government, or agency.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant was an agent of _____ (name of organization, State, local or Indian tribal government, or any agency thereof);

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

Third: That the defendant embezzled [stole] [obtained by fraud] [knowingly converted to the use of any person other than the rightful owner without authority] [intentionally misapplied] property that was owned by [under the care, custody, or control of]

_____ (name of organization, State, local or Indian tribal government, or any agency thereof); and

Fourth: That the property had a value of \$5,000 or more.

The term “agent” means a person authorized to act on behalf of another person or a government and, in the case of an organization, or government, includes a servant or employee, and a partner, director, officer, manager, and representative.

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

[The term “local” means of or pertaining to a political subdivision within a State.]

[The term “State” includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.]

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

To “embezzle” means to wrongfully, intentionally take money or property of another after the money or property has lawfully come within the possession or

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control of the person taking it. No particular type of moving or carrying away is required.

[To “steal” or “convert” means to wrongfully take money or property belonging to another with intent to deprive the owner of its use and benefit either temporarily or permanently. Any appreciable change of the location of the property with the intent to deprive constitutes a stealing whether or not there is an actual removal of it from the owner’s premises.]

[To “obtain by fraud” means to act knowingly and with intent to deceive or cheat, usually for the purpose of causing financial loss to someone else or bringing about a financial gain to oneself or another.]

[To “intentionally misapply” money or property means to intentionally convert such money or property for one’s own use and benefit, or for the use and benefit of another, knowing that one had no right to do so.]

The word “value” means the face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

It is not necessary to prove that the defendant’s conduct directly affected the funds received by the agency under the Federal program. However, there must be some connection between the criminal conduct and the organization [State government] [local government] [Indian tribal government] [any agency thereof] receiving federal assistance.

In determining whether the defendant is guilty of this offense, do not consider bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

Note

Agent. The statute broadly defines “agent” as “a person au-

thorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative.” 18 U.S.C. § 666(d)(1). However, the Fifth Circuit has held that “the statutory term ‘agent’ should not be given the broadest possible meaning . . . but instead should be construed in the context of § 666 to tie the agency relationship to the authority that a defendant has with respect to control and expenditure of the funds of an entity that receives federal monies.” *United States v. Phillips*, 219 F.3d 404, 415 (5th Cir. 2000). The Fifth Circuit has stated that “for an individual to be an ‘agent’ for the purposes of § 666, he must be ‘authorized to act on behalf of [the agency] with respect to its funds.’” *United States v. Whitfield*, 590 F.3d 325, 344 (5th Cir. 2009) (reversing all convictions for federal program bribery under 18 U.S.C. § 666 but affirming convictions for mail and wire fraud, and remanding for re-sentencing), *aff’d after re-sentencing sub nom. United States v. Teel*, 691 F.3d 578 (5th Cir. 2012).

Fund Tracing and the Nexus Requirement. Direct involvement of federal funds in a transaction is not an essential element of bribery under 18 U.S.C. § 666(b). *See Sabri v. United States*, 124 S.Ct. 1941, 1946 (2004); *Salinas v. United States*, 118 S.Ct. 469, 476 (1997); *United States v. Westmoreland*, 841 F.2d 572, 578 (5th Cir. 1988). The funds need not be purely federal, nor must the conduct in question have a direct effect on federal funds, as long as there is some nexus between the criminal conduct and the agency receiving federal assistance. *See Whitfield*, 590 F.3d at 345; *United States v. Lipscomb*, 299 F.3d 303, 308–16 (5th Cir. 2002); *Phillips*, 219 F.3d at 411, 413–14; *United States v. Moeller*, 987 F.2d 1134, 1137 (5th Cir. 1993); *Westmoreland*, 841 F.2d at 578. There is no reason to distinguish between §§ 666(a)(1) and 666(a)(2) on the issue of whether a nexus between the theft or bribery and the federal funds is required. *See United States v. Harris*, 296 F. App’x 402, 404 (5th Cir. 2008) (citing *United States v. Spano*, 401 F.3d 837, 840 n.2 (7th Cir. 2005)).

Benefits. The term “benefits” is not limited to monies received in the form of payments or disbursements. *See United States v. Hildebrand*, 527 F.3d 466, 476–78 (5th Cir. 2008) (holding that benefits received in the form of discounts fall within the scope of the statute).

Benefits and Federal Assistance. “The plain language of § 666(b) is ambiguous in defining ‘Federal program’ and ‘Federal assistance.’” *United States v. Marmolejo*, 89 F.3d 1185, 1189 (5th

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Cir. 1996), *aff'd sub nom. Salinas*, 118 S.Ct. at 476; *see Hildebrand*, 527 F.3d at 477.

Any receipt of federal funds can, at some level of generality, be characterized as a benefit. The statute does not employ this broad, almost limitless use of the term. Doing so would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance. To determine whether an organization participating in a federal assistance program receives “benefits,” an examination must be undertaken of the program’s structure, operation, and purpose. The inquiry should examine the conditions under which the organization receives the federal payments. The answer could depend, as it does here, on whether the recipient’s own operations are one of the reasons for maintaining the program.

Fischer v. United States, 120 S.Ct. 1780, 1788 (2000) (holding that a health care provider participating in the Medicare program received “benefits” within the meaning of the statute); *see Marmolejo*, 89 F.3d at 1189–90 (holding that a Federal grant to improve local jails qualified as Federal assistance even though the Federal government received something in return for the assistance) (citing *United States v. Rooney*, 986 F.2d 31, 35 (2d Cir. 1993)).

Intangible Property. The Fifth Circuit has expressly held that § 666(a)(1)(B) covers bribery in connection with transactions involving either tangible or intangible property. *See Marmolejo*, 89 F.3d at 1191–94 (holding that accepting bribes in exchange for permitting and arranging for conjugal visits fell within the plain meaning of the statute). Although the Sixth Circuit has held that 18 U.S.C. § 666(a)(1)(A) also covers both tangible and intangible stolen property, *United States v. Sanderson*, 966 F.2d 184, 188–89 (6th Cir. 1992), the Fifth Circuit has not yet determined whether theft of intangible property falls within the scope of § 666(a)(1)(A). To decide whether a transaction involving intangibles has a value of \$5,000 or more, courts should look to traditional valuation methods. *See Marmolejo*, 89 F.3d at 1193–94 (finding that the conjugal visits had a value which exceeded \$5,000 by analyzing how much a person in the market would be willing to pay for such visits).

One-Year Period. The definition in the instruction is derived from 18 U.S.C. § 666(d)(5). In *Marmolejo*, 89 F.3d at 1189–90, the Fifth Circuit held that separate agreements to provide federal funding to a county jail at different times were so interrelated that

they could be construed together to create a single Federal program providing Federal assistance to the county jail during the one-year period in question.

Bona Fide Wages. The last paragraph in the instruction concerning wages is taken from 18 U.S.C. § 666(c). Whether wages are bona fide and earned in the usual course of business is a question of fact for the jury to decide. *See United States v. Williams*, 507 F.3d 905 (5th Cir. 2007) (“Subsection (c) of § 666 does not serve to absolve the Defendant of wrongdoing merely because the funds were used to pay a ‘salary,’ especially where that ‘salary’ is not bona fide.”) (citing *United States v. Shelton*, 816 F. Supp. 1132, 1137 (W.D. Tex. 1993)).

State, Local or Indian Tribal Government. The definitions in the instruction are derived from 18 U.S.C. §§ 666(d)(2) through 666(d)(4). 18 U.S.C. § 666 criminalizes behavior affecting funds owned by or under the care, custody or control of State, local or Indian tribal governments, or an agency, thereof, not the Federal government or any agency thereof. *See* S. Rep. No. 225 at 369–71, reprinted in 1984 U.S.C.C.A.N. 3182, 3510–3511 (18 U.S.C. § 666 was “designed to create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies that are disbursed to private organization or *state and local governments* pursuant to a Federal program”) (emphasis added).

Steal, Embezzle or Fraud. The definitions of “steal” and embezzle” in this instruction are derived from *United States v. Pruett*, 681 F.3d 232, 247 (5th Cir. 2012), and *United States v. Dowl*, 619 F.3d 494, 501 (5th Cir. 2010).

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**BRIBERY CONCERNING PROGRAMS
RECEIVING FEDERAL FUNDS
(SOLICITING A BRIBE)**

18 U.S.C. § 666(a)(1)(B)

Title 18, United States Code, Section 666(a)(1)(B), makes it a crime for anyone who is an agent of an organization, or of a State, local or Indian tribal government, or any agency thereof, that receives more than \$10,000 in federal assistance, in any one year period, to corruptly solicit or demand for the benefit of any person, or to accept or agree to accept anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant was an agent of _____ (name of organization, State, local, or Indian tribal government, or any agency thereof);

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

Third: That the defendant corruptly solicited [demanded for the benefit of any person] [accepted]

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[agreed to accept] anything of value from any person with the intent to be influenced [rewarded] in connection with any business [transaction] [series of transactions] of such _____ (name of organization, State, local or Indian tribal government, or any agency thereof); and

Fourth: That the business [transaction] [series of transactions] involved anything of value of \$5,000 or more.

The term “agent” means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager and representative.

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

[The term “local” means of or pertaining to a political subdivision within a State.]

[The term “State” includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.]

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

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An act is “corruptly” done if it is done intentionally with an unlawful purpose.

The word “value” means the face, par, market value, or cost price, either wholesale or retail, whichever is greater.

It is not necessary to prove that the defendant’s conduct directly affected the Federal funds received by the agency under the Federal program. However, there must be some connection between the criminal conduct and the organization [State government] [local government] [Indian tribal government] [any agency thereof] receiving federal assistance.

In determining whether the defendant is guilty of this offense, do not consider bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

Note

Additional definitions can be found in the Note to Instruction No. 2.37A, Theft Concerning Programs Receiving Federal Funds.

In Connection With. In *United States v. Whitfield*, 590 F.3d 325, 346 (5th Cir. 2009), *aff’d after re-sentencing sub nom. United States v. Teel*, 691 F.3d 578 (5th Cir. 2012), the Fifth Circuit considered whether two former Mississippi state judges had accepted bribes “in connection with any business, transaction, or series of transactions” of the federally funded Mississippi Administrative Office of the Courts (“AOC”). Because the purpose of the AOC was to “assist in the efficient administration of the *nonjudicial* business of the courts of the state,” the court held that the defendants’ decisions as presiding judges in two lawsuits had no connection with any business, transaction, or series of transaction of the AOC. *Id.* (emphasis in original).

Corruptly. The definition of “corruptly” is derived from *United States v. Brunson*, 882 F.2d 151, 154 n.2 (5th Cir. 1989) (“The district court carefully explained the meaning of corruptly as ‘an act done voluntarily and intentionally and with the bad purpose of accomplishing either an unlawful end or result, or a lawful end or

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result by some unlawful method or means. The motive to act corruptly is ordinarily a hope or expectation of either financial gain or other benefit to oneself or some profit or benefit to another.’”).

2.37C

**BRIBERY CONCERNING PROGRAMS
RECEIVING FEDERAL FUNDS
(OFFERING A BRIBE)**

18 U.S.C. § 666(a)(2)

Title 18, United States Code, Section 666(a)(2), makes it a crime for anyone to corruptly give, offer, or agree to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local, or Indian tribal government, or any agency thereof, that receives more than \$10,000 in federal assistance in any one year period, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That _____ (name of agent) was an agent of _____ (name of organization, State, local or Indian tribal government, or any agency thereof);

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

Third: That the defendant corruptly gave [offered] [agreed to give] _____ (anything of value)

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2.37C

to _____ (any person) with the intent to influence [reward] _____ (name of agent) in connection with any business [transaction] [series of transactions] of _____ (name of organization, State, local or Indian tribal government, or any agency thereof]; and

Fourth: That the business [transaction] [series of transactions] involved anything of value of \$5,000 or more.

The term “agent” means a person authorized to act on behalf of another person, or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative.

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

[The term “local” means of or pertaining to a political subdivision within a State.]

[The term “State” includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.]

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

2.37C

PATTERN JURY INSTRUCTIONS

An act is “corruptly” done if it is done intentionally with an unlawful purpose.

The word “value” means the face, par, market value, or cost price, either wholesale or retail, whichever is greater.

It is not necessary to prove that the defendant’s conduct directly affected the Federal funds received by the agency under the Federal program. However, there must be some connection between the criminal conduct and the organization [State government] [local government] [Indian tribal government] [any agency thereof] receiving federal assistance.

In determining whether the defendant is guilty of this offense, do not consider bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

Note

See Notes to Instruction Nos. 2.37A and 2.37B, Theft or Bribery Concerning Programs Receiving Federal Funds.

2.38

ESCAPE

18 U.S.C. § 751(a)

Title 18, United States Code, Section 751(a), makes it a crime for anyone to [attempt to] escape from federal custody.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant was in federal custody;

Second: That the defendant was in federal custody due to a lawful arrest on a felony charge or due to a conviction for any offense;

Third: That the defendant left [attempted to leave] federal custody without permission; and

Fourth: That the defendant knew leaving would result in his absence from custody without permission.

To be “in federal custody” within the meaning of this statute, an individual must be detained by the Attorney General or his authorized representative or confined in an institution or facility by direction of the Attorney General or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate judge, or by lawful arrest by an officer or employee of the United States.

Note

For the elements of this offense and required mens rea, see *United States v. Bailey*, 100 S.Ct. 624 (1980). See also *United States v. Taylor*, 933 F.2d 307, 309–10 (5th Cir. 1991); *United States v. Harper*, 901 F.2d 471 (5th Cir. 1990). This instruction charges a

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felony offense. If a misdemeanor is charged, the second element should be modified accordingly. *See* 18 U.S.C. § 751(a); *see also United States v. Edrington*, 726 F.2d 1029 (5th Cir. 1984) (the underlying basis of the defendant's custody is an essential element of this crime); *United States v. Smith*, 534 F.2d 74 (5th Cir. 1976) (the validity of the conviction for which the defendant has been confined is not an element of this offense).

A frequent issue in cases under § 751(a) is the defense of duress or necessity. However, a threshold requirement must be met: "in order to be entitled to an instruction on duress or necessity as a defense to the crime charged, an escapee must first offer evidence justifying his continued absence from custody as well as his initial departure and [] an indispensable element of such an offer is testimony of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force." *Bailey*, 100 S.Ct. at 635–36; *see also Dixon v. United States*, 126 S.Ct. 2437 (2006); *United States v. Smithers*, 27 F.3d 142, 145 n.18 (5th Cir. 1994); Instruction No. 1.36, Justification, Duress, or Coercion.

2.38A

AIDING ESCAPE

18 U.S.C. § 752(a)

Title 18, United States Code, Section 752(a), makes it a crime for anyone to rescue or attempt to rescue or instigate, aid, or assist the escape or attempt to escape of any person who is in federal custody.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That _____ (name of individual escapee or intended escapee) was in federal custody;

Second: That _____ (name of individual escapee or intended escapee) was in federal custody pursuant to a lawful arrest, warrant, or other process issued under any law of the United States [at an institution or facility where the defendant was confined by direction of the Attorney General [for conviction of an offense] [for extradition] [for exclusion or expulsion proceedings]];

Third: That _____ (name of individual escapee or intended escapee) knew that he did not have permission to leave federal custody;

Fourth: That _____ (name of individual escapee or intended escapee) left [attempted to leave] federal custody without permission; and

Fifth: That the defendant knew that _____ (name of individual escapee or intended escapee) was leaving [attempting to leave] federal custody without permission and intentionally helped him do so.

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“Custody” means the detention of an individual by virtue of lawful process or authority.

“Escape” means absenting oneself from custody without permission.

Aiding an escape ends once immediate active pursuit of the escapee has ended, or once the escapee has reached temporary safety.

Note

See Note following Instruction No. 2.38, 18 U.S.C. § 751(a), Escape.

The definition of “escape” comes from *United States v. Bailey*, 100 S.Ct. 624, 633 (1980).

The instruction defining when aiding an escape ends may be needed to define the boundary between the offense of instigating or assisting an escape in violation of 18 U.S.C. § 752, and harboring a fugitive in violation of 18 U.S.C. § 1072. In *United States v. Smithers*, 27 F.3d 142, 144–45 (5th Cir. 1994), the Fifth Circuit held that aiding an escape ends once immediate active pursuit of the escapee has ended, or once the escapee has reached temporary safety.

2.39

THREATS AGAINST THE PRESIDENT

18 U.S.C. § 871

Title 18, United States Code, Section 871, makes it a crime for anyone knowingly and willfully to make a threat to injure, kill, or kidnap the President of the United States.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant mailed [wrote] [said] the words alleged to be the threat against the President as charged in the indictment;

Second: That the defendant understood and meant the words mailed [written] [said] as a threat; and

Third: That the defendant mailed [wrote] [said] the words knowingly and willfully, that is, intending them to be taken seriously.

A “threat” is a serious statement expressing an intention to kill, kidnap, or injure the President, which under the circumstances would cause apprehension in a reasonable person, as distinguished from words used as mere political argument, idle talk, exaggeration, or something said in a joking manner.

It is not necessary to prove that the defendant actually intended to carry out the threat.

Note

On the meaning of “threat,” see *United States v. Morales*, 272 F.3d 284, 287 (5th Cir. 2001) (“[I]n the context of ‘threatening interstate communications,’ 18 U.S.C. § 875(c), a statement is a

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threat if in its context [it] would have a reasonable tendency to create apprehension that its originator will act according to its tenor.”) (quoting *United States v. Myers*, 104 F.3d 76, 79 (5th Cir. 1997)); *United States v. Bozeman*, 495 F.2d 508, 510 (5th Cir. 1974).

For cases that discuss the elements of this offense, see *United States v. Howell*, 719 F.2d 1258, 1260–61 (5th Cir. 1983) (per curiam); *United States v. Robin*, 693 F.2d 376, 379–80 (5th Cir. 1982); *Rogers v. United States*, 488 F.2d 512, 514 (5th Cir. 1974), *overruled on other grounds by United States v. Rogers*, 95 S.Ct. 2091 (1975).

2.40

**INTERSTATE TRANSMISSION OF
EXTORTIONATE COMMUNICATION****18 U.S.C. § 875(b)**

Title 18, United States Code, Section 875(b), makes it a crime for anyone to send [transmit] an extortionate communication in interstate or foreign commerce.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly sent [transmitted] a communication containing a threat to injure [kidnap] the person of another, as charged;

Second: That the defendant sent [transmitted] that communication with intent to extort money [something of value] from any person [firm] [association] [corporation]; and

Third: That the communication was sent in interstate [foreign] commerce.

A “threat” is a serious statement expressing an intent to injure [kidnap] any person, which under the circumstances would cause apprehension in a reasonable person, as distinguished from mere idle or careless talk, exaggeration, or something said in a joking manner.

To act with intent to “extort” means to act with the intent to obtain money or something of value from someone else, with that person’s consent, but induced by the wrongful use of actual or threatened force, violence, or fear.

The term “thing of value” is used in the everyday,

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ordinary meaning and is not limited to money or tangible things with an identifiable price tag.

It is not necessary to prove that the defendant actually succeeded in obtaining the money or other thing of value, or that the defendant actually intended to carry out the threat made.

Note

See *United States v. Fagan*, 821 F.2d 1002, 1015 n.9 (5th Cir. 1987) (discussing breadth of “thing of value”).

See *United States v. Skelton*, 514 F.3d 433, 445–46 (5th Cir. 2008) (discussing this instruction); *United States v. Daughenbaugh*, 49 F.3d 171, 173 n.2 (5th Cir. 1995) (approving this instruction on the definition of threat with respect to 18 U.S.C. § 876); *United States v. Turner*, 960 F.2d 461, 464 & n.3 (5th Cir. 1992) (same).

A lesser offense may be charged pursuant to 18 U.S.C. § 875(c) if the defendant did not intend to extort money or a thing of value with the threatening communication. See *United States v. Morales*, 272 F.3d 284, 287 (5th Cir. 2001) (uses a definition of “threat” for purposes of § 875(c) similar to the one defined in *Daughenbaugh*).

See Notes to Instruction Nos. 2.39 and 2.41 on 18 U.S.C. § 871, Threats Against the President, and 18 U.S.C. § 876, Mailing Threatening Communications, respectively.

See Note to Instruction No. 2.58 on 18 U.S.C. § 1201(a) for the definition of “kidnap.”

Definitions of “Interstate Commerce,” “Foreign Commerce,” and “Commerce” are in Instruction Nos. 1.39, 1.40, and 1.41.

2.41

MAILING THREATENING COMMUNICATIONS

18 U.S.C. § 876(b)

Title 18, United States Code, Section 876(b), makes it a crime for anyone to use the mails to transmit an extortionate communication.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly deposited [caused to be delivered] in the mail, for delivery by the Postal Service, a communication containing a threat, as charged;

Second: That the nature of the threat was to kidnap [injure] any person; and

Third: That the defendant made the threat with the intent to extort money [something of value].

A “threat” is a serious statement expressing an intention to injure [kidnap] any person, which under the circumstances would cause apprehension in a reasonable person, as distinguished from idle or careless talk, exaggeration, or something said in a joking manner.

To “extort” means to wrongfully induce someone else to pay money or something of value by threatening a kidnaping or injury if such payment is not made.

The term “thing of value” is used in the everyday, ordinary meaning and is not limited to money or tangible things with an identifiable price tag.

It is not necessary to prove that any money or other

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thing of value was actually paid or that the defendant actually intended to carry out the threat made.

It is not necessary to prove that the defendant actually wrote the communication. What the government must prove beyond a reasonable doubt is that the defendant mailed, or caused to be delivered by mail, a communication containing a “threat” as defined in these instructions.

Note

See United States v. Stotts, 792 F.2d 1318, 1323 (5th Cir. 1986) (proof that defendant wrote communication is not element of the offense); *United States v. Fagan*, 821 F.2d 1002, 1015 n.9 (5th Cir. 1987) (discusses breadth of “thing of value”); *United States v. DeShazo*, 565 F.2d 893 (5th Cir. 1978) (present intent to actually do injury is not required, and § 876 is a general intent crime).

See also United States v. Daughenbaugh, 49 F.3d 171, 173 n.2 (5th Cir. 1995) (approving this instruction on the definition of threat); *United States v. Turner*, 960 F.2d 461, 464 & n.3 (5th Cir. 1992) (same).

See Notes to Instruction Nos. 2.39 and 2.40 on 18 U.S.C. § 871, Threats Against the President, and 18 U.S.C. § 875(b), Interstate Transmission of Extortionate Communication, respectively.

See Note to Instruction No. 2.58 on 18 U.S.C. § 1201(a) for the definition of “kidnap.”

A lesser offense may be charged pursuant to 18 U.S.C. § 876(c) if the defendant did not intend to extort money or a thing of value with the threatening communication.

2.42

MISREPRESENTATION OF CITIZENSHIP**18 U.S.C. § 911**

Title 18, United States Code, Section 911, makes it a crime to represent oneself falsely and willfully to be a citizen of the United States.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant represented that he was a citizen of the United States;

Second: That the defendant was not a citizen of the United States at the time he made the representation; and

Third: That the defendant knew he was not a citizen and deliberately made this false representation with intent to disobey or disregard the law.

Note

See United States v. Harrell, 894 F.2d 120, 126 (5th Cir. 1990) (listing of the elements). The statute requires that the false representation be willful. *See* 18 U.S.C. § 911. The Ninth Circuit requires that the statement be made to someone with good reason to inquire. *See United States v. Romero-Avila*, 210 F.3d 1017, 1020 (9th Cir. 2000).

2.43

**FALSE IMPERSONATION OF FEDERAL
OFFICER OR EMPLOYEE—DEMANDING OR
OBTAINING ANYTHING OF VALUE**

18 U.S.C. § 912

Title 18, United States Code, Section 912, makes it a crime for anyone to demand [obtain] money [paper] [documents] [something of value] while falsely assuming [pretending] to be an officer or employee of the United States.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant falsely assumed [pretended] to be an officer [employee] acting under the authority of the United States;

Second: That while acting in such assumed [pretended] character, the defendant demanded [obtained] money [paper] [documents] [something of value]; and

Third: That the defendant did so knowingly with intent to defraud.

To act “with intent to defraud” means to act with intent to wrongfully deprive another of property.

Note

This statute encompasses two separate offenses. This instruction pertains only to one of them, namely demanding or obtaining property through a pretended character. *See United States v. Lepowitch*, 63 S.Ct. 914 (1943). The Fifth Circuit requires allegation and proof of an intent to defraud. *See United States v. Cortes*, 600 F.2d 1054 (5th Cir. 1977); *United States v. Pollard*, 491 F.2d 1387 (5th Cir. 1974).

The other offense is merely to act in a pretended character.

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2.43

See Honea v. United States, 344 F.2d 798 (5th Cir. 1965). It requires an intent to deceive. *See United States v. Randolph*, 460 F.2d 367 (5th Cir. 1972).

2.44

DEALING IN FIREARMS WITHOUT LICENSE**18 U.S.C. § 922(a)(1)(A)**

Title 18, United States Code, Sections 922(a)(1)(A) and 924(a)(1)(D), make it a crime to be in the business of dealing in firearms [ammunition] without a federal license.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant was a person engaged in the business of selling firearms at wholesale or retail on _____ (date listed in the indictment);

Second: That the defendant engaged in such business without a license issued under federal law; and

Third: That the defendant did so willfully, that is, that the defendant was dealing in firearms with knowledge that his conduct was unlawful.

The term “firearm” means any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive. The term “firearm” also includes the frame or receiver of any such weapon, or any firearm muffler or firearm silencer, or destructive device.

A person is “engaged in the business of selling firearms at wholesale or retail,” if that person devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principle objective of livelihood and profit through the repetitive purchase and resale of firearms. Such term does not include a person who makes occasional sales, exchanges, or

purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of that person's personal collection of firearms.

The term "with the principle objective of livelihood and profit" means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection. However, proof of profit is not required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism.

Note

The statute contains two additional definitions of dealer. *See* 18 U.S.C. §§ 921(a)(11)(B)–(C). Also, a defendant can violate 18 U.S.C. § 922(a)(1)(A) by importing or manufacturing firearms without a license. Therefore, this instruction may need to be altered according to the indictment. Likewise, if the defendant is charged with selling ammunition, the provisions of 18 U.S.C. § 922(a)(1)(B) are applicable, and the instruction would need to be altered. The definition of ammunition is found in 18 U.S.C. § 921(a)(17)(A).

Willfulness is an element of this offense. *See* 18 U.S.C. § 924(a)(1)(D). *United States v. Bryan*, 118 S.Ct. 1939 (1998), describes the mens rea for the offense of dealing in firearms without a license and other firearms offenses such as 18 U.S.C. § 924(a)(2). The Government does not need to prove that the defendant had actual knowledge of the federal licensing requirement. *See Bryan*, 118 S.Ct. at 1947. However, knowledge that the conduct is unlawful is required. *Id.*

2.45

FALSE STATEMENT TO FIREARMS DEALER**18 U.S.C. § 922(a)(6)**

Title 18, United States Code, Sections 922(a)(6) and 924(a)(2), make it a crime for anyone to knowingly make a false statement to a firearms dealer in order to buy a firearm [ammunition].

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant made a false [fictitious] oral [written] statement;

Second: That the defendant knew the statement was false;

Third: That the statement was made in connection with the acquisition of a firearm [ammunition] from a licensed firearms [ammunitions] dealer;

Fourth: That the statement was intended or was likely to deceive a licensed firearms [ammunitions] dealer; and

Fifth: That the alleged false statement was material to the lawfulness of the sale or disposition of the firearm [ammunition].

The term “firearm” means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosive. The term “firearm” also includes the frame or receiver of any such weapon, or any firearm muffler or firearm silencer, or destructive device.

A statement is “false or fictitious” if it was untrue

when made and was then known to be untrue by the person making it.

A false statement is “likely to deceive” if the nature of the statement, considering all of the surrounding circumstances at the time it is made, is such that a reasonable person of ordinary prudence would have been actually deceived or misled.

Note

United States v. Guerrero, 234 F.3d 259 (5th Cir. 2000), holds that this statute does not intend to distinguish between acquisition and attempted acquisition and creates only one offense—the making of a false statement with respect to the eligibility of a person to obtain a firearm from a licensed dealer.

“Straw purchases” violate § 922(a)(6). See *United States v. Ortiz-Loya*, 777 F.2d 973, 979 (5th Cir. 1985). However, “if the true purchaser can lawfully purchase a firearm directly, section 922(a)(6) liability under that section does not attach.” *United States v. Polk*, 118 F.3d 286, 295 (5th Cir. 1997).

The definition of “ammunition” may also need to be included based upon the indictment. See 18 U.S.C. § 921(a)(17)(A). Likewise, in addition to making a false statement to a firearms dealer, a defendant can violate 18 U.S.C. § 922(a)(6) by making a false statement to an importer, manufacturer, or collector in order to buy a firearm or ammunition. See § 921(a)(9) (defining “importer”), § 921(a)(10) (defining “manufacturer”), 18 U.S.C. § 921(a)(11) (defining “dealer”), and § 921(a)(13) (defining “collector”). Therefore, the instruction may need to be altered according to the indictment.

2.46

**UNLAWFUL SALE OR DISPOSITION OF
FIREARM OR AMMUNITION****18 U.S.C. § 922(d)**

Title 18, United States Code, Sections 922(d) and 924(a)(2), make it a crime for a person knowingly to sell or otherwise dispose of a firearm to [a person in a prohibited category, e.g., a convicted felon] when the seller knows or has reasonable cause to believe that such a person is [a member of a prohibited category, e.g., a convicted felon].

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly sold [disposed of] a firearm [ammunition] to _____ (name of person receiving the firearm);

Second: That at the time of the sale [disposal] to _____ (name of person receiving the firearm), he was _____ (identify prohibited category into which the person falls, e.g., a convicted felon); and

Third: That at the time of the sale, the defendant knew or had reasonable cause to believe that _____ (name of person receiving the firearm) was _____ (identify prohibited category into which the person falls, e.g., a convicted felon).

The term “firearm” means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosive. The term “firearm” also includes the frame or receiver of any such weapon, or any firearm muffler or firearm silencer, or destructive device.

Note

The instruction mentions convicted felons, but there are eight other prohibited classes of people, for example controlled substance users. *See* 18 U.S.C. §§ 922(d)(2)–(9). The instruction may have to be altered based upon the indictment. To have “reasonable cause to believe” that someone is a member of a prohibited class within the meaning of § 922(d) means to have knowledge of facts which, although not amounting to direct knowledge, would cause a reasonable person, knowing the same things, reasonably to conclude that the person was in the charged category. *See United States v. Peters*, 403 F.3d 1263, 1268–69 (11th Cir. 2005); *see also United States v. Murray*, 988 F.2d 518, 521 (5th Cir. 1993) (discussing the quantum of proof regarding defendant’s knowledge of purchaser’s status as a felon).

“Otherwise dispose of” means “to transfer a firearm so that the transferee acquires possession of the firearm.” *United States v. Jefferson*, 334 F.3d 670, 674–75 (7th Cir. 2003); *see also United States v. Monteleone*, 77 F.3d 1086, 1092 (8th Cir. 1996) (holding that “disposal of” occurs when a transferee “comes into possession, control, or power of disposal of a firearm”).

The definition of ammunition may also need to be included based upon the indictment. *See* 18 U.S.C. § 921(a)(17)(A).

The mens rea requirement is set forth at 18 U.S.C. § 924(a)(2).

2.47

**POSSESSION OF A FIREARM BY A CONVICTED
FELON****18 U.S.C. § 922(g)(1)**

Title 18, United States Code, Sections 922(g)(1) and 924(a)(2), make it a crime for a convicted felon to knowingly possess a firearm [ammunition].

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly possessed a firearm [ammunition] as charged;

Second: That before the defendant possessed the firearm [ammunition], the defendant had been convicted in a court of a crime punishable by imprisonment for a term in excess of one year; and

Third: That the firearm [ammunition] possessed traveled in [affected] interstate [foreign] commerce; that is, before the defendant possessed the firearm, it had traveled at some time from one state to another [between any part of the United States and any other country].

The term “firearm” means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosive. The term “firearm” also includes the frame or receiver of any such weapon, or any firearm muffler or firearm silencer, or destructive device.

Note

Elements of this offense are listed in *United States v. Meza*, 701 F.3d 411, 418 (5th Cir. 2012), *United States v. Broadnax*, 601

F.3d 336, 341 (5th Cir. 2010) (quoting *United States v. Guidry*, 406 F.3d 314, 318 (5th Cir. 2005)), and *United States v. Anderson*, 559 F.3d 348, 353 (5th Cir. 2009) (quoting *United States v. Ybarra*, 70 F.3d 362, 365 (5th Cir. 1995)).

Willfulness is not an element of this offense. *See* 18 U.S.C. § 924(a)(2). The government must only prove the defendant knew he possessed a firearm or ammunition, but not that the defendant had knowledge of his status as a qualifying felon or that the firearm was “in or affecting” interstate or foreign commerce. *See United States v. Potts*, 644 F.3d 233, 237 (5th Cir. 2011); *United States v. Rose*, 587 F.3d 695 (5th Cir. 2009); *United States v. Schmidt*, 487 F.3d 253, 254–55 (5th Cir. 2007). The nexus is between the possession, transportation, or receipt of the firearm and the phrase “in commerce or affecting commerce.” *United States v. Scarborough*, 97 S.Ct. 1963, 1964 (1977). The government is not required to establish a link between the defendant and interstate or foreign commerce. *See United States v. Bass*, 92 S.Ct. 515, 522 (1971).

Simultaneous possession by a felon of multiple firearms, or firearm(s) and ammunition, is only one offense. *See Meza*, 701 F.3d at 433; *United States v. Villegas*, 494 F.3d 513, 515 (5th Cir. 2007). Thus, when multiple firearms are described in the indictment, it is not necessary to instruct the jury that it must be unanimous as to which firearm the defendant possessed on the occasion in question. *Id.*; *see United States v. Talbert*, 501 F.3d 449, 450 (5th Cir. 2007).

The determination whether the defendant has a prior conviction is for the jury. But, whether a conviction qualifies as a predicate offense under this statute is a legal question for the judge, not the jury. *See Broadnax*, 601 F.3d at 345. The issue is informed by the definition in 18 U.S.C. §§ 921(a)(20)(A)–(B). *See also United States v. Chenowith*, 459 F.3d 635, 636–38 (5th Cir. 2006); *United States v. Huff*, 370 F.3d 454, 458–59 (5th Cir. 2004); *Gill v. Ashcroft*, 335 F.3d 574, 575 (5th Cir. 2003); *United States v. Richardson*, 168 F.3d 836 (5th Cir. 1999).

If a defendant admits or stipulates that he has been previously convicted of a crime punishable by more than one year imprisonment, the following language may be included in the charge:

The parties have stipulated that the defendant has been convicted of a crime which is punishable by imprisonment for a term exceeding one year. You are to take that fact as proven.

See Old Chief v. United States, 117 S.Ct. 644 (1997); *United*

2.47

PATTERN JURY INSTRUCTIONS

States v. Chevere, 368 F.3d 120 (3d Cir. 2004) (the defendant’s stipulation to a prior conviction does not eliminate the need to charge on that element; it only prevents the jury from hearing about the nature and underlying facts of the prior conviction).

The element of possession can be satisfied by proof of actual or constructive possession. *See Meza*, 701 F.3d at 419–22; *United States v. De Leon*, 170 F.3d 494, 498 (5th Cir. 1999); *see also* Instruction No. 1.31, Possession.

“[T]he statute requires only a ‘minimal nexus between the firearm and interstate commerce.’ *United States v. Gresham*, 118 F.3d 258, 264 (5th Cir. 1997). This element is met where the government proves the firearm possessed was manufactured out of state. *See Guidry*, 406 F.3d at 318; *see also* 18 U.S.C. § 921(a)(2). In *United States v. Chambers*, 408 F.3d 237 (5th Cir. 2005), the Fifth Circuit overturned a defendant’s conviction on the grounds that the government constructively amended the indictment when the indictment charged that the ammunition passed through interstate commerce, but the evidence presented at trial only showed that the component parts of the ammunition passed through interstate commerce. The jury charge also only required the jury to find that the component parts traveled in interstate commerce. *Id.* at 246; *see also Broadnax*, 601 F.3d at 343–44 (discussing which charged items must travel in interstate commerce).

Definitions of “Interstate Commerce,” “Foreign Commerce,” and “Commerce” are in Instruction Nos. 1.39, 1.40, and 1.41.

2.48

**USING/CARRYING A FIREARM DURING
COMMISSION OF A DRUG TRAFFICKING
CRIME OR CRIME OF VIOLENCE****18 U.S.C. § 924(c)(1)**

Title 18, United States Code, Section 924(c)(1), makes it a crime for anyone to knowingly use or carry a firearm during and in relation to a drug trafficking crime [crime of violence] [to possess a firearm in furtherance of such a crime].

For you to find the defendant guilty of this crime, you must be convinced that the government has proven each of the following beyond a reasonable doubt:

First: That the defendant committed the crime alleged in Count _____. I instruct you that _____ is a drug trafficking crime [crime of violence]; and

Second: That the defendant knowingly used or carried a firearm during and in relation to the defendant's commission of the crime charged in Count ____.

To prove the defendant “used” a firearm in during and in relation to a drug trafficking crime [crime of violence], the government must prove that the defendant actively employed the firearm in the commission of Count _____, such as a use that is intended to or brings about a change in the circumstances of the commission of Count _____. “Active employment” may include brandishing, displaying, referring to, bartering, striking with, firing, or attempting to fire the firearm. “Use” is more than mere possession of a firearm or having it available during the drug trafficking crime [crime of violence].

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To prove the defendant “carried” a firearm during and in relation to a drug trafficking crime [crime of violence], the government must prove that the defendant carried the firearm in the ordinary meaning of the word “carry,” such as by transporting a firearm on the person or in a vehicle. The defendant’s carrying of the firearm cannot be merely coincidental or unrelated to the drug trafficking crime [crime of violence].

“In relation to” means that the firearm must have some purpose, role, or effect with respect to the drug trafficking crime [crime of violence].

[*Second*: That the defendant knowingly possessed a firearm in furtherance of the defendant’s commission of the crime charged in Count ____.]

[To prove the defendant possessed a firearm “in furtherance,” the government must prove that the defendant possessed a firearm that furthers, advances, or helps forward the drug trafficking crime [crime of violence].]

Note

In response to the decision of the Supreme Court in *Bailey v. United States*, 116 S.Ct. 501 (1995), Congress broadened the scope of 18 U.S.C. § 924(c)(1) to prohibit possession of a firearm in furtherance of a drug trafficking crime. 18 U.S.C. § 924(c)(1) was amended by the Criminal Use of Guns Act, Pub.L. No. 105-386, § 1(a)(1), 112 Stat. 3469 (1998), effective November 13, 1998. Section 924(c)(1) now applies to “any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm.” See *United States v. O’Brien*, 130 S.Ct. 2169 (2010), and *United States v. McGilberry*, 480 F.3d 326 (5th Cir. 2007), for discussion of the evolution of § 924(c)(1). The structure and elements of this statute are discussed in *Dean v. United States*, 129 S.Ct. 1849, 1853–54 (2009), and *United States v. Franklin*, 561 F.3d 398, 402 (5th Cir. 2009). This instruction was approved in *United States v. Montes*, 602 F.3d 381, 386–87 (5th Cir. 2010).

Use. The meaning of “use” and the Supreme Court’s decision

to define “use” with its “‘ordinary and natural’ meaning” are discussed in *Watson v. United States*, 128 S.Ct. 579 (2007), *Bailey*, 116 S.Ct. at 506, and *Smith v. United States*, 113 S.Ct. 2050 (1993). The *Bailey* Court gave sample definitions of “use,” such as “[t]o convert to one’s service,’ ‘to employ,’ ‘to avail oneself of,’ and ‘to carry out a purpose or action by means of.’” 116 S.Ct. at 506. The Court also set a minimum threshold of “use” as requiring more than mere possession, instead requiring “evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense.” *Id.* at 505–06. “The active-employment understanding of ‘use’ certainly includes brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire a firearm.” *Id.* at 508. See *United States v. Chavez*, 119 F.3d 342 (5th Cir. 1997), for an approved instruction on the difference between “use” and “carry.”

Carry. *Muscarello v. United States*, 118 S.Ct. 1911 (1998), and *United States v. Smith*, 481 F.3d 259, 264 (5th Cir. 2007), hold that “carry” includes carry on the person as well as in the trunk or glove box of an automobile. The term “carry” contemplates movement. See *United States v. Sanders*, 157 F.3d 302 (5th Cir. 1998). The firearm need not be easily accessible to be “carried”; instead, “the firearm must either be transported by the defendant or within his reach during and in relation to the predicate crime.” *Smith*, 481 F.3d at 264.

During And In Relation To. At a minimum, “in relation to” means “the firearm must have some purpose or effect with respect to a drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence.” *Smith*, 113 S.Ct. at 2059. It must “‘facilitat[e] or ha[ve] the potential of facilitating,’ the drug trafficking offense.” *Id.* (quoting *United States v. Stewart*, 779 F.2d 538, 539 (9th Cir. 1985)); see *United States v. Guidry*, 456 F.3d 493, 508 (5th Cir. 2006) (crime of violence). *Muscarello v. United States*, 118 S.Ct. 1911, 1918 (1998), notes that “Congress added these words in part to prevent prosecution where guns ‘played’ no part in the crime.” The Fifth Circuit upheld the pattern jury charge’s definition of this element. See *United States v. Harris*, 477 F.3d 241, 243–44 (5th Cir. 2007).

In Furtherance Of. *United States v. Ceballos-Torres*, 218 F.3d 409, 415 (5th Cir. 2000), analyzes the meaning of “in furtherance” at length and decides that “using the dictionary definition of ‘in furtherance’ is the appropriate way to construe the statute.” Thus, firearm possession that furthers, advances or helps forward the drug trafficking offense violates the statute. *Id.*

This court considers a list of factors in determining whether a firearm is used “in furtherance” of a drug-trafficking offense: (1) the type of drug activity being conducted; (2) the accessibility of the firearm; (3) the type of weapon; (4) whether the weapon is stolen; (5) whether the possession is lawful; (6) whether the firearm is loaded; (7) the weapon’s proximity to drugs or drug profits; and (8) the time and circumstances under which the firearm is found.

United States v. Nunez-Sanchez, 478 F.3d 663, 669 (5th Cir. 2007); *see also United States v. Rose*, 587 F.3d 695, 702 (5th Cir. 2009); *United States v. Charles*, 469 F.3d 402, 406 (5th Cir. 2006); *Ceballos-Torres*, 218 F.3d at 414–15. *See United States v. Yanez-Sosa*, 513 F.3d 194, 203–04 (5th Cir. 2008), for additional instructions on this element.

Predicate Offense. This instruction presumes that the predicate drug offense is charged in another count of the indictment. If the predicate drug offense is not so charged, this instruction must be amended to list the elements of the uncharged drug trafficking crime. *See United States v. Mendoza*, 11 F.3d 126 (9th Cir. 1993). A drug trafficking crime is “any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.” 18 U.S.C. § 924(c)(2).

What constitutes a “crime of violence” is a matter of statutory interpretation for the court. *See United States v. Jennings*, 195 F.3d 795 (5th Cir. 1999); *United States v. Credit*, 95 F.3d 362 (5th Cir. 1996). *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000), was decided seven days after certiorari was denied by the Supreme Court in *Jennings*. The district judge is cautioned that *Apprendi* may alter this holding.

In determining what constitutes a “crime of violence,” the Fifth Circuit uses a “categorical approach” in which the particular offense is viewed in the abstract, without considering the facts underlying the defendant’s conviction. *See United States v. Williams*, 343 F.3d 423, 431 (5th Cir. 2003). The underlying offense must have elements of violence. *See* 18 U.S.C. § 924(c)(3); *see also Credit*, 95 F.3d at 364. Carjacking is always a “crime of violence” as defined in § 924(c)(3). *See United States v. Frye*, 489 F.3d 201, 208–09 (5th Cir. 2007). In *Williams*, 343 F.3d at 433–34, the Fifth Circuit held that deprivation of civil rights resulting in bodily injury or involving dangerous weapons are always crimes of violence as defined in § 924(c)(1)(A)(iii).

Apprendi Issue. The Supreme Court, in *O’Brien*, 130 S.Ct. at 2180, held that “the machinegun provision in § 924(c)(1)(B)(ii) is an element of an offense.” If the indictment alleges that the firearm possessed by the defendant is a short-barreled rifle, a short-barreled shotgun, a semi-automatic assault weapon, a machinegun, a destructive device, or is equipped with a silencer or muffler, an additional element needs to be added to the charge. *See Apprendi*, 120 S.Ct. at 2351–63.

If the defendant is also charged with aiding and abetting a violation of § 924(c)(1), the government must prove that the defendant “act[ed] with the knowledge or specific intent of advancing the ‘use’ of the firearm.” *United States v. Lopez-Urbina*, 434 F.3d 750, 757–58 (5th Cir. 2005). The government must also prove that the defendant acted in a way to facilitate or encourage the use or carrying of the firearm. *Id.* at 758.

Jurors do not have to unanimously agree about which of the weapons was used in connection with the drug trafficking crime. *See United States v. Correa-Ventura*, 6 F.3d 1070, 1076–77 (5th Cir. 1993).

For the definition of “Possession,” see Instruction No. 1.31.

2.49

**FALSE STATEMENTS TO FEDERAL AGENCIES
AND AGENTS****18 U.S.C. §§ 1001(a)(2) and (a)(3)**

Title 18, United States Code, Section 1001, makes it a crime for anyone to knowingly and willfully make a false or fraudulent statement in any matter within the jurisdiction of the executive, legislative, or judicial branch of the government of the United States.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant made a false statement [made or used any false writing or document] to _____ (name executive, legislative, or judicial branch of the United States government) regarding a matter within its jurisdiction;

Second: That the defendant made the statement intentionally, knowing that it was false [knowing the same contained a false, fictitious, or fraudulent statement or entry];

Third: That the statement was material [the false, fictitious, or fraudulent statement or entry was material]; and

Fourth: That the defendant made the false statement for the purpose of misleading the _____ (name of executive, legislative, or judicial branch of the United States government).

A statement is material if it has a natural tendency to influence, or is capable of influencing, a decision of

_____ (name of executive, legislative, or judicial branch of the United States government).

It is not necessary to show that the _____ (name of executive, legislative, or judicial branch of the United States government) was in fact misled.

Note

See *United States v. Jara-Favela*, 686 F.3d 289, 301 (5th Cir. 2012), *United States v. Richardson*, 676 F.3d 491 (5th Cir. 2012), and *United States v. Hoover*, 467 F.3d 496 (5th Cir. 2006), for the elements of this offense.

Subsection (b) partially preserves the so-called “judicial function exception.” If the indictment charges a false statement to the legislature, see 18 U.S.C. §§ 1001(c)(1) and (2) for limitations.

Some courts have held that “reckless disregard” or “reckless indifference” may satisfy the scienter element, at least where the defendant makes a false material statement, and consciously avoids learning the true facts. See *United States v. Puente*, 982 F.2d 156 (5th Cir. 1993).

The “exculpatory no” doctrine exception to 18 U.S.C. § 1001 has been abolished. See *Brogan v. United States*, 118 S.Ct. 805 (1998); *United States v. Sidhu*, 130 F.3d 644, 650 (5th Cir. 1997). The indictment need not allege that a false statement was made with actual knowledge of federal agency jurisdiction. See *United States v. Yermian*, 104 S.Ct. 2936, 2943 n.14 (1984) (upholding conviction under 18 U.S.C. § 1001 where jury was instructed, without objection, that “the Government must prove that the respondent ‘knew or should have known’ that his false statements were made within the jurisdiction of a federal agency”).

Under certain circumstances, a false statement to a state, local, or even private agency can comprise a violation of 18 U.S.C. § 1001. In *United States v. Taylor*, 582 F.3d 558, 562 (5th Cir. 2009), the court held that the defendant, who made a false statement to the Mississippi Development Authority (“MDA”) on an application, made a false statement to a federal agency within the meaning of 18 U.S.C. § 1001 because the federal Housing and Urban Development agency oversaw MDA’s affairs and provided some of its funding.

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The definition of materiality is from *United States v. Gaudin*, 115 S.Ct. 2310, 2313 (1995). Further, “[a]ctual influence or reliance by a government agency is not required. The statement may still be material ‘even if it is ignored or never read by the agency receiving the misstatement.’” *Puente*, 982 F.2d at 159 (quoting *United States v. Swaim*, 757 F.2d 1530, 1534 (5th Cir. 1985)); see *United States v. Brown*, 303 F.3d 582 (5th Cir. 2002).

A defendant need not personally make the false statement, it is sufficient that he intentionally caused the false statement to be made. See *United States v. Elashyi*, 554 F.3d 480, 497 (5th Cir. 2008) (holding that there was sufficient evidence that defendant had either signed the required Shipper Export Declaration with the Commerce Department or had the freight forwarder sign them on his behalf using false values defendant provided and intended to be used).

This instruction does not cover violations of 18 U.S.C. § 1001(a)(1), falsely concealing or covering up by trick. To charge concealment, most circuits hold that the prosecution must prove that the defendant had a duty to disclose the information to the government. See, e.g., *United States v. Safavian*, 528 F.3d 957, 964 (D.C. Cir. 2008); *United States v. Moore*, 446 F.3d 671, 678 (7th Cir. 2006).

2.50

FALSE STATEMENTS IN BANK RECORDS

18 U.S.C. § 1005
(Third Paragraph)

Title 18, United States Code, Section 1005, makes it a crime for anyone to make a false entry in any book [report] [statement] of a federally insured bank, knowing the entry is false, with intent to injure or defraud the bank.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the _____ (name bank) was a federally insured bank;

Second: That the defendant made a false entry in a book [report] [statement] of _____ (name bank);

Third: That the defendant did so knowing it was false; and

Fourth: That the defendant did so intending to injure or defraud _____ (name bank).

Note

See *United States v. Munna*, 871 F.2d 515 (5th Cir. 1989), relative to the deprivation of intangible rights as constituting bank fraud.

Specific intent to injure or defraud the bank or its public officers is an express element of this section. See *United States v. Campbell*, 64 F.3d 967 (5th Cir. 1995). It is not necessary to prove intent to deceive the bank. Intent to deceive an officer, agent, auditor or examiner is sufficient. See *United States v. McCord*, 33 F.3d 1434 (5th Cir. 1994); *United States v. Chaney*, 964 F.2d 437 (5th

2.50

PATTERN JURY INSTRUCTIONS

Cir. 1992). If the case involves alleged injury to or deceit of an officer or other entity, the instruction must be tailored accordingly.

Materiality is not an element of this offense when the defendant is charged with a false statement, but it is an element where the defendant is charged with a false entry resulting from an omission of information. *See United States v. Harvard*, 103 F.3d 412, 417–20 (5th Cir. 1997). In such a case, materiality would be a jury question. *See United States v. Gaudin*, 115 S.Ct. 2310, 2314 (1995).

In an “omission” case, the second element of the instruction should be replaced with the following:

[That the defendant deliberately omitted a material fact in a book [record] [statement] of _____ (name bank).

A material omission is one that would naturally tend to influence, or was capable of influencing, the decision of _____ (name bank).

[In an omission case, the third element is omitted, but the fourth element is retained.]]

2.51

FALSE STATEMENT TO A BANK

18 U.S.C. § 1014

Title 18, United States Code, Section 1014, makes it a crime for anyone knowingly to make a false statement to a federally insured bank for the purpose of influencing the lending activities of a federally insured bank.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant made a false statement to _____ (name bank), as charged;

Second: That the defendant knew the statement was false when the defendant made it;

Third: That the defendant did so for the purpose of influencing a lending action of the institution, _____ (describe purpose, e.g., convincing the bank to give the defendant a loan); and

Fourth: That _____ (name bank) was federally insured.

It is not necessary, however, to prove that the institution involved was, in fact, influenced or misled. What must be proven is that the defendant intended to influence the lending decision of the bank by the false statement. To make a false statement to a federally insured bank, the defendant need not directly submit the false statement to the institution. It is sufficient if the defendant submits the statement to a third party, knowing that the third party will submit the false statement to the federally insured bank.

Note

See *United States v. Huntress*, 956 F.2d 1309, 1319 (5th Cir. 1992) (approving this instruction and finding that no further elaboration on the word “influence” is needed because it is “used in its everyday meaning in the statute”).

United States v. Wells, 117 S.Ct. 921, 927–31 (1997), held that materiality is not an element in a prosecution under 18 U.S.C. § 1014. See also *United States v. Dupre*, 117 F.3d 810, 818 (5th Cir. 1997). Among other reasons, the decision of the Supreme Court in *Wells* relied on the text’s “natural reading,” i.e., the absence of “material” within the text of the statute, on its statutory history, and on other elements of proof required by the statute. 117 S.Ct. at 927–31.

Judges should be aware that *United States v. Sandlin* has condensed the scienter requirement of this statute to “knowing and willfully,” though the language of the statute separates these two intent requirements, with “knowingly” modifying the action of making a “false statement or report,” while “willfully” modifies the action of overvaluing “any land, property or security.” 589 F.3d 749, 753 (5th Cir. 2009) (“The elements of guilt under Section 1014 are these: (1) the defendant knowingly and willfully made a false statement to the bank, (2) the defendant knew that the statement was false when he made it, (3) the defendant made the false statement for the purpose of influencing the bank to extend credit, and (4) the bank to which the false statement was made was federally insured.”).

Further, the statute requires an intent to influence the bank’s lending activities. See *United States v. Devoll*, 39 F.3d 575, 579–80 (5th Cir. 1994) (“[S]ection 1014 applies only to actions involving lending transactions.”); see also *United States v. Matthews*, 31 F. App’x 838, *10 (5th Cir. 2002); but see *United States v. Boren*, 278 F.3d 911, 914–16 (9th Cir. 2002) (discussing split between circuits on whether offense is limited to lending transactions). However, an intent to harm the bank or to bring financial gain to the defendant is not required. See *United States v. Waldrip*, 981 F.2d 799, 806 (5th Cir. 1993) (upholding district court’s exclusion of evidence on loss, because loss is not an element). Neither reliance by the bank nor an actual defrauding is required. *Id.*

The defendant need not make the false statement directly to an institution covered by the statute, nor must the defendant know which particular institution was involved or that it is federally

insured. See *United States v. McDow*, 27 F.3d 132, 136 (5th Cir. 1994). But the defendant must know “that it was a bank that he intended to influence.” *Id.* (internal quotation marks omitted). If the institution involved is not a federally insured bank, this charge must be modified to reflect the particular type of institution listed in the statute and as charged in the indictment.

Note that failure to disclose may constitute a false statement. See *United States v. Trice*, 823 F.2d 80, 86 (5th Cir. 1987); see also *Dupre*, 117 F.3d at 819. An alleged “debt” or “liability” must first be enforceable under state law before failure to disclose or the making of a false statement regarding such finances is able to be prosecuted under this statute. See *United States v. Fontenot*, 665 F.3d 640, 645–47 (5th Cir. 2011). Also note that “forgetting” does not meet the intent requirement of knowledge. See *Sandlin*, 589 F.3d at 753.

2.52

PRODUCTION OF FALSE DOCUMENT**18 U.S.C. § 1028(a)(1)**

Title 18, United States Code, Section 1028(a)(1), makes it a crime for anyone knowingly and without lawful authority to produce an identification document, authentication feature, or false identification document under certain specified circumstances.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly produced an identification document [an authentication feature] [a false identification document];

Second: That he did so without lawful authority; and

Third: That the identification document [authentication feature] [false identification document] 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].

[*Third:* That the identification document [authentication feature] [false identification document] was knowingly possessed with the intent that it be used to defraud the United States.]

[*Third:* That the production of the identification document [authentication feature] [false identification document] is in or affects interstate [foreign] commerce, including the transfer of a document by electronic means, or the identification document [false identifica-

tion document] is transported in the mail in the course of the production.]

The term “identification document” means a document made or 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 as a special event of national significance, a foreign government, a 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.

[The term “false identification document” means a document of a type intended or commonly accepted for the purposes of identification of 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] [an international governmental or quasi-governmental organization].]

[The term “authentication feature” means any hologram, watermark, certification, symbol, code, image, sequence of numbers or letters, or other feature either individually or in combination with another feature 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 term “produce” includes alter, authenticate, or assemble.

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[The phrase “intent that it be used to defraud the United States” means a specific intent to use the document to deceive the United States in order to cause some harm to the United States or bring about some personal gain. Harm to the United States includes any impairment to the administration of governmental functions.]

Note

This statute is a model of complexity. Subsection (a) describes eight different violations and subsection (b) provides different maximum sentences ranging from one year to thirty years depending on various facts. The instruction must be carefully tailored, therefore, to comply with the *Apprendi* doctrine. *Apprendi v. New Jersey*, 120 S.Ct. 2348, 2351–63 (2000). For example, in *United States v. Villarreal*, 253 F.3d 831, 839 (5th Cir. 2001), a sentence in excess of three years’ confinement was reversed because the trial court’s instructions did not ask the jury to find that the identification document in question was one listed in § 1028(b)(1)(A).

Interstate or foreign commerce may be affected even when the document transfer occurred entirely in a local venue. The focus is whether the document would have traveled in interstate or foreign commerce if the defendant had accomplished his intended goal. Thus, the commerce element is satisfied when a fraudulent document is sold to a foreign citizen who presumably desires to remain in this country and possibly travel into other states or countries. See *Villarreal*, 253 F.3d at 834–35.

Definitions of “Interstate Commerce,” “Foreign Commerce,” and “Commerce” are in Instruction Nos. 1.39, 1.40, and 1.41.

The definition of the phrase “intent that it be used to defraud the United States” is adapted from the definition for “intent to defraud” in the mail and wire fraud context. See *United States v. Jimenez*, 77 F.3d 95, 97 (5th Cir. 1996) (“Intent to defraud requires an intent to (1) deceive, and (2) cause harm to result from the deceit.”); *United States v. Powers*, 168 F.3d 741, 746 (5th Cir. 1999) (“An intent to defraud for the purpose of personal gain satisfies the ‘harm’ requirement.”). The elaboration on what counts as harm to the United States comes from the Fourth Circuit. See *United States v. Luke*, 628 F.3d 114 (4th Cir. 2010) (quoting *United States v. Goldsmith*, 68 F.2d 5, 7 (2d Cir. 1933)).

2.52A

**POSSESSION OF FALSE DOCUMENT WITH
INTENT TO DEFRAUD UNITED STATES****18 U.S.C. § 1028(a)(4)**

Title 18, United States Code, Section 1028(a)(4), makes it a crime for anyone knowingly and without lawful authority to possess an identification document [an authentication feature] [a false identification document] with the intent to defraud the United States.

For you to find a defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly possessed an identification document [an authentication feature] [a false identification document];

Second: That he did so without lawful authority; and

Third: That the identification document [authentication feature] [false identification document] was possessed with the intent that it be used to defraud the United States.

The term “identification document” means a document made or 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 as a special event of national significance, a foreign government, a 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.

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[The term “false identification document” means a document of a type intended or commonly accepted for the purposes of identification of 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] [an international governmental or quasi-governmental organization].]

[The term “authentication feature” means any hologram, watermark, certification, symbol, code, image, sequence of numbers or letters, or other feature, that either individually or in combination with another feature, 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 phrase “intent that it be used to defraud the United States” means a specific intent to use the document to deceive the United States in order cause some harm to the United States or bring about some personal gain. Harm to the United States includes any impairment to the administration of governmental functions.]

Note

Subsection (b) of this statute provides different maximum sentences ranging from one year to thirty years depending on various facts. The instruction must be carefully tailored, therefore, to comply with the *Appendi* doctrine.

The definition of the phrase “intent that it be used to defraud the United States” is adapted from the definition for “intent to defraud” in the mail and wire fraud context. *See United States v. Jimenez*, 77 F.3d 95, 97 (5th Cir. 1996) (“Intent to defraud requires

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an intent to (1) deceive, and (2) cause harm to result from the deceit.”); *United States v. Powers*, 168 F.3d 741, 746 (5th Cir. 1999) (“An intent to defraud for the purpose of personal gain satisfies the ‘harm’ requirement.”). The elaboration on what counts as harm to the United States comes from the Fourth Circuit. *See United States v. Luke*, 628 F.3d 114 (4th Cir 2010) (quoting *United States v. Goldsmith*, 68 F.2d 5, 7 (2d Cir 1933)).

2.53

USE OF UNAUTHORIZED ACCESS DEVICE

18 U.S.C. § 1029(a)(2)

Title 18, United States Code, Section 1029(a)(2), makes it a crime for anyone to traffic in or use, with intent to defraud, one or more unauthorized access devices during any one-year period and by such conduct obtain anything of value aggregating \$1,000 or more during that period.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly trafficked in [used] one or more unauthorized access devices;

Second: That by one or more such uses during the one-year period beginning _____ (date), and ending _____ (date), the defendant obtained anything of value aggregating \$1,000 or more;

Third: That the defendant acted with intent to defraud; and

Fourth: That the defendant's conduct affected interstate [foreign] commerce.

The government is not required to prove that the defendant knew that his conduct would affect interstate [foreign] commerce. It is not necessary for the government to show that the defendant actually intended or anticipated an effect on interstate [foreign] commerce by his actions or that commerce was actually affected. All that is necessary is that the natural and probable consequence of the acts the defendant took would be to affect interstate [foreign] commerce. If you decide that

there would be any effect at all on interstate [foreign] commerce, then that is enough to satisfy this element. The effect can be minimal.

The term “access device” means any 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 gaining 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, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument).

The term “unauthorized access device” means any access device that is lost, stolen, expired, revoked, canceled, or obtained with intent to defraud.

To act with “intent to defraud” means to act with the specific intent to deceive in order to cause some harm or bring about some personal gain.

Note

This instruction is limited to use of an access device in § 1029(a)(2). It provides a model for drafting instructions in cases under other subsections which contain different elements and maximum punishments.

If an issue is raised that the card or plate or account is not an “access device,” it may be necessary to submit that issue to the jury. See *United States v. Johnson*, 718 F.2d 1317 (5th Cir. 1983) (holding that whether a gold certificate was a security is a jury issue).

The term “access device” is broad enough to encompass technological advances and includes long-distance telephone access codes. Also, “counterfeit” and “unauthorized” are not mutually exclusive terms. See *United States v. Brewer*, 835 F.2d 550 (5th Cir. 1987).

A “counterfeit access device” under § 1029(a)(1) includes an

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otherwise legitimate device procured by the use of false information. See *United States v. Soape*, 169 F.3d 257 (5th Cir. 1999).

On “unauthorized access device,” see *United States v. Inman*, 411 F.3d 591 (5th Cir. 2005) (differentiating between a counterfeit access device and an unauthorized access device).

See *United States v. Jimenez*, 77 F.3d 95, 97 (5th Cir. 1996) (“Intent to defraud requires an intent to (1) deceive, and (2) cause harm to result from the deceit.”), and *United States v. Powers*, 168 F.3d 741, 746 (5th Cir. 1999) (“An intent to defraud for the purpose of personal gain satisfies the ‘harm’ requirement.”), for “intent to defraud.”

On “affecting commerce,” see *United States v. Jarrett*, 705 F.2d 198, 203 (7th Cir. 1983). On “interstate or foreign commerce,” see *United States v. Young*, 730 F.2d 221 (5th Cir. 1984), and *United States v. Massey*, 827 F.2d 995 (5th Cir. 1987).

Definitions of “Interstate Commerce,” “Foreign Commerce,” and “Commerce” are in Instruction Nos. 1.39, 1.40, and 1.41.

2.54

TRANSMISSION OF WAGERING INFORMATION

18 U.S.C. § 1084

Title 18, United States Code, Section 1084, makes it a crime for anyone to transmit bets or wagers on sports gambling in interstate or foreign commerce.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant was in the business of betting or wagering. That is, the defendant was prepared on a regular basis to accept bets placed by others;

Second: That the defendant, as a part of that business, purposely used a wire communication facility to receive or transmit bets on sports gambling;

Third: That the transmission was made between _____ and _____ (name states or state and foreign place); and

Fourth: That the defendant knew the transmission was made from one state to another or from one state to a foreign place.

This statute is intended to reach the activities of professional gamblers who knowingly conduct their activities through the use of interstate wire communication facilities, or wire communication facilities between a state and a foreign place, regardless of which party sent and which received the wager.

To prove that the defendant is in the betting business, the government must show beyond a reasonable doubt that the defendant engaged in a regular course of

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conduct or series of transactions involving time, attention, and labor devoted to betting or wagering for profit. The government must show more than casual, isolated, or sporadic transactions. On the other hand, it is not necessary that making bets or wagers, or dealing in wagering information, constitutes a person's primary source of income. The government need not show that the defendant has made any prescribed number of bets or that the defendant has actually earned a profit.

Note

This statute applies to bets or wagers on sporting events or contests. *See In re Mastercard Int'l Inc.*, 313 F.3d 257, 262 (5th Cir. 2002).

The First and Second Circuits have held that the defendant's knowledge of the interstate nature of the wire facility transmission is an element of the crime that must be proved. *See United States v. Southard*, 700 F.2d 1, 24 (1st Cir. 1983); *United States v. Barone*, 467 F.2d 247, 249 (2d Cir. 1972). The Ninth Circuit held, without discussion, that "the knowing use of interstate facilities is not an essential element" of § 1084. *See United States v. Swank*, 441 F.2d 264, 265 (9th Cir. 1971). The issue was raised, but not decided, in *United States v. Sellers*, 483 F.2d 37, 45 (5th Cir. 1973). The Committee has included the element of knowledge of the interstate nature of the transmission.

Definitions of "Interstate Commerce," "Foreign Commerce," and "Commerce" are in Instruction Nos. 1.39, 1.40, and 1.41. The issue of whether the transmission was in interstate or foreign commerce must be submitted to the jury. *See United States v. Gaudin*, 115 S.Ct. 2310, 2319–20 (1995) (holding that when materiality is an element of the charged offense, the issue of materiality must be submitted to the jury).

See also *United States v. Montford*, 27 F.3d 137 (5th Cir. 1994), holding that gambling ship excursions a few miles offshore of the United States coast do not amount to "foreign commerce" within the meaning of § 1084 and that "foreign commerce" requires some form of contact with a foreign state.

The Committee notes that, as technology advances, the definition of what constitutes a "wire" becomes unclear, and the instruc-

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tion may need to be altered accordingly.

2.55

MURDER (FIRST DEGREE)**18 U.S.C. § 1111**

Title 18, United States Code, Section 1111, makes it a crime for anyone to murder another human being with premeditation.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant unlawfully killed _____;

Second: That the defendant killed _____ with malice aforethought;

Third: That the killing was premeditated; and

Fourth: That the killing took place within the territorial [special maritime] jurisdiction of the United States.

To kill “with malice aforethought” means either to kill another person deliberately and intentionally, or to act with callous and wanton disregard for human life. To find malice aforethought, you need not be convinced that the defendant hated the person killed, or felt ill will toward the victim at the time.

In determining whether the killing was with malice aforethought, you may consider the use of a weapon or instrument and the manner in which death was caused.

A killing is “premeditated” when it is the result of planning or deliberation. The amount of time needed for premeditation of a killing depends on the person and the circumstances. It must be long enough for the

killer, after forming the intent to kill, to be fully conscious of that intent.

You should consider all the facts and circumstances preceding, surrounding, and following the killing which tend to shed light upon the condition of mind of the defendant, before and at the time of the killing. No fact, no matter how small, no circumstance, no matter how trivial, which bears upon the questions of malice aforethought and premeditation, should escape your careful consideration.

Note

This instruction applies to a premeditated killing only.

There are other methods of committing first degree murder, including a killing in the perpetration or attempt to perpetrate certain felonies, or perpetrated as part of a pattern or practice of assault or torture against a child or children. The instruction must be adjusted accordingly in those cases.

Additional definitions were added in subsection (c) in a 2003 amendment, including definitions of “assault,” “child,” “child abuse,” “pattern or practice of assault or torture,” “serious bodily injury,” and “torture.”

See *Lizama v. United States Parole Com’n*, 245 F.3d 503 (5th Cir. 2001), and *United States v. Lewis*, 92 F.3d 1371 (5th Cir. 1996), *aff’d in part*, 118 S.Ct. 1135 (1998), for discussion of this statute.

The instruction regarding “premeditated” was cited with approval in *United States v. Agofsky*, 516 F.3d 280 (5th Cir. 2008). In addition, the instruction was cited with approval in *United States v. Reff*, 479 F.3d 396 (5th Cir. 2007).

In the proper case, use Instruction No. 1.33 for Lesser Included Offense, Instruction No. 2.56 for Second Degree Murder, and Instruction No. 2.57 for Voluntary Manslaughter. See *Reff*, 479 F.3d at 402; *United States v. Harris*, 420 F.3d 467 (5th Cir. 2005); *United States v. Browner*, 889 F.2d 549 (5th Cir. 1989).

If there is evidence that the defendant acted lawfully, e.g., in

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self-defense, by accident, or in defense of property, a fifth element should be added and explained. For example: “That the defendant did not act in self-defense,” plus an explanation of self-defense. *See United States v. Branch*, 91 F.3d 699 (5th Cir. 1996); *see also* Instruction No. 1.36A, Self-Defense.

For a discussion of malice, see *United States v. McRae*, 593 F.2d 700 (5th Cir. 1979).

2.56

MURDER (SECOND DEGREE)**18 U.S.C. § 1111**

Title 18, United States Code, Section 1111, makes it a crime for anyone to murder another human being.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant unlawfully killed _____;

Second: That the defendant killed _____ with malice aforethought; and

Third: That the killing took place within the territorial [special maritime] jurisdiction of the United States.

To kill “with malice aforethought” means either to kill another person deliberately and intentionally, or to act with callous and wanton disregard for human life. To find malice aforethought, you need not be convinced that the defendant hated the person killed, or felt ill will toward the victim at the time.

In determining whether the killing was with malice aforethought, you may consider the use of a weapon or instrument and the manner in which death was caused.

You should consider all the facts and circumstances preceding, surrounding, and following the killing which tend to shed light upon the condition of mind of the defendant, before and at the time of the killing. No fact, no matter how small, no circumstance, no matter how trivial, which bears upon the issue of malice aforethought should escape your careful consideration.

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Note

In the proper case, use Instruction Nos. 1.33 and 2.57 for Lesser Included Offense and Voluntary Manslaughter.

“The intent required for second-degree murder is malice aforethought; it is distinguished from first-degree murder by the absence of premeditation.” *United States v. Browner*, 889 F.2d 549 (5th Cir. 1989); *see United States v. Harrelson*, 766 F.2d 186 (5th Cir. 1985).

If there is evidence that the defendant acted lawfully, e.g., in self-defense, by accident, or in defense of property, a fifth element should be added and explained. For example: “That the defendant did not act in self-defense,” plus an explanation of self-defense. *See United States v. Branch*, 91 F.3d 699 (5th Cir. 1996); *see also* Instruction No. 1.36A, Self-Defense.

For a discussion of this statute, *see Lizama v. United States Parole Com’n*, 245 F.3d 503 (5th Cir. 2001). *See also United States v. Reff*, 479 F.3d 396 (5th Cir. 2007); *United States v. Harris*, 420 F.3d 467 (5th Cir. 2005).

See United States v. Shaw, 701 F.2d 367 (5th Cir. 1983), and *United States v. McRae*, 593 F.2d 700 (5th Cir. 1979).

2.57

VOLUNTARY MANSLAUGHTER

18 U.S.C. § 1112

Title 18, United States Code, Section 1112, makes it a crime for anyone to unlawfully kill another human being, without malice.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant unlawfully killed _____;

Second: That the defendant did so without malice, that is, upon a sudden quarrel or heat of passion; and

Third: That the killing took place within the territorial [special maritime] jurisdiction of the United States.

The term “heat of passion” means a passion of fear or rage in which the defendant loses his normal self-control as a result of circumstances that would provoke such a passion in an ordinary person, but which did not justify the use of deadly force.

Note

The language of this instruction was cited in *United States v. Harris*, 420 F.3d 467, 476 (5th Cir. 2005).

This instruction applies only to voluntary manslaughter. 18 U.S.C. § 1112 also covers involuntary manslaughter. *See United States v. Browner*, 937 F.2d 165 (5th Cir. 1991) (Browner II) (conviction for assault with a deadly weapon upon retrial reversed because that offense is not a lesser included offense of voluntary manslaughter under the Federal Rules of Criminal Procedure, Rule 31(c)); *United States v. Browner*, 889 F.2d 549 (5th Cir. 1989)

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(Browner I) (conviction for voluntary manslaughter reversed and new trial ordered for failure to instruct on lesser included offense of involuntary manslaughter).

For a discussion of “heat of passion,” see *Lizama v. United States Parole Comm’n*, 245 F.3d 503 (5th Cir. 2001).

2.58

KIDNAPPING

18 U.S.C. § 1201(a)(1)

Title 18, United States Code, Section 1201(a)(1), makes it a crime for anyone to unlawfully kidnap another person in or affecting interstate or foreign commerce for some purpose or benefit.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant, knowingly acting contrary to law, kidnapped [seized] [confined] [inveigled] _____ (the person described in the indictment), as charged;

To “kidnap” a person means to unlawfully hold, keep, detain, or confine the person against that person’s will. Involuntariness or coercion in connection with the victim’s detention is an essential part of the offense.

[To “inveigle” a person means to lure, or entice, or lead the person astray by false representations or promises, or other deceitful means.]

Second: That the defendant held the person for ransom [reward] [some purpose or benefit]; and

You need not unanimously agree on why the defendant kidnapped the person in question, so long as you each find that he had some purpose or derived some benefit from the kidnapping.

Third: That _____ (name of victim) was willfully transported without _____’s (name of victim) consent, in interstate [foreign] commerce.

The government need not prove that the defendant knew that he was transporting the victim in interstate [foreign] commerce, only that he did.

Note

This section provides for several jurisdictional circumstances, including but not limited to, that which is stated above, as well as that the defendant travels in interstate or foreign commerce, or that the defendant “uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense.” 18 U.S.C. §§ 1201(a). Other jurisdictional circumstances may be found in subsection (e) or subsections (a)(2)–(4). If these are charged, the instruction should be modified accordingly. There are also a number of penalty enhancements within the statute that should be included as elements, if charged. *See* 18 U.S.C. §§ 1201(a), (g); *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000). If these are disputed issues, the court should consider giving a lesser included instruction. *See* Instruction No. 1.33.

Definitions of “Interstate Commerce,” “Foreign Commerce,” and “Commerce” are in Instruction Nos. 1.39, 1.40, and 1.41. Transporting a victim from a foreign country to the United States constitutes transportation in “foreign commerce” within the meaning of 18 U.S.C. § 1201(a)(1). *See United States v. De La Rosa*, 911 F.2d 985, 990–91 (5th Cir. 1990).

For the elements of this crime, see *United States v. Garza-Robles*, 627 F.3d 161, 166–68 (5th Cir. 2010); *United States v. Guidry*, 456 F.3d 493, 510 (5th Cir. 2006); *United States v. Barton*, 257 F.3d 433 (5th Cir. 2001); and *United States v. Webster*, 162 F.3d 308 (5th Cir. 1998). The unpublished opinion of *United States v. Cabrera Saucedo*, 384 F. App’x. 312, 318–19 (5th Cir. 2010), states the need to separate the mens rea of this offense and jurisdiction. *See also Webster*, 162 F.3d at 330.

Non-physical restraint may be sufficient to support a conviction under this section. *See Garza-Robles*, 627 F.3d at 167–68; *see also United States v. Carrion-Caliz*, 944 F.2d 220, 225–26 (5th Cir. 1991) (citing *United States v. Wesson*, 779 F.2d 1143, 1144 (9th Cir. 1986), and *United States v. Hoog*, 504 F.2d 45, 50–51 (8th Cir. 1974)).

In *Webster*, 162 F.3d at 328–30, the court held that the phrase

“for ransom, reward or otherwise” in the statute comprehends any purpose at all. *See also United States v. Williams*, 998 F.2d 258 (5th Cir. 1993) (approving a charge using the term “for immoral purposes,” because “some benefit” can include sexual gratification). There need not be jury unanimity on this point, as long as each juror finds that the defendant had some purpose or derived some benefit. *See Webster*, 162 F.3d at 328–30; *see also United States v. Dixon*, 273 F.3d 636 (5th Cir. 2001).

Pursuant to the 2006 Amendments, the victim need not be alive when he or she is transported in interstate [foreign] commerce. *See* Pub.L. 109-248, § 213(1). Furthermore, a defendant does not have to transport the victim personally in interstate commerce so long as the victim is transported in interstate commerce by confederates. *See United States v. Jackson*, 978 F.2d 903, 910 (5th Cir. 1992).

Section 1201(b) provides that failure to release a victim within twenty-four hours after the unlawful seizure creates a rebuttable presumption that the victim had been transported in interstate or foreign commerce. This presumption should be invoked with great caution, if at all. At least one circuit has held it to be unconstitutional. *See United States v. Moore*, 571 F.2d 76 (2d Cir. 1978). The Supreme Court allows permissive presumptions only when the presumed fact flows more likely than not from the proved fact. *See Cnty. Court of Ulster Cnty. v. Allen*, 99 S.Ct. 2213, 2224 (1979); *Leary v. United States*, 89 S.Ct. 1532 (1969).

2.59

MAIL FRAUD; MONEY/PROPERTY OR HONEST SERVICES**18 U.S.C. § 1341****[18 U.S.C. § 1346]**

Title 18, United States Code, Section 1341, makes it a crime for anyone to use the mails [any private or commercial interstate carrier] in carrying out a scheme to defraud.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly devised or intended to devise a scheme to defraud, that is _____ (describe scheme from the indictment);

Second: That the scheme to defraud employed false material representations [false material pretenses] [false material promises];

Third: That the defendant mailed something [caused something to be [sent] [delivered]] through the United States Postal Service [a private or commercial interstate carrier] for the purpose of executing such scheme or attempting so to do; and

Fourth: That the defendant acted with a specific intent to defraud.

A “scheme to defraud” means any plan, pattern, or course of action intended to deprive another of money or property. [It can also involve any scheme to deprive an employer [shareholders] [citizens] [government

agency] of the intangible right to honest services through soliciting or accepting bribes or kickbacks. [Define “bribery” pursuant to 18 U.S.C. §§ 201(b) or 665(a)(2) or state law; define “kickback” pursuant to 41 U.S.C. § 52(2) or state law].]

A “specific intent to defraud” means a conscious, knowing intent to deceive or cheat someone.

A representation [pretense] [promise] is “false” if it is known to be untrue or is made with reckless indifference as to its truth or falsity. A representation [pretense] [promise] would also be “false” if it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with the intent to defraud.

A representation [pretense] [promise] is “material” if it has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to which it is addressed.

It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme. What must be proved beyond a reasonable doubt is that the defendant knowingly devised or intended to devise a scheme to defraud by means of false or fraudulent pretenses, representations, or promises that was substantially the same as the one alleged in the indictment.

It is also not necessary that the government prove that the mailed material [material sent by private or commercial interstate carrier] was itself false or fraudulent, or that the use of the mail [a private or commercial interstate carrier] was intended as the specific or exclusive means of accomplishing the alleged fraud. What must be proved beyond a reasonable doubt is that the use of the mails [private or commercial interstate carrier] was closely related to the scheme because the defendant either mailed something or caused it to be

mailed [defendant either sent or delivered something or caused it to be sent or delivered by a private or commercial interstate carrier] in an attempt to execute or carry out the scheme.

The alleged scheme need not actually succeeded in defrauding anyone.

To “cause” the mails [private or commercial interstate carrier] to be used is to do an act with knowledge that the use of the mails [private or commercial interstate carrier] will follow in the ordinary course of business or where such use can reasonably be foreseen even though the defendant did not intend or request the mails [private or commercial interstate carrier] to be used.

Each separate use of the mails [a private or commercial interstate carrier] in furtherance of a scheme to defraud by means of false or fraudulent pretenses, representations, or promises constitutes a separate offense.

Note

A fifth element, prompted by the *Apprendi* doctrine, is required when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. §§ 1341 and 2326. *See Apprendi v. New Jersey*, 120 S.Ct. 2348, 2351–63 (2000). If these are disputed issues, the court should consider giving a lesser included instruction. *See* Instruction No. 1.33.

This instruction incorporates 18 U.S.C. § 1346, which states that, “[f]or the purposes of this chapter, the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.” That language should be in the charge only if the indictment so charges. *See Skilling v. United States*, 130 S.Ct. 2896, 2934 (2010); *United States v. Griffin*, 324 F.3d 330, 356 (5th Cir. 2003). In *Skilling*, the Supreme Court held that “honest services” fraud under § 1346 consists only of bribery and kickbacks, not undisclosed self-dealing. 130 S.Ct. at 2931–32; *see United States v. Barraza*, 655 F.3d 375, 382 (5th Cir.

2011). Section 1346 reaches both private and public sector fraud. See *Skilling*, 130 S.Ct. at 2934 n.45. In a post-*Skilling* case, the Fifth Circuit held that § 1346 prosecutions may involve bribery and kickbacks as defined by federal or state law depending on the circumstances. See *United States v. Teel*, 691 F.3d 578, 584 (5th Cir. 2012). In an unpublished case applying *Teel*, the Fifth Circuit held that the jury instructions used in the trial of a state official under § 1346 were erroneous because they were based on federal law as opposed to state law. See *United States v. Sanchez*, 2012 WL 5861659, *6 (5th Cir. Nov. 20, 2012). The court reasoned that “*Skilling*’s ‘uniform national standard’ does not obviate the requirement that a state official, when prosecuted under § 1346, owe[s] a state-law duty.” *Id.*

“The government need not establish that the defendant used the mails himself or that he actually intended that the mails be used. The government need only prove that the scheme depended for its success in some way upon the information and documents which passed through the mail.” *United States v. Akpan*, 407 F.3d 360, 370 (5th Cir. 2005); see also *Bridge v. Phoenix Bond & Indem. Co.*, 128 S.Ct. 2131, 2138 (2008) (“[A]ny mailing that is incident to an essential part of the scheme satisfies the mailing element, even if the mailing itself contains no false information.”) (internal quotation marks omitted); *United States v. Ingles*, 445 F.3d 830, 835 (5th Cir. 2006) (discussing requirement that mail be “incidental” to an essential part of the scheme and the meaning of “causing” the mail to be used). This may also include a “post-purchase mailing designed to lull the victim into a false sense of security, postpone inquiries or complaints, or make the transaction less suspect.” See *United States v. Strong*, 371 F.3d 225, 230–31 (5th Cir. 2004); but see *United States v. Evans*, 148 F.3d 477, 483 (5th Cir. 1998) (a mailing after the scheme to defraud already “reached fruition” did not constitute mail fraud).

The Fifth Circuit has also held that there is no requirement that “the victim who loses money or property in a mail fraud scheme also be the party that was deceived by the defendant’s scheme.” *United States v. McMillan*, 600 F.3d 434, 449 (5th Cir. 2010). It is irrelevant to whom the misrepresentations are directly made, as long as the object of the fraud is the victim’s property and the victim’s property rights were affected by the misrepresentations. *Id.*; see also *Ingles*, 445 F.3d at 837 (“[B]oth innocent mailings (i.e. those that do not contain a misrepresentation) and mailings between innocent parties can support a mail fraud conviction.”). Actual loss by the victim need not be proven. See *McMillan*, 600 F.3d at 450.

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For the elements of mail fraud, see *United States v. Hoeffner*, 626 F.3d 857, 863–64 (5th Cir. 2010); *McMillan*, 600 F.3d at 447; *United States v. Arledge*, 553 F.3d 881, 890 (5th Cir. 2008); and *United States v. Lucas*, 516 F.3d 316, 339 (5th Cir. 2008). *See also* *United States v. Stephens*, 571 F.3d 401, 404 (5th Cir. 2009) (“To prove a scheme to defraud, the Government must show fraudulent activity and that the defendant had a conscious, knowing intent to defraud.”); *United States v. Pettigrew*, 77 F.3d 1500, 1513 n.9 (5th Cir. 1996) (preferred wording of “intent to defraud” in that case uses the word “meaning” instead of “including”); *United States v. Dillman*, 15 F.3d 384, 392 (5th Cir. 1994) (stating definition of “false statement”); *United States v. Restivo*, 8 F.3d 274, 280 (5th Cir. 1993) (stating definitions of “scheme to defraud” and “intent to defraud”).

Where use of private or commercial interstate carrier is involved, the government need not prove that state lines were crossed, only that the carrier engages in interstate deliveries. *See United States v. Marek*, 238 F.3d 310, 318 (5th Cir. 2001).

The requirement of “materiality of falsehood” is derived from *Neder v. United States*, 119 S.Ct. 1827, 1841 (1999). *See also United States v. Radley*, 632 F.3d 177, 185 (5th Cir. 2011).

Because the language of the mail fraud and wire fraud statutes are so similar, cases construing one are applicable to the other. *See United States v. Phipps*, 595 F.3d 243, 245 (5th Cir. 2010). Accordingly, the Note to Instruction No. 2.60, 18 U.S.C. § 1343, Wire Fraud, should also be consulted.

2.60

WIRE FRAUD; MONEY/PROPERTY OR HONEST SERVICES**18 U.S.C. § 1343****[18 U.S.C. § 1346]**

Title 18, United States Code, Section 1343, makes it a crime for anyone to use interstate [foreign] wire [radio] [television] communications in carrying out a scheme to defraud.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly devised or intended to devise any scheme to defraud, that is _____ (describe scheme from the indictment);

Second: That the scheme to defraud employed false material representations [false material pretenses] [false material promises];

Third: That the defendant transmitted [caused to be transmitted] by way of wire [radio] [television] communications, in interstate [foreign] commerce, any writing [sign] [signal] [picture] [sound] for the purpose of executing such scheme; and

Fourth: That the defendant acted with a specific intent to defraud.

A “scheme to defraud” means any plan, pattern, or course of action intended to deprive another of money or property. [It can also involve any scheme to deprive an employer [shareholders] [citizens] [government

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agency] of the intangible right to honest services through soliciting or accepting bribes or kickbacks. [Define “bribery” pursuant to 18 U.S.C. §§ 201(b) or 665(a)(2) or state law; define “kickback” pursuant to 41 U.S.C. § 52(2) or state law].]

A “specific intent to defraud” means a conscious, knowing intent to deceive or cheat someone.

A representation [pretense] [promise] is “false” if it is known to be untrue or is made with reckless indifference as to its truth or falsity. A representation [pretense] [promise] would also be “false” if it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with the intent to defraud.

A representation [pretense] [promise] is “material” if it has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to which it is addressed.

It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme. What must be proved beyond a reasonable doubt is that the defendant knowingly devised or intended to devise a scheme to defraud by means of false or fraudulent pretenses, representations, or promises that was substantially the same as the one alleged in the indictment.

It is also not necessary that the government prove that the material transmitted by wire [radio] [television] communications was itself false or fraudulent, or that the use of the interstate [foreign] wire communications facilities was intended as the specific or exclusive means of accomplishing the alleged fraud. What must be proved beyond a reasonable doubt is that the use of the interstate [foreign] wire communications facilities was closely related to the scheme because the defendant either wired something or caused it to be wired in

interstate [foreign] commerce in an attempt to execute or carry out the scheme.

The alleged scheme need not actually succeed in defrauding anyone.

To “cause” interstate [foreign] wire [radio] [television] communications facilities to be used is to do an act with knowledge that the use of the wire [radio] [television] communications facilities will follow in the ordinary course of business or where such use can reasonably be foreseen.

Each separate use of the interstate [foreign] wire [radio] [television] communications facilities in furtherance of a scheme to defraud by means of false or fraudulent pretenses, representations, or promises constitutes a separate offense.

Note

A fifth element, prompted by the *Apprendi* doctrine, is required when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. §§ 1343 and 2326. *See Apprendi v. New Jersey*, 120 S.Ct. 2348, 2351–63 (2000). If these are disputed issues, the court should consider giving a lesser included instruction. *See* Instruction No. 1.33.

On the elements of a wire fraud offense, see *United States v. Radley*, 632 F.3d 177, 184–85 (5th Cir. 2011); *United States v. Dowl*, 619 F.3d 494, 499–500 (5th Cir. 2010); and *United States v. Valencia*, 600 F.3d 389, 430–31 (5th Cir. 2010). *See also United States v. Stephens*, 571 F.3d 401, 404 (5th Cir. 2009); *United States v. Ford*, 558 F.3d 371, 375 (5th Cir. 2009); *United States v. Brown*, 459 F.3d 509, 518 (5th Cir. 2006); *United States v. Freeman*, 434 F.3d 369, 377 (5th Cir. 2005); *United States v. Rivera*, 295 F.3d 461, 466 (5th Cir. 2002).

In wire fraud schemes, “[t]he wire need not be an essential element of the scheme; rather, it is sufficient for the wire to be incident to an essential part of the scheme or a step in the plot. The underlying question is whether the [use of the wire] somehow contributed to the successful continuation of the scheme—and, if

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so, whether [it was] so intended by the defendant.” *United States v. Barraza*, 655 F.3d 375, 383 (5th Cir. 2011) (citations omitted) (holding that an email was sufficient to sustain a wire fraud conviction); *see also United States v. Phipps*, 595 F.3d 243, 246–47 (5th Cir. 2010) (holding a single fax, not sent by the defendant and incidental to the scheme, to be sufficient to support a charge of wire fraud). The Committee notes that, as technology advances, the definition of what constitutes a “wire” becomes unclear and the instruction may need to be altered accordingly. *See United States v. Nunez*, 78 F. App’x 989, 991 (5th Cir. 2003) (upholding wire fraud conviction when scheme used cell phone).

“[O]nce membership in a scheme to defraud is established, a knowing participant is liable for any wire communications which subsequently takes place or which previously took place in connection with the scheme.” *United States v. Dula*, 989 F.2d 772, 778 (5th Cir. 1993); *see also United States v. Arledge*, 553 F.3d 881, 892 (5th Cir. 2008).

The requirement of “materiality of falsehood” is derived from *Neder v. United States*, 119 S.Ct. 1827, 1841 (1999). *See also Radley*, 632 F.3d at 185.

This instruction incorporates 18 U.S.C. § 1346, which states that, “[f]or the purposes of this chapter, the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.” For a discussion of “honest services” under § 1346, see the Note to Instruction No. 2.59, 18 U.S.C. § 1341, Mail Fraud.

The Note to Instruction No. 2.59, 18 U.S.C. § 1341, Mail Fraud, should also be consulted generally. Because the language of the mail fraud and wire fraud statutes are so similar, cases construing one are applicable to the other. *See Phipps*, 595 F.3d at 245.

2.61

BANK FRAUD

18 U.S.C. § 1344(2)

Title 18, United States Code, Section 1344(2), makes it a crime for anyone to knowingly execute or attempt to execute a scheme or plan to obtain any money[s], funds, assets, securities, or other property owned by or under the custody or control of an insured financial institution by means of false or fraudulent pretenses, representations, or promises.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly executed [attempted to execute] a scheme or plan to obtain money or property from _____ (name bank) by means of false or fraudulent pretenses [false or fraudulent representations] [false or fraudulent promises];

Second: That the defendant acted with a specific intent to defraud _____ (name bank);

Third: That the false or fraudulent pretenses [representations] [promises] that the defendant used were material;

Fourth: That the defendant placed the financial institution at risk of civil liability or financial loss; and

Fifth: That _____ (name bank) was insured by the Federal Deposit Insurance Corporation [name other agency as defined by 18 U.S.C. § 20].

A “scheme or plan” means any plan, pattern, or course of action involving a false or fraudulent pretense,

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representation, or promise intended to deceive others in order to obtain something of value, such as money, from the institution to be deceived.

A defendant acts with the requisite “intent to defraud” if the defendant acted knowingly and with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to the defendant.

A representation is “false” if it is known to be untrue or is made with reckless indifference as to its truth or falsity. A representation is also “false” when it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud.

A false representation is “material” if it has a natural tendency to influence, or is capable of influencing, the institution to which it is addressed.

It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature of the alleged scheme, or that the alleged scheme actually succeeded in defrauding someone. What must be proven beyond a reasonable doubt is that the accused knowingly executed or attempted to execute a scheme that was substantially similar to the scheme alleged in the indictment.

Note

See Note to Instruction No. 2.59, 18 U.S.C. § 1341, Mail Fraud, regarding whether a sixth element is prompted by the *Apprendi* doctrine when the indictment alleges any fact that would result in an enhanced sentence.

For a prosecution under § 1344(1), modify the language in the first paragraph to track the statute. See *United States v. Harvard*, 103 F.3d 412, 421 (5th Cir. 1997), for the elements of § 1344(1).

For cases that set forth the elements of § 1344(2), see *United*

States v. Nguyen, 493 F.3d 613 (5th Cir. 2007); *United States v. Odiodio*, 244 F.3d 398, 401 (5th Cir. 2001); *United States v. McCauley*, 253 F.3d 815, 820 (5th Cir. 2001); and *United States v. Dadi*, 235 F.3d 945, 950–51 (5th Cir. 2000). While the government must prove a risk of loss, the government need not prove a substantial likelihood of risk of loss. See *McCauley*, 253 F.3d at 820.

Because materiality is an element of the charged offense, the court must submit the question of materiality to the jury. See *Neder v. United States*, 119 S.Ct. 1827 (1999); *United States v. Foster*, 229 F.3d 1196, 1197 n.1 (5th Cir. 2000) (“[W]e read *Neder* to require a materiality instruction.”). The definition of “materiality” in this instruction was described as the “general” definition by the Supreme Court. *Neder*, 119 S.Ct. at 1837. However, the Supreme Court in *Neder* also noted a different definition in the Restatement (Second) of Torts § 538 (1976). *Id.* at 1840 n.5 (quoting the Restatement’s definition that “a statement is material if (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.”). The Fifth Circuit has recognized and acknowledged the existence of these alternative definitions of “material,” *United States v. Holmes*, 406 F.3d 337, 355 n.27 (5th Cir. 2005), and has discussed them in connection with prosecutions under the wire fraud statute. See *United States v. Davis*, 226 F.3d 346, 358–59 (5th Cir. 2000); *United States v. Richards*, 204 F.3d 177, 191–92 (5th Cir. 2000) (applying definition of materiality from footnote 5 of *Neder* to determine whether the superseding indictment charged the defendant with making materially false statements), *overruled on other grounds by United States v. Cotton*, 122 S.Ct. 1781, 1795 (2002).

The definition of materiality in this instruction was also discussed in a bank fraud context in *United States v. Campbell*, 64 F.3d 967, 975 (5th Cir. 1995) (citing *United States v. Heath*, 970 F.2d 1397, 1403 (5th Cir. 1992)). The judge should be aware that *United States v. Wells*, 117 S.Ct. 921 (1997), holds that materiality is not an element in a prosecution under 18 U.S.C. § 1014, a similar statute criminalizing the making of false statements to a bank. The Fifth Circuit has held that 18 U.S.C. § 1014, which prohibits making false statements to a federally insured lending institution, is not a lesser included offense of bank fraud. See *United States v. Morrow*, 177 F.3d 272, 293 (5th Cir. 1999).

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The “intent to defraud” and “scheme or plan to defraud” definitions are derived from *United States v. Restivo*, 8 F.3d 274, 280 (5th Cir. 1993) (citing *United States v. Saks*, 964 F.2d 1514, 1518 (5th Cir. 1992)). See also *United States v. Pettigrew*, 77 F.3d 1500, 1513 (5th Cir. 1996).

While a defendant may not be convicted of bank fraud when they merely present a check for payment on accounts with insufficient funds, bank fraud may properly rest on a scheme that involves misrepresentations to banks that directly influence the bank’s decision-making process. See *United States v. Morganfield*, 501 F.3d 453, 462–64 (5th Cir. 2007). The Fifth Circuit has adopted the positions held by the Fourth Circuit in rejecting the argument that there can be no bank fraud where the principle target is a third party. *Id.* at 464.

FDIC insurance, an essential element of bank fraud, may be proved by “the testimony of a bank officer.” *United States v. Sanders*, 343 F.3d 511, 517 (5th Cir 2003).

The definition for a “false statement” is derived from *United States v. Dillman*, 15 F.3d 384, 392 (5th Cir. 1994); *United States v. Gunter*, 876 F.2d 1113, 1120 (5th Cir. 1989); *United States v. Chavis*, 772 F.2d 100, 109–10 (5th Cir. 1985). See *United States v. Loeffel*, 172 F. App’x 612, 617 (5th Cir. 2006) (reiterating that “this circuit has previously accepted this definition of ‘false statement’ in the context of jury instructions for a bank fraud cause under 18 U.S.C. § 1344.”).

2.62

MAILING OBSCENE MATERIAL

18 U.S.C. § 1461

Title 18, United States Code, Section 1461, makes it a crime for anyone to use the United States mail to transmit obscene material.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly used the mail for the conveyance [delivery] of certain material [caused certain material to be delivered by mail], as charged;

Second: That the defendant knew at the time of the mailing that the material was of a sexually oriented nature; and

Third: That the material was obscene.

Although the government must prove that the defendant generally knew the mailed material was of a sexually oriented nature, the government does not have to prove that the defendant knew the material was legally obscene.

Freedom of expression has contributed much to the development and well being of our free society. In the exercise of the fundamental constitutional right to free expression which all of us enjoy, sex may be portrayed, and the subject of sex may be discussed, freely and publicly. Material is not to be condemned merely because it contains passages or sequences that are descriptive of sexual activity. However, the constitutional right to free expression does not extend to that which is obscene.

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To prove a matter is “obscene,” the government must satisfy three tests: (1) that the work appeals predominantly to prurient interest; (2) that it depicts or describes sexual conduct in a patently offensive way; and (3) that the material, taken as a whole, lacks serious literary, artistic, political, or scientific value.

An appeal to “prurient” interest is an appeal to a morbid, degrading, and unhealthy interest in sex, as distinguished from an ordinary interest in sex.

The first test, therefore, is whether the predominant theme or purpose of the material, when viewed as a whole and not part by part, and when considered in relation to the intended and probable recipients, is an appeal to the prurient interest of an average person in the community as a whole [to the prurient interest of members of a deviant sexual group]. In making this decision, you must examine the main or principal focus of the material, when assessed in its entirety and based on its total effect, not on incidental themes or isolated passages or sequences.

The second test is whether the material depicts or describes, in a patently offensive way, sexual conduct such as ultimate sexual acts, normal or perverted, actual or simulated; masturbation; excretory functions; or lewd exhibition of the genitals.

These first two tests which I have described are to be decided by you, applying contemporary community standards. This means that you should make the decision in the light of contemporary standards that would be applied by the average person in this community, with an average and normal attitude toward—and interest in—sex. Contemporary community standards are those accepted in this community as a whole. You must decide whether the material would appeal predominantly to prurient interests and would depict or describe sexual conduct in a patently offensive way

when viewed by an average person in this community as a whole, that is, by the community at large or in general. Matter is patently offensive by contemporary community standards if it so exceeds the generally accepted limits of candor in the entire community as to be clearly offensive. You must not judge the material by your own personal standards, if you believe them to be stricter than those generally held, nor should you determine what some groups of people may believe the community ought to accept or refuse to accept. Rather, you must determine the attitude of the community as a whole.

[However, the prurient-appeal requirement may also be assessed in terms of the sexual interest of a clearly defined deviant sexual group if the material in question was intended to appeal to the prurient interest of that group, as distinguished from the community in general.]

If you find that the material meets the first two tests of the obscenity definition, your final decision is whether the material, taken as a whole, lacks serious literary, artistic, political, or scientific value. Unlike the first two tests, this third test is not to be decided on contemporary community standards but rather on the basis of whether a reasonable person, considering the material as a whole, would find that the material lacks serious literary, artistic, political, or scientific value. An item may have serious value in one or more of these areas even if it portrays sexually oriented conduct. It is for you to say whether the material in this case has such value.

All three of these tests must be met before the material in question can be found to be obscene. If any one of them is not met, the material would not be obscene within the meaning of the law.

Note

Miller v. California, 93 S.Ct. 2607, 2615 (1973), establishes a three-pronged test to determine whether material is obscene. The prosecution has the burden of proving each element of the *Miller* test. See *United States v. Ragsdale*, 426 F.3d 765, 771 (5th Cir. 2005) (citing *Pope v. Illinois*, 107 S.Ct. 1918, 1924 (1987)).

For a discussion on “prurient” interest, see *Pinkus v. United States*, 98 S.Ct. 1808, 1814 (1978); *Hamling v. United States*, 94 S.Ct. 2887, 2913 (1974); *Mishkin v. New York*, 86 S.Ct. 958, 962–63 (1966); *Roth v. United States*, 77 S.Ct. 1304, 1310–11 (1957); and *United States v. Guglielmi*, 819 F.2d 451, 455 (4th Cir. 1987).

For a discussion on “patently offensive,” see *Hoover v. Byrd*, 801 F.2d 740 (5th Cir. 1986), and *United States v. Easley*, 927 F.2d 1442, 1449 (8th Cir. 1991). Although the first two prongs of the *Miller* test are to be judged by contemporary community standards, the third prong is to be judged by a “reasonable person” standard, a nationally uniform objective standard. See *Pope*, 107 S.Ct. at 1920–21; *United States v. Easley*, 942 F.2d 405, 411 (6th Cir. 1991).

In cases involving material designed for and primarily disseminated to a clearly defined deviant sexual group, the prurient-appeal requirement is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. See *Mishkin*, 86 S.Ct. at 963. The Supreme Court has stated that, “[w]e adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group” *Id.* at 964.

Hamling, 94 S.Ct. at 2908–11, and *United States v. Inv. Enters. Inc.*, 10 F.3d 263, 267 n.5 (5th Cir. 1993), indicate that knowledge of the sexually explicit nature of material is the required scienter for 18 U.S.C. §§ 1461 and 1462. See also *United States v. Schmeltzer*, 20 F.3d 610, 612 (5th Cir. 1994) (stating that knowledge that the material is sexually oriented is the scienter requirement for conviction under § 1462); *United States v. Sulaiman*, 490 F.2d 78, 79 (5th Cir. 1974) (stating that proof that the defendant knew the material was sexually oriented is sufficient to establish scienter under § 1461). A specific intent to mail something known to be obscene is not required. See *Hamling*, 94 S.Ct. at 2908–11; *United States v. Hill*, 500 F.2d 733, 740 (5th Cir. 1974) (asserting that knowledge that the material is sexually oriented is

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the only scienter required for conviction under §§ 1462 and 1465).

2.63

**INTERSTATE TRANSPORTATION OF OBSCENE
MATERIAL (BY COMMON CARRIER)****18 U.S.C. § 1462**

Title 18, United States Code, Section 1462, makes it a crime for anyone to use a common carrier to transmit obscene material in interstate [foreign] commerce.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly used a common carrier [interactive computer service] to transport _____ (describe material in the indictment) in interstate [foreign] commerce, as charged;

Second: That the defendant knew, at the time of such transportation, the sexually oriented content of the material; and

Third: That the material was obscene.

[Here include definition of obscenity as stated in Instruction No. 2.62, 18 U.S.C. § 1461, Mailing Obscene Material.]

A “common carrier” includes any person or corporation engaged in the business of carting, hauling, or transporting goods and commodities for members of the public for hire.

[“Interactive computer service” means any information service, system, or access to software provider that provides or enables computer access by multiple users to a computer service, including specifically a service or system that provides access to the Internet and such

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systems operated or services offered by libraries or educational institutions.]

One of the specific facts the government must prove is that the defendant knew of the sexually oriented contents of the material that was transported in interstate commerce. The government is not obligated to prove that the defendant knew that such material was legally obscene, only that the content was sexually oriented.

Note

For definitions of “Interstate Commerce,” “Foreign Commerce,” and “Commerce,” see Instruction Nos. 1.39, 1.40, and 1.41.

“Interactive computer service” is defined in 47 U.S.C. § 230(f)(2).

See Note following Instruction No. 2.62, 18 U.S.C. § 1461, Mailing Obscene Material.

2.64

**INTERSTATE TRANSPORTATION OF OBSCENE
MATERIAL (FOR PURPOSE OF SALE OR
DISTRIBUTION)****18 U.S.C. § 1465**

Title 18, United States Code, Section 1465, makes it a crime for anyone to transport obscene material in interstate [foreign] commerce for the purpose of selling [distributing] it.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly transported in interstate [foreign] commerce certain material, as charged;

Second: That the defendant transported such material for the purpose of selling [distributing] it;

Third: That the defendant knew, at the time of such transportation, of the sexually oriented content of the material; and

Fourth: That the material was obscene.

[Here include definition of obscenity as stated in Instruction No. 2.62, 18 U.S.C. § 1461, Mailing Obscene Material.]

To transport “for the purpose of sale or distribution” is to move the material with the intent to transfer the material to someone else, even if no money is involved.

[If two or more copies of any publication or two or more of any article of the character described in the

indictment have been transported, you may presume that the materials were intended for sale or distribution. That presumption, however, may be rebutted, or overcome, by other evidence.]

[If a combined total of five publications or articles described in the indictment have been transported, you may presume that the materials were intended for sale or distribution. That presumption, however, may be rebutted, or overcome, by other evidence.]

One of the facts that the government must prove is that the defendant knew of the sexually oriented content of the material which was transported in interstate commerce. The government does not have the obligation of showing that the defendant knew that such material was in fact legally obscene, only that the defendant knew that it was sexually oriented.

Note

For definitions of “Interstate Commerce,” “Foreign Commerce,” and “Commerce,” see Instruction Nos. 1.39, 1.40, and 1.41.

See Note following Instruction No. 2.62, 18 U.S.C. § 1461, Mailing Obscene Material.

In *United States v. Coil*, 442 F.3d 912 (5th Cir. 2006), the Fifth Circuit held that § 1465 is not rendered unconstitutional by *Stanley v. Georgia*, 89 S.Ct. 1243 (1969), which recognized the right of individuals to possess obscene materials in their homes, or by *Lawrence v. Texas*, 123 S.Ct. 2472 (2003), which held that homosexuals have a right to engage in certain consensual sexual activity in their home without government intervention.

2.65

**CORRUPTLY OBSTRUCTING
ADMINISTRATION OF JUSTICE****18 U.S.C. § 1503(a)**

Title 18, United States Code, Section 1503, makes it a crime for anyone corruptly to influence [obstruct] [impede] [endeavor to influence [obstruct] [impede]] the due administration of justice in connection with a pending judicial proceeding.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That there was a proceeding pending before a federal court [grand jury];

Second: That the defendant knew of the pending judicial proceeding and influenced [obstructed] [impeded] [endeavored to influence [obstruct] [impede]] the due administration of justice in that proceeding; and

Third: That the defendant's act was done "corruptly," that is, the defendant acted knowingly and dishonestly, with the specific intent to subvert or undermine the due administration of justice.

[When an "endeavor" is charged, add the following:

It is not necessary to show that the defendant was successful in achieving the forbidden objective, only that the defendant corruptly tried to achieve it in a manner which he knew was likely to influence [obstruct] [impede] the due administration of justice due to the natural and probable effect of the defendant's actions.]

Note

Under the *Apprendi* doctrine, a fourth element is needed if the

case involves any enhancements under § 1503(b). *See Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000). See Note to Instruction No. 2.66, 18 U.S.C. § 1503(a), Obstructing Administration of Justice by Threats or Force.

This charge applies to the omnibus clause of the statute. *See United States v. Aguilar*, 115 S.Ct. 2357 (1995). For a discussion of the elements of this offense, see *United States v. Richardson*, 676 F.3d 491, 501–04 (5th Cir. 2012); *United States v. Brown*, 459 F.3d 509, 530–31 (5th Cir. 2006); *United States v. De La Rosa*, 171 F.3d 215, 221–22 (5th Cir. 1999); and *United States v. Williams*, 874 F.2d 968, 977 (5th Cir. 1989).

With respect to the first element, § 1503 requires a pending judicial proceeding, as opposed to a police or agency investigation. *See Richardson*, 676 F.3d at 502–03; *United States v. Cihak*, 137 F.3d 252, 263 (5th Cir. 1998); *United States v. Casel*, 995 F.2d 1299, 1306 (5th Cir. 1993), *vacated on other grounds sub nom. Reed v. United States*, 114 S.Ct. 1289 (1994); *United States v. Vesich*, 724 F.2d 451, 454 (5th Cir. 1984). To establish “pendency,” the court must decide whether a reasonable jury could conclude that “the investigating agency has acted ‘in furtherance of an actual grand jury investigation, i.e., to secure a presently contemplated presentation of evidence before the grand jury.’” *Vesich*, 724 F.2d at 455 (quoting *United States v. Walasek*, 527 F.2d 676, 678 (3d Cir. 1975)).

The omnibus clause of § 1503 intends to cover all proscribed endeavors without regard to the technicalities of the law of attempt or the doctrine of impossibility. *See Richardson*, 676 F.3d at 503; *United States v. Neal*, 951 F.2d 630, 632 (5th Cir. 1992).

In *Aguilar*, 115 S.Ct. at 2362, the Supreme Court read the statute as requiring a “nexus” relationship in time, causation, or logic with the judicial proceeding so that the proscribed endeavor “must have the ‘natural and probable effect’ of interfering with the due administration of justice.” *See also Richardson*, 676 F.3d at 502; *United States v. Sharpe*, 193 F.3d 852, 865 (5th Cir. 1999).

The term “due administration of justice” is defined as “the performance of acts required by law in the discharge of duties such as appearing as a witness and giving truthful testimony when subpoenaed.” *Sharpe*, 193 F.3d at 864; *see also Richardson*, 676 F.3d at 502–03; *Williams*, 874 F.2d at 976 n.24 (citing *United States v. Partin*, 552 F.2d 621 (5th Cir. 1977)).

The Fifth Circuit expressly approved this instruction’s definition of “corruptly” in *Richardson*, 676 F.3d at 506–08.

2.65

PATTERN JURY INSTRUCTIONS

A trial court did not commit plain error by failing to give a unanimity instruction, at least when the defendant failed to show prejudice. *See Sharpe*, 193 F.3d at 870–71.

2.66

**OBSTRUCTING ADMINISTRATION OF JUSTICE
BY THREATS OR FORCE****18 U.S.C. § 1503(a)**

Title 18, United States Code, Section 1503, makes it a crime for anyone by threats or force to influence [obstruct] [impede] [endeavor to influence [obstruct] [impede]] the due administration of justice in connection with a pending judicial proceeding.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That there was a proceeding pending before a federal court [grand jury];

Second: That the defendant knew of the pending judicial proceeding;

Third: That the defendant threatened physical force [used physical force], as charged in the indictment; and

Fourth: That the defendant's conduct influenced [obstructed] [impeded] [endeavored to influence [obstruct] [impede]] the due administration of justice in that proceeding.

[When an "endeavor" is charged, add the following:

It is not necessary to show that the defendant was successful in achieving the forbidden objective, only that the defendant tried to achieve it in a manner which he knew was likely to influence [obstruct] [impede] the due administration of justice as to the natural and probable effect of the defendant's actions.]

2.66

PATTERN JURY INSTRUCTIONS

Note

See Note to Instruction No. 2.65, 18 U.S.C. § 1503(a), Corruptly Obstructing Administration of Justice.

This offense provides for an enhanced sentence in the case of a killing, or attempted killing of the juror or court officer, or in a case “in which the offense was committed against a petit juror and in which a class A or B felony was charged.” 18 U.S.C. § 1503(b). Another possible enhancement occurs when there is a use or threat of force in connection with the trial of any criminal case. The maximum sentence becomes the higher of that provided in § 1503 or that provided for the criminal offense charged in the trial in which the juror is participating. An additional element, prompted by the *Apprendi* doctrine, would be required in all such cases. See *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000).

2.67

CORRUPTLY INFLUENCING A JUROR**18 U.S.C. § 1503(a)**

Title 18, United States Code, Section 1503(a), makes it a crime for anyone corruptly to endeavor to influence [intimidate] [impede] any petit [grand] juror of a federal court.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That _____ was a petit [grand] juror of a federal court;

Second: That the defendant endeavored to influence [intimidate] [impede] the juror in the discharge of his duty as a petit [grand] juror; and

Third: That the defendant acted “corruptly,” that is, knowingly and dishonestly, with the specific intent to subvert or undermine the integrity of the court proceeding in which the juror served.

It is not necessary for the government to prove that the juror was in fact swayed or changed or prevented in any way, but only that the defendant corruptly tried to do so.

Note

This instruction charges only the corrupt endeavor to influence a juror. The statute also prohibits the use of threats or force as well as such action against an officer of the United States or magistrate. *See* 18 U.S.C. § 1503(a); Instruction No. 2.66, 18 U.S.C. § 1503(a), Obstructing Administration of Justice by Threats or Force. If this conduct is charged, or if the defendant is accused of injuring a juror, officer, or magistrate, the instruction should be modified accordingly.

2.67

PATTERN JURY INSTRUCTIONS

An additional element, prompted by the *Apprendi* doctrine, is required if the offense involves penalty enhancements under § 1503(b) or “occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force.” *See* 18 U.S.C. §§ 1503(a)–(b). *See* also the Note to Instruction No. 2.65, Corruptly Obstructing Administration of Justice.

2.68

INTIMIDATION TO INFLUENCE TESTIMONY

18 U.S.C. § 1512(b)(1)

Title 18, United States Code, Section 1512(b)(1), makes it a crime for anyone knowingly to use [attempt to use] intimidation [threats] [corruptly persuades] with the intent to influence [delay] [prevent] the testimony of any person in an official federal proceeding.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant used intimidation [threats] against another person [attempted to intimidate [threaten] another person]; and

[*First:* That the defendant corruptly persuaded [attempted to persuade] another person; and]

Second: That the defendant acted knowingly and with intent to dishonestly influence [delay] [prevent] the testimony of _____ with respect to _____ (describe official proceeding named in indictment), an official proceeding.

[An act is done “corruptly” if the defendant acted knowingly and dishonestly, with the specific intent to subvert or undermine the due administration of justice.]

The term “intimidation” means the use of any words or actions intended or designed to make another person timid or fearful or make that person refrain from doing something the person would otherwise do, or do something that person would otherwise not do.

To “act with intent to influence the testimony of a

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PATTERN JURY INSTRUCTIONS

witness” means to act for the purpose of getting the witness to change, color, or shade his or her testimony in some way, but it is not necessary for the government to prove that the witness’s testimony was, in fact, changed in any way.

Note

This crime allows for an enhancement of punishment where the violation “occurs in connection with a trial of a criminal case.” 18 U.S.C. § 1512(j); see *United States v. Salazar*, 542 F.3d 139, 146 (5th Cir. 2008). In such cases, therefore, the second element of the offense should specify that the official proceeding was a trial of a criminal case.

For a general discussion of § 1512 and a particular discussion of the “intent to influence” and “official proceeding,” see *United States v. Ramos*, 537 F.3d 439, 462–64 (5th Cir. 2008) (reversing convictions of two Border Patrol Agents for violating 18 U.S.C. § 1512(c) because an internal, informal investigation conducted by the Department of Homeland Security did not constitute an “official proceeding”), and *United States v. Shively*, 927 F.2d 804, 810–13 (5th Cir. 1991).

This instruction presumes an allegation that the intent to influence was accomplished through knowing intimidation, threats, or corrupt persuasion. However, § 1512(b)(1) can also be violated if one knowingly uses “misleading conduct” toward another person to influence testimony. See, e.g., *United States v. Gabriel*, 125 F.3d 89, 102 (2d Cir. 1997), *abrogated on other grounds by United States v. Quattrone*, 441 F.3d 153, 176 (2d Cir. 2006). In such a case, this instruction must be modified.

The mens rea requirement of “knowingly” applies equally to all the acts that immediately follow in the statutory language. See *Arthur Andersen LLP v. United States*, 125 S.Ct. 2129, 2136 (2005) (“Only persons conscious of wrongdoing can be said to ‘knowingly . . . corruptly persuad[e].’”).

It was error for the district court to exclude the term “dishonesty” from the Fifth Circuit Pattern Jury Instruction No. 2.65 definition of “corruptly” in a case involving allegations that an accounting firm obstructed a Securities and Exchange Commission proceeding in violation of § 1512(b) by destroying documents. See *Arthur Andersen LLP*, 125 S.Ct. at 2136. Specifically, the Court

held that by omitting the concept of “dishonesty” from the definition of “corruptly,” the jury was permitted to convict based on “innocent conduct,” i.e., “innocently persuad[ing] another to withhold information from the Government.” *Id.* at 706–07.

This instruction also presumes an official proceeding was pending. The statute specifically provides that an “official proceeding” need not be pending or about to be instituted at the time of the offense. *See* 18 U.S.C. § 1512(f)(1); *United States v. Greenwood*, 974 F.2d 1449, 1460 (5th Cir. 1992). Nonetheless, it is necessary for a “nexus” to exist between the intimidating act and the proceeding. That is, at the time of the violative act, the defendant must have foreseen an official proceeding in which the testimony may be proffered. *See Arthur Andersen LLP*, 125 S.Ct. at 2137.

Any proceeding before a United States district judge, United States bankruptcy judge, United States magistrate judge, or a federal grand jury is an “official proceeding” within the meaning of this law. The term “official proceeding” is defined in 18 U.S.C. § 1515(a)(1).

If the case involves an attempt to intimidate, add the Instruction No. 1.32, Attempt.

18 U.S.C. §§ 1512(a)(1)(c), 1512(a)(2)(c), and 1512(b)(3), prohibit killing a person, using physical force against a person, or knowingly using intimidation, threats, or corrupt persuasion against a person with the intent to hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the possible commission of a federal offense. A jury should be instructed in a § 1512(a)(1)(c) offense on the following two elements: (1) a killing, (2) committed with the intent to prevent a communication about the possible commission of a federal offense. *See Fowler v. United States*, 131 S.Ct. 2045, 2049 (2011); *United States v. Causey*, 185 F.3d 407, 422–23 (5th Cir. 1999). Resolving a circuit split, the *Fowler* Court held that evidence must establish that there was a reasonable likelihood that a relevant communication would have been made to a federal law enforcement officer. 131 S.Ct. at 2049–53.

2.69

**FALSE DECLARATION BEFORE GRAND JURY
OR COURT****18 U.S.C. § 1623**

Title 18, United States Code, Section 1623, makes it a crime for anyone to knowingly make a false material statement under oath to a court [grand jury].

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the statement was made while the defendant was under oath before the court [grand jury] as charged;

Second: That such statement was false in one or more of the respects charged;

Third: That the defendant knew such statement was false when the defendant made it; and

Fourth: That the false statement was material to the court proceeding [grand jury's inquiry].

A statement is “material” if it has a natural tendency to influence, or is capable of influencing, the decision of the court [grand jury].

In reviewing the statement which is alleged to have been false, you should consider such statement in the context of the sequence of questions asked and answers given, and the words used should be given their common and ordinary meaning unless the context clearly shows that a different meaning was mutually understood by the questioner and the witness.

If you should find that a particular question was

ambiguous and that the defendant truthfully answered one reasonable interpretation of the question under the circumstances presented, then such answer would not be false. Similarly, if you should find that the question was clear but the answer was ambiguous, and one reasonable interpretation of such answer would be truthful, then such answer would not be false.

[Where the defendant has under oath in proceedings before the court [grand jury] knowingly made two or more declarations which are inconsistent to the degree that one of them is necessarily false, the government need not specify which was false, so long as each was material to the point in question.]

Note

The materiality of the alleged false statement is a question for the jury. *See United States v. Gaudin*, 115 S.Ct. 2310 (1995).

The definition of “materiality” in this instruction was described as the “general” definition by the Supreme Court in *Neder v. United States*, 119 S.Ct. 1827, 1837 (1999). For a discussion on materiality and ambiguity, see *United States v. Brown*, 459 F.3d 501, 529–30 (5th Cir. 2006).

18 U.S.C. § 1623(c) eliminated the traditional requirement that a perjury conviction could not rest on proving two irreconcilable statements. *See, e.g., United States v. McAfee*, 8 F.3d 1010, 1014 (5th Cir. 2006).

18 U.S.C. § 1623(d) provides an affirmative defense of recantation where the defendant, in the same court or grand jury proceeding where he makes the declaration, admits it to be false. This defense is effective only if, at the time the admission of falsity is made, the declaration has not substantially affected the proceeding and it has not become clear that the falsity will be exposed. *See United States v. Scrimgeour*, 636 F.2d 1019, 1021 (5th Cir. 1981) (holding that the defendant must meet both prongs before a recantation defense is available, despite the use of the disjunctive in the statute).

A statement that is literally true cannot establish the basis for a perjury conviction under 18 U.S.C. § 1621, even if it is evasive

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and non-responsive. *See Bronston v. United States*, 93 S.Ct. 595, 602 (1973). A jury is entitled to disbelieve a defendant's claim that he "does not recall" an answer where falsity is established by circumstantial evidence. *See United States v. Abrams*, 568 F.2d 411, 418 (5th Cir. 1978).

2.70

THEFT OF MAIL MATTER

18 U.S.C. § 1708
(First Paragraph)

Title 18, United States Code, Section 1708, makes it a crime to steal mail from a United States mailbox [post office] [letter box] [mail receptacle] [authorized depository for mail matter].

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the letter described in the indictment was in the mail [post office] [letter box] [mail receptacle] [authorized depository for mail matter], as described in the indictment; and

Second: That the defendant stole the letter from the mail [post office] [letter box] [mail receptacle] [authorized depository for mail matter], as described in the indictment.

Mail matter is “stolen” when it has been wrongfully taken from an authorized depository for mail matter with intent to deprive the owner, temporarily or permanently, of its use and benefit. That intent must exist at the time the mail matter is taken from the mails.

Note

The first paragraph of the statute describes two offenses— theft of a letter from the mail as well as removal of the contents of a letter in the mail.

Many circuits appear to agree that § 1708 covers mail that has been accidentally delivered by the Postal Service to an address dif-

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PATTERN JURY INSTRUCTIONS

ferent from that on the envelope (misdelivered mail). The circuits are split, however, on whether the statute also covers mail that has been delivered by the Postal Service to the address on the envelope, but the address is in fact incorrect, either because it was misaddressed by the sender or because the recipient has moved from that address. The question is whether someone at that address who then takes the mail for himself has violated the statute. The Fifth Circuit takes the position that § 1708 does not cover such a situation—that once the mail is delivered to the address on the envelope, the custody of the Postal Service ceases and the envelope is no longer in “the mail.” See *United States v. Davis*, 461 F.2d 83 (5th Cir. 1972) (holding that taking money order from pharmacy desk violated statute because money order remained in “the mail” as misdelaivered, rather than misaddressed). Other circuits disagree. See *State v. Coleman*, 196 F.3d 83 (2d Cir. 1999) (collecting cases and holding that the statute covered mail that was addressed to the addressee’s prior address).

The statute also includes unlawfully taking, abstracting, or obtaining mail by fraud as well as secreting, embezzling, or destroying mail. In such a case, the instruction should be so modified.

2.71

POSSESSION OF STOLEN MAIL

18 U.S.C. § 1708
(Third Paragraph)

Title 18, United States Code, Section 1708, makes it a crime to possess _____ (describe items, e.g., checks) known by the defendant to have been stolen from the United States mail.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the _____ (e.g., checks) had been stolen from the mail [post office] [letter box] [mail receptacle] [authorized depository for mail matter];

Second: That the defendant knew the item was stolen; and

Third: That the defendant possessed the _____ (e.g., checks) described in the indictment and intended to do so unlawfully.

A private mailbox or mail receptacle is an “authorized depository for mail matter.”

Mail matter is “stolen” when it has been wrongfully taken from an authorized depository for mail matter with intent to deprive the owner, temporarily or permanently, of its use and benefit.

The government does not have to prove that the defendant stole the letter, or that the defendant knew the letter was stolen from the mail, only that the defendant knew that it was stolen.

2.71

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Note

United States v. Hall, 845 F.2d 1281 (5th Cir. 1988) (holding that evidence was sufficient to support guilty verdict where there was evidence that the check in question had been deposited in mail, that the addressee never received the check, and that the defendant's fingerprints were found on the check), cites the elements of the offense.

The statute also makes illegal the possession of mail which the defendant knows to have been unlawfully taken, embezzled, or abstracted. In such a case, the instruction should be modified.

2.72

**EMBEZZLEMENT/THEFT OF MAIL MATTER BY
POSTAL SERVICE EMPLOYEE****18 U.S.C. § 1709**

Title 18, United States Code, Section 1709, makes it a crime for a Postal Service employee to embezzle any mail matter possessed by the employee during employment.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant was a Postal Service employee at the time stated in the indictment;

Second: That as a Postal Service employee the defendant had been entrusted with [had lawfully come into possession of] the mail matter described in the indictment, which mail matter was intended to be conveyed by mail; and

Third: That the defendant embezzled such mail matter.

A letter is “intended to be conveyed by mail” if a reasonable person who saw the letter would think it was a letter intended to be delivered through the mail.

The fact that a particular letter may have been a “decoy” letter which was not meant to go anywhere would not prevent your finding that it was intended to be conveyed by mail if a reasonable person who saw the letter would think it was a normal letter which was intended to be delivered.

To “embezzle” means to wrongfully and intention-

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ally take money or property of another after the money or property has lawfully come into the possession or control of the person taking it.

Note

Section 1709 charges two crimes: the embezzlement of letters or articles contained therein and theft of the contents of letters, as distinguished from the letter itself. The statute does not cover stealing a letter. *See United States v. Trevino*, 491 F.2d 74, 75 (5th Cir. 1974) (holding that where indictment charged defendant with stealing a letter and not an article contained in a letter, stealing could not be equated with embezzlement and therefore the indictment failed to state an offense under the statute). For theft of a letter, use Instruction No. 2.70, 18 U.S.C. § 1708 (First Paragraph), Theft of Mail Matter.

2.73

EXTORTION BY FORCE, VIOLENCE, OR FEAR**18 U.S.C. § 1951(a)
(Hobbs Act)**

Title 18, United States Code, Section 1951(a), makes it a crime for anyone to obstruct, delay, or affect commerce by extortion. Extortion means the obtaining of or attempting to obtain property from another, with that person's consent, induced by wrongful use of actual or threatened force, violence, or fear.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant obtained [attempted to obtain] [conspired to obtain] property from another with that person's consent;

Second: That the defendant did so by wrongful use of actual or threatened force, violence, or fear; and

Third: That the defendant's conduct in any way or degree obstructed [delayed] [affected] commerce [the movement of any article or commodity in commerce].

The government is not required to prove that the defendant knew that his conduct would obstruct [delay] [affect] commerce [the movement of any article or commodity in commerce]. It is not necessary for the government to show that the defendant actually intended or anticipated an effect on commerce by his actions. All that is necessary is that the natural and probable consequence of the acts the defendant took would be to affect commerce. If you decide that there would be any effect at all on commerce, then that is enough to satisfy this element.

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The term “property” includes money and other tangible and intangible things of value.

The term “fear” includes fear of economic loss or damage, as well as fear of physical harm.

It is not necessary that the government prove that the fear was a consequence of a direct threat; it is sufficient for the government to show that the victim’s fear was reasonable under the circumstances.

The use of actual or threatened force, violence, or fear is “wrongful” if its purpose is to cause the victim to give property to someone who has no legitimate claim to the property.

The term “commerce” means commerce within the District of Columbia [commerce within the Territory or Possession of the United States] [all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof] [all commerce between points within the same State through any place outside such State] [all other commerce over which the United States has jurisdiction].

Note

Interference with commerce is the “express jurisdictional element” of the Hobbs Act. *United States v. Robinson*, 119 F.3d 1205, 1215 (5th Cir. 1997).

That the defendant’s conduct affected commerce is an essential element of the offense, and must be submitted to the jury for determination. *See United States v. Gaudin*, 115 S.Ct. 2310 (1995); *United States v. Hebert*, 131 F.3d 514, 521–22 (5th Cir. 1997); *United States v. Miles*, 122 F.3d 235, 239–40 (5th Cir. 1997).

“Commerce” is defined in § 1951(b)(3). The statute requires that commerce or the movement of goods in commerce be affected “in any way or degree.” 18 U.S.C. § 1951(a). However, Fifth Circuit jurisprudence reveals tension regarding the degree of proof required to establish the element of effect on commerce. *See United*

States v. Mann, 493 F.3d 484, 494 (5th Cir. 2007) (“A Hobbs Act prosecution requires the government to prove that the defendant committed, or attempted or conspired to commit, a robbery or act of extortion that caused an interference with interstate commerce.”); *United States v. McFarland*, 311 F.3d 376 (5th Cir. 2002) (affirming the constitutionality of the federal Hobbs Act robbery and extortion statute by an equally divided court); *United States v. Hickman*, 179 F.3d 230 (5th Cir. 1999) (en banc) (conviction affirmed by equally divided vote).

The Hobbs Act proscribes attempts and conspiracies as well as substantive offenses. In a prosecution for attempt or conspiracy, proof that a successful completion of the scheme would have affected commerce may suffice, but substantive convictions require proof that each act of robbery or extortion affected commerce. *See Mann*, 493 F.3d at 494–96; *United States v. Jennings*, 195 F.3d 795, 801–02 (5th Cir. 1999); *Robinson*, 119 F.3d at 1215.

It is not necessary to prove that the defendant caused the victim’s fear by a direct threat, so long as the victim’s fear was actual and reasonable, and the defendant took advantage of that fear to extort property. *See United States v. Rashad*, 687 F.3d 637, 642 (5th Cir. 2012); *United States v. Tomblin*, 46 F.3d 1369, 1384 (5th Cir. 1995); *United States v. Quinn*, 514 F.2d 1250, 1266–67 (5th Cir. 1975).

For a discussion of the meaning of “wrongful,” see *United States v. Enmons*, 93 S.Ct. 1007 (1973) (holding that the Hobbs Act “does not apply to the use of force to achieve legitimate labor ends”).

Extortion requires not only deprivation, but also acquisition of property. The Supreme Court held that anti-abortion protesters did not violate the Hobbs Act by using violence or threats of violence against a clinic, their employees, or their patients because the defendants did not “obtain” property from the plaintiffs. *See Scheidler v. Nat’l Org. for Women, Inc.*, 123 S.Ct. 1057, 1066 (2003) (dismissing injunction because defendants “neither pursued nor received something of value from respondents that they could exercise, transfer, or sell”).

The Hobbs Act does not apply where the federal government is the intended beneficiary of the alleged extortion. *See Wilkie v. Robbins*, 127 S.Ct. 2588, 2607 (2007) (holding that Congress did not intend to expose all federal employees “to extortion charges whenever they stretch in trying to enforce Government property claims”).

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This instruction addresses extortion by force, violence, or fear, not robbery. If the indictment charges robbery, the second element should be amended to replace “extortion” with “robbery.” In that circumstance, the judge may also wish to define “robbery” pursuant to 18 U.S.C. § 1951(b)(1).

2.74

**EXTORTION UNDER COLOR OF OFFICIAL
RIGHT****18 U.S.C. § 1951(a)
(Hobbs Act)**

Title 18, United States Code, Section 1951(a), makes it a crime for anyone to obstruct, delay, or affect commerce by extortion. Extortion includes the wrongful obtaining of or attempting to obtain property from another, with that person's consent, under color of official right.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant wrongfully obtained [attempted to obtain] [conspired to obtain] property from another with that person's consent;

Second: That the defendant did so under color of official right; and

Third: That the defendant's conduct in any way or degree obstructed [delayed] [affected] commerce [the movement of any article or commodity in commerce].

The government is not required to prove that the defendant knew that his conduct would obstruct [delay] [affect] commerce [the movement of any article or commodity in commerce]. It is not necessary for the government to show that the defendant actually intended or anticipated an effect on commerce by his actions. All that is necessary is that the natural and probable consequence of the acts the defendant took would be to affect commerce. If you decide that there would be any ef-

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fect at all on commerce, then that is enough to satisfy this element.

However, the effect on commerce must be real. It is not sufficient to show that commerce was somehow implicated in the course of events.

The term “property” includes money and other tangible and intangible things of value.

“Wrongfully obtaining property under color of official right” is the taking or attempted taking by a public official of property not due to him or his office, whether or not the public official employed force, threats, or fear. In other words, the wrongful use of otherwise valid official power may convert dutiful action into extortion. If a public official accepts or demands property in return for promised performance or nonperformance of an official act, the official is guilty of extortion. This is true even if the official was already duty bound to take or withhold the action in question, or even if the official did not have the power or authority to take or withhold the action in question, if the victim reasonably believed that the official had that authority or power.

The term “commerce” means commerce within the District of Columbia [commerce within any Territory or Possession of the United States] [all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof] [all commerce between points within the same State through any place outside such State] [all other commerce over which the United States has jurisdiction].

Note

See Note following Instruction No. 2.73, 18 U.S.C. § 1951(a), Extortion by Force, Violence, or Fear.

Extortion under color of official right does not require proof of

force, violence, threats, or use of fear, nor is it required that the defendant induced or solicited the payment by the victim. It is sufficient to prove that the defendant received a payment to which he was not entitled with knowledge that the payment was made in return for the performance or nonperformance of an official act. See *Evans v. United States*, 112 S.Ct. 1881, 1889 (1992); *United States v. Millet*, 123 F.3d 268, 275 (5th Cir. 1997).

The government is not required to prove that the defendant had the power or authority to take or refrain from taking the promised action so long as the victim reasonably believed that the official had the authority or power. See *United States v. Robinson*, 700 F.2d 205 (5th Cir. 1983). Furthermore, a person who holds himself out as a public official may be acting “under color of official right,” even though he actually holds no official position. See *United States v. Rubio*, 321 F.3d 517, 521–22 (5th Cir. 2003).

The phrase “wrongful use of otherwise valid official power” was cited with approval in *United States v. Partida*, 385 F.3d 546, 559 (5th Cir. 2004).

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ILLEGAL GAMBLING BUSINESS

18 U.S.C. § 1955

Title 18, United States Code, Section 1955, makes it a crime for anyone to conduct a gambling business that violates _____ (name state) law.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That five or more persons, including the defendant, knowingly conducted [financed] [managed] [supervised] [directed] [owned] all or part of a gambling business, as charged;

Second: That such gambling business violated the laws of the state of _____ or some political subdivision thereof. _____ (specify prohibited activity, e.g., bookmaking) is against the laws of the state of _____; and

Third: That such gambling business was in substantially continuous operation for a period in excess of thirty days [had a gross revenue of \$2,000 or more on any one day].

["Bookmaking" is a form of gambling, and involves the business of establishing certain terms and conditions applicable to given bets or wagers, usually called a line or odds, and then accepting bets from customers on either side of the wagering proposition with a view toward making a profit not from betting itself, but from a percentage or commission collected from the bettors or customers for the privilege of placing the bets.]

The words "finances, manages, supervises, directs,

or owns” are all used in their ordinary sense and include those who finance, manage, or supervise a business. The word “conduct” is a broader term and would include anyone working in the gambling business who is necessary or helpful to it, whether paid or unpaid, or has a voice in management, or a share in profits. A mere bettor or customer, however, would not be participating in the “conduct” of the business.

While it must be proved, as previously stated, that five or more people conducted, financed, or supervised an illegal gambling business that remained in substantially continuous operation for at least thirty days [had a gross revenue of at least \$2,000 on any single day], it need not be shown that five or more people have been charged with an offense; nor that the same five people, including the defendant, owned, financed, or conducted such gambling business throughout a thirty-day period; nor that the defendant even knew the names or identities of any given number of people who might have been so involved. Neither must it be proved that bets were accepted every day over a thirty-day period, nor that such activity constituted the primary business or employment of the defendant.

Note

For cases that set forth the elements of the offense, see *United States v. Davis*, 690 F.3d 330, 332 (5th Cir. 2012); *United States v. Threadgill*, 172 F.3d 357, 372–73 (5th Cir. 1999); *United States v. Heacock*, 31 F.3d 249, 251–54 (5th Cir. 1994); *United States v. Follin*, 979 F.2d 369, 371–73 (5th Cir. 1992); and *United States v. Tucker*, 638 F.2d 1292, 1294–98 (5th Cir. 1981).

A conviction can be sustained only on the basis of a violation of the specific state prohibition alleged in the government’s indictment. See *United States v. Truesdale*, 152 F.3d 443, 447 (5th Cir. 1998) (where indictment alleged only bookmaking under Texas gambling statute, none of the provision’s remaining four prohibitions could form basis of conviction).

An indictment under this section is not defective for failure to

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allege that the offense had a substantial effect on interstate commerce. *See Threadgill*, 172 F.3d at 372–73.

The “violation of the law of a State” element is satisfied by conducting a gambling business without a license in a state where the gambling activity charged has been made legal subject to state regulation and the requirement that a state license be obtained. *See United States v. Stewart*, 205 F.3d 840, 841–44 (5th Cir. 2000) (rejecting defendant’s argument that the Mississippi Gaming Control Act’s prohibition of unlicensed bookmaking was regulatory rather than criminal and thus that a violation thereof does not satisfy the “violation of the law of a State” requirement of § 1955). Also, considering that “bookmaking” is defined by state law, it would seem advisable for the district court to check this definition against the relevant state statute. *See, e.g.*, Tex. Penal Code § 47.01(2).

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**LAUNDERING OF MONETARY INSTRUMENTS—
PROCEEDS OF UNLAWFUL ACTIVITY****18 U.S.C. §§ 1956(a)(1)(A)(i) and 1956(a)(1)(B)(i)**

Title 18, United States Code, Section 1956(a)(1), makes it a crime for anyone to conduct [attempt to conduct] a financial transaction with the proceeds of specified unlawful activity, knowing that the property involved represents the proceeds of some form of illegal activity with the intent to promote the carrying on of specified unlawful activity [knowing that the transaction is designed to conceal or disguise the nature, location, source, ownership, or control of the proceeds of specified unlawful activity].

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly conducted [attempted to conduct] a financial transaction;

Second: That the financial transaction [attempted financial transaction] involved the proceeds of a specified unlawful activity, namely _____ (describe the specified unlawful activity);

Third: That the defendant knew that the property involved in the financial transaction represented the proceeds of some form of unlawful activity; and

Fourth: That the defendant intended to promote the carrying on of the specified unlawful activity.

[*Fourth:* That the defendant knew that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership, or

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control of the proceeds of the specified unlawful activity.]

With respect to the second element, the government must show that, in fact, the property was the proceeds of _____ (describe specific unlawful activity), which is a specified unlawful activity under the statute.

With respect to the third element, the government must prove that the defendant knew that the property involved in the transaction were the proceeds of some kind of crime that is a felony under federal, state, or foreign law; although, it is not necessary to show that the defendant knew exactly what crime generated the funds. I instruct you that _____ is a felony.

The term “transaction” includes _____ [select from the following, depending on the facts of the case: a purchase, sale, loan, pledge, gift, transfer, delivery or other disposition, or with respect to a financial institution, 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, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected].

The term “financial transaction” includes any “transaction,” as that term has just been defined, [choose the first or second option below:

1. which in any way or degree affects interstate or foreign commerce, involving the movement of funds by wire or other means, one or more monetary instruments, or the transfer of title to any real property, vehicle, vessel, or aircraft; or

2. which involves the use of a financial institution that is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree.]

[If necessary, include the definition of “monetary instruments,” 18 U.S.C. § 1956(c)(5), or “financial institutions,” 18 U.S.C. § 1956(c)(6).]

It is not necessary for the government to show that the defendant actually intended or anticipated an effect on interstate commerce by his actions or that commerce was actually affected. All that is necessary is that the natural and probable consequence of the acts the defendant took would be to affect interstate commerce. If you decide that there would be any effect at all on interstate commerce, then that is enough to satisfy this element. The effect can be minimal.

The term “conduct” includes initiating or concluding, or participating in initiating or concluding, a transaction.

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.

Note

This charge applies to the two more frequently charged subsections of § 1956(a)(1) but would have to be adjusted for indictments charging other subsections.

The elements for an offense charged under § 1956(a)(1) are discussed in *United States v. Pennell*, 409 F.3d 240, 243 (5th Cir. 2005); *United States v. Rivera*, 295 F.3d 461, 468 (5th Cir. 2002); and *United States v. Wilson*, 249 F.3d 366, 377 (5th Cir. 2001). The elements for an offense charged under § 1956(a)(2), which criminalizes certain kinds of transportation, are discussed in *Cuellar v. United States*, 128 S.Ct. 1994, 2002 (2008).

In certain cases that occurred on or before 2009, “proceeds”

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means profits. See *United States v. Santos*, 128 S.Ct. 2020, 2025 (2008); *Garland v. Roy*, 615 F.3d 391, 401 (5th Cir. 2010); see also *United States v. Lineberry*, 2012 WL 6062116 (5th Cir. Dec. 7, 2012). The definition of “proceeds” was amended by Congress in 2009 in reaction to *Santos*. See 18 U.S.C. § 1956(c)(9). The new definition should be given in all cases where the conduct occurred after 2009.

The judge must determine that the charged “specified unlawful activity” is actually one covered by 18 U.S.C. §§ 1956(c)(7)(A)–(F), and that the charged “some form of unlawful activity” is actually a felony under federal, state, or foreign law.

For a case establishing that a financial transaction involved the proceeds of a specific unlawful activity, see *United States v. Westbrook*, 119 F.3d 1176, 1191 (5th Cir. 1997) (evidence that defendant’s cash flow exceeded his legitimate income, together with evidence of defendant’s extensive drug dealing, is sufficient to show that the transaction involved the proceeds of specified unlawful activity). “Money does not become the proceeds of illegal activity until the unlawful activity is complete.” *United States v. Harris*, 666 F.3d 905, 909 (5th Cir. 2012) (holding that the mere payment of the purchase price for drugs does not constitute money laundering).

For a discussion of the element “knowingly attempting to conduct a financial transaction,” see *United States v. Delgado*, 256 F.3d 264 (5th Cir. 2001) (noting that the element can be proven even if the defendant has not personally handled the funds in question).

For a useful discussion of the scienter element, “knowing that the property involved represents the proceeds of some form of unlawful activity,” see *United States v. Ogle*, 328 F.3d 182, 187 n.3 (5th Cir. 2003) (“A conviction for money laundering does not require that the defendant know the precise source of the illegal funds, but only that the defendant know that the funds are ‘proceeds of some form of illegal activity.’”) (emphasis in original) (quoting 18 U.S.C. § 1956(a)(1)).

For a detailed discussion of the promotion element of § 1956(a)(1)(A)(i), see *United States v. Trejo*, 610 F.3d 308, 314 (5th Cir. 2010) (“Essentially, the government must show the transaction at issue was conducted with the intent to promote the carrying on of a specified unlawful activity.”); *United States v. Miles*, 360 F.3d 472, 477–79 (5th Cir. 2004) (reversing convictions of busi-

ness principals when payments represent customary costs of running legal business versus payments that promote illegal money laundering with ill-gotten gains); *United States v. Valuck*, 286 F.3d 221, 225–28 (5th Cir. 2002) (subscribing to broad interpretation of word “promote”); and *United States v. Dovalina*, 262 F.3d 472, 475 (5th Cir. 2001) (evidence of promotion sufficient where defendant used proceeds of drug trafficking to purchase barrels to ship marijuana and to pay for cellular phone bills and airfare related to his drug distribution business).

In *Cuellar*, the Supreme Court considered the “designed to conceal” element under § 1956(a)(2)(B). 128 S.Ct. at 1996. The Court held that the government need not show that the defendant’s acts created the appearance of legitimate wealth or converted dirty money into clean. *Id.* However, the Court added that “merely hiding the funds during transportation is not sufficient to violate the statute, even if substantial efforts have been expended to conceal the money.” *Id.* at 2003. The Court noted a distinction between concealing something to transport it, and transporting something to conceal it. *Id.* at 2005. In other words, “*how* one moves the money is distinct from *why* one moves the money.” *Id.* at 2005. The Court found that the defendant in the case was hiding the money to transport it, but no evidence indicated that he was transporting the money to conceal the nature, location, source, ownership, or control of the money. *Id.* “[A] conviction under this provision requires proof that the purpose—not merely the effect—of the transportation was to conceal or disguise” the nature, location, source, ownership, or control of the illegal proceeds. *Id.*

Also, for a defendant charged with conspiracy to commit a violation of § 1956(a)(1), the “defendant need not have specifically intended to conceal or disguise the proceeds of the unlawful activity” as “[i]t is sufficient for the defendant merely to be aware of the perpetrator’s intent to conceal or disguise the nature or source of the funds.” *United States v. Adair*, 436 F.3d 520, 524 (5th Cir. 2006). For a further detailed analysis of § 1956(a)(1)(B)(i)’s alternative fourth element, i.e., the “conceal or disguise” requirement, see *United States v. Griffin*, 324 F.3d 330, 351 (5th Cir. 2003).

With respect to the interstate commerce aspect, the government need only show a slight link to interstate or foreign commerce because § 1956 regulates conduct that, in the aggregate, has a substantial effect on such commerce. See *Westbrook*, 119 F.3d at 1191; see also *United States v. Ogba*, 526 F.3d 214, 239 (5th Cir. 2008).

For a case involving a transaction that does not involve a

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financial institution or its facilities, see *United States v. Garza*, 118 F.3d 278, 284–85 (5th Cir. 1997) (explaining that when some “transaction” does not involve a financial institution or its facilities, the government must show a “disposition” took place, i.e., a placing elsewhere or a giving over to the care or possession of another).

A jury instruction on conspiracy to commit money laundering, which described the substantive offense as involving both an intent to promote illegal activity and also to conceal or disguise the nature and source of the proceeds, was not plain error for failing to require the jury to unanimously agree on which of the two mental states the defendant possessed. See *United States v. Meshack*, 225 F.3d 556, 571 (5th Cir. 2000), *amended on reh’g in part by* 244 F.3d 367 (5th Cir. 2001) (per curiam), *abrogated in part by* *United States v. Longoria*, 298 F.3d 367 (5th Cir. 2002) (per curiam).

A conviction for conspiracy to commit money laundering under 18 U.S.C. § 1956(h) does not require proof of an overt act in furtherance of the conspiracy. See *Whitfield v. United States*, 123 S.Ct. 687, 691 (2005); see also *United States v. Guillermo Balleza*, 613 F.3d 432, 433 n.1 (5th Cir. 2010). A conviction under § 1956(h) also does not require proof of the elements of the substantive offense under § 1956(a)(1). See *United States v. Threadgill*, 172 F.3d 357, 367 (5th Cir. 1999). Accordingly, although § 1956(a)(1) requires that the funds be actual proceeds of illegal activity, a defendant can be convicted of conspiracy to violate § 1956(a)(1) even if the funds were not actually proceeds of illegal activity, i.e., a sting operation. See *Adair*, 436 F.3d at 525–26.

See also Instruction Nos. 1.32, 1.39, 1.40, and 1.41 on Attempt, Interstate Commerce, Foreign Commerce, and Commerce, respectively.

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**LAUNDERING OF MONETARY INSTRUMENTS—
PROPERTY REPRESENTED TO BE PROCEEDS
OF UNLAWFUL ACTIVITY****18 U.S.C. §§ 1956(a)(3)(A) and 1956(a)(3)(B)**

Title 18, United States Code, Section 1956(a)(3), makes it a crime for anyone to conduct [attempt to conduct] a financial transaction involving property represented to be the proceeds of specified unlawful activity to promote the carrying on of specified unlawful activity [to conceal or disguise the nature, location, source, ownership, or control of the proceeds of specified unlawful activity].

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly conducted [attempted to conduct] a financial transaction;

Second: That the financial transaction [attempted financial transaction] involved property represented to be the proceeds of a specified unlawful activity, namely _____ (describe the specified unlawful activity); and

Third: That the defendant intended to promote the carrying on of a specified unlawful activity.

[*Third:* That the defendant intended to conceal or disguise the nature, location, source, ownership, or the control of property believed to be the proceeds of a specified unlawful activity.]

The term “transaction” includes _____ [select from the following, depending on the facts of the case: a purchase, sale, loan, pledge, gift, transfer, delivery or

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other disposition, or with respect to a financial institution, 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, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected].

The term “financial transaction” includes any “transaction,” as that term has just been defined, [choose the first or second option below:

1. which in any way or degree affects interstate or foreign commerce, involving the movement of funds by wire or other means, one or more monetary instruments, or the transfer of title to any real property, vehicle, vessel, or aircraft; or
2. which involves the use of a financial institution that is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree].

It is not necessary for the government to show that the defendant actually intended or anticipated an effect on interstate commerce by his actions or that commerce was actually affected. All that is necessary is that the natural and probable consequence of the acts the defendant took would be to affect interstate commerce. If you decide that there would be any effect at all on interstate commerce, then that is enough to satisfy this element. The effect can be minimal.

The term “conduct” includes initiating or concluding, or participating in initiating or concluding, a transaction.

The term “represented” means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a federal official authorized to investigate or prosecute violations

of this section. The evidence need not show that the property involved was expressly described as being the proceeds of specified unlawful activity at or before each transaction. It is sufficient if the government proves that the officers made enough representations to cause a reasonable person to understand that the property involved in the transaction[s] was the proceeds of _____ (describe specified unlawful activity), which is the specified unlawful activity named in the indictment.

The term “proceeds” includes any property, or any interest in property, that one would acquire or retain as a result of the commission of the underlying specified unlawful activity. Proceeds can be any kind of property, not just money.

Note

This foregoing charge applies to two subsections of § 1956(a)(3), but would have to be adjusted for indictments charging a violation of § 1956(a)(3)(C). Also, this charge contemplates a representation of “proceeds,” which covers the vast majority of cases. The charge must be adjusted if the representation was that the property was “used to conduct or facilitate” specified unlawful activity. This charge deals with cases of undercover “sting” operations, where the government represents that the property is the proceeds of specified unlawful activity. See *United States v. Adair*, 436 F.3d 520, 525 (5th Cir. 2006).

The judge must determine that the charged “specified unlawful activity” is actually one covered by 18 U.S.C. §§ 1956(c)(7)(A)–(F). The charged specified unlawful activity in the second element can be different from that in the third element, at least in a § 1956(a)(3)(A) case.

If a money laundering prosecution is based on a “conceal or disguise” theory, the government need not show that defendant’s acts created the appearance of legitimate wealth or converted dirty money into clean. See *Cuellar v. United States*, 128 S.Ct. 1994, 2000 (2008) (“Although this element does not require proof that the defendant attempted to create the appearance of legitimate wealth, neither can it be satisfied solely by evidence that a defendant concealed the funds during their transport.”).

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Concerning the requirement of circumstances that would cause a reasonable person to infer that the property was proceeds of a specified unlawful activity, see *United States v. Casteneda-Cantu*, 20 F.3d 1325, 1331 (5th Cir. 1994).

With respect to the interstate commerce aspect, the government need only show a slight link to interstate or foreign commerce because § 1956 regulates conduct that, in the aggregate, has a substantial effect on such commerce. See *United States v. Westbrook*, 119 F.3d 1176, 1191 (5th Cir. 1997); see also *United States v. Ogba*, 526 F.3d 214, 239 (5th Cir. 2008).

See also Instruction Nos. 1.32, 1.39, 1.40, and 1.41 on Attempt, Interstate Commerce, Foreign Commerce, and Commerce, respectively.

2.77A

VIOLENT CRIMES IN AID OF RACKETEERING

18 U.S.C. § 1959(a)

Title 18, United States Code, Section 1959(a), makes it a crime for anyone to commit, attempt to commit, or conspire to commit a violent crime in aid of an enterprise engaged in racketeering activity.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the enterprise existed as alleged in the indictment.

An enterprise includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact, although not a legal entity. The term enterprise includes both legal and illegal associations.

Although the enterprise must be separate and apart from the pattern of racketeering activity in which the enterprise allegedly engaged, it is not necessary to find that the enterprise had some function wholly unrelated to the racketeering activity. The enterprise must be proven to have been an ongoing organization, formal or informal, that functioned as a continuing unit;

Second: That the enterprise was engaged in interstate [foreign] commerce or that its activities affected interstate [foreign] commerce.

The enterprise is “engaged in interstate [foreign] commerce” if it directly engaged in the production, distribution, or acquisition of goods or services in such commerce. The enterprise’s conduct “affected” inter-

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state [foreign] commerce if the conduct had a demonstrated connection or link with such commerce.

It is not necessary for the government to prove that the defendant knew or intended that the enterprise was engaged in commerce or that its conduct would affect commerce. It is only necessary that the natural consequences of the enterprise's conduct affected commerce in some way. Only a minimal effect on commerce is necessary;

Third: That the enterprise was engaged in racketeering activity.

“Racketeering activity” means the commission of certain crimes, including _____ (insert crime[s] alleged as racketeering activities in the indictment, e.g., narcotics trafficking), in violation of _____ (insert statute of crime, e.g., 21 U.S.C. §§ 841(a)(1) and 846).

There must be some nexus between the enterprise and the racketeering activity being conducted by members and/or associates of the enterprise. [Insert instructions on the elements of each racketeering activity.];

Fourth: That the defendant committed [attempted to commit] [conspired to commit] the following crime[s] of violence _____ (specify crime[s] of violence). I will [have already] instruct[ed] you on what the government must prove to establish that the defendant committed this [these] act[s]; and

[If the violent crime(s) are not charged in separate counts, instructions on the elements of each crime will need to be given as part of this VICAR charge.]

Fifth: That the defendant's purpose in committing [attempting to commit] [conspiring to commit] the crime[s] of violence was to gain entrance to, or to

maintain, or to increase his position in the enterprise [as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from the enterprise].

[If the purpose is to “gain entrance to, or to maintain, or to increase his position in the enterprise,” include the following language: It is not necessary for the government to prove that this was the sole purpose of the defendant in committing the charged crime. You need only find that it was a substantial purpose, or that the defendant committed the charged crime as an integral aspect of membership in the enterprise. In determining the defendant’s purpose in committing the alleged crime, you must determine what he had in mind. Because you cannot look into a person’s mind, you have to determine purpose by considering all of the facts and circumstances before you.]

Note

For a discussion of the elements of this offense, see *United States v. Smith*, 413 F.3d 1253, 1277 (10th Cir. 2005), *overruled on other grounds by United States v. Hutchinson*, 573 F.3d 1011 (10th Cir. 2009); and *United States v. Vasquez-Velasco*, 15 F.3d 833, 842 (9th Cir. 1994).

“Enterprise” is defined in 18 U.S.C. § 1959(b)(2); *Boyle v. United States*, 129 S.Ct. 2237, 2243–46 (2009); and *United States v. Turkette*, 101 S.Ct. 2524, 2528–29 (1981). The term “enterprise” as used in § 1959 has the same meaning as it does in the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1961, except that in § 1959, the commerce requirement is included in the enterprise definition; whereas, in RICO, the commerce requirement “appears in each of the sections stating substantive prohibitions of activities with respect to enterprises.” *United States v. Concepcion*, 983 F.2d 369, 380–81 (2d Cir. 1992); see *United States v. King*, 850 F. Supp. 750, 751 (C.D. Ill. 1994), *aff’d sub nom. United States v. Rogers*, 89 F.3d 1326 (7th Cir. 1996).

The above instruction provides the required elements with the minimum additional information needed to assist the jury in

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understanding those elements. If the district judge or the attorneys deem it necessary, the following language may be inserted to explain further the element of “enterprise”:

An enterprise is a group of people who have associated together for a common purpose of engaging in a course of conduct over a period of time. The personnel of the enterprise, however, may change and need not be associated with the enterprise for the entire period alleged in the indictment. Therefore, the government must prove the existence of an association-in-fact enterprise by evidence of an ongoing organization, formal or informal, and by evidence that the various associates functioned as a continuing unit. The enterprise must have the three following structural features: (1) a purpose; (2) relationships among those associated with the enterprise; and (3) longevity sufficient to permit these associates to pursue the enterprise’s purpose. The name of the organization itself is not an element of the offense and does not have to be proved. The government need not prove that the enterprise had any particular organizational structure.

The group need not have a hierarchical structure or a “chain of command”; decisions may be made on an ad hoc basis and by any number of methods—by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times. The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies. While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, you may nonetheless find that the enterprise element is satisfied by finding a group whose associates engage in spurts of activity punctuated by periods of quiescence [inactivity].

The following language may be included in the first element to elaborate on the issue of whether the enterprise existed “separate and apart” from the alleged racketeering activity:

Common sense dictates that the existence of an association-in-fact enterprise is oftentimes more readily proven by what it does rather than by an abstract analysis of its structure. Thus, the evidence used to prove the racketeering activity and the enterprise may coalesce.

For definitions of “Interstate Commerce,” “Foreign Commerce,” and “Commerce,” see Instruction Nos. 1.39, 1.40, and 1.41.

See *United States v. Robertson*, 115 S.Ct. 1732, 1732–33 (1995), for the definition of “engaging in” interstate commerce, and *United States v. Delgado*, 401 F.3d 290, 297 (5th Cir. 2005), for a discussion of “affecting” interstate commerce.

The crimes considered “racketeering activity” are listed in 18 U.S.C. § 1961(1).

There is no case law discussing unanimity as to the specific type of racketeering activity committed by the enterprise with respect to a VICAR charge. Although required if the substantive RICO offense is charged, unanimity as to the specific predicate racketeering acts is not required for a RICO conspiracy charge. See *United States v. Randall*, 661 F.3d 1291, 1297–99 (10th Cir. 2011) (agreeing with the Second, Seventh, and Eleventh Circuits in holding that unanimity as to the specific predicate racketeering acts is not required when a RICO conspiracy is charged, as long as the jury is unanimous on the type or types of racketeering activity).

The crimes of violence listed in § 1959(a) are murder, kidnapping, maiming, assault with a dangerous weapon, assault resulting in serious bodily injury, threatening to commit a crime of violence against any individual in violation of the laws of any State or the United States, and attempting or conspiring to commit any such crime.

When the charge alleges an attempt or conspiracy to commit a crime of violence, include an appropriate instruction regarding either attempt or conspiracy in conjunction with the violent crime instruction. See Instruction Nos. 1.32, Attempt, and 2.20, Conspiracy.

The government does not have to prove that maintaining or increasing position was the defendant’s sole or principal motive. See *United States v. Wilson*, 116 F.3d 1066, 1078 (5th Cir. 1997) (citing *Concepcion*, 983 F.2d at 381–82 (2d Cir. 1992)), *vacated on other grounds sub nom. by United States v. Brown*, 123 F.3d 213 (5th Cir. 1997). Maintenance or enhancement, however, must be a substantial purpose. See *United States v. Banks*, 514 F.3d 959, 965 (9th Cir. 2008). Further, this 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

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that membership.” See *United States v. Dhinsa*, 243 F.3d 635, 671 (2d Cir. 2001).

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**RACKETEER INFLUENCED CORRUPT
ORGANIZATIONS ACT****18 U.S.C. § 1962(c)**

Title 18, United States Code, Section 1962(c), makes it a crime for anyone employed by or associated with an enterprise engaged in or affecting interstate or foreign commerce to conduct or to participate, directly or indirectly, in the conduct of the affairs of that enterprise through a pattern of racketeering activity. The defendant, _____, is charged in Count — with committing this crime from on or about _____, to on or about _____, in that the defendant is alleged to have _____.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant was a person employed by or associated with the enterprise charged;

Second: That the enterprise existed as alleged in the indictment.

An enterprise includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact, although not a legal entity. The term enterprise includes both legal and illegal associations. The enterprise must be separate and apart from the pattern of racketeering activity in which the defendant allegedly engaged. The enterprise must be proven to have been an ongoing organization, formal or informal, that functioned as a continuing unit;

Third: That the defendant, either directly or indirectly, conducted or participated in the conduct of the affairs of the enterprise through a pattern of racketeering activity.

The defendant must have participated in the operation or management of the enterprise, but need not be a member of upper management. Racketeering activity includes the acts charged as separate crimes in Counts —, —, and —. You have been instructed on what the government must prove to establish that the defendant committed these acts.

[If the predicate acts are not charged in separate counts, instructions on the elements of each racketeering activity will need to be given as part of the racketeering charge.]

To prove a pattern of racketeering activity, the government must prove beyond a reasonable doubt that (1) the acts of racketeering activity are related to each other, and (2) they amount to or pose a threat of continued criminal activity. To prove the racketeering acts are related to one another, the government must prove that the criminal conduct charged embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

At a minimum, a pattern of racketeering activity requires at least two acts of racketeering activity within ten years of each other; provided, however, that the government proves the relationship and continuity of those acts as defined. All of you must be unanimous as to which racketeering acts you each believe beyond a reasonable doubt that the defendant committed. Unless you are unanimous in finding beyond a reasonable doubt that the defendant committed a racketeering act charged, you must disregard that act in deciding

whether the defendant is guilty or not guilty of racketeering. It is not sufficient that some of the jurors find that the defendant committed two of the acts while others of you find that the defendant committed different acts.

The government must prove that the defendant, directly or indirectly through the pattern of racketeering activity charged, conducted or participated in the conduct of the affairs of the enterprise. To do so, the government must additionally demonstrate a relationship among the defendant, the pattern of racketeering activity, and the enterprise. The defendant and the enterprise cannot be the same. To prove that the defendant conducted or participated as alleged, the government must prove that the defendant in fact committed the racketeering acts as alleged, the defendant's position in the enterprise facilitated his commission of the acts, and these acts had some effect on the enterprise; and

Fourth: That the enterprise was engaged in interstate [foreign] commerce or that its activities affected interstate [foreign] commerce.

The enterprise "engaged in commerce" if it directly engaged in the production, distribution, or acquisition of goods or services in interstate [foreign] commerce.

The enterprise's conduct "affected" interstate [foreign] commerce if the conduct had a demonstrated connection or link with such commerce.

It is not necessary for the government to prove that the defendant knew or intended that the enterprise was engaged in commerce or that its conduct would affect commerce. It is only necessary that the natural consequences of the enterprise's conduct affected commerce in some way. Only a minimal effect on commerce is necessary.

Note

Definitions of “Interstate Commerce,” “Foreign Commerce,” and “Commerce” are in Instruction Nos. 1.39, 1.40, and 1.41.

The elements of this offense are discussed in *United States v. Delgado*, 401 F.3d 290, 297 (5th Cir. 2005). For a discussion of “pattern of racketeering,” see *H.J., Inc. v. Nw. Bell Tel. Co.*, 109 S.Ct. 2893, 2899–2903 (1989); *In re Burzynski*, 989 F.2d 733, 742–44 (5th Cir. 1993); and *Abell v. Potomac Ins. Co. of Illinois*, 946 F.2d 1160, 1168 (5th Cir. 1991).

For a discussion of the definition of “enterprise,” see *Boyle v. United States*, 129 S.Ct. 2237, 2244 (2009) (holding that while an association-in-fact enterprise must have structural features, it does not follow that a district court must use the term “structure” in its jury instructions).

A § 1962(d) RICO conspiracy allegation may involve considerations different from the typical conspiracy. See *Salinas v. United States*, 118 S.Ct. 469, 477–78 (1997); see also *Delgado*, 401 F.3d at 296; *United States v. Faulkner*, 17 F.3d 745, 773–74 (5th Cir. 1994); *United States v. Jensen*, 41 F.3d 946, 956–57 (5th Cir. 1994); *United States v. Cauble*, 706 F.2d 1322, 1341–45 (5th Cir. 1983).

See *United States v. Marmolejo*, 89 F.3d 1185, 1196–97 (5th Cir. 1996), *aff’d*, *Salinas v. United States*, 118 S.Ct. 469 (1997), in which the court held that a RICO conspirator need not agree personally to commit the pattern of racketeering activities but instead must simply agree to the objective of the RICO violation. See also *Delgado*, 401 F.3d at 296.

See *United States v. Robertson*, 115 S.Ct. 1732, 1733 (1995) (per curiam), for a definition of “engaging in” interstate commerce, and *Delgado*, 401 F.3d at 297, for a discussion of “affecting” interstate commerce.

For a discussion on establishing the existence of two separate entities, a “person” and a distinct “enterprise” under § 1962(c), see *Cedric Kushner Promotions, Ltd. v. King*, 121 S.Ct. 2087 (2001). In *King*, the Supreme Court held that the “distinctness” principle under § 1962(c) requires no more than the formal legal distinction between “person” and “enterprise” (namely, incorporation). *Id.* at 2091. Therefore, the RICO provision applies when a corporate employee unlawfully conducts the affairs of the corporation of which he is the sole owner—whether he conducts those affairs within the

scope, or beyond the scope, of corporate authority. *Id*; see also *Abraham v. Singh*, 480 F.3d 351, 357 (5th Cir. 2007) (holding that the RICO person, an individual employee of the corporation, was distinct from the RICO enterprise, the corporation itself); *Whelan v. Winchester Prod. Co.*, 319 F.3d 225, 229 (5th Cir. 2003) (no distinct enterprise where defendant corporation, in association with its officers and employees, allegedly committed predicate acts in the ordinary course of corporation's own business). A sole proprietorship may also be an "enterprise" under RICO so long as it is not a "one man show." See *Guidry v. Bank of LaPlace*, 954 F.2d 278 (5th Cir. 1992).

2.79

BANK ROBBERY**18 U.S.C. §§ 2113(a) and (d)**

Title 18, United States Code, Sections 2113(a) and 2113(d), make it a crime for anyone to take from a person [the presence of someone] by force and violence [by intimidation] any money [property] in the possession of a federally insured bank [credit union] [savings and loan association], and in the process of so doing to assault any person [put in jeopardy the life of any person] by the use of a dangerous weapon or device.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant intentionally took from the person [the presence of another] money [property];

Second: That the money [property] belonged to or was in the possession of a federally insured bank, credit union, or savings and loan association at the time of the taking;

Third: That the defendant took the money [property] by means of force and violence [by means of intimidation]; and

Fourth: That the defendant assaulted some person [put in jeopardy the life of some person] by the use of a dangerous weapon or device, while engaged in taking the money [property].

A “federally insured bank” means any bank with deposits insured by the Federal Deposit Insurance Corporation.

A “federally insured credit union” means any

federal credit union and any state-chartered credit union the accounts of which are insured by the National Credit Union Administration Board. A state-chartered credit union includes a credit union chartered under the laws of a state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.

A “federally insured savings and loan association” means any savings and loan association the deposits of which are insured by the Federal Deposit Insurance Corporation.

[To take “by means of intimidation” is to say or do something in such a way that a person of ordinary sensibilities would be fearful of bodily harm. It is not necessary to prove that the alleged victim was actually frightened, and neither is it necessary to show that the behavior of the defendant was so violent that it was likely to cause terror, panic, or hysteria. However, a taking would not be by “means of intimidation” if the fear, if any, resulted from the alleged victim’s own timidity rather than some intimidating conduct on the part of the defendant. The essence of the offense is the taking of money or property accompanied by intentional, intimidating behavior on the part of the defendant.]

[An “assault” may be committed without actually striking or injuring another person. An assault occurs whenever one person makes a threat to injure someone else and also has an apparent, present ability to carry out the threat such as by brandishing or pointing a dangerous weapon or device at the other.]

[A “dangerous weapon or device” includes anything capable of being readily operated or wielded by one person to inflict severe bodily harm or injury upon another person.]

[To “put in jeopardy the life of any person by the

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use of a dangerous weapon or device” means to expose someone else to a risk of death by the use of a dangerous weapon or device.]

Note

Richardson v. United States, 119 S.Ct. 1707, 1710 (1999); *United States v. Dentler*, 492 F.3d 306, 309–10 (5th Cir. 2007); *United States v. Burton*, 425 F.3d 1008, 1010–11 (5th Cir. 2005); and *United States v. Burton*, 126 F.3d 666, 670 (5th Cir. 1997), list the elements of the offense, breaking them down differently than this instruction but including the same information.

The statute creates various methods of committing the offense. Care must be taken in adapting the instruction to the allegations of the indictment. See *United States v. Bizzard*, 615 F.2d 1080, 1081–82 (5th Cir. 1980) (holding that the district court committed reversible error in including instruction on assault in connection with bank robbery when assault was not charged in the indictment). This instruction also presupposes that the indictment charges a violation of subsections (a) and (d) in the same count. If a subsection (d) violation is not alleged, the fourth element and its corresponding definitions would be deleted. Also, when a violation of subsections (a) and (d) is alleged in one count, the jury should be instructed in an appropriate case that a violation of subsection (a) alone, i.e., the first three elements above, is a lesser included offense of the alleged violation of subsections (a) and (d) combined, i.e., all four elements. See Instruction No. 1.33 on Lesser Included Offense. On the other hand, 18 U.S.C. § 2113(b), bank larceny, is not a lesser included offense of 18 U.S.C. § 2113(a), bank robbery. See *Carter v. United States*, 120 S.Ct. 2159 (2000) (distinguishing between the elements of a § 2113(a) offense and a § 2113(b) offense). Likewise, possession of stolen bank property, 18 U.S.C. § 2113(c), is not a lesser included offense of bank robbery, 18 U.S.C. § 2113(a). See *United States v. Buchner*, 7 F.3d 1149 (5th Cir. 1993).

Under subsection (d), both the “assault” and the “putting in jeopardy” prongs require the use of a dangerous weapon. See *Simpson v. United States*, 98 S.Ct. 909, 913 n.6 (1978) (holding that a defendant may not be sentenced under both § 2113(d) and § 924(c)). According to the Fifth Circuit, a dangerous weapon for purposes of this statute includes “an object reasonably perceived to be a dangerous weapon.” *United States v. Ferguson*, 211 F.3d 878, 883 (5th Cir. 2000). Furthermore, in the same case, the Fifth

Circuit stated that “[a] robber who does not display a dangerous weapon or an ostensibly dangerous weapon or device cannot be found guilty of aggravated bank robbery under § 2113(d) unless the evidence establishes that he had a concealed weapon and that he used it in the course of the bank robbery.” *Id.* (holding that although the defendant did not show a dangerous weapon, evidence supported conviction for aggravated robbery under the theory that he used a concealed weapon in the course of robbery).

For cases dealing with “intimidation,” see *United States v. Baker*, 17 F.3d 94 (5th Cir. 1994), and *United States v. McCarty*, 36 F.3d 1349 (5th Cir. 1994).

The definitions of “federally insured credit union” and “federally insured savings and loan association” are based on definitions found in 18 U.S.C. §§ 2113(g)–(h).

2.80

BANK THEFT**18 U.S.C. § 2113(b)**

Title 18, United States Code, Section 2113(b), makes it a crime for anyone to take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$1,000 belonging to or in the care, custody, control, management, or possession of any federally insured bank [credit union] [savings and loan association].

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant took and carried away money [property] [a thing of value] belonging to [in the care, custody, control, management, possession of] _____ (name bank, credit union, or insured savings and loan association);

Second: That at that time _____ (name bank, credit union, or insured savings and loan association), a bank [credit union] [savings and loan association] had its deposits insured by the Federal Deposit Insurance Corporation;

Third: That the defendant took and carried away such money [property] [thing of value] with the intent to steal; and

Fourth: That such money [property] [thing of value] exceeded \$1,000 in value.

A “federally insured bank” means any bank with deposits insured by the Federal Deposit Insurance Corporation.

[A “federally insured credit union” means any federal credit union and any state-chartered credit union the accounts of which are insured by the National Credit Union Administration Board. A state-chartered credit union includes a credit union chartered under the laws of a state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.]

[A “federally insured savings and loan association” means any savings and loan association the deposits of which are insured by the Federal Deposit Insurance Corporation.]

Note

A “hot” check can constitute a violation of § 2113(b) if there is sufficient evidence, other than the bad check itself, to prove intent to steal. *See United States v. Aguilar*, 967 F.2d 111, 114–15 (5th Cir. 1992) (citing *United States v. Khamis*, 674 F.2d 390 (5th Cir. 1982), and explaining that a “hot” check can constitute a violation of § 641 as long as the prosecution proves that the defendant did not intend to honor the check when he wrote it).

The conduct and expectations of a defendant and his associates can be considered in determining value. *See United States v. Hooten*, 933 F.2d 293, 297 (5th Cir. 1991) (upholding conviction upon concluding that reasonable trier of fact could have found that the value of a nonnegotiable note for \$1.5 million owed to a credit union exceeded the minimum statutory value of \$1,000, considering that the defendant attempted to sell the note for \$150,000).

Bank theft under 18 U.S.C. § 2113(b) requires a specific intent to steal or purloin. *See United States v. Daniels*, 252 F.3d 411 (5th Cir. 2001) (citing *Carter v. United States*, 120 S.Ct. 2159 (2000)). A defendant has the requisite intent under § 2113(b) if he enters a bank with no intent to commit a crime but thereafter develops an intent to steal. *See United States v. Jones*, 993 F.2d 58, 61 (5th Cir. 1993).

In *Bell v. United States*, 103 S.Ct. 2398, 2401–02 (1983), the Supreme Court upheld the defendant’s conviction for depositing another’s check into his account and later withdrawing funds, explaining that § 2113(b) is not limited to common law larceny, but also proscribes obtaining money under false pretenses.

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For a definition of “steal,” see Instruction No. 2.33, 18 U.S.C. § 641, Theft of Government Money or Property.

18 U.S.C. § 2113(b) is not a lesser included offense of 18 U.S.C. § 2113(a). *See Carter*, 120 S.Ct. at 2165–68 (distinguishing between the elements of a § 2113(a) offense and a § 2113(b) offense).

If a disputed issue is whether the property stolen had a value of more than \$1,000, the court should consider giving Instruction No. 1.33, Lesser Included Offense.

2.81

CARJACKING

18 U.S.C. § 2119

Title 18, United States Code, Section 2119, makes it a crime for anyone to take [attempt to take] a motor vehicle that has been transported in interstate [foreign] commerce from a person [the presence of someone] by force and violence [by intimidation] with the intent to cause death or serious bodily harm.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant intentionally took [attempted to take] from a person [presence of another] a motor vehicle described in the indictment;

Second: That the motor vehicle had been transported in interstate [foreign] commerce;

Third: That the defendant did so by means of force and violence [intimidation];

Fourth: That the defendant intended to cause death or serious bodily harm; and

Fifth: That the defendant possessed such intent when he took [attempted to take] the victim's vehicle.

[*Sixth:* That serious bodily injury [death] resulted.]

[Serious bodily injury means bodily injury which involves (A) a substantial risk of death; or (B) extreme physical pain; or (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.]

Note

18 U.S.C. § 2119 describes three possible separate offenses, depending on the outcome: a carjacking in which (1) neither a serious injury nor a death occurs; (2) a serious injury occurs; or (3) a death occurs. In the latter two instances, the outcomes are elements of the offense and must be charged in the indictment and presented to the jury. *See Jones v. United States*, 119 S.Ct. 1215 (1999) (reversing conviction where jury was instructed only on elements of § 2119(1) and judge sentenced defendant to 25 years under § 2119(2)). The carjacking statute specifically refers to 18 U.S.C. § 1365 for the definition of “serious bodily injury.”

Like other circuits, the Fifth Circuit defines “presence of another” broadly to encompass situations where the victim may be some distance from his or her vehicle, even inside a building. *See United States v. Edwards*, 231 F.3d 933, 937 (5th Cir. 2000) (applying definition of “presence” used in robbery statutes to uphold conviction where victim was 15 feet away from vehicle because a reasonable jury could infer that the victim was close enough that he could have prevented his car being taken had he not been in fear for his safety); *United States v. Servarese*, 385 F.3d 15, 20 (1st Cir. 2004) (“In the carjacking context courts have required the victim to have both a degree of physical proximity to the vehicle and an ability to control or immediately obtain access to the vehicle.”); *United States v. Lopez*, 271 F.3d 472, 486 (3d Cir. 2001) (holding that the “presence” requirement of the carjacking statute was satisfied when the victims were attacked and beaten inside their house and keys to a van parked outside the house were taken); *United States v. Moore*, 198 F.3d 793, 797 (10th Cir. 1999) (upholding conviction where defendants took keys from the victim inside a bank, and the car was in the parking lot outside the bank); *United States v. Kimble*, 178 F.3d 1163, 1168 (11th Cir. 1999) (upholding conviction where defendants took the keys from the victim in the restaurant, and the car was parked outside the restaurant).

With respect to the intent to cause death or serious bodily harm, the Supreme Court has held that the element is fulfilled even if the intent is conditional, that is, the defendant intended to do such harm only if the vehicle was not relinquished. *See Holloway v. United States*, 119 S.Ct. 966, 974 (1999). However, the defendant must possess the intent to cause death or serious bodily injury at the precise moment he demanded or took control of the car by force, violence, or intimidation. *See United States v. Harris*, 420 F.3d 467, 471 (5th Cir. 2005); *see also United States v. Frye*, 489 F.3d 201, 208–09 (5th Cir. 2007).

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2.81

In *Ramirez-Burgos v. United States*, 313 F.3d 23, 30, n.9 (1st Cir. 2002), the court stated “[w]e do not here set forth the temporal limits of a carjacking under section 2119. But we reaffirm, without hesitation, that the commission of a carjacking continues at least while the carjacker maintains control over the victim in her car.”

Definitions of “Interstate Commerce,” “Foreign Commerce,” and “Commerce” are in Instruction Nos. 1.39, 1.40, and 1.41.

2.82

FAILURE TO REGISTER AS SEX OFFENDER**18 U.S.C. § 2250**

Title 18, United States Code, Section 2250, makes it a crime for a person who is required to register under the Sex Offender Registration and Notification Act, and who travels in interstate [foreign] commerce, to knowingly fail to register as required by the Act.

For you to find the defendant guilty of this crime, you must be convinced that the government has proven each of the following beyond a reasonable doubt:

First: That the defendant was required to register under the Sex Offender Registration and Notification Act, as charged;

Second: That the defendant traveled in interstate [foreign] commerce; and

Third: That the defendant knowingly failed to register as required by the Sex Offender Registration and Notification Act.

These three elements must be proven to have occurred in sequence.

A person is required to register if he is a sex offender, which means a person convicted of a sex offense. _____ is a sex offense.

A sex offender is required to register where he resides, which is the location of his home or other place where he habitually lives.

The government must prove beyond a reasonable doubt that the defendant knew he had to register and that he intentionally did not do so, but the government

does not have to prove that the defendant knew he was violating federal law.

Note

This is a basic instruction for a state convicted sex offender charged with failure to register in the place in which he resides. The elements for federal sex offenders are slightly different. Sex offenders are also required to update their registration. *See* 18 U.S.C. § 2250. The Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. §§ 16911–29, and its implementing regulations, 28 CFR 72.1–72.3, contain requirements and definitions that will be pertinent to the crime charged. *See United States v. Wampler*, 2013 WL 49484 (5th Cir. Jan. 3, 2013); *see also* The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38063 (July 2, 2008).

See generally Carr v. United States, 130 S.Ct. 2229 (2010). The Fifth Circuit has stated that SORNA is not a specific intent crime and therefore does not require knowledge that the defendant's failure to register violated federal law. *See United States v. Whaley*, 577 F.3d 254, 262 n.6 (5th Cir. 2009).

A fourth element is necessary under the *Apprendi* doctrine if there is an enhancement for a crime of violence found in § 2250(c). Affirmative defenses to this charge are listed in § 2250(b). Definitions of “Interstate Commerce,” “Foreign Commerce,” and “Commerce” may be found in Instruction Nos. 1.39, 1.40, and 1.41, respectively.

The following cases address SORNA's application, *Reynolds v. United States*, 132 S.Ct. 975 (2012); *Carr*, 130 S.Ct. at 2235–41; and *United States v. Kebodeaux*, 687 F.3d 232 (2012) (en banc), *cert. granted*, 2013 WL 135538 (U.S. Jan. 11, 2013).

2.82A

PATTERN JURY INSTRUCTIONS

2.82A

**SEXUAL EXPLOITATION OF CHILDREN—
PRODUCING CHILD PORNOGRAPHY**

18 U.S.C. § 2251(a)

Title 18, United States Code, Section 2251(a), makes it a crime to employ, use, persuade, induce, entice, or coerce any minor to engage in sexually explicit conduct for the purpose of producing a visual depiction or transmitting a live visual depiction of such conduct.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant employed [used] [persuaded] [induced] [enticed] [coerced] a minor to engage in sexually explicit conduct;

Second: That the defendant acted with the purpose of producing a visual depiction [transmitting a live visual depiction] of such conduct; and

Third: That the visual depiction was actually transported [transmitted] using any means or facility of interstate [foreign] commerce [in or affecting interstate or foreign commerce] or mailed.

[*Third:* That the visual depiction was produced [transmitted] using materials that have been mailed [shipped] [transported] in [affecting] interstate [foreign] commerce by any means, including by computer.]

[*Third:* That the defendant knew [had reason to know] that the visual depiction would be transported [transmitted] using any means or facility of interstate

[foreign] commerce [in or affecting interstate or foreign commerce] or mailed.]

[The term “computer” means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communication 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.]

The term “minor” means any person under the age of eighteen years.

“Sexually explicit conduct” means actual or simulated sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; bestiality; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area of any person. Be cautioned that not every exposure of the genitals or pubic area constitutes lascivious exhibition. Whether a visual depiction constitutes such a lascivious exhibition requires a consideration of the overall content of the material. You may consider such factors as whether the focal point of the visual depiction is on the child’s genitalia or pubic area; whether the setting of the depiction is sexually suggestive, that is, in a place or pose associated with sexual activity; whether the child is depicted in an unnatural pose or in inappropriate attire, considering the age of the child; whether the child is fully or partially nude; whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; or whether the depiction is designed to elicit a sexual response in the viewer. This list is not exhaustive, and no single factor is dispositive.

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

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“Visual depiction” includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.

Note

Note that this offense includes a possible *Apprendi* issue due to the “resulting in death” enhancement in subsection (e). See *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000).

Knowledge of the age of the minor victim is not an element of the offense. See *United States v. Crow*, 164 F.3d 229, 236 (5th Cir. 1999) (citing *United States v. X-Citement Video, Inc.*, 115 S.Ct. 464, 471 n.5–6, 471–72 (1994), and *United States v. U.S. Dist. Ct.*, 858 F.2d 534, 538 (9th Cir. 1988)); but see *United States v. Steen*, 634 F.3d 822, 824 n.4 (5th Cir. 2011) (commenting that the scienter requirement has not been discussed in the context of voyeurs and child pornography production under § 2251(a)).

Section 2251 “does not require that a defendant know the interstate nature of an instrument on which a depiction of child pornography is produced.” *United States v. Terrell*, 700 F.3d 755, 760 (5th Cir. 2012).

The explanation of “lascivious exhibition” is derived from *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), and has been adopted by the Fifth Circuit. See *Steen*, 634 F.3d at 826; *United States v. Grimes*, 244 F.3d 375, 380 (5th Cir. 2001).

The term “producing” is defined in 18 U.S.C. § 2256(3). For further discussion of the term “production,” see *United States v. Dickson*, 632 F.3d 186, 189 (5th Cir. 2011), in which the Fifth Circuit held that images were “produced” when they were copied or downloaded onto hard drives, disks, or compact discs.

“Transmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce for the purposes of 18 U.S.C. § 2251.” *United States v. Runyan*, 290 F.3d 223, 239 (5th Cir. 2002).

“[E]vidence of a defendant’s intent to distribute child pornogra-

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2.82A

phy via interstate commerce is adequate to satisfy the jurisdictional element of § 2251.” *Runyan*, 290 F.3d at 243.

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. Horn*, 187 F.3d 781 (8th Cir. 1999); *United States v. Kemmish*, 120 F.3d 937, 942 (9th Cir. 1997).

Use the definitions of “Interstate Commerce” and “Foreign Commerce” as defined in Instruction Nos. 1.39 and 1.40, respectively.

2.82B

**SEXUAL EXPLOITATION OF CHILDREN—
RECEIVING AND DISTRIBUTING MATERIAL
INVOLVING SEXUAL EXPLOITATION OF
MINORS**

18 U.S.C. § 2252(a)(2)

Title 18, United States Code, Section 2252(a)(2), makes it a crime to knowingly receive [distribute] [reproduce for distribution] any visual depiction of a minor engaging in sexually explicit conduct in interstate [foreign] commerce.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly received [distributed] a visual depiction, as alleged in the indictment, using any means or facility of interstate or foreign commerce [that had been mailed];

[*First:* That the defendant knowingly received [distributed] a visual depiction, as alleged in the indictment, that had been shipped [transported] in or affecting interstate or foreign commerce;]

[*First:* That the defendant knowingly received [distributed] a visual depiction, as alleged in the indictment, that contained materials which had been mailed;]

[*First:* That the defendant knowingly received [distributed] a visual depiction, as alleged in the indictment, that contained materials which had been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;]

[*First:* That the defendant knowingly reproduced

any visual depiction for distribution, as alleged in the indictment, using any means or facility of [in or affecting] interstate or foreign commerce or through the mail;]

Second: That the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct;

Third: That such visual depiction was of a minor engaged in sexually explicit conduct; and

Fourth: That the defendant knew that such visual depiction was of sexually explicit conduct and that at least one of the persons engaged in sexually explicit conduct in such visual depiction was a minor.

To “receive” something means to knowingly accept or take possession of something. Receipt does not require proof of ownership.

[To “distribute” something simply means to deliver or transfer possession of it to someone else, with or without any financial interest in the transaction.]

“Visual depiction” includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.

The term “computer” means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.

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The term “minor” means any person under the age of eighteen years.

“Sexually explicit conduct” means actual or simulated sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; bestiality; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area of any person. Be cautioned that not every exposure of the genitals or pubic area constitutes lascivious exhibition. Whether a visual depiction constitutes such a lascivious exhibition requires a consideration of the overall content of the material. You may consider such factors as whether the focal point of the visual depiction is on the child’s genitalia or pubic area; whether the setting of the depiction is sexually suggestive, that is, in a place or pose associated with sexual activity; whether the child is depicted in an unnatural pose or in inappropriate attire, considering the age of the child; whether the child is fully or partially nude; whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; or whether the depiction is designed to elicit a sexual response in the viewer. This list is not exhaustive, and no single factor is dispositive.

The term “production” includes copying or downloading visual depictions from another source.

Note

For a general discussion of “knowingly” as it relates to § 2252 and the general scienter requirement of this section, see *United States v. X-Citement Video, Inc.*, 115 S.Ct. 464 (1994). See also *United States v. Kimbrough*, 69 F.3d 723, 733 (5th Cir. 1995) (recognizing that the term knowingly “extends to both the sexually explicit nature of the material and to the age of the performers” and affirming the language regarding the defendant’s knowledge “that at least one of the persons depicted was a minor”).

The explanation of “lascivious exhibition” is derived from *United*

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States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986), and has been adopted by the Fifth Circuit. See *United States v. Steen*, 634 F.3d 822, 826 (5th Cir. 2011); *United States v. Grimes*, 244 F.3d 375, 380 (5th Cir. 2001).

The term “producing” is defined in 18 U.S.C. § 2256(3). For further discussion of the term “production,” see *United States v. Dickson*, 632 F.3d 186, 189 (5th Cir.), *cert. denied*, 131 S.Ct. 2947 (2011), in which the Fifth Circuit held that images were “produced” when they were copied or downloaded onto hard drives, disks, or compact discs.

“Transmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce.” *United States v. Runyan*, 290 F.3d 223, 239 (5th Cir. 2002) (internal quotation marks omitted) (discussing 18 U.S.C. § 2251); see *United States v. Winkler*, 639 F.3d 692, 701 (5th Cir. 2011) (extending *Runyan* holding to § 2252).

Each separate transportation or shipping of violative material constitutes a separate offense under the statute. See *United States v. Gallardo*, 915 F.2d 149, 151 (5th Cir. 1990).

A multiplicity issue may arise if a defendant is charged with a violation of 18 U.S.C. §§ 2252(a) and 2252A for the same incident or conduct. See *United States v. Reedy*, 304 F.3d 358, 364–65, 365 n.3 (5th Cir. 2002) (noting that the Supreme Court’s holding in *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389 (2002), rendered the two statutes “functionally identical”).

The term “receipt” is explained in *United States v. Clark*, 741 F.2d 699, 703 (5th Cir. 1984). For a discussion of “knowing receipt” in the context of § 2252, see *Winkler*, 639 F.3d at 695–99.

Use the definitions of “Knowingly,” “Interstate Commerce,” and “Foreign Commerce” in Instruction Nos. 1.37, 1.39, and 1.40, respectively.

2.82C

**SEXUAL EXPLOITATION OF CHILDREN—
POSSESSION OF CHILD PORNOGRAPHY****18 U.S.C. § 2252(a)(4)(B)**

Title 18, United States Code, Section 2252(a)(4)(B), makes it a crime to knowingly possess [access with intent to view] matter that contains any visual depiction of a minor engaging in sexually explicit conduct that has been mailed [shipped] [transported] using any means or facility of [in or affecting] interstate or foreign commerce, or which was produced using materials that had been so mailed [shipped] [transported], by any means including by computer.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following elements beyond a reasonable doubt:

First: That the defendant knowingly possessed [accessed with the intent to view] one or more books [magazines] [periodicals] [films] [videotapes] [other matter] that contained any visual depiction of a minor engaging in sexually explicit conduct, as alleged in the indictment;

Second: That the item[s] was [were] mailed [shipped [transported] using any means or facility of [in or affecting] interstate or foreign commerce];

[*Second:* That the item[s] was [were] produced using material that had been mailed [shipped [transported] by any means of [in or affecting] interstate or foreign commerce, including by computer];]

Third: That the producing of such visual depiction involved the use of a minor engaging in sexually explicit conduct;

Fourth: That such visual depiction was of a minor engaged in sexually explicit conduct; and

Fifth: That the defendant knew that such visual depiction was of sexually explicit conduct and that at least one of the persons engaged in sexually explicit conduct in such visual depiction was a minor.

The term “computer” means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.

The term “visual depiction” includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.

The term “minor” means any person under the age of eighteen years.

“Sexually explicit conduct” means actual or simulated sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; bestiality; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area of any person. Be cautioned that not every exposure of the genitals or pubic area constitutes lascivious exhibition. Whether a visual depiction constitutes such a lascivious exhibition requires a

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consideration of the overall content of the material. You may consider such factors as whether the focal point of the visual depiction is on the child's genitalia or pubic area; whether the setting of the depiction is sexually suggestive, that is, in a place or pose associated with sexual activity; whether the child is depicted in an unnatural pose or in inappropriate attire, considering the age of the child; whether the child is fully or partially nude; whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; or whether the depiction is designed to elicit a sexual response in the viewer. This list is not exhaustive, and no single factor is dispositive.

The term “production” includes copying or downloading visual depictions from another source.

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

Note

See Note following Instruction No. 2.82B, 18 U.S.C. § 2252(a)(2), Sexual Exploitation of Children—Receiving and Distributing Material Involving Sexual Exploitation of Minors.

Constructive possession is sufficient to sustain a conviction under § 2252(a)(4)(B). See *United States v. Villasenor*, 236 F.3d 220, 223 (5th Cir. 2000); *United States v. Layne*, 43 F.3d 127, 131 (5th Cir. 1995).

Post-production computer alterations of a visual depiction of a minor engaging in sexually explicit conduct that placed pixel blocks over the girl's genitals does not take depictions outside of the reach of the statute. See *United States v. Grimes*, 244 F.3d 375, 380 (5th Cir. 2001).

Section 2252(a)(4)(B) is facially valid and falls within Congress's power under the Commerce Clause. See, e.g., *United States v. Kallestad*, 236 F.3d 225, 231 (5th Cir. 2000).

It is an affirmative defense to the above offense that a defendant possessed “less than three matters containing any visual

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depiction” proscribed by § 2252(a)(4)(B) and promptly and in good faith took reasonable steps to destroy each depiction, without retaining or allowing any person, other than a law enforcement agency, to access it or reported the matter to a law enforcement agency and allowed that agency access to each such visual depiction. *See* 18 U.S.C. § 2252(c).

Use the definitions of “Possession,” “Knowingly,” “Interstate Commerce,” and “Foreign Commerce” in Instruction Nos. 1.31, 1.37, 1.39, and 1.40, respectively.

2.82D

**SEXUAL EXPLOITATION OF CHILDREN—
TRANSPORTING OR SHIPPING OF CHILD
PORNOGRAPHY****(Visual Depiction of Actual Minor)****18 U.S.C. § 2252A(a)(1)**

Title 18, United States Code, Section 2252A(a)(1), makes it a crime to knowingly mail, transport, or ship any child pornography by any means or facility of [in or affecting] interstate or foreign commerce, including by computer.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly mailed an item or items of child pornography as alleged in the indictment; and

[*First:* That the defendant knowingly transported [shipped] by any means or facility of [in or affecting] interstate or foreign commerce, including by computer, an item or items of child pornography, as alleged in the indictment; and]

Second: That when the defendant mailed [transported] [shipped] the item[s], the defendant knew the item[s] was [were] child pornography.

The term “computer” means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communication 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.

The term “child pornography” means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct.

The term “minor” means any person under the age of eighteen years.

“Visual depiction” includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.

“Sexually explicit conduct” means actual or simulated sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; bestiality; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area of any person. Be cautioned that not every exposure of the genitals or pubic area constitutes lascivious exhibition. Whether a visual depiction constitutes such a lascivious exhibition requires a consideration of the overall content of the material. You may consider such factors as whether the focal point of the visual depiction is on the child’s genitalia or pubic area; whether the setting of the depiction is sexually suggestive, that is, in a place or pose associated with sexual activity; whether the child is depicted in an unnatural pose or in inappropriate attire, considering the age of the child; whether the child is fully or partially nude; whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; or

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whether the depiction is designed to elicit a sexual response in the viewer. This list is not exhaustive, and no single factor is dispositive.

Note

The mens rea of “knowingly” extends both to the age of the performers and the sexually explicit nature of the material. See *United States v. Moreland*, 665 F.3d 137, 141 (5th Cir. 2011) (citing *United States v. X-Citement Video, Inc.*, 115 S.Ct. 464 (1994)).

In *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389 (2002), the Supreme Court struck down two definitional terms of “child pornography” contained in 18 U.S.C. § 2256(8) as vague and overbroad. Accordingly, only the definitions listed in 18 U.S.C. §§ 2256(8)(A) and (C) should be utilized.

The Fifth Circuit has recognized that “*Free Speech Coalition* did not establish a broad requirement that the Government must present expert testimony to establish that the unlawful image depicts a real child.” *United States v. McNealy*, 625 F.3d 858, 865 (5th Cir. 2010); see *United States v. Slanina*, 359 F.3d 356, 357 (5th Cir. 2004) (per curiam); *United States v. Salcido*, 506 F.3d 729, 734 (9th Cir. 2007) (per curiam) (“With respect to the quantum of evidence necessary to support a conviction, there seems to be general agreement among the circuits that pornographic images themselves are sufficient to prove the depictions of actual minors.”); *United States v. Farrelly*, 389 F.3d 649, 652 (6th Cir. 2004), *abrogated on other grounds by United States v. Williams*, 411 F.3d 675 (6th Cir. 2005) (“*Free Speech Coalition* does not require the Government to do more in the context of this case than present images to the jury for a determination that the depictions were of actual children.”). Rather, juries are “capable of distinguishing between real and virtual images.” *McNealy*, 625 F.3d at 865 (internal quotation marks omitted).

The explanation of “lascivious exhibition” is derived from *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), and has been adopted by the Fifth Circuit. See *United States v. Steen*, 634 F.3d 822, 826 (5th Cir. 2011); *United States v. Grimes*, 244 F.3d 375, 380 (5th Cir. 2001).

A multiplicity issue may arise if a defendant is charged with a violation of 18 U.S.C. §§ 2252(a) and 2252A for the same incident or conduct. See *United States v. Reedy*, 304 F.3d 358, 364–65, 365

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n.3 (5th Cir. 2002) (noting that the Supreme Court’s holding in *Free Speech Coalition* rendered the two statutes “functionally identical”).

The transmission of images by means of the Internet is “tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce for the purposes of 18 U.S.C. § 2251.” *United States v. Runyan*, 290 F.3d 223, 239 (5th Cir. 2002). When the government alleges downloading images via the Internet as the jurisdictional nexus, the evidence must “independently link all the images upon which a conviction is based to the Internet.” *Id.* at 242–43; *see also United States v. Winkler*, 639 F.3d 692, 700–01 (5th Cir. 2011); *United States v. Henriques*, 234 F.3d 263, 266 (5th Cir. 2000).

Use the definitions of “Knowingly,” “Interstate Commerce,” and “Foreign Commerce” in Instruction Nos. 1.37, 1.39, and 1.40, respectively.

2.82E**SEXUAL EXPLOITATION OF CHILDREN—
RECEIVING OR DISTRIBUTING CHILD
PORNOGRAPHY****(Visual Depiction of Actual Minor)****18 U.S.C. § 2252A(a)(2)(A)**

Title 18, United States Code, Section 2252A(a)(2)(A), makes it a crime to knowingly receive [distribute] any child pornography that has been mailed or, using any means or facility of interstate [foreign] commerce, shipped [transported] in or affecting interstate [foreign] commerce by any means, including by computer.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly received [distributed] an item or items of child pornography, as alleged in the indictment;

Second: That the item[s] of child pornography had been mailed;

[*Second:* That the item[s] of child pornography had been shipped [transported] in or affecting interstate or foreign commerce by any means, including by computer;]

Third: That when the defendant received [distributed] the item[s], the defendant knew the item[s] was [were] [contained] child pornography.

To “receive” something means to knowingly accept or take possession of something. Receipt does not require proof of ownership.

[To “distribute” something means to deliver or transfer possession of it to someone else, with or without any financial interest in the transaction.]

The term “computer” means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communication 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.

The term “child pornography” means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct.

The term “minor” means any person under the age of eighteen years.

“Visual depiction” includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.

“Sexually explicit conduct” means actual or simulated sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; bestiality; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area of any person. Be cautioned that not every exposure of the genitals or pubic area constitutes lascivious exhibition. Whether a visual depiction constitutes such a lascivious exhibition requires a

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consideration of the overall content of the material. You may consider such factors as whether the focal point of the visual depiction is on the child's genitalia or pubic area; whether the setting of the depiction is sexually suggestive, that is, in a place or pose associated with sexual activity; whether the child is depicted in an unnatural pose or in inappropriate attire, considering the age of the child; whether the child is fully or partially nude; whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; or whether the depiction is designed to elicit a sexual response in the viewer. This list is not exhaustive, and no single factor is dispositive.

Note

See Note following Instruction No. 2.82D, 18 U.S.C. § 2252A(a)(1), Sexual Exploitation of Children—Transporting or Shipping of Child Pornography.

Intent to distribute is not a required element in a “receipt” case. See *United States v. Olander*, 572 F.3d 764, 770 (9th Cir. 2009); *United States v. Watzman*, 486 F.3d 1004, 1009–10 (7th Cir. 2007).

For a discussion of whether a person “knowingly receives” child pornography, see *United States v. Pruitt*, 638 F.3d 763, 766–67 (11th Cir.), *cert. denied*, 132 S.Ct. 113 (2011).

When a defendant is charged with receiving or distributing child pornography, each separate receipt or distribution violates the statute. See *United States v. Planck*, 493 F.3d 501, 505 (5th Cir. 2007).

Use the definitions of “Knowingly,” “Interstate Commerce,” and “Foreign Commerce” in Instruction Nos. 1.37, 1.39, and 1.40, respectively.

2.82F

**SEXUAL EXPLOITATION OF CHILDREN—
RECEIVING OR DISTRIBUTING MATERIAL
THAT CONTAINS CHILD PORNOGRAPHY****18 U.S.C. § 2252A(a)(2)(B)**

Title 18, United States Code, Section 2252A(a)(2)(B), makes it a crime to knowingly receive [distribute] any material that contains child pornography that has been mailed or, using any means or facility of interstate [foreign] commerce, shipped [transported] in or affecting interstate [foreign] commerce by any means, including by computer.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly received [distributed] material that contained child pornography, as alleged in the indictment;

Second: That the material containing child pornography had been mailed; and

[*Second:* That the material containing child pornography was shipped [transported] in or affecting interstate [foreign] commerce by any means, including by computer; and]

Third: That when the defendant received [distributed] the material, the defendant knew it contained child pornography.

To “receive” something means to knowingly accept or take possession of something. Receipt does not require proof of ownership.

[To “distribute” something means to deliver or

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transfer possession of it to someone else, with or without any financial interest in the transaction.]

The term “computer” means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communication 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.

The term “child pornography” means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct.

The term “minor” means any person under the age of eighteen years.

“Visual depiction” includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.

“Sexually explicit conduct” means actual or simulated sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; bestiality; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area of any person. Be cautioned that not every exposure of the genitals or pubic area constitutes lascivious exhibition. Whether a visual depiction constitutes such a lascivious exhibition requires a consideration of the overall content of the material. You

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may consider such factors as whether the focal point of the visual depiction is on the child's genitalia or pubic area; whether the setting of the depiction is sexually suggestive, that is, in a place or pose associated with sexual activity; whether the child is depicted in an unnatural pose or in inappropriate attire, considering the age of the child; whether the child is fully or partially nude; whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; or whether the depiction is designed to elicit a sexual response in the viewer. This list is not exhaustive, and no single factor is dispositive.

Note

See Note following Instruction Nos. 2.82D and 2.82E for 18 U.S.C. §§ 2252A(a)(1) and 2252A(a)(2)(A), respectively.

Use the definitions of "Knowingly," "Interstate Commerce," and "Foreign Commerce" in Instruction Nos. 1.37, 1.39, and 1.40, respectively.

2.82G**SEXUAL EXPLOITATION OF CHILDREN—
POSSESSING OR ACCESSING CHILD
PORNOGRAPHY****(Visual Depiction of an Actual Minor)****18 U.S.C. § 2252A(a)(5)(B)**

Title 18, United States Code, Section 2252A(a)(5)(B), makes it a crime to knowingly possess [access with intent to view] any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed [shipped [transported] using any means or facility of [in or affecting] interstate or foreign commerce, including by computer, or that was produced using materials that have been mailed or so shipped [transported] in or affecting interstate commerce by any means, including by computer].

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly possessed [accessed with the intent to view] an item or items that contains an image of child pornography, as alleged in the indictment;

Second: That the material was mailed [shipped [transported] using any means or facility of [in or affecting] interstate or foreign commerce [by any means], including by computer]; and

[*Second:* That the material was produced using materials that had been mailed [shipped [transported] in or affecting interstate or foreign commerce by any means, including by computer]; and]

Third: That when the defendant possessed [accessed with the intent to view] the material, the defendant knew the material was [contained] child pornography.

The term “computer” means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communication 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.

The term “child pornography” means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct.

The term “minor” means any person under the age of eighteen years.

“Visual depiction” includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.

“Sexually explicit conduct” means actual or simulated sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; bestiality; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area of any person. Be cautioned that not every exposure of the genitals or pubic area constitutes lascivious exhibition. Whether a visual depiction

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constitutes such a lascivious exhibition requires a consideration of the overall content of the material. You may consider such factors as whether the focal point of the visual depiction is on the child's genitalia or pubic area; whether the setting of the depiction is sexually suggestive, that is, in a place or pose associated with sexual activity; whether the child is depicted in an unnatural pose or in inappropriate attire, considering the age of the child; whether the child is fully or partially nude; whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; or whether the depiction is designed to elicit a sexual response in the viewer. This list is not exhaustive, and no single factor is dispositive.

Note

See Note following Instruction No. 2.82D, 18 U.S.C. § 2252A(a)(1), Sexual Exploitation of Children—Transporting or Shipping of Child Pornography.

For a discussion of “knowing possession” in relation to § 2252A(a)(5)(B), see *United States v. Moreland*, 665 F.3d 137, 149–51 (5th Cir. 2011).

The term “producing” means producing, directing, manufacturing, issuing, publishing, or advertising. 18 U.S.C. § 2256(3).

Videos that have traveled on the Internet have moved in interstate commerce within the meaning of 18 U.S.C. § 2252A(a)(5)(B). See *United States v. Winkler*, 639 F.3d 692, 700–01 (5th Cir. 2011).

“Where a defendant has a single envelope or book or magazine containing many images of minors engaging in sexual activity, the government often should charge only a single count.” *United States v. Reedy*, 304 F.3d 358, 367 (5th Cir. 2002). When, however, a defendant has images stored in “separate materials,” as defined in § 2252A, such as a “computer, book, and a magazine,” the government may charge multiple counts for each type of material or media possessed, “as long as the prohibited images were obtained through the result of different transactions.” *United States v. Planck*, 493 F.3d 501, 504 (5th Cir. 2007).

The Third, Sixth, Ninth, and Eleventh Circuits have held that

the possession of child pornography proscribed by § 2252A(a)(5)(B) is a lesser included offense of the crime of receiving child pornography contained in § 2252A(a)(2), such that convicting a defendant of possessing and receiving the same image of child pornography constitutes double jeopardy. *See United States v. Ehle*, 640 F.3d 689, 698 (6th Cir. 2011); *United States v. Bobb*, 577 F.3d 1366, 1372–75 (11th Cir. 2009); *United States v. Miller*, 527 F.3d 54, 71–72 (3d Cir. 2008); *United States v. Davenport*, 519 F.3d 940, 944–45 (9th Cir. 2008). The Fifth Circuit, in *Winkler*, recognized in dicta that several of its sister circuits had characterized the possession of child pornography as a lesser-included offense of receipt, but noted that there are certain circumstances in which “possession can be proven but receipt cannot,” although the court declined to opine further. 639 F.3d at 696 n.2; *see also United States v. Dobbs*, 629 F.3d 1199, 1206 (10th Cir. 2011) (declining to comment on the difference between knowing possession and knowing receipt); *United States v. Irving*, 554 F.3d 64, 78 (2d Cir. 2009) (leaving open the question of whether possession of child pornography is a lesser-included offense of receiving such pornography). Where, however, a defendant’s convictions are based on two distinct offenses occurring, for example, on different dates or involving different images of child pornography, conviction under both sections of the statute is permissible. *See Bobb*, 577 F.3d at 1375.

Section 2252A(c) and (d) provide affirmative defenses to the above offense.

Use the definitions of “Possession,” “Knowingly,” “Interstate Commerce,” and “Foreign Commerce” in Instruction Nos. 1.31, 1.37, 1.39, and 1.40, respectively.

2.83

**INTERSTATE TRANSPORTATION OF A STOLEN
MOTOR VEHICLE, VESSEL, OR AIRCRAFT****18 U.S.C. § 2312**

Title 18, United States Code, Section 2312, makes it a crime for anyone to transport in interstate or foreign commerce a stolen motor vehicle, vessel, or aircraft, knowing it to have been stolen.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant transported in interstate [foreign] commerce a stolen motor vehicle [vessel] [aircraft]; and

Second: That, at the time of such transportation, the defendant knew that the motor vehicle [vessel] [aircraft] had been stolen.

The word “stolen” as used in the indictment in this case means all wrongful and dishonest takings of motor vehicles, vessels, or aircraft, with the intent to deprive the owner, temporarily or permanently, of the rights and benefits of ownership.

Note

The Fifth Circuit, in dicta, has cited with approval a broad definition of “stolen” under this statute. *See United States v. Aguilar*, 967 F.2d 111, 113 (5th Cir. 1992) (holding that where an automobile is purchased with a worthless check and is transported interstate, it is “stolen” under § 2312).

Definitions of “Interstate Commerce,” “Foreign Commerce,” and “Commerce” are in Instruction Nos. 1.39, 1.40, and 1.41.

2.83A

**RECEIPT OF A STOLEN MOTOR VEHICLE,
VESSEL, OR AIRCRAFT****18 U.S.C. § 2313**

Title 18, United States Code, Section 2313, makes it a crime for anyone to receive any motor vehicle, vessel, or aircraft which has crossed a state or United States boundary after being stolen, knowing it to have been stolen.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the motor vehicle [vessel] [aircraft] in question was stolen;

Second: That the motor vehicle [vessel] [aircraft] had crossed a state or United States boundary after being stolen;

Third: That the defendant received the stolen motor vehicle [vessel] [aircraft]; and

Fourth: That the defendant knew the motor vehicle [vessel] [aircraft] to have been stolen at the time the defendant received it.

Before a defendant can be convicted of the offense charged, the government must prove beyond a reasonable doubt that the defendant knew that the property had been stolen, but it is not required to prove that the defendant knew that the property had crossed a state or United States boundary after being stolen.

The word “stolen” means all wrongful and dishonest takings of motor vehicles, vessels, or aircrafts with

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the intent to deprive the owner, temporarily or permanently, of the rights and benefits of ownership.

Note

United States v. Mitchell, 876 F.2d 1178, 1180 (5th Cir. 1989), states the elements of the offense. In *Mitchell*, the Fifth Circuit held that testimony that defendant purchased the vehicles did not preclude a finding that defendant knew the vehicles were stolen. 876 F.2d at 1180.

Although this instruction pertains only to a “receipt” offense, an indictment often alleges that the defendant “received, possessed, concealed, sold, and disposed of” a particular motor vehicle, vessel, or aircraft. In such cases, it is not necessary for the government to prove that all of these acts were in fact committed, as any one of them is a violation of the statute. The Fifth Circuit has held, however, that the statute describes two distinct conceptual groupings or types of wrongdoing—housing of the vehicle (receiving, concealing, and storing) and marketing of the vehicle (bartering, selling, and disposing)—and the jury must agree unanimously upon which way the offense was committed. See *United States v. Gipson*, 553 F.2d 453, 458 (5th Cir. 1977) (holding that jury instruction that allowed conviction based on finding that defendant committed any of six acts listed in the then-current version of 18 U.S.C. § 2313 violated unanimity rule); see also *United States v. Trupin*, 117 F.3d 678, 687 (2nd Cir. 1997) (holding that instruction on 18 U.S.C. § 2115 which required jury unanimity regarding “whether the defendant possessed, concealed, or stored the property,” or “whether the defendant bartered, sold or disposed of the property,” was not erroneous). In *Schad v. Arizona*, 111 S.Ct 2491, 2498 (1999), however, a plurality of the Supreme Court criticized *Gipson*’s classification of alternative means of committing a crime into “distinct conceptual groupings” as “conclusory,” and “too indeterminate to provide concrete guidance to courts faced with verdict specificity questions.”

See also Instruction No. 1.25 on Unanimity of Theory.

2.84

**INTERSTATE TRANSPORTATION OF STOLEN
PROPERTY****18 U.S.C. § 2314
(First Paragraph)**

Title 18, United States Code, Section 2314, makes it a crime for anyone to transport [cause to be transported] in interstate [foreign] commerce stolen property having a value of \$5,000 or more, knowing it to have been stolen [converted] [taken by fraud].

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant transported [caused to be transported] in interstate [foreign] commerce items of stolen property as described in the indictment;

Second: That at the time of such transportation, the defendant knew that the property had been stolen [converted] [taken by fraud]; and

Third: That the property had a value of \$5,000 or more.

Knowledge or reasonable foreseeability of interstate [foreign] transport is not required to convict. It is enough if the defendant set in motion a series of events which in the normal course led to the transportation.

“Property” means goods, wares, merchandise, securities, or money.

The word “stolen” means all wrongful and dishonest taking of property with the intent to deprive the owner of the rights and benefits of ownership, temporarily or permanently.

[The phrase “taken by fraud” means to deceive or cheat someone out of property by means of false or fraudulent pretenses, representations or promises.]

The word “value” means the face, par, or market value, whichever is the greatest [and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof].

Note

United States v. Anderson, 174 F.3d 515 (5th Cir. 1999), sets out the elements of the offense. *See also Dowling v. United States*, 105 S.Ct. 3127, 3131 (1985); *United States v. Mackay*, 33 F.3d 489 (5th Cir. 1994). A conviction requires that the goods actually travel in interstate or foreign commerce. *See United States v. Payan*, 992 F.2d 1387 (5th Cir. 1993). Since the \$5,000 value is jurisdictional, the property must have that value at the time it was stolen or at some point during its receipt, transportation, or concealment. *See United States v. Watson*, 966 F.2d 161 (5th Cir. 1992).

“In cases of fraudulently-obtained goods, such as the instant case, the government must establish defendant’s knowledge that the goods were procured by fraud, although it need not prove the knowledge or foreseeability that such goods crossed state lines.” *United States v. Vonsteen*, 872 F.2d 626, 630 (5th Cir. 1989); *see United States v. Lennon*, 751 F.2d 737, 740 (5th Cir. 1985) (“[S]ection 2314 does not require knowledge or reasonable foreseeability of interstate transport of the money obtained by fraud.”); *see also United States v. McIntosh*, 280 F.3d 479, 483 (5th Cir. 2002) (it is unnecessary to show the defendant actually transported anything himself—it need only be shown that he caused the interstate transportation by duping out-of-state investors into sending him checks procured by fraud) (citing *Pereira v. United States*, 74 S.Ct. 358, 363 (1954)).

United States v. Wright, 791 F.2d 133, 135–36 (10th Cir. 1986), highlights the point that this offense is not limited to the physical movement of money obtained by fraud from one state to another, it is also a violation of 18 U.S.C. § 2314 to cause an interstate electronic transfer of the funds. *See also United States v. Levy*, 579 F.2d 1332, 1336 (5th Cir. 1978) (upholding § 2314 conviction where defendant obtained money by fraud, deposited those funds into a

Louisiana bank account, and then transported his ill-gotten gains by writing checks on the Louisiana account and depositing them into a Texas bank). Real property and rights associated with copyright ownership are not “within the ambit of transporting goods, wares, or merchandise that have been stolen, converted, or taken by fraud.” *United States v. Smith*, 686 F.2d 234, 239 (5th Cir. 1982); *see also Coleman v. Am. Elec. Power Co., Inc.*, 48 F. App’x 918, *2 (5th Cir. 2002).

“Money” and “securities” are further defined in 18 U.S.C. § 2311.

Where meager property is transformed into valuable property by the theft or deceit of the defendant, the value assigned to meet the jurisdictional requirement is generally the face, fair, or market value of the item, whichever is higher. *See United States v. Onjliego*, 286 F.3d 249 (5th Cir. 2002) (amounts written by defendant on the blank stolen airline tickets could be used as “face” value to meet the statutory jurisdictional minimum dollar amount under 18 U.S.C. § 2314, just as the value requirement for a blank money order can be met “by the face value of, or the amount received for, filled in blank money orders, or the value of the blanks in a thieves’ market for blank money orders”); *United States v. Robinson*, 553 F.2d 429, 431 (5th Cir. 1977) (holding that the “face” value of a fraudulently secured promissory note does not depend on the amount of money eventually obtained in a litigation settlement on that note).

Definitions of “Interstate Commerce,” “Foreign Commerce,” and “Commerce” are in Instruction Nos. 1.39, 1.40, and 1.41.

If the indictment charges commission of the offense in more than one manner, see Instruction No. 1.25 on Unanimity of Theory.

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**RECEIPT, POSSESSION, OR SALE OF STOLEN
PROPERTY**

**18 U.S.C. § 2315
(First Paragraph)**

Title 18, United States Code, Section 2315, makes it a crime for anyone knowingly to receive, conceal, sell, or dispose of stolen property which has a value of \$5,000 or more and which has crossed a state or United States boundary.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the property named in the indictment was stolen [unlawfully taken or converted];

Second: That such property had crossed a state or United States boundary after being stolen [unlawfully taken or converted];

Third: That the defendant received [concealed] [sold] [disposed of] items of the stolen property;

Fourth: That the defendant knew the property was stolen [unlawfully taken or converted] at the time the defendant received [concealed] [sold] [disposed of] it; and

Fifth: That such items had a value of \$5,000 or more.

Before a defendant can be convicted of the offense charged, the government must prove beyond a reasonable doubt that the defendant knew that the property had been stolen, but it is not required to prove that the

defendant knew that the property had crossed a state or United States boundary after being stolen.

“Property” means goods, wares, merchandise, securities, or money.

The term “value” means the face, par, or market value, whichever is the greatest [and the aggregate value of all goods, wares, merchandise, securities, and money referred to in a single indictment shall constitute the value thereof].

Note

United States v. Anderson, 174 F.3d 515 (5th Cir. 1999), sets forth the elements of the offense.

An indictment often alleges that the defendant “received, possessed, concealed, sold, and disposed of” certain stolen property. In such cases, it is not necessary for the government to prove that all of these acts were in fact committed, as anyone of them is a violation of the statute. The Fifth Circuit has held, however, that the analogous statute of § 2313 describes two conceptual types of wrongdoing—harboring the stolen property and marketing the property—and the jury must agree unanimously upon which way the offense was committed. *See United States v. Gipson*, 553 F.2d 453, 458 (5th Cir. 1977) (holding that jury instruction that allowed conviction based on finding that defendant committed any of six acts listed in the then version of 18 U.S.C. § 2313 violated unanimity rule); *see also United States v. Trupin*, 117 F.3d 678, 687 (2d Cir. 1997) (holding that instruction on 18 U.S.C. § 2115 which required jury unanimity regarding “whether the defendant possessed, concealed, or stored the property,” or “whether the defendant bartered, sold or disposed of the property,” was not erroneous). In *Schad v. Arizona*, 111 S.Ct. 2491, 2489 (1999), however, a plurality of the Supreme Court has criticized *Gipson*’s classification of alternative means of committing a crime into “distinct conceptual groupings” as “too indeterminate” to provide concrete guidance to courts.

By statute, 18 U.S.C. § 2314 applies solely to “goods, wares, merchandise, securities or money.” Thus, in *Coleman v. Am. Elec. Power Co., Inc.*, 48 F. App’x 918, *2 (5th Cir. 2002) (holding that easement rights do not fall under 18 U.S.C. §§ 2314 or 2315 and

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therefore there was no predicate criminal activity which could support RICO claim), the court stated that “real property and estates or rights in real property do not fall within the definition of ‘goods, wares, merchandise, securities or money.’” The court further noted that “an incorporeal, intangible right or privilege to engage in or to authorize certain activity is not generally considered to be goods, wares, or merchandise.” *Id.*

2.85

ENTICEMENT OF A MINOR

18 U.S.C. § 2422(b)

Title 18, United States Code, Section 2422(b), makes it a crime for anyone to knowingly persuade [induce] [entice] [coerce] [attempt to persuade, induce, entice or coerce] a person under 18 years old to engage in any sexual activity for which any person can be charged with a criminal offense by use of any facility or means of interstate [foreign] commerce [the mail].

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly persuaded [induced] [enticed] [coerced] [attempted to persuade, induce, entice or coerce] an individual to engage in any sexual activity, or prostitution, as charged;

Second: That the defendant used the Internet [the mail] [a telephone] [a cell phone] [any facility or means of [interstate] [foreign] commerce] to do so;

Third: That the defendant believed that such individual was less than 18 years of age; and

Fourth: That, had the sexual activity actually occurred, the defendant could be charged with the criminal offense of _____ under the laws of _____ [insert state] [the United States].

It is not necessary for the government to prove the individual was in fact less than 18 years of age; but it is necessary for the government to prove the defendant believed such individual to be under that age.

It is not necessary for the government to prove that

the individual was actually persuaded [induced] [enticed] [coerced] into engaging in [the described sexual activity] [prostitution], as long as it proves the defendant intended to persuade [induce] [entice] [coerce] the individual to engage in some form of unlawful sexual activity with the defendant and knowingly took some action that was a substantial step toward bringing it about. A substantial step is conduct that strongly corroborates the firmness of the defendant's criminal attempt. Mere preparation is not enough.

["Prostitution" means engaging in or agreeing to or offering to engage in any sexual act with or for another person in exchange for money or other consideration.]

As a matter of law, the following is a crime [are crimes] under _____ [state law] [federal law]: [describe elements of the crime as alleged in the indictment].

Note

In *United States v. Lundy*, 676 F.3d 444, 450–51 (5th Cir. 2012), the Fifth Circuit approved instructional language similar to the two paragraphs above beginning with the phrase "[i]t is not necessary." See also *United States v. Wolford*, 386 F. App'x 479, 483 (5th Cir. 2010) (a proper jury instruction that states a defendant must believe the person is under 18 years of age "ensures that conviction will not lie where speech is within the bounds of the First Amendment's protections").

For a discussion of an attempted violation of § 2422, see *United States v. Broussard*, 669 F.3d 537, 547 (5th Cir. 2012). See also *United States v. Olvera*, 687 F.3d 645 (5th Cir. 2012) (defendant need not communicate directly with the minor victim); *United States v. Barlow*, 568 F.3d 215, 219 (5th Cir. 2009) (this statute does not require the sexual contact occur); *United States v. Farner*, 251 F.3d 510, 513 (5th Cir. 2001).

This section does not require "proof of travel across state lines"—instead, it only requires the use of "any facility or means of interstate or foreign commerce" and "it is beyond debate that the Internet and email are facilities or means of interstate commerce."

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Barlow, 568 F.3d at 220; *see also United States v. D’Andrea*, 440 F. App’x 273, 274 (5th Cir. 2011) (“The facility or means of interstate commerce provision is an element of the offense; but interstate communication is not required by the statute.”).

2.86

FAILURE TO APPEAR

18 U.S.C. § 3146

Title 18, United States Code, Section 3146, makes it a crime for anyone to knowingly fail to appear in court [surrender for service of sentence] on a required date.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant was previously charged with [convicted of] _____ (name crime) in this court;

Second: That the defendant had been released on bond [his own recognizance] by a _____ (specify judicial officer) on condition that the defendant appear in court [surrender for service of sentence];

Third: That the defendant thereafter failed to appear [surrender for service of sentence] as required; and

Fourth: That the defendant knew he was required to appear [surrender for service of sentence] on that date and purposefully and knowingly failed to do so.

Note

Under some circumstances, the fourth element of the instruction should be modified. In *United States v. Allison*, 953 F.2d 870, 876 (5th Cir. 1992), *modified on rehearing*, 986 F.2d 896 (5th Cir. 1993), the trial court specifically refused to give the fourth element of the pattern instruction above, and instead substituted language that the defendant did so “willfully.” The Fifth Circuit found that this was appropriate under the facts of the particular case. *Id.* at 876–77. There, the defendant never received notice because it was

mailed to a certain residence from which he had already absconded. *Id.* at 876. The Fifth Circuit held: “When a defendant purposefully engages in a course of conduct designed to prevent him from receiving notice to appear, the conduct will fulfill the willful requirement just as clearly as when he receives and deliberately ignores a notice to appear.” *Id.*

The statutory language itself does not contain a requirement that the defendant act “willfully.” The statute does provide for the affirmative defense of “uncontrollable circumstances.” *See* 18 U.S.C. § 3146(c).

2.87

**CONTROLLED SUBSTANCES—POSSESSION
WITH INTENT TO DISTRIBUTE****21 U.S.C. § 841(a)(1)**

Title 21, United States Code, Section 841(a)(1), makes it a crime for anyone knowingly or intentionally to possess a controlled substance with intent to distribute it.

_____ (name controlled substance) is a controlled substance within the meaning of this law.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly possessed a controlled substance;

Second: That the substance was in fact _____ (name controlled substance); and

Third: That the defendant possessed the substance with the intent to distribute it.

[*Fourth:* That the quantity of the substance was at least _____ (state quantity).]

To “possess with intent to distribute” simply means to possess with intent to deliver or transfer possession of a controlled substance to another person, with or without any financial interest in the transaction.

Note

Instruction No. 1.31, defining “Possession,” should be included as needed.

Cases listing the elements of a § 841(a)(1) conviction include

United States v. Pompa, 434 F.3d 800, 806 (5th Cir. 2005), and *United States v. Infante*, 404 F.3d 376, 385 (5th Cir. 2005).

The fourth element, prompted by the *Apprendi* doctrine, is required when the indictment alleges a quantity that would result in an enhanced penalty under 21 U.S.C. § 841(b). See *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000); *United States v. Clinton*, 256 F.3d 311, 313–14 (5th Cir. 2001); *United States v. Garcia*, 242 F.3d 593, 599–600 (5th Cir. 2001).

Generally, the exact quantity of the controlled substance need not be determined so long as the jury establishes a quantity at or above a given baseline amount in the appropriate subsection of § 841(b). For example, in a marijuana case, if the amount is determined to be at least 100 kilograms, the maximum sentence would be the same for any amount up to 999 kilograms. See 21 U.S.C. §§ 841(b)(1)(B)(vii), 841(b)(1)(A)(vii); see also *United States v. DeLeon*, 247 F.3d 593, 597 (5th Cir. 2001) (holding that an indictment’s allegation of a drug-quantity range, as opposed to a precise drug quantity, is sufficient to satisfy *Apprendi* and its progeny). If there is a fact dispute, however, as to whether the amount is above or below a particular baseline (e.g., 100 kilograms of marijuana versus 99 kilograms), the court may consider submitting the higher amount in the fourth element, accompanied by Instruction No. 1.33, Lesser Included Offense, for the lower amount. Alternatively, the court may substitute for the fourth element a special interrogatory asking the jury to indicate the total amount of the controlled substance it believes was proved beyond a reasonable doubt. See *United States v. Arnold*, 416 F.3d 349, 356 (5th Cir. 2005) (approving use of special interrogatory).

“The term ‘distribute’ is broader in scope than the term ‘sale,’ ” *United States v. Brown*, 217 F.3d 247 (5th Cir. 2000), and means to deliver, other than by administering or dispensing. See 21 U.S.C. § 802(11).

In a marijuana case, if the indictment fails to allege a drug quantity, the default sentencing provision for a conviction is provided by § 841(b)(1)(D). See *United States v. Gonzalez*, 259 F.3d 355, 359 (5th Cir. 2001) (citing *Garcia*, 242 F.3d at 599–600). Further, when a jury is not instructed to find the amount of cocaine base (crack cocaine), the statutory maximum is determined under § 841(b)(1)(C). See *Clinton*, 256 F.3d at 315; *United States v. Thomas*, 246 F.3d 438, 439 (5th Cir. 2001).

A fifth element, prompted by the *Apprendi* doctrine, is required

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when the indictment alleges a serious bodily injury or death that would result in an enhanced penalty under 21 U.S.C. § 841(b). *See United States v. Greenough*, 669 F.3d 567, 568 (5th Cir. 2012). If a disputed issue is whether the serious bodily injury or death resulted from the use of the substance, the court should consider giving Instruction No. 1.33, Lesser Included Offense.

If the evidence warrants, the following instruction may be added:

The government must prove beyond a reasonable doubt that the defendant knew he possessed a controlled substance, but need not prove that the defendant knew what particular controlled substance was involved.

See United States v. Gamez-Gonzalez, 319 F.3d 695, 700 (5th Cir. 2003).

“Knowledge” and “intent” are used in their common meaning in the conspiracy and possession statutes and therefore do not require further instruction. *See United States v. Cano-Guel*, 167 F.3d 900, 906 (5th Cir. 1999) (“knowledge”); *United States v. Sanchez-Sotello*, 8 F.3d 202, 212 (5th Cir. 1993) (“knowledge” and “intent”). Intent to distribute may be inferred from a large quantity of illegal narcotics, the value and quality of the drugs, and the possession of drug paraphernalia. *See United States v. Valdez*, 453 F.3d 252, 260 n.7 (5th Cir. 2006) (citing *United States v. Cartwright*, 6 F.3d 294, 299 (5th Cir. 1999)); *United States v. Redd*, 355 F.3d 866, 873 (5th Cir. 2003); *see also United States v. Williamson*, 533 F.3d 269, 270 (5th Cir. 2008) (intent to distribute could be inferred from possession of digital scales and 90.89 grams of cocaine base). If a “personal use” instruction is appropriate, it should inform “the jury of its task: i.e., to determine whether the quantity is consistent with personal use and, if so, to find no inference of an intent to distribute without other evidence.” *United States v. Cain*, 440 F.3d 672, 674–75 (5th Cir. 2006).

For a discussion on the requisite scienter of “knowledge” in “hidden compartment” cases, *see United States v. Mireles*, 471 F.3d 551, 556–57 (5th Cir. 2006).

For when to give an instruction on the lesser included offense of simple possession, *see United States v. Fitzgerald*, 89 F.3d 218, 220–21 (5th Cir. 1996), and *United States v. Lucien*, 61 F.3d 366, 373–74 (5th Cir. 1995).

For cases discussing when to give an instruction on deliberate

ignorance, see *United States v. Fuchs*, 467 F.3d 889, 901–02 (5th Cir. 2006), and *United States v. Freeman*, 434 F.3d 369, 378 (5th Cir. 2005). A deliberate ignorance instruction is found at Instruction No. 1.37A.

2.88

**UNLAWFUL USE OF COMMUNICATION
FACILITY****21 U.S.C. § 843(b)**

Title 21, United States Code, Section 843(b), makes it a crime for anyone knowingly or intentionally to use a communication facility to commit [facilitate the commission of] a controlled substances offense.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly or intentionally used a “communication facility” as charged; and

Second: That the defendant used the “communication facility” with the intent to commit [facilitate the commission of] the offense of _____ (describe the offense, e.g., possession with intent to distribute a controlled substance), as that offense has been defined in these instructions.

The term “communication facility” includes mail, telephone, wire, radio, and all other means of communication.

[To “facilitate” the commission of an offense means to make easier or less difficult, or to aid or assist in the commission of that offense.]

Note

The elements of the offense are discussed in *United States v. Mankins*, 135 F.3d 946, 949 (5th Cir. 1998).

In *Abuelhawa v. United States*, 129 S.Ct. 2102 (2009), the Court held that the defendant did not “facilitate” his drug dealer’s

sale to him by using his cell phone to make a drug purchase from his dealer.

The Fifth Circuit has held that “[t]here is no statutory requirement that the indictment specify the drug involved in the offense, nor has our court imposed a jurisprudential one.” *United States v. Guerra-Marez*, 928 F.2d 665, 675 (5th Cir. 1991). The communications forming the basis of a § 843(b) violation need not specifically refer to the drug trade as long as a reasonable jury could find that the defendant was discussing matters pertaining to the drug offense. See *United States v. Gonzalez-Rodriguez*, 966 F.2d 918, 922–23 (5th Cir. 1992).

For a useful discussion of the meaning of “facilitating the commission of a drug offense,” see *United States v. Dixon*, 132 F.3d 192, 200–01 (5th Cir. 1997).

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CONTROLLED SUBSTANCES—CONSPIRACY**21 U.S.C. § 846**

Title 21, United States Code, Section 846, makes it a crime for anyone to conspire with someone else to commit a violation of certain controlled substances laws of the United States. In this case, the defendant is charged with conspiring to _____ [describe the object of the conspiracy as alleged in the indictment, e.g., possess with intent to distribute a controlled substance, and give elements of object crime unless they are given under a different count of the indictment].

A “conspiracy” is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of “partnership in crime” in which each member becomes the agent of every other member.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That two or more persons, directly or indirectly, reached an agreement to _____ (describe the object of the conspiracy);

Second: That the defendant knew of the unlawful purpose of the agreement;

Third: That the defendant joined in the agreement willfully, that is, with the intent to further its unlawful purpose; and

Fourth: That the overall scope of the conspiracy involved at least _____ (describe quantity) of _____ (name controlled substance).

One may become a member of a conspiracy without knowing all the details of the unlawful scheme or the identities of all the other alleged conspirators. If a defendant understands the unlawful nature of a plan or scheme and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him for conspiracy even though the defendant had not participated before and even though the defendant played only a minor part.

The government need not prove that the alleged conspirators entered into any formal agreement, nor that they directly stated between themselves all the details of the scheme. Similarly, the government need not prove that all of the details of the scheme alleged in the indictment were actually agreed upon or carried out, nor must it prove that all of the persons alleged to have been members of the conspiracy were such, or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

Mere presence at the scene of an event, even with knowledge that a crime is being committed, or the mere fact that certain persons may have associated with each other and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. A person who has no knowledge of a conspiracy, but who happens to act in a way that advances some purpose of a conspiracy, does not thereby become a conspirator.

Note

This instruction is also applicable to an offense under 21 U.S.C. § 963 with appropriate modifications for a conspiracy alleging importation as the object of the conspiracy.

If the evidence warrants, the following instruction may be added: “The government must prove beyond a reasonable doubt that the defendant knew he was possessing a controlled substance, but need not prove that the defendant knew what particular controlled substance was involved.” See *United States v. Gamez-Gonzalez*, 319 F.3d 695, 700 (5th Cir. 2003). If multiple objects of the conspiracy are charged in the indictment, the jury need not unanimously agree on the object of the conspiracy to convict, though the type of controlled substance will affect sentencing. See *United States v. Patino-Prado*, 533 F.3d 304 (5th Cir. 2008).

The elements of a drug conspiracy are described in *United States v. Tenorio*, 360 F.3d 491, 494 (5th Cir. 2004), and *United States v. Hayes*, 342 F.3d 385, 389–90 (5th Cir. 2003).

The fourth element, prompted by the *Apprendi* doctrine, is required when the indictment alleges a quantity that would result in an enhanced penalty under 21 U.S.C. § 841(b). See *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000); *United States v. Turner*, 319 F.3d 716, 721–22 (5th Cir. 2003); *United States v. Clinton*, 256 F.3d 311, 314 (5th Cir. 2001); *United States v. DeLeon*, 247 F.3d 593, 597 (5th Cir. 2001). Generally, the exact quantity of the controlled substance need not be determined so long as the jury establishes a quantity at or above a given baseline amount in the appropriate subsection of § 841(b). For example, in a marijuana case, if the amount is determined to be at least 100 kilograms, the maximum sentence would be the same for any amount up to 999 kilograms. See 21 U.S.C. § 841(b)(1)(B)(vii); *DeLeon*, 247 F.3d at 597 (holding that an indictment’s allegation of a drug-quantity range, as opposed to a precise drug quantity, is sufficient to satisfy *Apprendi* and its progeny). If there is a fact dispute, however, as to whether the amount is above or below a particular baseline (e.g., 100 kilograms of marijuana versus 99 kilograms), the court may consider submitting the higher amount in the fourth element, accompanied by Instruction No. 1.33, Lesser Included Offense, for the lower amount. Alternatively, the court may substitute for the fourth element a special interrogatory asking the jury to indicate the total amount of the controlled substance it believes was proved beyond a reasonable doubt. See *United States v. Arnold*, 416 F.3d 349, 356 (5th Cir. 2005) (approving use of special interrogatory). Whatever approach is used, the jury’s finding as to the scope of the overall conspiracy establishes the maximum sentencing range.

In a drug conspiracy, however, two separate findings are required. One is the quantity involved in the entire conspiracy, and the other is the quantity that each particular defendant knew

or should have known was involved in the conspiracy. *See United States v. Ruiz*, 43 F.3d 985, 990 (5th Cir. 1995), *overruled in part by United States v. Doggett*, 230 F.3d 160, 163–64 (5th Cir. 2000) (overruling unrelated sentencing issue); *United States v. Puig-Infante*, 19 F.3d 929, 942 (5th Cir. 1994); *United States v. Maseratti*, 1 F.3d 330, 340 (5th Cir. 1993). It is the Committee’s view that the second finding, i.e., determining each particular defendant’s liability, should continue to be made by the sentencing judge according to the principles discussed in the United States Sentencing Guidelines. *See* U.S. Sentencing Guidelines Manual § 1B1.3 (2012). The *Apprendi* doctrine affects only the potential maximum sentence. It does not affect any statutory minimum sentences nor sentence calculations under the sentencing guidelines. *See United States v. Keith*, 230 F.3d 784, 787 (5th Cir. 2000); *Clinton*, 256 F.3d at 314; *Doggett*, 230 F.3d at 166.

“Knowledge” and “intent” are used in their common meaning in the conspiracy and possession statutes and therefore do not require further instruction. *See United States v. Cano-Guel*, 167 F.3d 900, 906 (5th Cir. 1999) (“knowledge”); *United States v. Sanchez-Sotello*, 8 F.3d 202, 212 (5th Cir. 1993) (“knowledge” and “intent”). Intent to distribute may be inferred from a large quantity of illegal narcotics, the value and quality of the drugs, and the possession of drug paraphernalia. *See United States v. Valdez*, 453 F.3d 252, 260 n.7 (5th Cir. 2006); *United States v. Redd*, 355 F.3d 866, 873 (5th Cir. 2003); *see also United States v. Williamson*, 533 F.3d 269, 270 (5th Cir. 2008) (intent to distribute could be inferred from possession of digital scales and 90.89 grams of cocaine base). If a “personal use” instruction is appropriate, it should “adequately inform[] the jury of its task: i.e., to determine whether the quantity is consistent with personal use and, if so, to find no inference of an intent to distribute without other evidence.” *United States v. Cain*, 440 F.3d 672, 674–75 (5th Cir. 2006).

Unlike under the general conspiracy statute, 18 U.S.C. § 371, the government need not prove an overt act by the defendants in furtherance of a drug conspiracy. *See United States v. Shabani*, 115 S.Ct. 382, 383 (1994); *United States v. Lewis*, 476 F.3d 369, 383 (5th Cir. 2007) (citing *Turner*, 319 F.3d at 721); *United States v. Montgomery*, 210 F.3d 446, 449 (5th Cir. 2000).

Proof that a defendant is guilty of a conspiracy does not support a conviction that the defendant is guilty of a substantive count charging conduct committed by another conspirator in the absence of a *Pinkerton* instruction. *See United States v. Polk*, 56 F.3d 613, 619 (5th Cir. 1995); Instruction No. 2.22, Conspirator’s Liability for Substantive Count.

Failure to instruct on the elements of the “object” crime of the conspiracy is at least “serious” error, if not plain error. *See United States v. Vaglica*, 720 F.2d 388, 391 (5th Cir. 1983); *see also United States v. Smithers*, 27 F.3d 142, 146 (5th Cir. 1994).

Where evidence at trial indicates that some of the defendants were involved only in separate conspiracies unrelated to the overall conspiracy charged in the indictment, a defendant is entitled to an instruction on that theory. *See United States v. Mitchell*, 484 F.3d 762 (5th Cir. 2007); *United States v. Stowell*, 947 F.2d 1251, 1258 (5th Cir. 1991); *see also United States v. Carbajal*, 290 F.3d 277, 291 n.25 (5th Cir. 2002); *United States v. Cyprian*, 197 F.3d 736, 741 (5th Cir. 1999) (stating that because the defendant made no request, the absence of a multiple conspiracies jury instruction was not “plain error”). *See also* Instruction No. 2.21, Multiple Conspiracies.

“Proof of the buyer-seller agreement, without more, is not sufficient to tie a buyer to a conspiracy.” *United States v. Scroggins*, 379 F.3d 233, 263 (5th Cir. 2004) (citation omitted). So long as the jury instruction given by the trial court accurately reflects the law on conspiracy, however, there need not be a separate instruction on the defense of a “mere buyer-seller relationship.” *See United States v. Asibor*, 109 F.3d 1023, 1034–35 (5th Cir. 1997) (citing *Maseratti*, 1 F.3d at 336); *United States v. Mata*, 517 F.3d 279 (5th Cir. 2008) (specifically approving this instruction as adequate, obviating the need for a specific buyer-seller instruction).

2.90

CONTINUING CRIMINAL ENTERPRISE

21 U.S.C. § 848

Title 21, United States Code, Section 848, makes it a crime for anyone to engage in a continuing criminal enterprise.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant violated the Controlled Substances Act as charged in Counts _____ of the indictment;

Second: That such violations were part of a continuing series of violations, which means at least three violations of the Controlled Substances Act as charged in Counts _____ of the indictment. These violations must be connected together as a series of related or ongoing activities as distinguished from isolated and disconnected acts. You must unanimously agree on which of these underlying violations has been proved;

Third: That the defendant obtained substantial income or resources from the series of violations; and

Fourth: That the defendant undertook such violations in concert with five or more other persons with respect to whom the defendant occupied a position of organizer, supervisor, or manager. The five other persons need not have acted at the same time or in concert with each other. You need not unanimously agree on the identity of any other persons acting in concert with the defendant so long as each of you finds that there were five or more such persons.

2.90

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The term “substantial income or resources” means income in money or property that is significant in size or amount as distinguished from some relatively insignificant, insubstantial, or trivial amount.

The term “organizer, supervisor, or manager” means that the defendant was more than a fellow worker and that the defendant either organized or directed the activities of five or more other persons. The defendant need not be the only organizer or supervisor, and the “five or more persons” may include persons who are indirectly subordinate to the defendant through an intermediary.

Note

The statute does not state how many violations are required to satisfy the requirement of a “continuing series of violations,” but the Fifth Circuit has determined that at least three predicate drug violations are required. *See United States v. Hicks*, 945 F.2d 107 (5th Cir. 1991). In *Richardson v. United States*, 119 S.Ct. 1707, 1710 (1999), the Supreme Court assumed, but did not decide, that three predicate violations were required. It further held that jury unanimity is required as to the predicate violations. *Id.* at 1713; *see also United States v. Green*, 293 F.3d 886, 889 (5th Cir. 2002); *Jeffers v. Chandler*, 253 F.3d 827, 829 (5th Cir. 2001).

The jury need not unanimously agree, however, on the identity of the five participants in the fourth element. *See United States v. Lewis*, 476 F.3d 369, 382 (5th Cir. 2007); *United States v. Short*, 181 F.3d 620, 623–24 (5th Cir. 1999) (contrasting the *Richardson* case); *United States v. Brito*, 136 F.3d 397, 408 (5th Cir. 1998). The *Richardson* opinion assumed, without deciding, that unanimity is not required on this element. 119 S.Ct. at 1713.

The jury may conclude that the defendant managed at least five persons when the persons could be “considered either directly subordinate to [defendant] or indirectly subordinate through a [co-defendant].” *United States v. Garcia Abrego*, 141 F.3d 142, 165 (5th Cir. 1998). An innocent participant, however, acting without criminal intent cannot be counted as one of the five individuals in the continuing criminal enterprise (CCE). *See United States v. Fuchs*, 467 F.3d 889, 903 (5th Cir. 2006).

The Fifth Circuit has not yet had occasion to decide whether

the term “organizer” in § 848 implies some degree of managerial authority, rather than mere coordination of various players. *See Lewis*, 476 F.3d at 376 (citing *Garcia Abrego*, 141 F.3d at 167 n.11); *Fuchs*, 467 F.3d at 903. It is clear, however, that a mere buyer-seller relationship, without additional indicia of control or authority, is insufficient to establish liability under § 848. *See Lewis*, 476 F.3d at 376–77; *United States v. Bass*, 310 F.3d 321, 325–26 (5th Cir. 2002). The government need not prove absolute control over “managed” persons; rather, “some evidence that when the defendant gave instructions, they were on some occasions obeyed is necessary to demonstrate indicia of control.” *Lewis*, 476 F.3d at 378 n.3. The defendant need not have personally exercised control over five people; rather, it is sufficient if the defendant delegates authority to lieutenants and enforcers who do so. *See Bass*, 310 F.3d at 326–27.

The Supreme Court has held that a § 846 drug conspiracy is a lesser included offense of the CCE. *See Jeffers v. United States*, 432 U.S. 137, 157–58 (1997); *see also Rutledge v. United States*, 116 S.Ct. 1241, 1250–51 (1996); *Brito*, 136 F.3d at 408. A defendant may be indicted for conspiracy and CCE, but may not be sentenced on both charges. *See United States v. Tolliver*, 61 F.3d 1189, 1223 (5th Cir. 1995), *vacated on other grounds sub nom. by Sterling v. United States*, 116 S.Ct. 900 (1996) (vacated only as to defendants who appealed). Except for a drug conspiracy, however, predicate drug offenses are not lesser included offenses of the continuing criminal enterprise for the purposes of the Fifth Amendment’s Double Jeopardy clause. *See United States v. Devine*, 934 F.2d 1325, 1342–44 (5th Cir. 1991).

The term “substantial income or resources,” as defined in the instructions, adequately informs the jury, and the district court is not required to supplement its definition with specific monetary figures. *See Brito*, 136 F.3d at 407. The “substantial income” element is satisfied, for example, if many thousands of dollars changed hands, and some was received by the defendant, *United States v. Gonzales*, 866 F.2d 781, 784 (5th Cir. 1989), or where the defendant had no legitimate income and was able to purchase drugs and finance his living expenses, *Lewis*, 476 F.3d at 379 (applying Second Circuit standard articulated in *United States v. Joyner*, 201 F.3d 61, 72 (2d Cir. 2000)).

Section 848(e) is not a penalty enhancement or sentencing provision; rather, it sets forth “an entirely new group of offenses—intentional murders committed during certain specified felonies.” *United States v. Villarreal*, 963 F.2d 725, 728 (5th Cir. 1992). When

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PATTERN JURY INSTRUCTIONS

the government seeks the death penalty under 21 U.S.C. § 848(e), the *Apprendi* doctrine requires the submission of additional elements. Furthermore, the statutory definition of “law enforcement officer” may need to be included. *See* 21 U.S.C. § 848(e)(2).

2.91

**CONTROLLED SUBSTANCES—
MANUFACTURING OPERATIONS****21 U.S.C. § 856(a)(1)**

Title 21, United States Code, Section 856(a)(1), makes it a crime for anyone knowingly to open [lease] [rent] [maintain] any place for the purpose of manufacturing [distributing] [using] any controlled substance.

_____ is a controlled substance within the meaning of this law.

For you to find the defendant guilty of this crime, you must be convinced that the government has proven the following beyond a reasonable doubt:

That the defendant knowingly and intentionally opened [leased] [rented] [maintained] a place for the purpose of manufacturing [distributing] [using] a controlled substance.

The government is not required to prove that the drug activity was the defendant's primary purpose, only that drug activity was a significant reason why defendant opened [leased] [rented] [maintained] the place.

Note

The elements of § 856(a)(1) are discussed in *United States v. Meshack*, 225 F.3d 556, 571 (5th Cir. 2000).

It is not required that drug activity be the primary purpose of defendant's opening or maintaining his establishment, only a significant purpose. *See Meshack*, 225 F.3d at 571; *see also United States v. Aguilar*, 237 F. App'x 956, 962 (5th Cir. 2007). The meaning of the phrase "the purpose" lies within the common understanding of jurors and needs no further definition. *See Meshack*, 225 F.3d at 571.

For a useful discussion of the meaning of "maintained," see *United States v. Morgan*, 117 F.3d 849, 855–58 (5th Cir. 1997).

2.91

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The Fifth Circuit has held that a deliberate ignorance instruction is inappropriate, and may constitute reversible error, if given in a § 856(a)(1) case. See *United States v. Young*, 282 F.3d 349, 353 (5th Cir. 2002) (“[A] ‘deliberate ignorance’ instruction was inappropriate when the only fact at issue is the defendant’s own intentions.”); *United States v. Soto-Silva*, 129 F.3d 340, 344 (5th Cir. 1997); *United States v. Chen*, 913 F.2d 183, 190 (5th Cir. 1990).

For a useful discussion distinguishing the “purpose” requirement between §§ 856(a)(1) and 856(a)(2), see *Chen*, 913 F.2d at 189–91.

2.92

**CONTROLLED SUBSTANCES—UNLAWFUL
IMPORTATION****21 U.S.C. §§ 952(a) and 960(a)(1)**

Title 21, United States Code, Sections 952(a) and 960(a)(1), make it a crime for anyone knowingly or intentionally to import a controlled substance.

_____ (name controlled substance) is a controlled substance within the meaning of this law.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant brought _____ (name controlled substance) into the United States from a place outside the United States;

Second: That the defendant knew the substance he was bringing into the United States was a controlled substance; and

Third: That the defendant knew that the substance would enter the United States.

[*Fourth:* That the quantity of the substance was at least _____ (state quantity).]

Note

The fourth element, prompted by the *Apprendi* doctrine, is required when the indictment alleges a quantity that would result in an enhanced penalty under 21 U.S.C. § 841(b). *See, e.g., United States v. Reyes*, 300 F.3d 555, 559 (5th Cir. 2002); *United States v. Clinton*, 256 F.3d 311, 313–14 (5th Cir. 2001); *United States v. Slaughter*, 238 F.3d 580, 583 (5th Cir. 2000) (21 U.S.C. § 846).

Generally, the exact quantity of the controlled substance need

not be determined so long as the jury establishes a quantity at or above a given baseline amount in the appropriate subsection of 21 U.S.C. § 960(b). For example, in a marijuana case, if the amount is determined to be at least 100 kilograms, the maximum sentence would be the same for any amount up to 999 kilograms. *See United States v. DeLeon*, 247 F.3d 593, 597 (5th Cir. 2001) (holding that an indictment's allegation of a drug-quantity range, as opposed to a precise drug quantity, is sufficient to satisfy *Apprendi* and its progeny). If there is a fact dispute, however, as to whether the amount is above or below a particular baseline (e.g., 100 kilograms of marijuana versus 99 kilograms), the court may consider submitting the higher amount in the fourth element, accompanied by Instruction No. 1.33, Lesser Included Offense, for the lower amount. Alternatively, the court may substitute for the fourth element a special interrogatory asking the jury to indicate the total amount of the controlled substance it believes was proved beyond a reasonable doubt. *See United States v. Arnold*, 416 F.3d 349, 356 (5th Cir. 2005) (approving use of special interrogatory).

Although dealing with § 841 rather than §§ 952(a) and 960(b), the cases *United States v. Garcia*, 242 F.3d 593, 599–600 (5th Cir. 2001), and *United States v. Thomas*, 246 F.3d 438, 439 (5th Cir. 2001), are instructive in determining the default sentencing provision when the indictment fails to allege a drug quantity.

The elements of this offense are discussed in *United States v. Martinez-Lugo*, 411 F.3d 597, 599 n.1 (5th Cir. 2005), and *United States v. Reyes*, 300 F.3d 555, 559 (5th Cir. 2002).

If the evidence warrants, the following instruction may be added: “The government must prove beyond a reasonable doubt that the defendant knew he possessed a controlled substance, but need not prove that the defendant knew what particular controlled substance was involved.” *See United States v. Gamez-Gonzalez*, 319 F.3d 695, 700 (5th Cir. 2003).

For a particular discussion of the third element, see *United States v. Ojebode*, 957 F.2d 1218, 1227 (5th Cir. 1992) (indicating that so long as defendant knows he is bringing a controlled substance into the United States, it is not necessary to prove that defendant intended the United States to be the final destination of the substance).

2.93

EXPORTING ARMS WITHOUT A LICENSE**22 U.S.C. § 2778(c) and 22 C.F.R. § 127.1(a)**

Title 22, United States Code, Section 2778, and Title 22, Code of Federal Regulations, Section 127.1(a), make it a crime for anyone willfully to export from the United States any defense article which appears on the United States Munitions List without first obtaining a license or written approval from the Department of State.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant exported articles;

Second: That the articles were listed on the United States Munitions List at the time of export;

Third: That the defendant exported the articles without obtaining a license [written approval] from the Department of State; and

Fourth: That the defendant acted “willfully,” that is, that the defendant knew such license [approval] was required for the export of these articles and intended to violate the law by exporting them without such license [approval].

Note

The statute’s requirement of willfulness means that the defendant acted with the specific intent to violate a known legal duty. See *United States v. Covarrubias*, 94 F.3d 172, 175 (5th Cir. 1996); *United States v. Hernandez*, 662 F.2d 289, 292 (5th Cir. 1981). Evidence that defendant knew he was doing something illegal is not enough to show that he knew he was unlawfully exporting weapons

listed on the Munitions List. *See Hernandez*, 662 F.2d at 292. Defendant is entitled to an instruction on his ignorance of the law in that regard. *Id.* *United States v. Rodriguez*, 132 F.3d 208, 212 (5th Cir. 1997), follows the strict scienter rule of *Covarrubias* and *Hernandez*. The Committee recognizes that *United States v. Bryan*, 118 S.Ct. 1939 (1998), might not require strict scienter for offenses under the Firearms Owners' Protection Act, but recommends that *Covarrubias* be followed for offenses under 22 U.S.C. § 2778, as being a technical statute. For a discussion of the types of written notice that may satisfy the government's burden to prove specific intent, see *United States v. Caldwell*, 295 F. App'x 689, 695–96 (5th Cir. 2008).

Actual exportation is not required for a violation of 22 U.S.C. § 2778; attempted exportation is also prohibited by the statute. *See United States v. Castro-Trevino*, 464 F.3d 536, 542 (5th Cir. 2006).

2.94

**RECEIVING OR POSSESSING UNREGISTERED
FIREARMS****26 U.S.C. § 5861(d)**

Title 26, United States Code, Section 5861(d), makes it a crime for anyone knowingly to possess [receive] certain kinds of unregistered firearms such as _____ (describe firearm in the indictment).

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly possessed [received] a firearm;

Second: That this firearm was a _____ (describe firearm under § 5845, e.g., shotgun having a barrel of less than 18 inches in length);

Third: That the defendant knew of the characteristics of the firearm _____ (describe, e.g., a shotgun having a barrel of less than 18 inches in length);

Fourth: That this firearm was [could readily have been put] in operating condition; and

Fifth: That this firearm was not registered to the defendant in the National Firearms Registration and Transfer Record. It does not matter whether the defendant knew that the firearm was not registered or had to be registered.

Note

Firearms are defined by 26 U.S.C. § 5845. This instruction assumes that the defendant is charged with possession of a shotgun less than 18 inches in barrel length. Substitute other firearm characteristics as necessary.

2.94

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Section 5861 requires no specific intent or knowledge that a firearm is unregistered. *See United States v. Freed*, 91 S.Ct. 1112, 1117 (1971); *United States v. Moschetta*, 673 F.2d 96, 100 (5th Cir. 1982).

The government must prove that the defendant knew of the features or characteristics of the firearm that are within the definition at 26 U.S.C. § 5845. *See Rogers v. United States*, 118 S.Ct. 673 (1998); *Staples v. United States*, 114 S.Ct. 1793 (1994); *United States v. Anderson*, 885 F.2d 1248 (5th Cir. 1989) (en banc). *United States v. Reyna*, 130 F.3d 104 (5th Cir. 1997), holds that the government is required to prove the defendant had knowledge of the characteristics of the firearm that violate the law.

Each firearm that meets the criteria of § 5861(d) is a unit of prosecution. *See United States v. Tarrant*, 460 F.2d 701, 702 (5th Cir. 1972).

See United States v. Hooker, 997 F.2d 67 (5th Cir. 1993), for similar treatment of 18 U.S.C. § 922(k) (firearms with altered or obliterated serial numbers).

It is not an element that the firearm be registerable. *See United States v. Thomas*, 15 F.3d 381 (5th Cir. 1994).

The government must prove that the firearm can be operated or readily restored to operating condition. *See United States v. Woods*, 560 F.2d 660, 664–65 (5th Cir. 1977).

Destructive devices are prosecuted as firearms under 26 U.S.C. § 5861(d). *See United States v. York*, 600 F.3d 347, 354–55 (5th Cir. 2010) (Molotov cocktail is a destructive device); *United States v. Hunn*, 344 F. App'x 920, 921 (5th Cir. 2009) (homemade pipe bomb is a destructive device).

2.95

TAX EVASION

26 U.S.C. § 7201

Title 26, United States Code, Section 7201, makes it a crime for anyone willfully to attempt to evade or defeat the payment of any federal income tax.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That there exists a substantial tax deficiency owed by the defendant to the Internal Revenue Service, as charged;

Second: That the defendant committed at least one affirmative act to evade or defeat assessment or payment of the income tax[es] owed. An affirmative act includes any conduct the likely effect of which would be to mislead or conceal; and

Third: That the defendant acted willfully, that is, the law imposed a duty on the defendant, the defendant knew of that duty, and the defendant voluntarily and intentionally violated that duty.

Note

For a listing of elements, see *United States v. Miller*, 588 F.3d 897, 907 (5th Cir. 2009) (listing the elements as: “(1) existence of a tax deficiency; (2) an affirmative act constituting an evasion or an attempted evasion of the tax; and (3) willfulness.”); *United States v. Nolen*, 472 F.3d 362, 377 (5th Cir. 2006); see also *Kawashima v. Holder*, 132 S.Ct. 1166, 1174 (2012); *Boulware v. United States*, 128 S.Ct. 1168 (2008); *Sansone v. United States*, 85 S.Ct. 1004, 1010 (1965).

Accordingly, there must be a tax deficiency, meaning the government must prove taxes are actually owed beyond a reason-

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PATTERN JURY INSTRUCTIONS

able doubt. *See Boulware*, 128 S.Ct. at 1172, 1178 (“Without the deficiency there is nothing but some act expressing the will to evade, and, under § 7201, acting on ‘bad intentions, alone [is] not punishable.’”).

There is a split of authority within this circuit on whether the deficiency must be substantial. *See, e.g., Miller*, 588 F.3d at 907; *United States v. Masat*, 896 F.2d 88, 97 (5th Cir. 1990). No recent Fifth Circuit cases have addressed the issue, though at least one court has held that “[t]he government need not prove the exact income alleged in the indictment nor evasion of the entire tax charged, so long as it is shown that a substantial portion of tax was evaded.” *United States v. Parr*, 509 F.2d 1381, 1385–86 (5th Cir. 1975). The Supreme Court recognizes the split of authority between the circuits but has not addressed the issue. *See Boulware*, 128 S.Ct. at 1172 n.2; *Sansone*, 85 S.Ct. at 1010.

The government must prove an affirmative act and cannot rely upon a failure to act or failure to file a tax return, even if that failure was willful. *See Spies v. United States*, 63 S.Ct. 364, 368 (1943); *Nolen*, 472 F.3d at 379–81; *Masat*, 896 F.2d at 97–99. An affirmative act includes “any conduct, the likely effect of which would be to mislead or to conceal.” *Spies*, 63 S.Ct. at 368. There are two possible routes of conduct under this statute: evading or defeating the payment of tax and evading or defeating the assessment of a tax. *See Kawashima*, 132 S.Ct. at 1175. Where the act alleged involves something other than filing a false tax return, the above instruction must be adapted to make sufficiently clear to the jury that an affirmative act is required. *See Nolen*, 472 F.3d at 378–81; *Masat*, 896 F.2d at 99; *see also United States v. Jones*, 459 F. App’x 379, *2, *6 (5th Cir. 2012).

The third element, willfulness, has been defined in the context of tax offenses as the voluntary, intentional violation of a known legal duty. *See Cheek v. United States*, 111 S.Ct. 604, 609–11 (1991); *United States v. Pomponio*, 97 S.Ct. 22, 23–24 (1976); *Miller*, 588 F.3d at 907 (“To prove willfulness, the third element, the government must show that: (1) the law imposed a duty on the defendant; (2) the defendant knew of that duty; and (3) the defendant voluntarily and intentionally violated that duty.”); *United States v. Burton*, 737 F.2d 439, 441 (5th Cir. 1984).

Good faith is a defense to willfulness, even if that good faith belief is objectively unreasonable. *See Cheek*, 11 S.Ct. at 609–12; *United States v. Wisenbaker*, 14 F.3d 1022, 1025 (5th Cir. 1994). However, “a defendant’s good-faith belief that the tax laws are un-

constitutional or otherwise invalid” will not negate willfulness. *United States v. Simkanin*, 420 F.3d 397, 410 (5th Cir. 2005); see also *Cheek*, 111 S.Ct. at 612–13; *Burton*, 737 F.2d at 440.

A supplemental instruction on good faith defense was not required in a case where the judge charged additional language on willfulness:

The jury was instructed that respondents were not guilty of violating [§] 7206(1) unless they had signed the tax returns knowing them to be false, and had done so willfully. A willful act was defined in the instructions as one done ‘voluntarily and intentionally and with the specific intent to do something which the law forbids, that is to say with (the) bad purpose either to disobey or to disregard the law.’ Finally, the jury was instructed that ‘(g)ood motive alone is never a defense where the act done or omitted is a crime,’ and that consequently motive was irrelevant except as it bore on intent.

Pomponio, 97 S.Ct. at 23–24. In *Simkanin*, the Fifth Circuit held that an additional instruction on good faith was not required when the district court instructed jurors that “[t]o act willfully means to act voluntarily and deliberately and intending to violate a known legal duty.” 420 F.3d at 409–11. Consequently, if there is evidence that the defendant had a good faith belief that he was not violating the provisions of the tax laws, some courts include a good faith instruction.

The Fifth Circuit approved an instruction on the good faith defense to tax evasion in *Masat*, 948 F.2d at 931 n.15. See also *Cheek*, 111 S.Ct. at 610–11 (“[I]f the Government proves actual knowledge of the pertinent legal duty, the prosecution, without more, has satisfied the knowledge component of the willfulness requirement. But carrying this burden requires negating a defendant’s claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws. This is so because one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist.”); *United States v. Doyle*, 956 F.2d 73, 75–76 (5th Cir. 1992).

For further discussion on instructions regarding “willfulness,” see *United States v. MacHauer*, 403 F. App’x 967, *4 (5th Cir. 2010); *United States v. McGuire*, 79 F.3d 1396, 1406 (5th Cir. 1996);

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United States v. Barnett, 945 F.2d 1296, 1298–99 (5th Cir. 1991).

2.96

**FALSE STATEMENTS ON INCOME TAX
RETURN****26 U.S.C. § 7206(1)**

Title 26, United States Code, Section 7206(1), makes it a crime for anyone willfully to make a false material statement on an income tax return.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant signed an income tax return that contained a written declaration that it was made under penalties of perjury;

Second: That in this return the defendant falsely stated that _____ (state material matters asserted, e.g., the defendant received gross income of _____ during the year _____);

Third: That the defendant knew the statement was false;

Fourth: That the false statement was material; and

Fifth: That the defendant made the statement willfully, that is, with intent to violate a known legal duty.

A statement is “material” if it has a natural tendency to influence, or is capable of influencing, the Internal Revenue Service in investigating or auditing a tax return or in verifying or monitoring the reporting of income by a taxpayer.

Note

The elements of this offense are discussed in *United States v.*

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Loe, 262 F.3d 427, 435 n.5 (5th Cir. 2001), and *United States v. Mann*, 161 F.3d 840, 848 (5th Cir. 1998). If the indictment involves a statement or document other than an income tax return, then tailor the instruction accordingly. See *United States v. Clayton*, 506 F.3d 405, 413 (5th Cir. 2007) (holding that other forms and certain schedules may give rise to liability).

Where the indictment charges the defendant with a material omission, the second element must be modified to show what the return failed to state.

The definition of “material” is discussed in *Neder v. United States*, 119 S.Ct. 1827, 1837 (1999). In *Neder*, the Supreme Court acknowledged that materiality is an essential element of this crime and that the defendant has a constitutional right to have that issue submitted to the jury. *Id.* But the Supreme Court determined that the failure to submit the issue of materiality to the jury is not a “structural” error that requires reversal of a conviction but, instead, an error that is subject to the harmless error rule articulated in *Chapman v. California*, 385 U.S. 824 (1967). *Id.* Under the unique facts of the case, the *Neder* Court then held that the district court’s failure to submit the element of materiality to the jury with respect to the tax charges was harmless error. *Id.* at 1833, 1837.

Willfulness, as it relates to tax offenses, is defined as the “voluntary, intentional violation of a known legal duty.” *Cheek v. United States*, 111 S.Ct. 604, 610 (1991); see *United States v. Charroux*, 3 F.3d 827, 831 (5th Cir. 1993); see also *United States v. Simkanin*, 420 F.3d 397, 404, 410–11 (5th Cir. 2005). See also Instruction No. 1.38, “Willfully”—To Act.

Under certain circumstances, reliance on a qualified tax preparer is an affirmative defense to a charge of willful filing of a false tax return. See *Loe*, 248 F.3d at 469; *Charroux*, 3 F.3d at 831; *United States v. Wilson*, 887 F.2d 69, 73 (5th Cir. 1989); see also *United States v. Masat*, 948 F.2d 923, 930 (5th Cir. 1991) (to establish reliance as a defense, defendant must show: (1) he relied in good faith on a professional; and (2) he made complete disclosures of all the relevant facts).

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**AIDING OR ASSISTING IN PREPARATION OF
FALSE DOCUMENTS UNDER INTERNAL
REVENUE LAWS****26 U.S.C. § 7206(2)**

Title 26, United States Code, Section 7206(2), makes it a crime for anyone willfully to aid or assist in the preparation of a document, under the internal revenue laws, that is false or fraudulent as to any material matter.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant aided in [assisted in] [procured] [counseled] [advised] the preparation [presentation] of a return [an affidavit] [a claim] arising under [in connection with any matter arising under] the internal revenue laws;

Second: That this return [affidavit] [claim] falsely [fraudulently] stated that _____ (state material matters asserted, e.g., _____ received a gross income of _____ during the year _____);

Third: That the defendant knew that the statement in the return [affidavit] [claim] was false [fraudulent];

Fourth: That the false [fraudulent] statement was material; and

Fifth: That the defendant aided in [assisted in] [procured] [counseled] [advised] the preparation [presentation] of this false [fraudulent] statement willfully, that is, with intent to violate a known legal duty.

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It is not necessary that the government prove that the falsity or fraud was with the knowledge or consent of the person authorized or required to present such return [claim] [affidavit] [document].

A statement is “material” if it has a natural tendency to influence, or is capable of influencing, the Internal Revenue Service in investigating or auditing a tax return or in verifying or monitoring the reporting of income by a taxpayer.

Note

See Note to False Statements On Income Tax Return, Instruction No. 2.96.

The elements of this offense are discussed in *United States v. Clark*, 139 F.3d 485, 489 (5th Cir. 1998), and *United States v. Coveney*, 995 F.2d 578, 588 (5th Cir. 1993). See also *United States v. Mudekunya*, 646 F.3d 281, 286 (5th Cir. 2011) (holding that the defendant does not need to file the return); *United States v. Clark*, 577 F.3d 273, 285 (5th Cir. 2009) (holding that the defendant need not sign or prepare return to conspire or aid and abet filing of false return; statute reaches all knowing participants in the fraud).

Where the indictment charges the defendant with a material omission, the second element must be modified to show what the return failed to state.

A person need not actually sign or prepare a tax return in order to be guilty of willfully aiding and assisting in the preparation of false returns. See *Coveney*, 995 F.2d at 588; *United States v. Bryan*, 896 F.2d 68 (5th Cir. 1990). In *Bryan*, the Fifth Circuit held that the following conduct in promoting fraudulent tax shelters was sufficient to support the defendants’ convictions: speaking at seminars to generate clients for the scheme, participating in the decision to create an offshore corporation for the assignment of losses and gains so as to create taxable losses on paper, discussing how to avoid discovery, and discussing various methods to secretly return offshore gains to clients. 896 F.2d at 72–75.

See Instruction No. 1.38 for a discussion of the word “willfully.”

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**REPORTS ON EXPORTING AND IMPORTING
MONETARY INSTRUMENTS****31 U.S.C. § 5316(a)(1)**

Title 31, United States Code, Section 5316(a)(1), makes it a crime for anyone intentionally to fail to report the exporting [importing] of monetary instruments of more than \$10,000 at one time.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly transported [was about to transport] more than \$10,000 in _____ (describe the alleged monetary instrument, e.g., currency) at one time 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];

Second: That the defendant knew that he had a legal duty to file a report of more than \$10,000 transported; and

Third: That the defendant knowingly failed to file the report, with intent to violate the law.

Fourth: That the defendant willfully violated this law while violating another law of the United States, specifically _____ (describe the law mentioned in the indictment) [as part of a pattern of illegal activity involving more than \$100,000 in a 12-month period].]

Note

The fourth element, prompted by the *Apprendi* doctrine, is

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required when the indictment alleges facts which would result in an enhanced penalty under 31 U.S.C. § 5322. *See Apprendi v. New Jersey*, 120 S.Ct. 2348, 2362–63 (2000).

To convict under this statute, the government must prove that “the defendant had actual knowledge of the currency reporting requirement and voluntarily and intentionally violated that known legal duty.” *United States v. O’Banion*, 943 F.2d 1422, 1426–27 (5th Cir. 1991) (citations omitted).

This offense can be committed through structuring. *See* 31 U.S.C. § 5324(b). Instruction No. 2.99, 18 U.S.C. § 5324(a)(3), Structuring Transactions to Evade Reporting Requirements, must then be adjusted accordingly.

Use definitions in 31 U.S.C. § 5312, if needed in a particular case.

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**STRUCTURING TRANSACTIONS TO EVADE
REPORTING REQUIREMENTS****31 U.S.C. § 5324(a)(3)**

Title 31, United States Code, Section 5324(a)(3), makes it a crime for anyone to structure [attempt to structure] [assist in structuring] any transaction with one or more domestic financial institutions in order to evade the reporting requirements of or any regulation prescribed under section 5313(a) of Title 31 of the United States Code.

Section 5313(a) and its implementing regulations require the filing of a government form called a Currency Transaction Report (CTR). Those regulations require that every domestic financial institution which engages in a currency transaction of more than \$10,000 must file a report with the Internal Revenue Service furnishing, among other things, the identity and address of the person engaging in the transaction, the person or entity, if any, for whom he is acting, and the amount of the currency transaction. The CTR must be filed within fifteen (15) days of the transaction.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knew of the domestic financial institution's legal obligation to report transactions in excess of \$10,000;

Second: That the defendant knowingly structured [attempted to structure] [assisted in structuring] a currency transaction; and

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Third: That the purpose of the structured transaction was to evade that reporting obligation.

[*Fourth:* That the defendant violated this law while violating another law of the United States, specifically _____ (describe the law mentioned in the indictment) [as part of a pattern of illegal activity involving more than \$100,000 in a 12-month period].]

A person structures a transaction if that person, acting alone or with others, conducts one or more currency transactions in any amount, at one or more financial institutions, on one or more days, for the purpose of evading the reporting requirements described earlier. Structuring includes breaking down a single sum of currency exceeding \$10,000 into smaller sums, or conducting a series of currency transactions, including transactions at or below \$10,000. Illegal structuring can exist even if no transaction exceeded \$10,000 at any single financial institution on any single day.

The government need not prove that a defendant knew that structuring a transaction to avoid triggering the filing requirements was itself illegal. The government need only prove beyond a reasonable doubt that a defendant structured [assisted in structuring] [attempted to structure] currency transactions with knowledge of the reporting requirements.

Note

The fourth element, prompted by the *Apprendi* doctrine, is required when the indictment alleges facts that would result in an enhanced penalty under 31 U.S.C. § 5324(c). See *Apprendi v. New Jersey*, 120 S.Ct. 2348, 2362–63 (2000).

This instruction is based on a charge of structuring to avoid the requirements of 31 U.S.C. § 5313(a). The structuring statute can also be used with other reporting statutes, e.g., 12 U.S.C. §§ 1829(b) and 1953, or 31 U.S.C. §§ 5316, 5325, and 5326, and these instructions would have to be adjusted accordingly.

SUBSTANTIVE OFFENSE INSTRUCTIONS

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If the case involves monetary instruments other than currency, substitute appropriate term. See the definition of “monetary instruments” and other pertinent definitions in 31 U.S.C. § 5312.

If the evidence is that the bank filed the CTR as required, then the judge may instruct the jury that the defendant may still be found guilty of this offense even if the bank properly filed the CTR.

III. APPENDIX

- 3.01 Proposed Model Jury Instructions: The Use of Electronic
Technology to Conduct Research on or Communicate
about a Case
- 3.02 Visual Aid—Focus on the Courtroom

3.01

PATTERN JURY INSTRUCTIONS

3.01

PROPOSED MODEL JURY INSTRUCTIONS: THE USE OF ELECTRONIC TECHNOLOGY TO CONDUCT RESEARCH ON OR COMMUNICATE ABOUT A CASE

Prepared by the Judicial Conference Committee on
Court Administration and Case Management
June 2012

[Note: These instructions should be provided to jurors before trial, at the close of a case, at the end of each day before jurors return home, and other times, as appropriate.]

Before Trial:

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom.

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end.

I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You

also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. You may not use any similar technology of social media, even if I have not specifically mentioned it here. I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

I hope that for all of you this case is interesting and noteworthy.

At the Close of the Case:

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as the telephone, a cell phone, smart phone, iPhone, Blackberry or computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube, or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations. I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

You may not use these electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom. Information on

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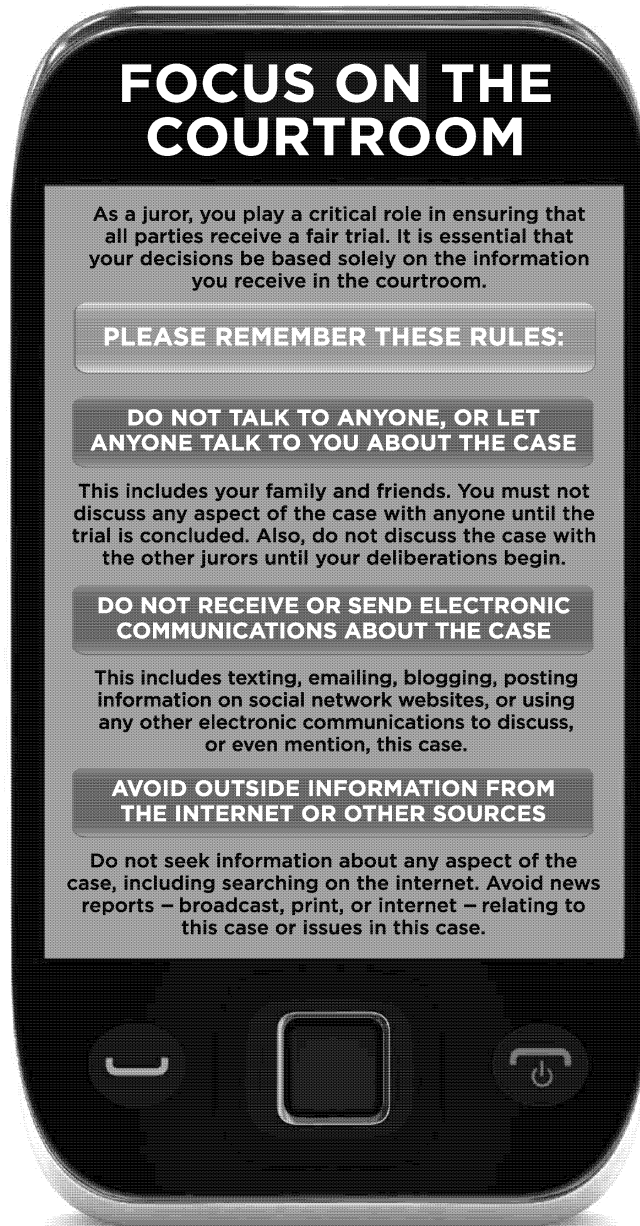
the internet or available through social media might be wrong, incomplete, or inaccurate. You are only permitted to discuss the case with your fellow jurors during deliberations because they have seen and heard the same evidence you have. In our judicial system, it is important that you are not influenced by anything or anyone outside of this courtroom. Otherwise, your decision may be based on information known only by you and not your fellow jurors or the parties in the case. This would unfairly and adversely impact the judicial process.

Note

This instruction was prepared by the Judicial Conference Committee on Court Administration and Case Management (CACM), June 2012.

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VISUAL AID—FOCUS ON THE COURTROOM

**THANK YOU FOR SERVING AS A JUROR**

